IADC: BEST PRACTICES IN CIVIL DISCOVERY

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This presentation is intended to address advanced topics in civil discovery. It presupposes prior experience in written discovery and oral discovery, as well as pretrial procedure.

The presentation is divided into two general subject matter areas: Written Discovery and Oral Discovery. The materials are presented in a Frequently Asked Questions ("FAQ") format that may be more accessible to seasoned practitioners.

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I. WRITTEN DISCOVERY

1. Are "General Objections" Acceptable?

No. "General Objections" are objections that precede substantive written discovery responses and purport to apply to each response. General Objections are meaningless, and they purposely obscure substantive written discovery responses. Those propounding discovery should promptly write to the objecting party and insist that the objecting party withdraw their General Objections. If the party does not do so, the propounding party should include this issue in a Motion to Compel.

This unsurprising proposition is recognized by virtually all courts nationwide. *See Loudoun Cty. Asphalt, L.L.C. v. Wise Guys Contr., L.L.C.*, 79 Va. Cir. 605 (2009); *Sagness v. Duplechin,* No. 4:16-cv-3152, 2017 U.S. Dist. LEXIS 46475 at *4 (D. Neb. Mar. 29, 2017) ("General blanket objections do not meet [the FRCP's] specificity requirements and will be disregarded by this court."); *Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 187 (N.D. Iowa 2017) ("Indeed, the idea that such general or 'boilerplate' objections preserve any objections is an 'urban legend.'"); *Fischer v. Forrest*, No. 14-cv-1304, 2017 U.S. Dist. LEXIS 28102 at *7 (S.D.N.Y. Feb. 28, 2017) ("General objections should rarely be used… unless each objection applies to each document request."); *Cafaro v. Zois*, 2016 U.S. Dist. LEXIS 33645 (S.D. Fla. Mar. 9, 2016) ("Boilerplate objections may also border on a frivolous response to discovery requests." (citing *Steed v. EverHome Mortg. Co.*, 308 F. App'x 364, 371 (11th Cir. 2009))); and *Heller v. City of Dallas*, 303 F.R.D. 466, 484 (N.D. Tex. 2014) ("Counsel should cease and desist from raising these free-standing and purportedly universally applicable 'general objections' in responding to discovery requests.")

2. Do Parties Responding to Requests for Production Have an Obligation to Identify the Document Requests to Which the Documents Are Responsive?

Parties often produce a tremendous volume of uncategorized documents in response to requests for production. This tactic, known as the "document dump," can stymie the ability of the discovering party to review and analyze the produced documents in a meaningful way. Courts have ordered disclosing parties to organize and categorize large volumes of documents, and identify the document requests to which each document corresponds:

> [Disclosing parties] are incorrect in thinking they can haphazardly produce documents without reference to which request the documents are produced. To ensure a fair and clear record, the [Defendant] will be ordered to Bates Stamp all documents produced to Plaintiff and to indicate which documents correspond to the categories requested.

Gregg v. Local 305 IBEW, 2009 U.S. Dist. LEXIS 40761 at *30 – 31 (N.D. Ill. 2009) citing *Glover v. Bd. of Educ.*, No. 02 C 50143, 2004 U.S. Dist. LEXIS 6358, 2004 WL 785270, at *2 (N.D. Ill. Apr. 9, 2004); *see also Flentye v. Kathrein*, No. 06-c-3492, 2007 U.S. Dist. LEXIS 74260 at *5 –

6 (N.D. Ill. Oct. 2, 2007) (Requiring a party to produce Bates-stamped documents comprising the initial disclosures required under Rule 26.)

3. How Do You Count Interrogatory Sub-Parts?

Often, a party will refuse to answer interrogatories by claiming that the interrogatories served exceed the federal limit (25 interrogatories) or a state limit (30 interrogatories). The Rules count "discrete sub-parts" as interrogatories: "Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts." *See e.g.* Fed. R. Civ. P. 33(a)(1). But how does one determine if a clause, phrase or adjective is a "discrete subpart" that counts as an additional interrogatory? There are three schools of thought.

i. The "Related Question" Test.

A slight majority of courts seem to follow the "related question" test. If the clause, phrase, or adjective is logically and factually related to the overall interrogatory, then it is not "discrete" and does not count as a separate interrogatory:

> District courts in the Eleventh Circuit, like most district courts in other circuits, have adopted and applied 'the "related question" test to determine whether the subparts are discrete, asking whether the particular subparts are "logically or factually subsumed within and necessarily related to the primary question."

