

**The Federal Bar Association  
Northern Virginia Chapter**



**Presents:**

***A BENCH-BAR DIALOGUE:***

**FIVE  
~~TEN~~ <sup>^</sup> *TIMELY TOPICS ...***  
***That the Magistrate Judges Think You Should Know!***

**A Panel Discussion With The**

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

**Moderator:  
Craig C. Reilly**

*Materials Prepared by:*

Craig C. Reilly © 2018  
111 Oronoco Street  
Alexandria, Virginia 22314-2822  
(703) 549-5354  
craig.reilly@ccreillylaw.com  
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## I. PUBLIC AND PRESS ACCESS TO “JUDICIAL RECORDS”

*The Right of Access:* Under the common law, judicial records are presumptively public: “It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” See *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978). Similarly, under the First Amendment, the press and public alike have a right of access to attend trials—both criminal and civil. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (criminal); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (a civil trial is “a public event”). That First Amendment right also has been extended to certain pretrial hearings, depending upon the historical tradition of openness and the value of public scrutiny of that proceeding. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (“*Press-Enterprise I*”); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”). Where a First Amendment right of access attaches to the hearing, the same right of access applies to papers and documents filed in association with the pretrial proceeding, in both criminal and civil cases. See *In re Washington Post Co.*, 807 F.2d 383, 389-90 (4th Cir. 1986) (access to records of plea and sentencing proceedings); *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 252-54 (4th Cir. 1988) (access to summary judgment record). Thus, there are *two* sources of a right of access to judicial records.<sup>1</sup>

Essentially, the right of access is allowed so that the press and public can perform a “watch dog” function, ensuring that the administration of justice is fair, impartial, and effective.

See *Virginia Department of State Police v. The Washington Post*, 386 F.3d 567, 575 (4th Cir.

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<sup>1</sup> Much of the case law concerning open hearings and access to judicial records has been developed in criminal cases—and often reveals the tension between having public criminal proceedings and preserving the defendant’s right to a fair trial before an impartial jury. See *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 547-51 (1976). The same principles of openness—open judicial records and open trials—apply to civil cases, too. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 & n.9, 580 n.17 (1980). Get used to the idea that judicial records, hearings, and trials in civil cases are “public property”—literally!

2004), *cert. denied*, 544 U.S. 949 (2005); *accord, e.g., Nixon v. Warner Communications*, 435 U.S. at 597-98; *Richmond Newspapers v. Virginia*, 448 U.S. at 575. It is important to keep this justification in mind. The press and public may be able to perform that “watch dog” function without knowing all the details involved in the case, such as trade secrets, confidential business information, or other private or proprietary information that may have been put in issue.

The nature of the judicial records dictates which right of access applies. The common law right of access applies to “all judicial records and documents,” while the First Amendment right of access applies “only to particular judicial records and documents”—such as exhibits filed in connection with plea hearings and sentencing hearings in criminal cases, and trial proceedings and dispositive motions in civil cases. *Stone v. University of Maryland Medical Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988). Thus, as soon as your client commences a civil action—or as soon as he has been sued—the *common law* right of access attaches to “all judicial records and documents” filed in the case. Then, as soon as the merits are presented to the Court, the *First Amendment* right of access attaches.<sup>2</sup> The nature of the right of access also determines the standard that must be overcome to keep judicial records under seal.

***Overcoming the Common Law Right of Access:*** The Supreme Court has recognized that “the [common law] right to inspect and copy judicial records is not absolute. Every court has

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<sup>2/</sup> Although known as the “First Amendment right of access,” this right is not reserved for the press. “It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally . . . .” *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972). “The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.” *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974). The First Amendment protects a freedom of the press, of course, but it also secures for every citizen freedom of speech, as well as the rights to peaceably assemble, and to petition the government, which together give rise to the First Amendment right of access to judicial proceedings and records. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 575.

supervisory power over its own records and files, and access has been denied where the court files might have become a vehicle for improper purposes,” such as promoting spite, libel, and public scandal, invading privacy, or injuring a litigant’s “competitive standing.” *Nixon v. Warner Communications*, 435 U.S. at 598. Exercising that supervisory power is committed to the “sound discretion” of the district court, which is to be “exercised in light of the relevant facts and circumstances of the particular case.” *Id.* at 598-99. Thus, the Court controls sealing, not the parties.

When proffering a substantive justification, however, remember that the parties “have no privacy rights in the contents of the court record.” *See Under Seal v. Under Seal*, 326 F.3d 479, 486 (4th Cir. 2003) (affirming district court order unsealing record in federal false claims act case). Rather, you must show a compelling private interest—apart from the desire for privacy—to overcome the common law right of access and justify sealing a judicial record.

***Overcoming the First Amendment Right of Access:*** If the First Amendment right of access applies to the judicial records, then access can be denied only if—and only to the extent—necessary to advance “a compelling government interest.” *Press-Enterprises I*, 464 U.S. at 510. Under that standard, sealing cannot be based on “unsubstantiated or speculative claims of harm.” *Company Doe v. Public Citizen*, 749 F.3d 246, 269-70 (4th Cir. 2013). But what “compelling government interest” arises in a civil action between private parties?

In civil litigation, the most frequently invoked reason for sealing is to protect trade secrets and confidential business information. Generally speaking, trade secrets and confidential business information are species of private property. *See Carpenter v. United States*, 484 U.S. 19, 26 (1987) (confidential business information); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474-78 (1974) (trade secrets). But for compulsory discovery, your client would not be

sharing any of that information with your litigation opponent or the public. Recognizing this, the Supreme Court observed that the “liberal discovery” rules “do not distinguish between public and private information,” and litigants, therefore, may obtain information during discovery that “if publicly released could be damaging to reputation or privacy. *The government clearly has a substantial interest in preventing this sort of abuse of its processes.*” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984). Thus, there is “a compelling government interest” that justifies keeping confidential, competitively sensitive materials under seal, thereby preventing misuse of those materials by competitors.

***What Constitutes a “Judicial Record”?***: Before going further, we need to know what constitutes a “judicial record.” Under the rules of procedure, there are three categories of judicial documents filed with the Court: “pleadings,” “motions,” and “other papers.” See FED.R.CIV.P. 7(a) & (b). The term “other papers” includes, for example, briefs, affidavits, and exhibits filed in support of, or in opposition to, a motion. The Fourth Circuit has held that “documents filed with the court are ‘judicial records’ if they play a role in the adjudicative process, or adjudicate substantive rights.” *United States v. Appelbaum (In re United States)*, 707 F.3d 283, 290-91 (4th Cir. 2013). One thing is clear: only documents “filed with the court” can be deemed “judicial records.” But the mere filing of a document is not determinative; rather, how that document is used is the touchstone in determining whether it is a “judicial record.”

Importantly, it is settled that civil discovery proceedings are “not a public components of a civil trial,” and, in general, civil discovery is “conducted in private as a matter of modern practice;” therefore, the “raw fruits” of civil discovery are not judicial records. See *Seattle Times*, 467 U.S. at 33-35. Discovery documents (*e.g.*, disclosures, requests, objections, answers and responses, document productions, and deposition transcripts) are not filed under Rule 5(d),

and are not a “judicial records.” Thus, under *Seattle Times*, the parties may move the Court to enter a protective order that limits the use and disclosure of discovery materials without impairing the public’s right of access to judicial records. Whether, and to what extent, discovery documents and materials may become “judicial records” when they are “used” in the case is explored further below.

