The Federal Bar Association
Northern Virginia Chapter

Presents:

A BENCH-BAR DIALOGUE:

TEN TIMELY TOPICS …
That the Magistrate Judges Think You Should Know!

Panel Discussion With The

United States Magistrate Judges
of the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Moderator:
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1. ROME WAS NOT BUILT IN A DAY … BUT DEPOSITIONS ARE.

By rule, "a deposition is limited to 1 day of 7 hours." FED. R. CIV. P. 30(d)(1). The seven-hour/one-day limit is intended to prevent a deposition from bogging down in the mire of a meandering and undisciplined interrogation or from being a physical ordeal. However, the Court "***must allow*** additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent." *Id*. (emphasis added). What does that mean?

At a minimum, it means that "The party seeking a court order to extend the examination … is expected to show good cause to justify such an order." ADV. COM. NOTES, 192 F.R.D. 340, 395 (2000); *accord, e.g., Kleppinger v. Texas Dept. of Transp*., 283 F.R.D. 330, 333 (S.D. Tex. 2012). When weighing the justification in the "good cause" determination under Rule 30(d)(1), the Court ***presumes*** that the seven-hour limit applies:

> In weighing these factors, and applying them to whether a deposition should be longer than seven hours, ***the court should begin with the presumption that the seven-hour limit was carefully chosen and that extensions of that limit should be the exception, not the rule***. Automatic extensions eviscerate the rule. Moreover, the seven-hour limit encourages efficiency; it has been said that a writer's best friends are a deadline and a page limitation. The same may be said of lawyers conducting depositions.

Roberson v. Bair, 242 F.R.D. 130, 138 (D.D.C. 2007) (emphasis added); *Somerset Studios, LLC v. School Specialty, Inc*., No. C 10-5527 MEJ, 2011 U.S. Dist. LEXIS 103927, *12-13, 2011 WL 4344596 (N.D. Cal. Sept. 14, 2011) (same). So, what constitutes "good cause"?

The rule revisers suggest that "good cause" may be shown by "a variety of factors," including the following:

- If "the witness needs an interpreter;"
- If "the examination will cover events occurring over a long period of time;"

- If "the witness will be questioned about numerous or lengthy documents;"[1]
- "If the examination reveals that documents have been requested but not produced;"
- If each party in a multi-party case "needs" to examine the witness, "although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest;"
- If "the lawyer for the witness wants to examine the witness;" and
- "Finally, with regard to expert witnesses, there may more often be a need for additional time—even after the submission of the report required by Rule 26(a)(2)—for full exploration of the theories upon which the witness relies."

ADV. COM. NOTES, 192 F.R.D. at 395-96. In addition to the grounds suggested by the rule revisers, here are two more reasons:

First, additional time might be warranted if the witness wears two hats—that is, he is a fact witness with first-hand knowledge ***and*** he may offer expert opinions. *Indianapolis Airport Auth. v. Travelers Prop. Cas. Co. of Am.*, No. 1:13-cv-01316-JMS-TAB, 2015 US Dist. LEXIS 94537; 2015 WL 4458903 (S.D. Ind. July 21, 2015). In that case, the District Court allowed four additional hours for a "hybrid fact and expert witness" who was "the owner's technical representative" on a long-term construction project, who was the "central witness to the case," whose "testimony included events regarding the airport construction project spanning several years," and whose "testimony will involve a large volume of documentary evidence" described by the District Court as "several thousand" documents. *Indianapolis Airport*, 2015 U.S. Dist. LEXIS at *9-11. In light of those facts, the District Court found that four additional hours would be necessary to "fairly examine" that unusual "hybrid" witness.

[1] Extra time should not be automatically allowed when a lot of documents are involved; instead, examining counsel may be required "to send copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them. Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit." *Id.*

Second, additional time also might be warranted if the examination was "impeded" during the deposition—for example, by counsel's objections or the witness's refusals to answer—which deprives the examining party of the time needed for a "fair examination." *See LaPlante v. Estano*, 226 F.R.D. 439, 439-40 (D. Conn. 2005) (additional deposition ordered because "plaintiff, and his attorney, were recalcitrant and uncooperative in their refusal to answer questions that seek information which is clearly relevant, not privileged, not overly broad, and not unduly burdensome"); *Calderon v. Symeon*, No. 3:06CV1130 (AHN), 2007 U.S. Dist. LEXIS 20510; 2007 WL 735773 (D. Conn. Feb. 2, 2007) (same). However, the generalized argument that there were "too many objections" does not satisfy the "good cause" standard under Rule 30(d)(1). The rules permit objections on a question-by-question basis, so long as the objection is "stated concisely in a nonargumentative and nonsuggestive manner." FED. R. CIV. P. 30(c)(2). If objections are concisely stated and do not impede the deposition, that they were "excessive" would not in and of itself warrant allowing an additional deposition. *Mendez v. R+L Carriers, Inc.*, No. CV 11-02478-CW (JSC), 2012 U.S. Dist. LEXIS 60248, *4-7, 2012 WL 1535756 (N.D. Cal. Apr. 30, 2012) (finding 293 objections in 6-hour deposition "excessive" but not allowing further deposition). You must do more than count the objections to show "good cause."

But a showing of "good cause" is not enough; the Court also must consider whether allowing additional time is "consistent with Rule 26(b)(1) and (2)." FED. R. CIV. P. 30(d)(1). When construing Rule 30(d)(1) together with Rule 26(b)(1) and (2), therefore, the Court (1) must ensure that the additional deposition would not be "unreasonably cumulative or duplicative;" (2) must consider whether the information may be "obtainable from another source that is more convenient, or less burdensome or less expensive;" (3) must determine whether "the party has had ample opportunity to obtain the information sought;" or (4) must weight whether "the burden or

expense" of the additional deposition outweighs its likely benefit. *Roberson*, 242 F.R.D. at 138. Thus, to obtain additional deposition time, a party must show both ***need*** ("good cause,") and satisfy a ***benefit-burden*** (proportionality) justification.