Perez v. Aircom Mgmt. Corp., 2012 U.S. Dist. LEXIS 136140 at *2 – 3 (S.D. Fla. Sept. 24, 2012) (emphasis added); *see also Mitchell Co. v. Campus*, 2008 U.S. Dist. LEXIS 47505 at *19 – 21 (S.D. Ala. June 16, 2008) (quoting *Forum Architects, LLC v. Candela*, 2008 U.S. Dist. LEXIS 4705 at *2 – 3 (N.D. Fla. Jan. 23, 2008)); *Powell v. Home Depot USA, Inc.*, 2008 U.S. Dist. LEXIS 49144 at *6 – 7 (S.D. Fla. June 16, 2008) (Hopkins, M.J.) ("Courts within the jurisdiction of the Eleventh Circuit have recently followed what is known as the 'related question test' to determine whether a subpart in an interrogatory should be considered discrete."); *Oliver v. City of Orlando*, 2007 U.S. Dist. LEXIS 80552 at *2 (M.D. Fla. Oct. 31, 2007) ("If the subparts are subsumed and necessarily related to the primary question, then the subpart is not 'discrete' within the meaning of Rule 33(a)"); *Erfindergemeinschaft UroPep GbR v. Eli Lilly & Co.*, 315 F.R.D. 191, 196 (E.D. Tex. 2016) ("[M]ost courts have followed what is sometimes referred to as the "related question" approach. In an effort to give some specificity to the inquiry, the test applied under the "related question" approach is generally stated as follows: subparts that are logically or factually subsumed within and necessarily related to the primary question" should not be treated as separate interrogatories") citing *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997); *Gilmore v. Lockard*, No. 1:12-cv-925, 2015 U.S. Dist. LEXIS 118059, 2015 WL 5173170 at *8 (E.D. Cal. Sept. 3, 2015); *In re Lithium Ion Batteries Antitrust Litig*., No. 13-md-2420, 2015 U.S. Dist. LEXIS 45976, 2015 WL 1221924 at *2 (N.D. Cal. Mar. 17, 2015); *Klein v. Fed. Ins. Co*., 2014 U.S. Dist. LEXIS 95482, 2014 WL 3408355 at *6 (N.D. Tex. July 14, 2014); *Makaeff v. Trump Univ., LLC*, No. 10-cv-940, 2014 U.S. Dist. LEXIS 94732, 2014 WL 3490356 at *4 (S.D. Cal. July 11, 2014); *Perez v. Aircom Mgmt. Corp.*, No. 12-60322, 2012 U.S. Dist. LEXIS 136140, 2012 WL 6811079 at *1 (S.D. Fla. Sept. 24, 2012); *Thermal Design, Inc. v.*

Guardian Bldg. Prods., No. 08-C-828, 2011 U.S. Dist. LEXIS 50108, 2011 WL 1527025 at *2 (E.D. Wis. Apr. 20, 2011); *Calderon v. Reederei Claus-Peter Offen GmbH & Co.*, 2008 U.S. Dist. LEXIS 76323, 2008 WL 4194810 at *1 (S.D. Fla. Sept. 11, 2008); *State Farm Mut. v. Pain & Injury Rehab. Clinic, Inc.*, 2008 U.S. Dist. LEXIS 50507, 2008 WL 2605206 at *2 (E.D. Mich. June 30, 2008); *Madison v. Nesmith*, 2008 U.S. Dist. LEXIS 16130, 2008 WL 619171 at *3 (N.D.N.Y. Mar. 3, 2008); *Williams v. Taser Int'l, Inc.*, 2007 U.S. Dist. LEXIS 40280, 2007 WL 1630875 at *2 (N.D. Ga. June 4, 2007); *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006); and *Safeco of Am. v. Rawstron*, 181 F.R.D. 441, 445 (C.D. Cal. 1998).

ii. The "Pragmatic Approach" Test.

Many courts espouse the "related question" test but really apply the "pragmatic approach" test. The "pragmatic approach" test is akin to Justice Potter's definition of pornography – the judge knows it when she sees it:

> [A]scertaining whether an interrogatory counted as one question or more than one question required a pragmatic approach **Perhaps a more pragmatic approach, reminiscent of Justice Stewart's memorable "definition" of pornography, would be to look at the way lawyers draft interrogatories and see if their typical approaches threaten the purpose of the rule by putting together in a single question distinct areas of inquiry that should be kept separate**. Thus, once a subpart of an interrogatory introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it, the subpart must be considered a separate interrogatory no matter how it is designated. *Id.* **Using this analysis, I will now determine which of plaintiff's interrogatories, no matter how they are numbered or otherwise propounded, must be considered more than one interrogatory**.

Willingham v. Ashcroft, 226 F.R.D. 57, 59 (D.D.C. 2005) quoting *Banks v. Office of Senate Sergeant-at Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004).