***Mandatory Procedures for Sealing:*** To protect the confidentiality of certain sensitive discovery materials, parties frequently use a blanket protective order providing that such materials must be filed under sealed following the procedures set forth in Local Civil Rule 5. In many respects, following the proper procedures to obtain a sealing order is as important as the substantive justification offered for sealing.

Under current Fourth Circuit law, the district court must do the following prior to sealing any court records:

- (1) give public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.

*Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000). To satisfy the first requirement, the Court must provide notice of a request for sealing in the court record and provide interested persons with “an opportunity to object.” *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984). Individual notice is not required, and the Court may give adequate notice either by “notifying the persons present in the courtroom of the request to seal” at the time of the hearing, or by “docketing [the sealing request] in advance of deciding the issue.” *Id.* To meet the second requirement, the Court must consider using redactions or limited sealing (either scope or duration) in lieu of permanent blanket sealing. And to meet the third requirement, the Court must make specific findings, supported by the record, that justify sealing under the applicable

standard—either the First Amendment or common law. Any sealing order that fails to satisfy these three requirements is “invalid.” *Ashcraft*, 218 F.2d at 288. The *Ashcraft* standard is strictly enforced by the Court.

You must follow these procedural steps in Local Civil Rule 5, as well as proffer a substantive justification for sealing. Failure to follow the rule or to provide a substantive justification may result in denial of a sealing request.

***Sealed or Redacted Pleadings:*** It seems indisputable that a complaint is a “judicial record.” It is “filed” and “play[s] a role in the adjudicative process” by asserting claims; however, it is not necessarily used to “adjudicate substantive rights.” So, which right of access applies? When seeking to seal the complaint in a civil action, the common law right of access applies. *See Bayer Cropscience LP v. BASF SE*, No. 3:16cv790, Doc. 23 (E.D. Va. Nov. 17, 2016) (applying common law standard and granting motion to seal complaint to protect confidential business information). To overcome the common law right of access, a party’s private interest in protecting its “competitive standing” may justify sealing. *See Nixon v. Warner Communications*, 435 U.S. at 598; *accord In re Knight Pub. Co.*, 743 F.2d at 235 (sealing judicial records is permissible to prevent others from “gaining a business advantage” from materials filed with court). A proper showing of such private interests should justify sealing a complaint.

***Sealing and Motions to Dismiss:*** Sealing papers in connection with a motion to dismiss does not arise often, in my experience; however, when sealing issues do arise, they arise in different ways.

Generally, papers filed in connection with a Rule 12 motion to dismiss would be judicial records because they are used to adjudicate substantive rights. However, a motion to dismiss

often tests only the sufficiency of the allegations of the allegations on the face of the complaint to state a claim for relief. *See* FED.R.CIV.P. 12(b)(6). So, sealing might not arise at all.

Documents attached to or referenced in a pleading, of course, are “a part of the pleading for all purposes.” FED.R.CIV.P. 10(c). Occasionally, then, a confidential document has been filed under seal with the complaint. In other instances, the confidential document has been referenced in the complaint, but not filed.

For example, if the plaintiff sues under a confidential written contract that is referenced in the complaint, but not attached, the defendant may want to file it in support of its motion to dismiss to show that the claim is barred by the terms of the contract. If the defendant seeks to file that document under seal, what standard applies? I submit that the First Amendment right of access applies because the motion to dismiss would be adjudicating substantive rights. *Cf. Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988) (First Amendment right of access attaches to judicial records considered on summary judgment motion). To file and maintain the document under seal, therefore, one party (or both) would have to show grounds that justify sealing under the higher standard.

In support of its motion to dismiss, the defendant might submit a confidential document that is not referenced in the complaint. What happens then? If, on a motion to dismiss, “matters outside the pleadings are presented to and ***not excluded by the court***, the motion must be treated as one for summary judgment under Rule 56.” FED.R.CIV.P. 12(d) (emphasis added). In that case, it appears that a First Amendment right of access applies to that document. *See Rushford*, 846 F.2d. at 252-54. So, the defendant will have triggered—at least potentially—the First Amendment right of access.

But not every document filed in connection with a motion to dismiss necessarily becomes a judicial record. What happens if one of the parties has filed a competitively sensitive document as an exhibit in connection with the motion to dismiss, but the Court denies the motion and declines to consider the sealed exhibit? Short-answer: It may remain sealed.

Until the Court determines whether it will even consider matters outside the pleadings, the First Amendment right of access does not attach to the exhibits filed in connection with a motion to dismiss, and they may be filed under seal. The Fourth Circuit has held that: “Neither the Supreme Court nor this Court has ever ruled that the mere filing of a document triggers the First Amendment guarantee of access.” *In re Policy Management Sys. Corp.*, No. 94-2254, 67 F.3d 296 (table), 1995 U.S. App. LEXIS 25900, \*9 (4th Cir. 1995) (unpublished) (“*PMSC*”).

The Fourth Circuit’s opinion in *PMSC* cogently explains the reasons for this:

Although a party can file materials outside the pleadings while seeking court action on a motion to dismiss, the court can rule on the motion without considering the materials. Because documents filed with a motion to dismiss that are excluded by the court do not play any role in the adjudicative process, we find that the documents essentially retain their status as discovery materials and therefore are not subject to the First Amendment guarantee of access. Moreover, public access to documents that a court did not consider would not “play a significant positive role in the functioning of the particular process in question.”

*Id.* at \* 11 (citation and footnote omitted). However, “if the court converts the motion to dismiss into a motion for summary judgment, then the First Amendment guarantee of access attaches under *Rushford*” to any exhibits relied upon by the Court. *Id.* n.5.<sup>3</sup> Accordingly, unless and until

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<sup>3</sup> Other rulings in this Division have cited *PMSC* and used this analysis when presented with sealing motions in connection with motions to dismiss. *E.g.*, *United States ex rel. Carter v. Halliburton Co.*, No. 1:11cv602 (JCC/JFA), 2011 U.S. Dist. LEXIS 136462 (E.D. Va. Nov. 29, 2011) (granting motion to seal in part, and denying in part); *United States ex rel. Carter v. Halliburton Co.*, No. 1:10cv864 (JCC/TCB), 2011 U.S. Dist. LEXIS 55623 (E.D. Va. May 24, 2011) (granting motion to seal in part, and denying in part); *GTSI v. Wildflower Int’l, Inc.*, No.1:09cv123(JCC), 2009 U.S. Dist. LEXIS 36618 (E.D. Va. Apr. 30, 2009) (denying motion to dismiss and granting motion to seal).

the Court determines that it will consider matters outside the complaint, only a common law right of access attaches to the exhibits filed by a defendant in support of its motion to dismiss, and the documents may be sealed to protect confidential business information.

***Sealing and Preliminary Injunctions:*** Preliminary injunction motions, while not necessarily dispositive, nonetheless trigger more public scrutiny. Thus, when confidential materials are filed to support or oppose a motion for a preliminary injunction, the First Amendment right of access applies. *See Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984). Therefore, to maintain sealing, a party must show a “compelling governmental interest.” Moreover, the Court must make a careful item-by-item review based on specific factual showings and find a basis for sealing (or redacting) each item. *See Pax Mondaial Ltd. v. Afghan Res. Group*, No. 1:11cv1347, 2012 U.S. Dist. LEXIS 105365 (E.D. Va. July 27, 2012) (Carroll, USMJ) (unsealing preliminary injunction exhibits). Thus, in a misappropriation of trade secrets action, the plaintiff who seeks a preliminary injunction must make sure that those secrets are not compromised by a procedural default at the threshold of the case.