Finally, although the notes helpfully give examples of "good cause," they do not suggest ***how to make*** a showing to obtain an additional deposition. Here are some things to consider:

Strict enforcement of discovery limitations has long been a hallmark of this District. Neither the Federal Rules nor the Local Civil Rules permit the "free and untrammeled use of discovery." *Lykins v. Attorney General*, 86 F.R.D. 318, 19 (E.D. Va. 1980) (explaining showing of "good cause" required for relief from local discovery rules limiting number of interrogatories and depositions). Rule-based discovery limitations serve as "a checkpoint beyond which a party may not proceed without evidencing the good cause." *Id.* Such limitations enhance discovery "by focusing and re-focusing [counsel's] attention upon the fact that discovery is not simply a form book, pro forma, exercise but is instead a litigating tool which should be used with discretion." *Id.* Furthermore, limitations prevent the use of discovery to "browbeat" an opponent into settlement "by the sheer time and expense of responding to discovery demands." *Id.* Accordingly, this District has long required a showing of both need and proportionality to exceed discovery limitations.

Thus, to show "good cause," the examining party must do more than make "ritualistic recitations" that the deposition will involve "multiple issues," or address topics having a "complex nature." *Cf. id.* at 318-19. Instead, you must make a specific and particularized showing. Under Rule 30(d)(1), the Court must be skeptical when the same putative "good cause" for additional deposition time "is probably true of many depositions" in the case. *Somerst Studios*, 2011 U.S. Dist. LEXIS 103927, *13. Therefore, the need for a specific and particularized showing of "good cause" cannot be overstated.

2. SURPRISING "RULES" REGARDING RULE 30(B)(6) DEPOSITIONS

In 1970, when the deposition and discovery rules were revised and expanded to assume their contemporary forms, one of the innovations was the Rule 30(b)(6) deposition of corporations and other organizations (like partnerships, government agencies, unions, etc.). Under prior practice, the examining party would name an individual deponent for examination, who could only be deposed based on his or her personal knowledge. This sometimes lead to a series of costly but ineffective depositions when the examining party did not know who to depose on particular topics, or a game of hide-and-seek if the individual deponents deferred to others as having more knowledge (known as "bandying"). ADV. COM. NOTES, 48 F.R.D. 487, 514-15 (1970). The rule was intended to benefit both sides, and generally does so.

The rule, as currently stated, reads as follows:

> (6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

FED. R. CIV. P. 30(b)(6). But what does all this *really* mean? Here are some surprising rules about this Rule:

- ***The responding party might not need to produce the "person most knowledgeable":*** The rule requires that the designee must "consent to testify on [the organization's] behalf" and be prepared to "testify about the information known or reasonably available to the organization." Even though the designee's personal knowledge is not expressly required by the rule, courts differ about this issue. *Compare QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012) ("The rule does not expressly or implicitly require the corporation or entity to produce the 'person most knowledgeable' for the corporate deposition."), *with U.S. ex rel. Excelsior Elev., Inc. v. Construction Concepts, Inc.*, No. 1:05-cv-01527-OWW-TAG, 2006 U.S.

Dist. LEXIS 84511, *7 (E.D. Cal. Nov. 8, 2006) ("Rule 30(b)(6) of the Federal Rules of Civil Procedure authorizes the depositions of 'persons most knowledgeable.'"). If the responding party does not produce the "person most knowledgeable" about a designated topic, the question then becomes "Why not?" The examining party may request, and the Court might allow, an additional individual Rule 30(a)(1) deposition of that person separately from the Rule 30(b)(6) deposition.

- ***The designee may be allowed to use notes:*** Consistent with the express requirement that the designee be prepared to "testify about information known or reasonably available to the organization," the designee may be allowed to use notes or a notebook at the deposition if he or she lacks comprehensive personal knowledge on a particular topic. *See Hui Zeng v. Electronic Data Sys. Corp.*, No. 1:07cv310 (JCC), 2007 U.S. Dist. LEXIS 67812, *10-15 (E.D. Va. Sept. 13, 2007).

- ***"I don't know" is not an acceptable answer, but "We don't know" might be:*** Because the designee must be prepared to "testify about information known or reasonably available to the organization," the designee cannot answer "I don't know." If that occurs, the examining party may be entitled to an additional Rule 30(b)(6) deposition, *Barron v. Caterpillar, Inc.*, 175 F.R.D. 168, 177 (E.D. Pa. 1996) (if "the corporate designee lacks sufficient knowledge … the onus falls on the corporation to present an additional designee capable of providing sufficient answers to the eluded requests"); or a ruling at trial limiting the evidence, *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906, 933 n.7 (E.D. Va. 1989); or other appropriate sanctions, FED. R. CIV. P. 37(a)(3)(B). But if the answer is "We don't know"—that is, after reasonably diligent inquiry the corporation had no responsive information—that may end the inquiry at the deposition itself. *Barron*, 175 F.R.D. at 177-78. Nonetheless, the examining party may be allowed to use other discovery techniques to fill that gap, or use an evidentiary ruling to prevent the responding party from filling that gap with other evidence at trial.

- ***Even though the number of topics is not limited by Rule 30(b)(6), they might be limited by Rules 26(b)(1) and (2):*** Neither the local civil rules nor Rule 30(b)(6) state a maximum number of topics for a designee-deposition. However, Rule 26(b)(1) and (2) regarding proportionality will certainly guide the setting of reasonable parameters. Likewise, when there are numerous topics, the responding party may be able to object on grounds of relevance, time-period of inquiry, overbreadth, and burden. *See Martin v. All State Ins. Co.*, 292 F.R.D. 261 (N.D. Tex. 2013).