The *Erfindergemeinschaft* Court, although ostensibly using the "related question" approach, really adopted the "pragmatic approach": "**It is important to acknowledge at the outset that the issue of 'discreteness' cannot reliably be captured by a verbal formula, and that ultimately the issue turns on a case-by-case assessment** of the degree to which the subpart is logically related to the primary question in the interrogatory, as opposed to being separate and distinct." *Erfindergemeinschaft*, 315 F.R.D at 197 (emphasis added).

iii. The "Strict Construction" Approach.

As the name suggests, the "strict construction" approach simply counts every subpart and separate clause of an interrogatory whether it is logically related to the main interrogatory or not: "The plain meaning of the language in the rule is clear and unambiguous. Local Rule 190-1(c) requires that every part of an interrogatory be counted and subject to the limitation of 40." *Valdez v. Ford Motor Co.*, 134 F.R.D. 296, 298 (D. Nev. 1991). The "strict construction" is not widely

adopted. Most courts apply the "related question" or "pragmatic approach." Courts in the Fourth Circuit tend to apply the "related question" test:

> In that opinion, I examined two divergent methods of counting interrogatories and concluded that even under the more lenient standard, the plaintiffs had exceeded their limit. **That lenient standard provides that the court should determine whether "a subpart is logically or factually subsumed within and necessarily related to the primary question.**

Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 2002 U.S. Dist. LEXIS 14327 at *2 – 3 (W.D. Va. Aug. 5, 2002) citing *Am. Chiropractic Assoc. v. Trigon Healthcare, Inc.*, 2002 U.S. Dist. LEXIS 6199 (W.D. VA. March 18, 2002).

4. Can You Require a Verified Statement That the Responding Party Has Searched for Responsive Documents Under Rule 4:9 and FRCP 34?

Often, parties answer requests for production by stating that they have "no documents." Because written responses to requests for production are not verified, it is difficult to insure that the responding party has made a meaningful search for the requested documents. Some courts will require a responding party to verify, under oath, that they have searched for responsive documents and none have been found. This is particularly true where there is extrinsic evidence that the documents should exist.

> "If there is reason to believe that the response is incomplete or incorrect, the court may require a certification that the respondent 'ha[s] conducted a search for the information reasonably available to them through their agents, attorneys, or others subject to their control and has determined that the information requested either does not exist or that is has been produced.' Ordinarily, a sworn statement that a party has no more documents in its possession, custody or control is sufficient to satisfy the party's obligation to respond to a request for production of documents."

Eramo v. Rolling Stone LLC, 2016 U.S. Dist. LEXIS 80794 at *5 – 6 (W.D. Va. June 21, 2016) quoting *Meeks v. Parsons*, No. 1:03-cv-6700, 2009 U.S. Dist. LEXIS 90283 (E.D. Cal. Sept. 18, 2009) and *Gray v. Faulkner*, 148 F.R.D. 220, 223 – 24 (N.D. Ind. Apr. 14, 1992).

5. Are Objections to Discovery Waived if the Discovery Responses Are Served Late?

Yes. If you serve discovery late, you have waived objections, potentially even objections at to privilege and work product.

> "[O]bjections to [written discovery] must be stated with particularity *in a timely answer*, and that a failure to do so may constitute a waiver of grounds not properly raised, including privilege or work product immunity, unless the court excuses this failure for good cause shown."

Precision Fabrics Group, Inc. v. Tietex Int'l, Ltd., 2015 U.S. Dist. LEXIS 104382 at *9 (M.D.N.C. Aug. 10, 2015) (citations omitted; emphasis in original); *see also Hall v. Sullivan*, 231 F.R.D. 468, 474 (D. Md. 2005) ("[I]mplicit within Rule 34 is the requirement that objections to document production requests must be stated with particularity in a timely answer, and that a failure to do so may constitute a waiver of grounds not properly raised, including privilege or work product immunity, unless the court excuses this failure for good cause shown"; *Phillips v. Dallas Carriers Corp*., 133 F.R.D. 475, 477 (M.D.N.C. 1990) (Sharp, M.J.) ("It is well settled that the failure to make a timely objection in response to a Rule 34 request results in waiver.")

6. <u>FRCP 33(d) and Specificity of Identification of Records.</u>

When a party responds to Interrogatories by referring to documents pursuant to FRCP 33(d) a dispute often ensues as to whether the responding party supplied sufficient detail for the discovering party to determine which documents are responsive to specific interrogatory requests. Courts generally require specificity:

> The producing party must show that the named documents contain all of the information requested by the interrogatories. *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 564 (D. Kan. 1997). Crucial to this inquiry is that the producing party have adequately and precisely specified for each interrogatory, the actual documents where information will be found. 8A Wright, *supra*, § 2178, at 336. Document dumps or vague references to documents do not suffice. *Capacchione v. Charlotte-Mecklenburg Schools*, 182 F.R.D. 486 (W.D.N.C. 1998)(200 boxes); *In Re Bilzerian*, 190 B.R. 964 (M.D. Fla. 1995)(28 boxes). Depending on the number of documents and the number of interrogatories, indices may be required. *O'Connor v. Boeing North American, Inc.*, 185 F.R.D. 272, 278 (C.D. Cal. 1999).