***Sealing and Motions to Amend:*** The Fourth Circuit has noted that “we have never held that the public has a First Amendment right of access to a pretrial hearing on a non-dispositive civil motion or to the transcript of such a hearing.” *Washington Post*, 386 F.3d at 580. In the Fourth Circuit and this District, however, there is no clear guidance as to which right of access applies to a motion to amend. *See White v. Chapman*, No. 1:14cv848 (JCC/IDD), 2015 WL 4360329; 2015 U.S. Dist. LEXIS 91433, \*10-11 n.5 (E.D. Va. July 14, 2015). I submit that only a common law right of access applies to these materials because a motion to amend is a non-dispositive procedural matter. Nonetheless, it may be wise to analyze the information at issue under both standards.

***Sealing and Discovery Motions:*** As noted above, discovery materials are not inherently “judicial records.” When discovery materials are filed with the district court a tension arises between the parties’ interests in keeping civil discovery confidential and the public’s common law or First Amendment right of access to judicial records. The justification for granting public access to discovery documents filed with the district court does not arise from the act of filing a motion, but from the nature of the motion filed. See *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001) (constitutional right of access turns on nature of motion, *held*, right of access applies to adjudicative motions, but not discovery motions); *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157 (3d Cir. 1993) (common law right of access allowed for *nondiscovery* pretrial motions, but not for discovery motions); *cf. PMSC*, at \*9 (mere filing does not give rise to right of access). In particular, confidential discovery materials filed with the district court to permit determination of a non-dispositive discovery motion would not give rise to a First Amendment right of access. *E.g., Anderson v. Cryovac, Inc.*, 805 F.2d 1, 10-13 (1st Cir. 1986). Therefore, when the matter before the district court is a discovery motion, a First Amendment right of access does not arise with respect to confidential discovery materials filed in support of, or in opposition to, the motion.

Several courts have gone further and held that there is no common law right of access to discovery materials that are filed in connection with discovery motions. *E.g., Anderson*, 805 F.2d at 13; *Chicago Tribune*, 263 F.3d at 1312-13; *Leucadia*, 998 F.2d at 163-65; *but see Mokhiber v. Davis*, 537 A.2d 1100 (D.C. 1988) (recognizing common law right of access to discovery motions). The Fourth Circuit has not ruled on this issue yet, but the *Rushford* and *PMSC* rulings shed light on the Court’s rationale, indicating that even a common law right of access might not be found.

But, I would not take any chances. I submit that a common law right of access applies. Even assuming that a common law right of access will attach to materials filed in connection with a discovery motion, that interest may be overcome by a showing of compelling private interests—such as, the need to protect confidential and competitively sensitive information. *Nixon v. Warner Communications*, 435 U.S. at 598; *In re Knight Pub. Co.*, 743 F.2d at 235. A proper showing of such private interests should justify a sealed filing in support of, or in opposition to, a discovery motion.

***Sealing and Summary Judgment:*** Generally, confidential discovery materials filed in connection with a summary judgment motion give rise to a First Amendment right of access because “summary judgment adjudicates substantive rights and serves as a substitute for a [public civil] trial.” *Rushford*, 846 F.2d at 252. Similarly, in *Seattle Times*, the Supreme Court distinguished between information and materials that had been “discovered” (to which there is no right of access) and those that have been “admitted” into evidence for an adjudication on the merits (to which there is a right of access). *Seattle Times*, 467 U.S. at 33. Once discovery materials “are made part of a dispositive motion, such as a summary judgment motion, they lose their status of being raw fruits of discovery” and become “judicial documents.” *Rushford*, 846 F.2d at 252 (citation and internal quotations omitted). “The reasons for granting a protective order to facilitate pre-trial discovery may or may not be sufficient to justify proscribing the First Amendment right of access to judicial documents.” *Id.* at 254. Thus, where, a blanket protective order has been entered, which allows the parties to designate discovery materials as “confidential” and requires the other party to file those materials under seal, the Court must review the materials so filed and independently determine whether those materials should remain under seal. *See In re Time, Inc.*, 182 F.3d 270, 271-72 (4th Cir. 1999). The Court may even

raise this issue *sua sponte* if your opponent does not. (I have had that happen—*twice!* It was not pretty either time.)

***Sealing Hearings and Trial:*** The standard and procedures for closing a courtroom during trial or for motions are very strict under Fourth Circuit law:

There is a strong presumption in favor of openness: Closed proceedings ... must be rare and only for cause shown that outweighs the value of openness. ... The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.... Even with findings adequate to support closure, the trial court must consider alternatives before the courtroom can be closed constitutionally.

To facilitate a trial court's case-by-case determination of closure, representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion. When a closure motion is made in open court, persons present must be given notice and an opportunity to object before the public can be excluded.

*In Re Knight*, 743 F.2d at 234 (citations and internal quotation marks omitted). One of the “rare” instances in which a trial may be sealed for “cause shown” would be to protect trade secrets.

Where a civil litigant's “trade secrets” (or other “confidential business information”) are contained in the judicial record, the value of which property rights would be destroyed by public disclosure in a trial or hearing, a sufficient “compelling governmental interest” exists to warrant sealing of the courtroom and the pertinent judicial documents. *See In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1983); *accord Woven Elec. Corp. v. The Advance Group Inc.*, 19 U.S.P.Q.2d 1439, 1443, 1991 U.S. App. LEXIS 14345, \*16-\*19 (4th Cir. 1991) (citing and following *Iowa Freedom of Information Council*) (district court may close civil trial and seal trial record as necessary to protect litigant's trade secrets). This is a very unusual and

rarely granted protection. Moreover, expect to make a detailed showing that the information really is a trade secret. Generalities and conclusory assertions will not persuade the Court.

***Sealing Trial Exhibits:*** Under the local rules, trial exhibits cannot be sealed except by court order. E.D.VA.CIV.R. 5(H). As is necessary to protect trade secrets, however, trial exhibits may be redacted or sealed. *See Woven, supra*. Moreover, until exhibits are admitted (or offered), they are not judicial records. *See Seattle Times*, 467 U.S. at 33. Once admitted, however, the First Amendment right of access applies. *Level 3 Comm., LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572 (E.D. Va. 2009). Importantly, under local practice you must identify your trial exhibits in your Rule 26(a)(3) disclosure, which is submitted at the pretrial conference, but *you do not file your trial exhibits until one day before trial*. *See* E.D.VA.CIV.R. 79(A). That allows you plenty of time to seek a sealing order. You will need to follow the proper procedures—notice, motion, and factual support—when seeking to seal trial exhibits before or during trial.

Furthermore, even “demonstrative exhibits” – like power point slides – used at a public hearing or trial are “judicial records,” and public access to them may be demanded. *See Rambus, Inc. v. Infineon Technologies AG*, No. 3:00cv524, 2005 LEXIS 8621 (E.D. Va. May 6, 2005). If you bring something into Court, be prepared for everyone present to walk out with a copy of it.