- ***Rule 30 might limit you to one designee-deposition:*** To avoid the "bad optics" of having too many topics, parties sometimes serve multiple Rule 30(b)(6) notices—*e.g.*, one on financial information, one on technical information, one on contract negotiations, etc. A party's right to conduct designee-depositions, however, "is neither absolute, automatic, nor self-determinable. Rather, it is governed by Rule 30(a)(2)[(A)(ii)], which provides that a party may take the testimony of any person without leave of court unless 'the person to be examined has already been deposed in the case.'" *In re Sulfuric Acid Antitrust Litig.*, No. 03 C 4576, 2005 WL 1994105, at *1 (N.D. Ill. Aug. 19, 2005)

(quoting Rule 30(a)(2)[(A)(ii)]).[2] District courts have applied Rule 30(a)(2)(A)(ii) in the 30(b)(6) context to hold that a party must seek leave of court to notice a subsequent 30(b)(6) deposition where the "person"—*i.e.*, the corporation—has already been deposed. *Sulfuric Acid*, 2005 WL 1994105, at *1 (finding defendants' second Rule 30(b)(6) subpoenas and notices "invalid" and denying motion to compel Rule 30(b)(6) depositions); *see also Burdick v. Union Sec. Ins. Co.*, No. CV 07-4028 ABC (JCX), 2008 WL 5102851, *3 (C.D. Cal. Dec. 3, 2008) (holding plaintiff's additional Rule 30(b)(6) notice invalid due to plaintiff's failure first to obtain leave of court); *State Farm Mutual Auto. Ins. v. New Horizon, Inc.*, 254 F.R.D. 227, 235 (E.D. Pa. 2008) ("The policy against permitting a second deposition of an already-deposed deponent is equally applicable to depositions of individuals and organizations."); *accord Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 08-C-16, 2009 WL 2870622, at *1 (E.D. Wis. Sept. 2, 2009) (denying motion to compel additional 30(b)(6) testimony because "[l]eave of court is to be granted only when a second deposition would be 'consistent with Rule 26(b)(2),' which requires consideration of several pragmatic factors (e.g., burden and expense, whether the party seeking discovery has been afforded ample opportunity, etc.)," and finding that defendant had not "shown adequate grounds for taking such a deposition.").

- ***Lawyers can be designated to testify—at their peril:*** Sometimes, designee-deposition topics include the opposing party's contentions—which usually include an analysis applying law to fact (*e.g.*, "Defendant's contention that laches applies to bar Plaintiff's remedies."). Whether that is a "proper" topic or not (*see* next bullet-point), it is a frequent occurrence. And so, sometimes, lawyers are designated to "testify" (or more likely, to argue) in support of those contentions. This brings about two other issues that you would rather avoid: Disputes about attorney-client privileges and work product, *Masco Corp. of Indiana v. Price Pfister Inc.*, 33 U.S.P.Q. 2d 1694; 1994 WL 761246 (E.D. Va. Oct. 7, 1994), and possible disqualification of that lawyer, *International Woodworkers v. Chesapeake Bay Plywood*, 659 F.2d 1259, 1272-73 (4th Cir. 1981).

- ***You might not be allowed to use Rule 30(b)(6) for all topics:*** A Rule 30(b)(6) deposition might not be well-suited for discovery of your opponent's contentions. Not only is it likely to be fraught with attorney-client privileges and work product disputes, it might result in a lot of fencing and posturing, instead of eliciting a concise statement of contentions. Even if you are determined to plow ahead, your opponent may object under Rule 26(c)(1)(C) that contention discovery should be taken by another means—in particular, a contention interrogatory under Rule 33(a)(2). *See McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 285-88, *modified and aff'd on other grounds*, 765 F.Supp. 611 (N.D. Calif. 1991).

- ***The place of the designee-deposition may be up to the Court:*** By custom, most depositions are noticed for the lawyers' respective offices in this District. By local civil rule, in fact, the deposition of plaintiff's or counterclaimant's "representative" may be taken in this District. E.D. VA. CIV. R. 30(A). But what if the defendant designates four executives located at its Chicago headquarters—should defendant have to incur the

[2] In the 2007 restyling revisions to the Rules, former Rule 30(a)(2)(B) was re-numbered as Rule 30(a)(2)(A)(ii).

> expense of bringing all four here? Maybe, maybe not. Courts often apply a presumption that a defendant-corporation's designee-deposition is taken in its home forum, but then use a multi-factor test when exercising their discretion to consider ordering the deposition in the district where the action is pending. *See In re Outside Tirewall Litig.*, 267 F.R.D. 466 E.D. Va. 2010); *Turner v. Prudential Ins. Co.*, 119 F.R.D. 381 (M.D.N.C. 1988); *Resolution Trust Corp. v. Worldwide Ins. Mgmt. Corp.*, 127 F.R.D. 125 (N.D. Tex. 1992). Under this flexible rule, however, the designee-depositions of even an overseas defendant-corporation may be required in the trial court district. *See Rosenruist-Gestao E Servs. LDA v. Virgin Enterps.*, 511 F.3d 437, 445-46 (4th Cir. 2007).

3. WHAT IS A "DISCRETE SUBPART"?

Under the local practice (as stated in the initial scheduling order), parties cannot serve "more than thirty (30) interrogatories, including parts and subparts," on any other party, without leave of court. Similarly, Rule 33 limits the number of interrogatories "including all discrete subparts," each of which is counted separately. FED. R. CIV. P. 33(a)(1). Although worded slightly differently, these rules are applied in the same manner. So, what is a "discrete subpart"?

The 1993 Advisory Committee Notes explain the meaning of "discrete subpart" as follows:

> Parties cannot evade this presumptive limitation [of 25 interrogatories] through the device of joining as 'subparts' questions that seek information about ***discrete separate subjects***. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

ADV. COM. NOTES, 146 F.R.D. 501, 675-76 (1993) (emphasis added). Thus, a "discrete subpart" is not a separate grammatical unit, like a separate clause seeking additional detail about the same subject, but a separate question that inquires about a "discrete separate subject."

If subparts of a question do not probe "discrete separate subjects," but are "logically or factually subsumed within and necessarily related to the primary question," they are not separately counted. *See, e.g., Nyfield v. Virgin Islands Tel. Corp.*, 200 F.R.D. 246, 247-48 (D.V.I. 2001); *accord Mullins v. Prudential Ins. Co.*, 267 F.R.D. 504, 516 (W.D. Ky. 2010)

(same); *Smith v. Café Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (same)*; Safeco of America v. Rawstron*, 181 F.R.D. 441 (C.D. Cal. 1998) (same); *Kendall v. GES Exposition Services, Inc.*, 174 F.R.D. 684 (D. Nev. 1997) (same). Thus, an interrogatory asking for "the name, address, and telephone number of each fact witness, together with a description of the topics of which each has knowledge," should count as one interrogatory, not four.

But the definition of "discrete subpart" is hardly uniform. *Compare Kendall*, 174 F.R.D. at 685 ("interrogatory subparts are to be counted as part of but one interrogatory … if they are logically or factually subsumed within and necessarily related to the primary question") (citation omitted), *with, e.g., Cardenas v. Dorel Juvenile Group, Inc.*, 231 F.R.D. 616, 620 (D. Kan. 2005) ("This interrogatory does not contain multiple subparts that discuss various, unrelated topics. Rather, it is one interrogatory directed at eliciting details concerning a *common theme*. The Court therefore finds that it should not be counted as multiple interrogatories.") (emphasis in original); *Kline v. Berry*, 287 F.R.D 75, 79 (D.D.C. 2012) ("When a subpart introduces a 'separate and distinct' line of inquiry from the one that precedes it, it should be counted as a new interrogatory;" or put another way, "whether subsequent questions within an interrogatory are 'logically or factually subsumed' within the primary question and whether the subsequent questions can stand independently of the first question"); *Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004) (Because there is "no bright line test," defining "a 'discrete subpart' has proven difficult. While a draconian approach would be to view each participial phrase as a subpart, the courts have instead attempted to formulate more conceptual approaches, asking whether one question is subsumed and related to another or whether each question can stand alone and be answered irrespective of the answer to the others."). Interestingly, the judge in *Banks* then adopted Justice Potter Stewart's famous formulation for

identifying pornography: "I know it when I see it." *Id*. at 10 n.4. When it comes to "discrete subparts," perhaps some judges really do know 'em when they see 'em.

Similarly, courts routinely curb so-called "blockbuster" interrogatories which ask an adversary to identify "in detail all facts and identify all documents." *E.g.*, *Hilt v. SFC, Inc*., 170 F.R.D. 182, 186-87 (D. Kan. 1997) (finding the following interrogatories overbroad and unduly burdensome (i) "each and every fact supporting all of the allegations" in each count, (ii) identify "each person having knowledge of each fact," and (iii) identify "all documents purporting to support" each count); *accord Grynberg v. Total S.A.*, 2006 U.S. Dist. LEXIS 28854, *15-18 (D. Colo. May 3, 2006) (denying motion to compel regarding "blockbuster" interrogatory seeking "all" facts regarding "each" affirmative defense); *but see Cardenas*, 231 F.R.D. at 618-19 (distinguishing *Hilt*). As the district court in *Hilt* reasoned, such interrogatories

> [I]ndiscriminately sweep an entire pleading, including allegations which are admitted, with an excessive number of interrogatories (at least 132 instead of four). They require the responding party to provide in essence a running narrative or description of the entire case, together with identifications of all knowledgeable persons and supporting documents. Aside from its general argument for discoverability, defendant has provided no reason or justification for this kind of indiscriminate sweep.

Hilt, 170 F.R.D. at 188. For example, by cramming all affirmative defenses into one interrogatory, and then asking the responding party to "Identify all facts, witnesses, and documents supporting each affirmative defense," a party may have violated the limits of Rule 33(a)(1)—particularly if "identify" is given an expansive meaning.[3]

What should you do if your opponent serves a blockbuster interrogatory, or more than 30 interrogatories, including discrete subparts? The answer is easy in this District: You should ***object***, which will trigger at least a meet-and-confer process before answers are due.

[3] For an example of a "burdensome" definition of "identify," *see Diversified Prods. Corp. v. Sports Cntr. Co., Inc.*, 43 F.R.D. 3, 4 (D. Md. 1967).

E.D.VA.CIV.R. 26(C) & 37(E). If the dispute is not resolved by the time the party must serve answers, what should you do? Some answering parties will answer at least some of the interrogatories up to the number-limit as they have counted it. *See, e.g., Prochaska & Associates v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 155 F.R.D. 189 (D. Neb. 1993) (district court did not require further answers). More risky, but not unprecedented, is not answering at all. *See, e.g., Aetna Cas. & Sur. Co. v. W.W. Grainger Inc.*, 170 F.R.D. 454 (E.D. Wis. 1997) (answering party refused to respond, motion to compel denied). My advice is to make every effort to work out the dispute in the meet-and-confer process, or at least narrow it, and not put yourself at risk if a motion to compel is filed.

What should the Court do? There is no one "right" answer. As noted above, some Courts will do their own counting and limit the answering party's obligation to just those. Some Courts will deem the issues important enough to allow "additional" interrogatories. But some Courts have refused to enforce a motion to compel when the requesting party has asked too many interrogatories—effectively striking that set—forcing the requesting party to start over.

Similarly, some courts will limit answers to blockbuster interrogatories to identification of the "principal" facts, documents, and witnesses instead of "all." *E.g., Allianz Insurance Co. v. Surface Specialties, Inc.*, Civ. No. 03-2470-CM-DJW, 2005 U.S. Dist. LEXIS 301, *25; 2005 WL 44534, *8 (D. Kan. Jan. 7, 2005). This seems the better remedy than simply striking them.

4. WHAT DOES IT MEAN TO SERVE AS "LOCAL COUNSEL"?

Although not unique to Alexandria, the role of local counsel is significant here—more so than in other courts. Although subject to the same Federal Rules, the "Rocket Docket" has its own local rules and practices that are vastly different than those in other Districts. Thus, local counsel, like a harbor pilot, steers the litigation through the shoals and swift currents of the

Alexandria courthouse. Moreover, in addition to ethical obligations to the client that cannot be limited, local counsel has obligations to the Court that cannot be limited.

Even if another attorney has been formally admitted *pro hac vice* to serve as lead counsel, an attorney admitted to practice before the EDVA must actively participate in the case. *See* E.D. VA. CIV. R. 83.1(D)(1)(b), (D)(3) & (F). Local counsel truly serves as ***both*** an advocate and an officer of the court. This Local Rule is intended to ensure that in every case each party has an attorney "both knowledgeable about Virginia law and local rules of practice and readily subject to the Court's discipline and authority." *Northern Va. Law School, Inc. v. Alexandria*, 680 F. Supp. 222, 227 (E.D. Va. 1988). There are, then, certain irreducible obligations.