***Hearing and Trial Transcripts:*** Generally, the same right of access applies to the transcript as to the judicial records of pre-trial hearings. *Washington Post*, 386 F.3d at 580. So, for a pretrial hearing, the common law right of access should apply to the transcript. By contrast, a civil trial is public, *Craig v. Harney*, 331 U.S. at 374, as is the trial transcript. *See* 28 U.S.C. § 753(b). Thus, the First Amendment right of access applies to the trial transcript. *See In re The Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (recognizing First Amendment right of

access to hearings, evidence, *and transcripts*). Even if no one attended your hearing or trial, someone can obtain the transcript.

## **II. REDACTING IRRELEVANT INFORMATION FROM RELEVANT DOCUMENTS.**

This statement cannot be doubted: “Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action.” *See Seattle Times*, 467 U.S. at 33. What if, within the broad scope of discovery, there were some documents that contained some “relevant” information, as well as some “irrelevant” or “non-responsive” information—such as a complex contract with numerous exhibits. Can you redact the irrelevant information and produce a redacted document? It depends on who you ask.

In the name of proportionality and protection of proprietary information, one district court said, “Yes!” In a products liability action, the Southern District of Florida held that “irrelevant” information could be redacted from an otherwise relevant document produced by the Defendants because “disclosing such information could provide its competitors with competitively sensitive information to the ultimate detriment of each Defendant.” *In re Takata Airbag Prods. Liability Litig.*, MDL No. 2599, 2016 U.S. Dist. LEXIS 46206, \*143-44 (S.D. Fla. Mar. 1, 2016). The district judge reasoned that, just as the new concept of “proportionality” dictates that “a party is not entitled to receive every piece of relevant information,” “[it] is only logical, then, that a party is similarly not entitled to receive every piece of irrelevant information in responsive documents if the producing party has a persuasive reason for why such information should be withheld.” *Id.* at \*144. Instead of redacting the “irrelevant” proprietary information, why not enter a protective order barring non-litigation use and requiring sealing of proprietary information in court filings? In other words, has that judge mixed apples and oranges?

There are, in fact, numerous cases in which the district court has held that the entry of a blanket protective order precludes a responding party from making unilateral redactions of purportedly “non-responsive” information. *E.g.*, *David v. Alphin*, No. 3:07cv11, 2010 U.S. Dist. LEXIS 144275, \*21-24; 2010 WL 1404722 (W.D.N.C. Mar. 30, 2010) (barring “unilateral redactions” in light of blanket protective order, requiring responding party to produce unredacted copies).<sup>4</sup> In finding unilateral redactions wholly improper, one district court summarized the law this way:

Medtronic insists that it can redact “irrelevant” information from the documents it produces to Michelson in the course of discovery. The Federal Rules of Civil Procedure do not recognize irrelevance as a privilege or an objection that warrants redaction, or that would involve the compilation of a privilege log, as with other redactions. Thus far in the discovery process, Medtronic has produced blank pages to Michelson which represent redacted, “irrelevant” information and it has produced no log of the redacted information. The relevance of a document is subjective, and according to the Federal Rules, should be construed broadly. The protective order ensures the confidentiality of sensitive information. There is no need for redaction of information for irrelevance; it will serve only to increase the pretrial litigation in this case. Medtronic shall not redact information from discovery that it deems irrelevant in this lawsuit.

*Medtronic Sofamor Danek v. Michelson*, 2002 U.S. Dist. LEXIS 27981, at \*19-20. Should that reasoning and ruling apply generally, even universally, instead of one allowing redactions of “irrelevant” information from otherwise responsive documents?

Let’s return to *Takata*, to see if there is an answer there. In that MDL case, the central issue concerned an allegedly defective airbag. The defendants were parts suppliers and car manufacturers. The district judge ruled that the following information was “irrelevant” and could be unilaterally redacted from otherwise responsive documents:

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<sup>4</sup> *Accord, e.g.*, *Bartholomew v. Avalon Capital Group, Inc.*, 248 F.R.D. 441, 451-52 (D. Minn. 2011); *Evon v. Law Offices of Sidney Mickell*, No. CIV. NO. S-09-0760 JAM GGH, 2010 U.S. Dist. LEXIS 20666, n.1; 2010 WL 455476, n.1 (E.D. Cal. Feb. 3, 2010); *In re FedEx Ground Pkg. Sys., Inc.*, No. 3:05-MD-527 RM (MDL-1700), 2007 U.S. Dist. LEXIS 1865, \*14-15; 2007 WL 79312, \*5 (N.D. Ind. Jan. 5, 2007); *Medtronic Sofamor Danek v. Michelson*, No. 01-2373-GV, 2002 U.S. Dist. LEXIS 27981, \*17-20 (W.D. Tenn. Jan. 30, 2002).

1) pricing, profits, non-public financial information; 2) parts, suppliers, or costs; 3) design, development, and engineering; 4) marketing and business strategy; 5) other makes and models; 6) non-U.S. products; and 7) service and quality issues — *so long as that information does not concern airbags.*

*Takata*, 2016 U.S. Dist. LEXIS 46206, at \*145 (emphasis in original). The judge reasoned that “This decision balances the producing parties’ desire to protect their competitively sensitive information, with the importance of the issues at stake in this action and the importance of the discovery in resolving the issues at hand.” *Id.* The district judge applied similar parameters to permit producing parties to withhold particular irrelevant documents (*i.e.*, documents that fell within the seven categories for redaction) when otherwise producing a “family” of related documents. *Id.* Nonetheless, the producing party had to “provide contextual information” regarding any withheld documents. *Id.* Given the complexity of that multi-defendant MDL action, that process might work better than a blanket protective order. But does that reasoning apply to a simpler case? I think a blanket protective order generally works better in most cases.

As another alternative to unilateral redactions of “irrelevant” information, one might consider *in camera* review. If particular portions of responsive documents warrant redaction notwithstanding the protective order, then the producing party may be able to submit those proposed redactions to the Court *in camera* and justify the extraordinary relief of redaction on a document-by-document basis. See *Gates v. Rohm & Haas Co.*, Civ. No. 06-1743, 2007 U.S. Dist. LEXIS 5266; 2007 WL 247919 (E.D. Pa. Jan. 25, 2007). That procedure, while burdensome on the Court and time-consuming, ensures that the Court decides whether the redacted material is “non-responsive,” rather than the producing party.

Accordingly, allowing relevance-redactions may be necessary in an extraordinarily complex case, but in most others a blanket protective order or *in camera* review should be sufficient.

### III. PROPORTIONALITY REDUX

It is well-settled that the “discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials.” *Herbert v. Lando*, 441 U.S. 153, 177 (1979); accord *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003) (“Discovery under the Federal Rules of Civil Procedure is broad in scope and freely permitted.”) But in 2015, the discovery rules were revised to emphasize that “proportionality” must be considered when allowing or limiting discovery. How has that been working so far? Apparently, its implementation has been neither uniform nor easy. See Hon. Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, REV. LITIG., Vol. 36, No. 1, 117 (U. Tex. Sch. of Law 2017). Let’s examine why proportionality might be the next big thing ... or a crazy idea.

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, reprinted FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 26, Adv. Com. Notes, 2015 Amendment, at 150-52 (Thom. Reuters 2018) (hereafter “2015 ADV. COM. NOTES”). In other words, the revisers took two ideas that had not worked separately, combined them, and hoped that would

work together. No wonder that Judge Grimm asks if we are insane—to do the same thing over and over again, while expecting different results, really is crazy.