Although lead counsel and the client may agree that the local counsel will have only a limited role, *see* VSB RULE 1:2(b)[4], the local lawyer cannot limit the obligations he has to the Court. First, under our local rules, a member of the Eastern District of Virginia bar must sign each paper; must appear for all hearings, conferences, and trials, and—most importantly—"will be held accountable for the case," even if a "foreign attorney" is the lead counsel. E.D. VA. CIV. R. 83.1(D)(1)(b), (D)(3) & (F). Second, the duty to "sign" every pleading, motion, and other paper, *see* FED. R. CIV. P. 11(a), also means that local counsel will necessarily be a "presenter" with a mandatory and nondelagable duty of reasonable inquiry under Rule 11, *see* FED. R. CIV. P. 11(b). Similar duties arise if local counsel signs discovery papers. *See* FED. R. CIV. P. 26(g). If you sign it, you own it, so to speak—which is a sobering prospect.

Although local counsel (*qua* presenter) must make a reasonable inquiry before signing, he may fulfill that duty by ***reasonably relying*** on his co-counsel. The Advisory Committee explained that "[W]hat constitutes a reasonable inquiry may depend on such factors as …

[4] The Virginia State Bar Rules of Professional Conduct apply to all attorneys practicing in the Eastern District of Virginia. E.D. VA. CIV. R. 83.1(I).

whether he depended on forwarding counsel …." ADV. COM. NOTES, 97 F.R.D. 165, 199 (1983) (emphasis added). Thus, local counsel does not have to "reinvent the wheel" prior to presenting a paper to the Court. Under the circumstances of the particular case, it may be proper for local counsel to rely on the judgment of "forwarding counsel," who may be more knowledgeable about the facts and the area of law. But do not be a passive presenter—stop and think, ask and be satisfied before you sign and file as local counsel.

5. RULE 34 – PART 1: "EARLY" REQUESTS FOR DOCUMENTS

By rule, there is a discovery moratorium until the Rule 26(f) conference. FED. R. CIV. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order."). The 2015 amendments, however, now provide for "early" "delivery" of Rule 34 requests for documents:

> (2) Early Rule 34 Requests.
>
> > (A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be ***delivered***: (i) to that party by any other party, and (ii) by that party to any plaintiff or to any other party that has been served.
> >
> > (B) When Considered Served. ***The request is considered to have been served at the first Rule 26(f) conference***.

FED. R. CIV. P. 26(d)(2) (emphasis added). Rule 34(b)(2) regarding "responses and objections" to document requests, also has been conformed to allow for early "delivery" under Rule 26(d)(2).

The revisers explained this rule change as follows:

> Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule

> 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

2015 ADV. COM. NOTES, reprinted FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 26, Adv. Com. Notes, 2015 Amendment, at 174 (Thom. Reuters 2016) (hereafter "2015 ADV. COM. NOTES"). In light of this, the question for us is whether this provision will be useful (or even used) in the Alexandria Division. I submit it will be marginally useful, at best.

The Rule 26(d)(2) moratorium may be lifted "by court order," and under the standard initial scheduling order issued in the Alexandria Division, "Discovery may begin as of receipt of this Order." Thus, by the time of the Rule 26(f) conference between counsel, the formulation and filing of a joint discovery plan, and the Rule 16(b) conference with the Magistrate Judge, the initial wave of discovery usually has been served and helps shape the discussion of discovery planning.

6. RULE 34 – PART 2: RESPONDING TO DOCUMENT REQUESTS

Under the 2015 revisions to Rule 34, three changes warrant a closer look—that is, "producing" copies instead of permitting inspection, making "specific" objections, and disclosing whether documents are being "withheld" on the basis of each objection.

"Producing" Documents: Under Rule 34, the responding party is not required to provide a set of copies to the requesting party. Instead, Rule 34 provides that the requesting party "***must*** describe with reasonable particularity each item or category of items ***to be inspected***," "***must*** specify a reasonable time, place, and manner for ***the inspection***," and, if seeking electronically stored information ("ESI"), "***may*** specify the form or forms" for production. FED. R. CIV. P. 34(b)(1)(A), (B) & (C). Nonetheless, the requesting party usually

requests "production" at counsel's office within 30 days—but all that can be demanded is "inspection."

In turn, under Rule 34(b)(2)(A) & (B), the responding party "***must*** respond in writing within 30 days after being served," and "***must*** either state that inspection … will be permitted as requested" or object to the request (more on this below). Under the 2015 amendments to Rule 34, the responding party "***may*** state that it will ***produce*** copies of documents or electronically stored information ***instead of permitting inspection***." FED. R. CIV. P. 34(b)(2)(B) (emphasis added). "Producing" (making and providing copies) is wholly optional in the discretion of the responding party. This change "reflects the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection," and [the] response must state that copies will be produced." 2015 ADV. COM. NOTES, at 198. Since "producing" copies has been the "common practice" for several decades (except in extraordinary cases predating ESI, when a "warehouse production" was made) one wonders why the change was made now—it is not as if photocopying were a new, cutting-edge technology.

Importantly, if the responding party chooses to make a production of paper copies or ESI, that production "must be completed no later than the time for inspection specified in the request ***or another reasonable time specified in the response***." FED. R. CIV. P. 34(b)(2)(B) (emphasis added). In other words, the production is due within 30 days, if so requested, unless the responding party proposes a "reasonable" alternative. The responding party's proposed production date must be both "reasonable" ***and*** "specifically identified in the response." 2015 ADV. COM. NOTES, at 198. Moreover, "[w]hen it is necessary to make the production in stages the response should specify the beginning and end dates of the production." *Id*. In other words, one may make a "rolling production" if it is "reasonable."

Finally, keep in mind that Rule 34 also states this requirement for ***production of paper documents***: "Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents … : (i) 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." FED. R. CIV. P. 34(b)(2)(E)(i). So, you cannot merely photocopy and dump a lot of paper on your opponent; rather, you must organize your production.

In addition to the "new" production provisions, there are some special provisions for ESI productions that are discussed in connection with the ESI protocols in Section 7 below.

Specific Objections: For each document request, the responding party "must either state whether that inspection … will be permitted as requested or ***state with specificity the grounds for objecting to the request, including the reasons***." FED. R. CIV. P. 34(b)(2)(B) (emphasis added). This amendment was made to close an analytical gap, and "adopts the language of Rule 33(b)(4) [for interrogatory objections], eliminating any doubt that less specific objections might be suitable under Rule 34." 2015 ADV. COM. NOTES, at 198. The notes give an example that illuminates the intended specificity and ties it to the what-is-being-"withheld" amendment:

> The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

Id. So, the mere objection "overbroad" is not good enough.

This is a very important provision in the EDVA because we state objections separately and in advance of responses. E.D. VA. CIV. R. 26(C). Specific objections, of course, have long

been required by Local Rule 26(C), but the new federal rule emphasizes that duty. And specificity will facilitate the meet-and-confer that is intended to follow after the objections are served. E.D. VA. CIV. R. 37(E). To get a better feel for this rule, let's look at more examples:

For the example in the Advisory Committee Notes, the document request might have been this: "A copy of each purchase order for widgets submitted by plaintiff to defendant in the last 10 years." Instead of merely objecting "overbroad," the responding party must object to this effect: "Objection; the time-period ("last 10 years") is overbroad; instead, plaintiff will limit its response to the five years preceding the contract at issue."

Another example might be this: "A copy of each purchase order for any goods submitted by plaintiff to any seller in the last 10 years." Instead of merely objecting "overbroad and irrelevant," the responding party must object to this effect: "Objection; the time-period ("last 10 years") is overbroad, and the scope ("any goods" from "any seller") is not relevant or reasonably and proportionately directed to the claims and defenses at issue; instead, plaintiff will limit its response to the five years preceding the contract at issue, and limit the scope to widgets purchased from defendant."

A final example might be this: "A copy of each purchase order for any goods submitted by plaintiff to any seller in the last 10 years, together with all correspondence (including email) between plaintiff and any seller before and after each purchase order." Instead of merely objecting "overbroad, irrelevant, and unduly burdensome" the responding party must object to this effect: "Objection; the time-period ("last 10 years") is overbroad; the scope ("any goods" from "any seller") is not relevant or reasonably and proportionately directed to the claims and defenses at issue; and searching emails and other correspondence between plaintiff and any seller regarding purchase orders for any goods would be unduly burdensome; instead, plaintiff will

limit its response to the five years preceding the contract at issue, and limit the scope to widgets purchased from defendant."

What is being "Withheld": It has become a common practice to state at the end of a detailed, paragraph-long objection something to this effect: "Subject to, and without waiving any of the foregoing objections, plaintiff will produce responsive documents, if any." However, this tag-line does not specify ***what*** will be produced or withheld; it only states that ***something*** might be produced that the responding party deems "responsive," and implies that ***something else*** might be withheld on the basis of one or more of its objections. That vague statement has always been wrong, *e.g.*, *Heller v. City of Dallas*, 303 F.R.D. 466, 486-87 (N.D. Tex. 2014), and now is forbidden by the revised rule.

Rule 34 now provides that "An objection must state whether any responsive materials are being withheld on the basis of that objection." FED. R. CIV. P. 34(b)(2)(C). Thus, the perfunctory tag-line so often used should not be sufficient—particularly in light of the explanation offered by the rule revisers:

> This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. … An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

2015 ADV. COM. NOTES, at 198. Here is what this appears to mean:

In the three examples above, the objections are sufficiently specific when identifying the parameters of the plaintiff's intended response that a further statement of what was "withheld" probably is not necessary. Assume that the objection in the second example had been this "Objection; the time-period ("last 10 years") is overbroad, and the scope ("any goods" from "any seller") is not relevant or reasonably and proportionately directed to the claims and defenses at

issue." In that case, the response should include a statement to this effect: "Plaintiff has withheld potentially responsive documents that are older than the five years prior to the contract at issue, or that pertain to goods other than widgets plaintiff purchased from defendant."

Importantly, though, the revisers clarify that the responding party does not have to create a "log" of the "withheld" materials: "The 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." 2015 ADV. COM. NOTES, at 198. Specificity in both objections and responses should eliminate the game of "blind man's bluff" that would otherwise arise from the (perhaps studied) vagueness usually employed in objections and responses.

7. RULE 34 – PART 3: ESI PRODUCTION.

Under Rule 34, the requesting party, if seeking ESI, "***may*** specify the form or forms" for production. FED. R. CIV. P. 34(b)(1)(C) (emphasis added). If the responding party objects to the ESI production form, it "***must***" identify the form it will use instead; similarly, if no form is specified by the requesting party, the responding party "***must***" identify the form it will use. FED. R. CIV. P. 34(b)(2)(D). Moreover, Rule 34 provides that "Unless otherwise stipulated or ordered by the court, these procedures apply to producing … electronically stored information: … (ii) If a request does not specify a form for producing electronically stored information, [the responding party] ***must*** produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." FED. R. CIV. P. 34(b)(2)(E)(ii) (emphasis added). Furthermore, ESI need only be produced in "one form." FED. R. CIV. P. 34(b)(2)(E)(iii). Since ESI usually is processed, produced, received, and managed by an in-house staff or outside

vendor using particular software, databases, and techniques, both the requesting and the responding party will need to make sure that the ESI format works for both sides.

Thus, you must know your client's data, your ESI vendor's capabilities, and your own preferences. And you should find out what the other side can (cannot), or will (will not), do with its own ESI. So, do not wait for the Rule 34 process to discuss the form of production—raise this issue at the Rule 26(f) conference.

8. RULE 34 – PART 4: ESI PROTOCOLS.

Under Rule 26(f), the parties' discovery plan, they "must state the parties' views and proposals on: … any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced." FED. R. CIV. P. 26(f)(2) & (3)(C). This discussion may result in an ESI production protocol that is stated in the plan, or a statement in the plan that a separate ESI stipulation will be filed.