The 2015 rule revisers, however had high hopes. 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 150-51. But the role 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.” Rather, 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.” 2015 ADV. COM. NOTES, Rule 26, at 150. 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.* at 151. This dovetails nicely with the Rule 34 changes in 2015 regarding specific objections.

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

Concerned that District Courts had been unsuccessful thus far “in achieving proportional discovery,” Judge Grimm conducted a survey, and found that judges did not view themselves as “case managers,” but as “dispute resolvers.” He then devised a “techniques ‘toolkit’” that a federal judge can use “to achieve proportionality.” Here (in summary form) are the contents of the toolkit:

**1. *Active Judicial Monitoring and Management of Discovery:*** The district judge may become actively involved in the case, knowing the issues, and participating in discovery by reviewing and sampling documents, conducting discovery in phases (focusing on “important facts and issues” first before proceeding to other issues), and being available for informal consultation and guidance (obviating the need for formal motions, briefings, and rulings, which may drive parties apart rather than bring them together).

**2. *Encouraging Cooperation among the Parties and Counsel:*** The district judge may “educate” the lawyers and parties on “the benefits of cooperation”—savings in time, litigation expense, and aggravation—and remind them that there may be sanctions if they fail to cooperate.

**3. *Adopting Informal Discovery Resolution Methods:*** The district judge may allow the parties to use letters and telephone conferences to ensure that the judge is involved before “a dispute escalates to the filing of motions and counter-motions.” Indeed, Rule 16(b)(v) states that a Rule 16(b) scheduling order may now include a requirement that a movant request a conference with the court prior to filing a discovery motion.

**4. *Phasing Discovery:*** This is a formal segmentation of discovery into phases, “focusing on the information most likely to be relevant to resolving the central claims and defenses, and additional phases [may be allowed] based on the result of the initial phase.” *See Mancía v.*

*Mayflower Textile Servs., Co.*, 253 F.R.D. 354, 365 (D. Md. 2008) (Grimm, U.S.M.J.). This requires that the parties “cooperate” and agree upon what is most important.

**5. *Appointment of Judicial Adjuncts:*** The district judge may appoint a magistrate judge, special master, mediator, neutral, or facilitator to meet with the parties to actively monitor and manage discovery, informally resolve disputes, and present a report and recommendation to the district judge if the matter is not resolved.

**6. *Cost-Shifting:*** The district judge may consider implementing cost-shifting, whereby the party seeking more discovery may have to pay all or a share of the costs. This may be particularly effective in cases involving “asymmetrical discovery where the requesting party seeks substantial discovery from the producing party, but has relatively little information that the requesting party seeks in return.”<sup>5</sup> When implementing cost-shifting, adopting the seven-factor test from *Zublake v. UBS Warburg*, 217 F.R.D. 309, 317-20 (S.D.N.Y. 2003), is recommended.

**7. *Controlling the Scope of Discovery:*** The district judge may intervene early to narrow the scope of discovery, and even limit initial discovery requests and allow subsequent requests only if the initial results warrant further inquiry.

**8. *Prohibition of “Boilerplate” Objections:*** The rules require narrow and particularized objections, and the district judge should enforce that by prohibiting boilerplate objections.

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<sup>5</sup> It has long been the rule that each party generally absorbs the costs of his own discovery productions. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (“Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests.”). However, the judge has long 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 the costs of responding.” 2015 ADV. COM. NOTES, Rule 26, at 151. So expect cost-shifting to be implemented sparingly.

**9. Ordering Sampling of Voluminous Data Sources to Reduce Cost and Burden:** In large, complex cases involving voluminous ESI, the district judge should consider requiring sampling of data (for relevance, privilege, and work product) prior to authorizing full-scale discovery.

**10. Ordering that Discovery be Made from Less Burdensome or Expensive Sources:** The district judge may implement her authority under Rule 26(b)(2)(C)(i) to bar certain forms of discovery and to order that discovery “be obtained from some other source that is more convenient, less burdensome, and less expensive.”

**11. Use of Protocols, Standing Orders, or Local Rules that Implement Proportionality Requirement:** Some district courts have already adopted local rules discovery guidelines. *E.g.*, D. Md. Loc. R., App’x A, *Discovery Guideline*. These may include standardized protective orders, pattern discovery requests, and other forms that have proven effective over time.

**12. Encouraging the Use of Technology to Reduce the Costs of Discovery of ESI:** This principally is a recommendation for use of “predictive coding.”

**13. Evaluate Proportionality by Estimating the Range of Plausible Recovery and Costs of Discovery:** Judge Grimm sums up this proposal with this statement: “[T]here is little debate that the parties should not spend \$500,000 on discovery to resolve a case where the maximum likely recovery will not exceed \$250,000.” An early evaluation will then dictate the “discovery budget” for the case.

**14. Capping Time/Money Spent on Discovery:** This may be implemented by limiting the number of interrogatories, document requests, requests for admissions, depositions, and length of depositions. Similarly, the Court may cap how much time and money a party needs to spend to respond to discovery, like searching for and producing ESI.

**15. Enforcing Rule 26(g)(1) Certifications:** Under this rule, counsel certifies that the discovery requests are reasonable and necessary. If that proves not to be the case, the Court may enforce Rule 26(g) violations by sanctioning the offending lawyer.

**16. Reducing Discovery Costs through use of Fed. R. Evid. 502:** Under Rule 502, the parties and the Court may take steps to prevent the inadvertent production of privileged materials from constituting a waiver. The insertion of a Rule 502 provision in a protective order or discovery plan may reduce review costs and ease tensions in the case.

**17. Imposing Sanctions for Discovery Abuse:** The threat or imposition of Rule 37 sanctions may keep the parties and their lawyers “in line,” and deter further abuses. This authority under Rule 37 is flexible, and permits the district judge to have the penalty “fit” the offense.

**What we do in the EDVA, Alexandria Division:** Here is a list of ways in which this Division addresses proportionality:

- Limiting the Time for Discovery to 3 to 4 Months;
- Limiting the Number of Interrogatories;
- Limiting the Number of Depositions;
- Prohibiting Boilerplate Objections;
- Requiring meet-and-confer communications;
- Referring discovery motions to the Magistrate Judge assigned to the case; and
- Requiring prompt disposition of discovery motions.

Are these methods effective? Is there more we should do?

#### IV. WHAT TO DO WHEN PLANNING FOR A “BIG CASE.”

The standard initial order is entered in every case, allowing three to four months for discovery. What about a “big case”—like a securities fraud class action or a patent infringement action—can the parties obtain relief from the standard schedule at the outset?

In particular, when presented with a “big case,” the federal courts are urged to use the procedures and guidelines set forth in the Federal Judicial Center’s current *MANUAL FOR COMPLEX LITIGATION*. 6A Wright, Miller & Kane, *FEDERAL PRACTICE AND PROCEDURE: CIVIL: 3D* § 1530, at 429 *et seq.* (2010). For example, securities fraud class actions have been specifically identified as complex litigation for which special scheduling procedures would be appropriate. *See* *MANUAL FOR COMPLEX LITIGATION: ANNOT.*, §§ 21.1 *et seq.* (4th ed. 2017) (hereafter, “*MANUAL*”). In class actions, the *MANUAL* recommends that the Court develop a case-management plan, with the parties’ input, to address numerous issues including the following:

- “identifying and narrowing issues of fact and law”
- “planning for prompt determination of class action questions, including a schedule for discovery and briefing on class issues”
- “managing disclosure and discovery, including”
  - “a process for preserving evidence”
  - “procedures for the exchange of documents, photographs, videos, and other materials in digital form”
  - “procedures for the exchange of digital-format materials”
  - “sequencing and limitations, including specific scheduling and deadlines”
- “establishing procedures for managing expert testimony”
- “creating schedules and deadlines for various pretrial phases of the case and setting a tentative or firm trial date”

- “evaluating prospects for settlement ... or the possible referral to mediation or other procedures”
- “instituting any other special procedures to facilitate management of the litigation.”