Here is a checklist of items for discussion and (as appropriate) agreement:

- **IDENTIFICATION OF SOURCES**
  - *Email*
  - *Servers*
  - *Laptops and other devices*
- **PRESERVATION**
  - *Letter to Client*
  - *Letter to opponent, third-parties*
  - *Seek preservation order*
- **COLLECTION**
  - *Custodians*
  - *Key-word searches*
  - *Predictive coding*
- **PROCESSING**
- **REVIEW FOR RELEVANCE**

- **REVIEW FOR PRIVILEGES / SERVICE OF PRIVILEGE LOGS**
- **PRODUCTION**
  - *Format(s)*
  - *Metadata*
- **POST-PRODUCTION MANAGEMENT AND USE**
- **DISPUTE RESOLUTION**
  - *Liaison*
  - *Clawback provision*
  - *Procedures for notice, meet-and-confer, motions*

9. PROPORTIONALITY AND RELEVANCE

The discovery rules adopted in 1938 were a "striking and imaginative departure from tradition," the importance of which exceeded the original drafters' expectations. ADV. COM. NOTES, 48 F.R.D. 487, 487 (1970). Relevance was to be given "a flexible treatment" during discovery because the precise parameters of what would be admissible at trial could not be predicted. *Id.* at 498. From the outset, then, the Rules Committee contemplated "a broad search for facts." ADV. COM. NOTES, 5 F.R.D. 433, 454 (1948). During discovery, "admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice." *Id.* Indeed, the discovery rules "permit 'fishing' for evidence." *Id.* (citation omitted). Only "matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of" permissible discovery. *Id.* In the phrase that defined the spirit of the original discovery rules, "No longer would the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). But it did not turn out that way because the original discovery rules often were too narrowly employed. More facts discovery, it was thought, would lead to more truth at trial.

The first major change in the discovery rules came in 1970, which gave us the framework for contemporary discovery practices. Those changes were intended to expand upon the original principles of liberally allowing broad, party-controlled discovery as an aid to the search for truth at trial. Under the 1970 revisions, relevance for discovery purposes was "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Moreover, by broadening the scope and streamlining the mechanics of discovery, the Rule drafters were hoping to "encourage extrajudicial discovery with a minimum of court intervention." ADV. COM. NOTES, 48 F.R.D. at 488. But it did not work out that way—instead, broad, party-controlled fact discovery quickly got out of hand.

In 1983, the Rules Committee first introduced proportionality as a limit on discovery that would be monitored by the Court. The revisors reasoned that "The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. ... Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery ... . All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake." ADV. COM. NOTES, 97 F.R.D. 165, 216-17 (1983). Under "new" Rule 26(b)(2)(i)-(iii) (later re-numbered Rule 26(b)(2)(C)), the district courts were authorized to place limits on discovery when (i) the discovery is cumulative, duplicative, or unnecessarily inconvenient, (ii) the party seeking the discovery has had an ample opportunity already, or (iii) "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account ... the importance of the proposed discovery in resolving the issues." Those additional limitations were written specifically "to deal with the

problem of over-discovery." ADV. COM. NOTES, 97 F.R.D. at 217. "The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry." *Id.* In other words, party-controlled discovery was going to be reigned in.

Under the 1983 revisions, the judge was to control discovery, not the parties. The district court judges were "encourage[d] to be more aggressive in identifying and discouraging discovery overuse." *Id.* When curbing "disproportionate" discovery, the district court was to consider the nature and complexity of the factual issues, the financial resources of the parties and the significance of the rights and issues at stake. *See id.* at 218. The Rules Committee urged, "The court must apply standards in an even-handed manner that will prevent use of discovery as a war of attrition or as a device to coerce a party, whether financially weak or affluent." *Id.* These admonitions were uttered by the Rule drafters just a dozen years after they had written the 1970 revisions, which had been designed to permit discovery to operate with a "minimum of court intervention." But it did not work out that way because, even after 1983, party-initiated discovery was difficult to control—like having a tiger by the tail—and it was fueled by high-stakes litigation, and it was even fueling law firm expansion.

After trying to impose proportionality in 1983, the revisors tried a different approach in 2000 by redefining "relevance." From 1938 to 2000, discovery could be obtained "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 ... . The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1) (superseded 2000). With discovery was still out of control and getting worse as the volume of discoverable electronically

stored information soared, in 2000, the revisors narrowed the meaning of the "relevance" in an effort to narrow the scope and costs of discovery.

In 2000, Rule 26(b)(1) was changed to this: Discovery was permitted only of "matter, not privileged, that is relevant to the claim or defense of any party … . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Fed. R. Civ. P. 26(b)(1) (superseded 2015). This narrower standard was meant to limit "party-controlled" discovery. ADV. COM. NOTES, 192 F.R.D. 340, 389 (2000). But it did not work out that way because the discovery culture still was informed by the 1970-era attitudes.

So, in 2015, Rule 26(b)(1) was changed to this:

> 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 its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED. R. CIV. P. 26(b)(1) (emphasis added). In effect, this revision retained the definition of "relevance" from former Rule 26(b)(1) (*ca*. 2000) but combined it with the proportionality requirements from former Rule 26(b)(2) (*ca*. 1983). *See* 2015 ADV. COM. NOTES, Rule 26, at 172-73. In other words, the revisors took two ideas that had not worked separately, combined them, and expected that they would work now. But, will it work out this way? We will have to see.

Under this new formulation, "The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." *Id*. at 173. But the roles each plays, and the manner of implementing proportionality parameters, cannot be explained in simple terms. Indeed, page after page of the 2015 Advisory Committee

Notes to Rule 26 are devoted to explaining these matters—which is must-reading for any litigator or judge.

Importantly, though, the requesting party is not necessarily at fault if he requests "too much." Instead, the responding party may be in the better position to assess proportionality and object. But the responding party is not allowed "to refuse discovery simply by making a boilerplate objection that [the discovery] is not proportional." *Id*. at 173. Instead,

> A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

Id. This dovetails nicely with the Rule 34 changes regarding specific objections.