MANUAL. § 11.211 at 52-53. So in a “big case,” the parties’ *Joint Discovery Plan* must attempt to implement each of these recommendations.

When each of the necessary discovery and pretrial events is scheduled in a class action—in the proper sequence and with sufficient spacing between events—a reasonably efficient schedule usually exceeds the three to four months allowed. Similarly, it often is hard to cram all the necessary pretrial events in a patent case in just three to four months. Invariably, some things need to take place before claim construction, and others afterwards. How can the parties obtain an extension of the pretrial period at the outset?

Rule 1 provides that the court procedures should be applied to secure the “just, speedy, and inexpensive determination” of each action on the merits. FED.R.CIV.P. 1. To be sure, speed is important—but it is only one of the three principal goals. Thus, even while “routine” cases should be placed on a standardized schedule for speedy disposition on the merits, it has been held that the “exceptional case requires different treatment ... and the spirit of the rules does not require that completeness in the exposure of the issues in the pretrial discovery proceedings be sacrificed to speed in reaching the ultimate trial on the merits.” *Freehill v. Lewis*, 355 F.2d 46, 48 (4th Cir. 1965). I submit that most “big cases” are “exceptional” and warrant relief from the standard discovery and pretrial schedule *at the outset*.

Generally, the “scope and conduct of discovery ... are within the sound discretion of the district court.” *Erdmann v. Preferred Research, Inc.*, 852 F.2d 788, 792 (4th Cir. 1988). Under Rule 16, the Court must enter an order that limits the time to complete discovery. FED.R.CIV.P. 16(b)(3)(A); *accord* E.D.VA.CIV.R. 16(B). The Court also may enter an initial order setting a

date for the final pretrial conference. FED.R.CIV.P. 16(b)(3)(B)(v); *accord* E.D.VA.CIV.R. 16(B). Once set, these dates may be modified only for “good cause.” FED.R.CIV.P. 16(b)(4); *accord* E.D.VA.CIV.R. 16(B). To be sure, ritualistic claims of “complexity” do not constitute “good cause” for relief from the scheduling order. *Cf. Lykins v. Attorney General*, 86 F.R.D. 318, 318-19 (E.D. Va. 1980) (explaining showing of “good cause” required for relief from local discovery limitations). One would think that, in most “big cases,” little effort would be necessary to explain the complexities—counsel have seen this movie before, and can confidently forecast that good cause exists to modify the dates set in the initial order. Nonetheless, I would present facts and figures, rather than rely on counsel’s intuitive feel for the case, no matter how experienced counsel is with these cases.

It also should be noted that the Alexandria initial scheduling *Order* is issued *in advance of* the Rule 26(f) and Rule 16(b) conferences. When these Rules were amended as an optional provision in 1993 (and implemented nationwide in 2000), entry of a scheduling order was intended *to follow* the parties’ Rule 26(f) conference report, to permit the court to set the discovery schedule based on the parties’ input. *See* ADV. COM. NOTES, 146 F.R.D. 501, 603, 642 (1993). Likewise, it was envisioned that party-initiated discovery generally would not commence before to the Rule 26(f) and 16(b) conferences. FED.R.CIV.P. 26(d)(1). In Alexandria, however, the Court sets the overall discovery period and discovery commences *before* both the Rule 26(f) conference report is filed and the Rule 16(b) conference is held. Thus, it seems that we might be putting the cart before the horse—at least in “big cases.”

I submit that “big cases” warrant further analysis, and input from the parties, prior to the Court’s setting of deadlines that can only be altered for good cause. To be sure, when good cause is shown later in the case, extensions will be granted. However, in the meantime, the

jammed-up schedule can lead to friction between the parties, overheated motions practice, tactical fights over email, rushed and sloppy e-discovery productions, hurried Rule 45 practice, double-tracking of depositions, placeholder expert reports, and myriad other problems. Moreover, within the tight schedule, it is hard to take a measured approach to discovery, as there is little time to reflect, and less to sort the wheat from the chaff. Finally, the “big case” will need to be heavily staffed to meet short-deadlines, leading to frequent intra-office conferences and supervisory work that could be obviated by some scheduling relief at the outset.

#### **V. THE *SHELTON* RULE DOES NOT APPLY ... OR DOES IT?**

When a business deal falls apart, parties sometimes retain the lawyers who handled the business deal to handle the litigation. At other times, in-house counsel who played a role in the business deal also will play a role in the litigation. And, occasionally, an opponent may seek to depose an outside lawyer, or in-house counsel, who has been wearing two hats. When that happens, invariably the lawyer will argue that the *Shelton* rule applies. What is that; does it apply at all; and, if so, when?

Under *Shelton*, the deposition of opposing counsel should be “limited to where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.” *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (internal citation omitted). Thus, *Shelton* states a rigid, preemptive rule: opposing counsel or in-house counsel who is assisting with trial shall not be deposed unless a three-part showing has been made. Here are the pros and cons of this rule.

**Pros:** The *Shelton* rule is easy to apply and prevents the mischief of tactical depositions by creating a presumption against deposing opposing counsel. Thus, it has been invoked in

numerous cases, including in this District. *See, e.g., Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1112 (10th Cir. 2001); *Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 574 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1228 (2016); *Moody v. City of Newport New, Virginia*, No. 4:14-CV-99, 2016 WL 9000275, at \*1 (E.D. Va. Jan. 20, 2016); *Ford Motor Co. v. Nat'l Indem. Co.*, No. 3:12CV839, 2013 WL 3831438, at \*2 (E.D. Va. July 23, 2013); *accord Fed. Trade Comm'n v. Directv, Inc.*, No. 15-CV-01129-HSG(MEJ), 2016 WL 1741137, at \*2 (N.D. Cal. May 3, 2016); *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 263 F.R.D. 1, 8–9 (D.D.C. 2009). The underlying reasons for applying the rule must be examined, though, because they might not categorically justify an order barring a lawyer's deposition.

The strongest reason to bar the deposition of an opposing party's counsel is because such depositions often embroil the parties in unnecessary disputes over the attorney-client privilege and work product doctrine. *See NFA Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 84-86 (M.D.N.C. 1987). Thus, the *Shelton* rule is intended "to protect against the ills of deposing opposing counsel in a pending case which could potentially lead to the disclosure of the attorney's litigation strategy." *Murphy v. Adelpia Recovery Tr.*, No. 3-09-MC-105-B, 2009 WL 4755368, at \*2 (N.D. Tex. Nov. 3, 2009) (quoting *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002)) ; *accord Am. Heartland Port, Inc. v. Am. Port Holdings, Inc.*, No. 5:11-CV-50, 2014 WL 12605549, at \*3 (N.D. W.Va. Apr. 7, 2014) (*Shelton* applies in two circumstances: "1) when trial or litigation counsel are being deposed or 2) where the subject matter of the deposition may elicit litigation strategy") (internal citation omitted). Moreover, deposing an opponent's litigation attorney, paralegal, or in-house counsel who is assisting with the litigation is "highly disfavored in Federal courts" simply because it may interfere with the representation. *Am. Heartland Port*, 2014 WL 12605549, at \*2 (internal citations omitted); *see*

also *Pure Fishing, Inc. v. Redwing Tackle, Ltd.*, 3:10-cv-03117 (D.S.C. April 16, 2012) (Dkt. 59) (granting plaintiff’s motion for a protective order to prevent the deposition of plaintiff’s attorney and paralegal). In summary, in most of these cases, the information was readily available from other sources, or the questioning would tread too closely to privileged or protected information, or the deposition appears to have been noticed for tactical reasons—or all three.

**Cons:** While there are good reasons to apply the *Shelton* rule in some circumstances, there are at least as many reasons not to apply it in other circumstances. Here are reasons not to apply the rule:

First, the Fourth Circuit has not adopted the *Shelton* rule, or any other rule on this issue. *See Cooper v. Omni Ins. Co.*, No. 4:14-cv-706-RBH, 2015 U.S. Dist. LEXIS 55815, \*10 (D.S.C. Apr. 29, 2015). Therefore, the Judges and Magistrate Judges in this District would not be required to apply *Shelton*. Moreover, *Shelton* “has not been universally adopted” in other Districts, either. *Id.* at \*9. In fact, at the Circuit-level, the Second Circuit rejected the rigid *Shelton* presumption in favor of “a flexible approach.” *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 71-72 (2d Cir. 2003). Accordingly, *Shelton* is not **the** leading case stating a universally applied rule—it is simply one of many conflicting cases in which this issue has been considered.

Second, other cases take a completely different view from *Shelton*. For example, in *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598 (D. Del. 1986), the District Court denied “Scovill’s Rule 26(c) motion for a protective order preventing the deposition of its [in-house] counsel Hoopes on the ground that any information sought is subject to the attorney-client privilege,” reasoning that “a protective order would be improper and premature at this time.” *Id.* at 603. The District Judge observed that “[t]he circumstances are rare which justify an order that

a deposition not be taken at all, and the existence of privilege is not one of those circumstances. At the noticed depositions, Scovill can object to questions it considers improper and advise Hoopes not to answer.” *Id.* (citation omitted). The *Scovill* approach has been adopted and implemented in numerous other decisions.<sup>6</sup> Therefore, in the absence of the Fourth Circuit’s adoption of *Shelton*’s rigid, preemptive rule, you should ask the Court to consider other authority and apply precedents that fit the facts of your case.

Third, while other Judges in this District and elsewhere have followed *Shelton* (see above), many courts have expressly declined to do so, finding the presumptive rule inappropriate in the circumstances of the case before them. *See, e.g., In re Subpoena Issued to Dennis Friedman, supra; Qad Inc. v. ALN Assoc., Inc.*, 132 F.R.D. 492, 495 (N.D. Ill. 1990); *accord Pain Ctr. of S.E. Ind., LLC v. Origin Healthcare Solutions, LLC*, No. 1:13-cv-133-RLY-DKL, 2015 U.S. Dist. LEXIS 74732; 2015 WL 3631692 (S.D. Ind. June 10, 2015); *Phillips v. Indianapolis Life Ins. Co.*, 1:06-cv-1544-WTL-JMS, 2009 U.S. Dist. LEXIS 46800 (S.D. Ind. June 3, 2009); *Cook Inc. v. C.R. Bard, Inc.*, NO. IP 00-1791-C (B/S), 2003 U.S. Dist. LEXIS 20779; 2003 WL 23009047 (S.D. Ind. Sept. 18, 2003). These courts found the *Shelton* rule is overly protective of counsel and unnecessarily suppresses facts.

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<sup>6</sup> *Appvion, Inc. v. P.H. Glatfelter Co.*, 2016 U.S. Dist. LEXIS 42519, 2016 WL 1261090, at \*1 (E.D. Wis. 2016) (“To the extent some of the information sought would be privileged, the attorney being deposed (themselves also represented by counsel) will be equipped to navigate those waters.”); *Kaiser v. Mutual Life Ins. Co. of New York*, 161 F.R.D. 378, 380 (S.D. Ind.1994) (“[D]eponents are expected ... to assert their objections during the deposition and to allow questioning parties to develop circumstantial facts in order to explore the propriety of the assertion of the privilege, immunity, or other objection.”); *Cooper v. Welch Foods, Inc.*, 105 F.R.D. 4, 6 (W.D.N.Y. 1984) (finding that deposition of attorney should be taken and privileges asserted therein); *In re Arthur Treacher’s Franchisee Litigation*, 92 F.R.D. 429, 437-38 (E.D. Pa.1981) (“If the questions to be asked of Mr. Griffin delve into privileged areas then his recourse will be to object and refuse to answer. Such an objection and refusal to answer should, of course, be predicated upon a sufficient demonstration that the matter inquired into is privileged ... . In any event, the Court cannot rule in a vacuum, prior to the deposition, that every question to be asked will seek to elicit privileged information.”).

Fourth, the *Shelton* rule might not apply to the facts of your case. The Eighth Circuit in *Shelton* was remedying the tactical misuse of the deposition process by targeting opposing counsel without any sound basis. Similarly, in many of the cases following *Shelton*, the requesting party unilaterally served a notice of deposition on opposing litigation counsel who had not otherwise been affirmatively identified by the opposing party as a fact witness. *See, e.g., Ford Motor Co. v. National Indem. Co.*, No. 3:12-cv-839, 2013 U.S. Dist. LEXIS 102985, \*7-9; 2013 WL 3831438 (E.D. Va. July 23, 2013) (following *Shelton* and prohibiting opposing counsel's deposition). But, as Judge Payne noted, "Quite clearly, if [opposing counsel] is to be called as a witness, he must be deposed, but that is not the case at this time." *Id.* at \*9. So, watch out for opportunities to apply the exception noted by Judge Payne.

Fifth, when a party has affirmatively identified its trial counsel as having knowledge regarding disputed factual issues, then *Shelton* does not apply. *See Powers v. Bd. of Trs. of the Univ. of Ill.*, No. 08-CV-2267, 2010 U.S. Dist. LEXIS 100733; 2010 WL 3834441 (C.D. Ill. Sept 23, 2010) (where during discovery plaintiff identifies its own trial counsel as having knowledge of facts bearing on disputed issues, *Shelton* does not apply and trial counsel may be deposed). So watch for circumstances where a party has voluntarily and affirmatively identified its lawyer (or in-house counsel) as a fact witness because the *Shelton* rule should not apply then.

Accordingly, whether the Court should apply the *Shelton* rule depends on many factors. It is not always the right solution, nor always the wrong one.