As importantly, though, the mere fact that discovery burdens are ***asymmetrical*** in a given case does not mean that it is ***disproportionate*** in the sense used in revised Rule 26(b)(1). *Id.* A plaintiff with little information to disclose nonetheless may request that the defendant produce a vast amount of information, so long as it is proportionate to the other factors, such as "the issues at stake" and the parties' relative "resources."

Finally, as has long been the rule, each party generally absorbs the costs of his own discovery productions. *See Oppenheimer Fund*, 437 U.S. at 358 ("Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests."). However, the Court always had discretion under Rule 26(c) to condition discovery "on the requesting party's payment of the costs of discovery." *Id.* Rule 26(c) was amended in 2015 to expressly authorize entry of a protective order "specifying … the allocation of expenses" for particular discovery requests and responses. FED. R. CIV. P. 26(c)(1)(B). Nonetheless, this amendment "does not imply that cost-shifting should become a common practice. Courts and

parties should continue to assume that a responding party ordinarily bears to costs of responding." 2015 ADV. COM. NOTES, Rule 26, at 174. So expect cost-shifting to be implemented sparingly.

10. NEW SEALING PROCEDURES UNDER LOCAL CIVIL RULE 5(C).

When first enacted in 2000, Local Civil Rule 5(C) was intended to streamline sealed filings by allowing the entry of a protective order that prospectively authorized the parties to submit sealed filings during the pretrial period. As of 2012, prospective sealing orders were no longer allowed, even though the original rule remained on the books. Earlier this year, Local Civil Rule 5(C) and the other provisions of that rule were comprehensively reviewed and revised, and here are the key changes regarding sealing motions:

Subdivision 5(A) provides that no sealed filings are permitted ***unless*** authorized "by law or Court rule," or by Court order on motion made under subdivision (C).

Subdivision 5(B) specifies the procedures to be used when sealing is authorized "by law."

Subdivision 5(C) specifies the procedures to be used when sealing is sought by motion. Key procedural provisions are as follows:

- The filer files the sealed materials himself through a specific ECF button under the main menu of ECF ***Civil Events*** called ***Sealed Documents***—such as a *Sealed Memorandum in Support*, *Sealed Attachment/Exhibit(s)*, or *Sealed Response/Reply/Opposition*. The filing is secure, and public access is restricted. Any material so filed will be kept under seal provisionally until there is a ruling by the Court.
- Sealed materials are filed separately under seal even if intended as part of a publicly filed document. For example, if you file a declaration with three exhibits, only one of which is sealed, you would first file the *Declaration* as the main document under the **Other Documents** menu, and the three exhibits would be filed as "Exhibits" under *Attachments*

draw-down box, and you would use a place-holder for the sealed exhibit (*e.g.*, "EXHIBIT A FILED UNDER SEAL"). Then you would make another filing under ***Sealed Documents*** to file the sealed version of the exhibit.

- You must still serve a copy of any sealed filing on opposing counsel—they cannot access it through ECF.
- Under ***Subdivision 5(D)***, the filer must deliver a paper copy (or copies) to the presiding judge (which paper copies are later destroyed or returned).
- Under ***Subdivision 5(E)***, the container of the paper copy must properly identify the case and other information regarding the sealed filing, and should identify the corresponding ECF filing number (*e.g.*, "Sealed Version of Defendant's Summary Judgment Exhibit H, ECF No. 237-7").
- If you are filing a redacted brief, then that would be filed publicly under the normal ECF event (*e.g.*, ***Civil Events*** main menu, ***Responses, Replies and Memoranda*** sub-menu, and draw-down box item *Memorandum in Support*). You also must file the un-redacted version under the proper ECF ***Sealed Document*** menu item (*e.g.*, *Sealed Memorandum in Support*).
- You ***do not file*** a *Notice of Hearing* for the sealing motion, but you must file a *Notice of Filing Sealing Motion LCvR5(C)*, so that the matter is properly in the public docket. That ECF button is found under ***Notices*** in the ***Civil Events*** menu. That filing starts the seven-day period for responses and objections. The notice must contain the language required by Local Civil Rule 5(C), and inform opposing parties and the public of the right to object or respond within seven (7) days.
- Whether the sealed materials are your client's or the opposing party's, you must "contemporaneously" file a motion to seal, under the ***Civil Events*** menu item ***Motions***, draw-down box "Seal." That motion can be filed immediately before, or immediately after the sealed filing.
- Whether the sealed materials are your client's or the opposing party's, you must file a brief in support of the sealing motion justifying the sealed filing. If the materials belong to your client, your brief should be thorough, and you might need to make a proffer

therein to justify the sealing, or might need to submit a supporting declaration from your client. If the sealed materials belong to an opposing party, you may be able to recite in your brief that (a) there is a protective order in place requiring that "confidential materials" be filed under seal, (b) the materials were designated "confidential" by your opponent, and (c) the materials facially appear to satisfy the criteria in the protective order for designation as "confidential materials." Your opponent then will have to file a *Response* to justify the sealing (see below).

- Within seven days of the sealed filings, objections and responses must be filed. Further briefing or submissions may be requested by the presiding judge, or a show cause order may be issued to the filer or the party who designated the materials as confidential to present further evidence or argument in support of sealing.
- If the sealed filing contains "confidential" information or documents belonging to an opposing party, that opposing party must file a *Response* that justifies the sealing. This is an important filing, and the failure to file a sufficient *Response* may lead to unsealing notwithstanding that a proper sealing motion had been filed.

Here are some other helpful hints:

Generally, a motion is needed for each filing; however, a single motion may cover a group of related filings made contemporaneously. For example, if you file a declaration in support of a motion that attaches six sealed exhibits and a redacted brief, then one sealing motion can cover those related filings.

Although there often is not time for a meet-and-confer session prior to filing, you should at least have one after the filing to see if either side is willing to voluntarily unseal a filing.

Finally, while making sealed filings has been facilitated, it is still disfavored, and you should strive to avoid making sealed filings or minimize sealing by using redacted filings. Generally, "blanket-sealing"—such as filing an entire brief under seal—is improper.