## VI. BONUS TOPICS

1. *How Many Depositions Can Each Party Take in a Case?* The answer is not found in one place, but four. First, Rule 30(a)(2)(A)(i), generally limits *each side* (not each party) to *ten* total depositions—in multi-party cases, parties on the same side are expected to coordinate and share. Second Rule 26(b)(4)(A) states that “any expert” may be deposed. *Query:* Do expert depositions count against the 10-per-side limit? There is no express exception in the rules; so, yes, experts count against the 10-per-side limit. Third, the standard initial order states that “A party may not exceed five (5) non-party, non-expert depositions.” *Query:* Does this mean *each party* gets five non-party depositions in addition to the 10-per-side already allowed? In my view, no, because this provision seems to mean only that *each side* may use up to five of the allotted ten depositions on non-parties— but others disagree. Fourth, Rule 30(b)(6) permits a corporate party to designate “one or more” individuals to testify on its behalf. *Query:* Does each individual count as a separate deponent under the 10-per-side limit? No; however many individuals testify, a Rule 30(b)(6) deposition counts “as a single deposition” against the limit. ADV. COM. NOTES, 146 F.R.D. 501, 662 (1993). The 10-per-side limit may be modified by stipulation or leave of court. In a “big case,” I suggest addressing enlargement of the deposition limit in the Rule 26(f) conference and Rule 16(b) conference—even then, you may need to rely on “good cause” to enlarge the limit further if necessary later in the case.

2. *Rule 34 Objections/Responses:* In the EDVA, objections are unlinked from responses. E.D.VA.CIV.R. 26(C). Must you serve both, or only objections? If you must serve a response, what must it say?

As written Rule 34(b)(2), calls for responses and objections to be asserted side-by-side in one paper:

## (2) Responses and Objections.

(A) **Time to Respond.** The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties’ first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) **Responding to Each Item.** For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) **Objections.** An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) **Responding to a Request for Production of Electronically Stored Information.** The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.

Under these provisions, objections and responses interlock—that is, for “*each*” request, the party must say either that it is responding and producing documents, or objecting, in whole or in part, and identifying any documents being withheld. So Rule 34 requires only one written paper.

But our Local Civil Rules may require two. Under Local Civil Rule 26(C), you must serve objections on the 15th day. After requiring early objections, Local Civil Rule 26(C) goes on to say, “Any such objection shall not extend the time within which the objecting party must otherwise answer or respond to any discovery matter to which no specific objection has been served.” That suggests that a separate, written response should be served on the 30th day, not merely a production of documents.

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). In my experience,

however, the objections rarely identify what documents will be withheld on the basis of specific objections. If that description has not been included in the objections, should it be in the response? I think, yes. So, the description of what was withheld must be in one paper or the other.

Moreover, on the 30th day, you cannot simply produce documents “subject to objections”—particularly in light of the explanation offered by the revisers of Rule 34 in 2015:

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.

2015 ADV. COM. NOTES, Rule 34, at 172. This further confirms my belief that, to the extent not stated in the objections, a separate written Rule 34 response must be served to describe what has been withheld if your objections do not.

How should you describe the documents that are being withheld? Importantly, 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, Rule 34, at 172. Reasonable 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.

So, what should the response say? It must say four things: First, whether the responding party is producing documents or permitting inspection. FED.R.CIV.P. 34(b)(2)(B). Second, whether a rolling production will be made; if so, the responding party also must specify a “reasonable” completion date. *Id.* Third, it must state the format of any ESI production if

different from the requesting party's proposed format. FED.R.CIV.P. 34(b)(2)(D). Fourth, to the extent not stated in your objections, the response must "state whether any responsive materials are being withheld on the basis of [each] objection." FED.R.CIV.P. 34(b)(2)(C). You need not serve a log of withheld documents, but you must serve something reasonably clear and fairly specific.

Here is a vexing issue: If you serve only objections on the 15th day, and intend to serve a written response on the 30th day describing what you are producing and withholding, should you be prepared to discuss both your objections and what you will be withholding during a meet and confer between the 15th and 30th days? I think yes; others think no. Which is it? If the answer is no, then what is the use of requiring early objections?

Here is another vexing issue: The 2015 Advisory Committee Notes suggest that the responding party's statement identifying "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, Rule 34, at 172. What on earth does that mean?

In a recent case, the responding party timely served 10 pages of general objections and 35 pages of generalized "specific" objections—one for each of 65 requests; however, the "specific" objections did not state whether any documents were being withheld on the basis of the objections, and, if so, what. (In its objections, the responding party at least said it would be making a "rolling production" in the format and on the timeline specified in the agreed upon ESI protocol.) We expected a written Rule 34 response on the 30th day, but none was served. When we pressed for a response to explain what, if anything was withheld based on each objection, the responding party argued that a written response was unnecessary. Finally, though, they agreed.

The responding party then served a 5-page document that simply identified search terms, custodians, and sources of documents that, collectively, were used to respond to some or all 65 documents requests, without specifying which search-parameters applied to which objections and requests. The responding party argued that its statement identifying “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, Rule 34, at 172. When we asked for more specificity, they said “Go complain to the revisers of the rules.”

If you use this method to satisfy Rule 34(b)(2)(C), it seems better suited for application to each request, rather than *en masse*. To be sure, some search parameters will apply across the board—such as a time period for your search. But Rule 34 requires a separate response or objection to *each* request or part of a request, as well as a statement “whether any responsive materials are being withheld on the basis of [each] objection.” A blanket statement of search parameters, it seems to me, fails that essential purpose of the Rule, regardless of how one might want to interpret the reviser’s comments. The better practice appears to be that individualized responses identifying applicable search parameters used for *each* request are required.

**3. Boilerplate Objections:** Rules 33(b)(4) and 34(b)(2)(C) require specific objections to each interrogatory or document request, as does Local Civil Rule 26(C). Yet, old habits die hard. Despite the Rules’ edicts requiring “specific objections,” most lawyers still assert dozens of boilerplate general objections as well as generalized objections to each request (optimistically labeled as “specific objections”). Why?

There may be many reasons why lawyers makes these objections, such as: inexperience; ignorance of the new rules; reluctance to deviate from the template on the word processor that the firm has used for years; the other side did it, too; directions from the busy partner-in-charge

to “object to everything, and we will sort it all out later;” fear of being blamed if a potential objection is omitted; or tactical thinking by lawyers having limited and compartmentalized responsibility in the case.

Well, at least two Magistrate Judges are fighting back. In one case, after overruling the boilerplate objections, the Magistrate Judge gave this “wake up” call to the bar: “From now on in cases before this Court, any discovery response that does not comply with Rule 34’s requirement to state objections with specificity (and to clearly indicate whether responsive material is being withheld on the basis of objection) will be deemed a waiver of all objections (except as to privilege).” *Fischer v. Forrest*, No. 14 Civ. 1304 (PAE) (AJP), 2017 U.S. Dist. LEXIS 28102, \*9; 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017). In another case, the Magistrate Judge overruled all general and boilerplate objections and sanctioned the responding party. *Sagness v. Duplechin*, No. 4:16CV3152, 2017 U.S. Dist. LEXIS 46475; 2017 WL 1183988 (D. Neb. Mar. 29, 2017). And a quick look at *Shepard’s*<sup>®</sup> confirms that other judges are following these decisions as well as other decisions similar rulings. As decisions of this sort proliferate, perhaps lawyers will finally curb the near-universal penchant to object as broadly, as often, and on as many grounds as possible.

In our District, there might be a causal-relationship between the early objection rule and lawyers’ over-objectioning. How can that urge be combated? Here’s an answer: I have seen Rule 16(b) scheduling orders issued by Magistrate Judges in this Court that bar or “overrule” all “general objections” that have been or may be asserted. I think that should fix it.