SEC v. Elfindepan, 206 F.R.D. 574, 576–77 (M.D.N.C. 2002).

Upon the filing of a motion to compel, the propounding party "must make a prima facie showing that the use of Rule 33(d) is somehow inadequate to the task of answering the discovery, whether because the information is not fully contained in the documents, is too difficult to extract, or other such means. The burden then shifts to the producing party to justify the use of Rule 33(d)." *United Oil Co. v. Parts Assocs.*, 227 F.R.D. 404, 407 (D. Md. 2005). "[T]he producing party must **adequately and precisely specify, for each interrogatory, the actual documents where the requested information will be found**." *Hillyard Enters. V. Warren Co.* , 2003 U.S. Dist. LEXIS 27922 (E.D.N.C.2003) (emphasis added); *Brown v. Blue Cross & Blue Shield of Ala.*, 2014 U.S. Dist. LEXIS 96105 at *8 – 9 (W.D.N.C. July 15, 2014) (**"**Relevant here, the producing party must show that a review of the offered documents will, in fact, reveal answers to the interrogatories. Additionally, **the producing party must adequately and precisely specify, for each interrogatory, the actual documents where the requested information will be found."**) (emphasis added; citations omitted).

Finally, the Federal Rules Advisory Committee stated that Rule 33(d) was never intended to be a shortcut to avoid answering an interrogatory:

> The Committee is advised that parties upon whom interrogatories are served have occasionally responded by directing the interrogating party to a mass of business records… justifying the response by the option provided by this subdivision**. Such practices are an abuse of the option.** A party who is permitted by the terms of this subdivision to offer records for inspection in lieu of answering an interrogatory should offer them in a manner that permits the same direct and economical access that is available to the party. If the information sought exists in the form of compilations, abstracts or summaries then available to the responding party, those should be made available to the interrogating party. The final sentence is added to make it clear that a responding party has the duty **to specify, by category and location, the records from which answers to interrogatories can be derived**.

Fed. R. Civ. P. 33 advisory committee's note (1980 Amendment) (emphasis added).

7. Can a Responding Party Cite to Government or Non-Party Records in Answer to Interrogatories under Rule 4:8 (f) or FRCP 33(d)?

Parties often respond to interrogatories by vaguely citing to government documents or third party data while saying "these documents are equally available to [the interrogating party]." Such a response is inadequate under the Rules.

Reference to documents in the possession of government agencies, without also producing the documents, does not justify a refusal to provide a substantive, narrative response under Rule 33. *See, e.g. Davis v. Fendler*, 650 F.2d 1154, 1158 n.3 (9th Cir. 1981) ("It is apparent that the records of the first four of these places [government entities] do not qualify as appellant's 'business records.' **A party cannot, under the guise of Rule 33(c)[now 33(d)] resort to such tactics.");** *In re Savitt/Adler Litig*., 176 F.R.D. 44, 49 – 50 (N.D.N.Y. 1997) (holding invocation of Rule 33(d) improper where documents referenced were not plaintiffs' business records); 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2178 (2d ed.) 1994) ("Ordinarily it is also required that the information be obtainable from the records of the responding party, not those of somebody else".) *See also Bujnicki v. American Paving and Excavating, Inc*., 2004 U.S. Dist. LEXIS 8869, at *46 (W.D.N.Y. Feb. 25, 2004) (notwithstanding the fact that defendants can obtain the requested documents from third-party source, "plaintiff is required to produce all responsive documents in her possession.")

While citing to the responding party's previously produced business records is acceptable under Rule 33(d) [see previous FAQ for levels of specificity] it is not acceptable for government records or third party documents.

8. How Much "Meet and Confer" is Enough?

How much time and effort does a party have to expend to comply with the requirement, under FRCP 37(a)(1) and Va. Rules 4:1(c) and 4:12(a)(2)? Courts in the Fourth Circuit make clear that FRCP 37(a)(1) requires meaningful and good faith efforts to avoid discovery disputes. "There is no need for the Court to reach the merits of Defendant's Motion to Compel because Defendant

failed to confer with [Defendant] prior to filing the Motion as required by FRCP 37." *Patrick v. Teays Valley Trs., L.L.C.*, 297 F.R.D. 248, 266 (N.D.W. Va. 2013).

FRCP 37(a)(1) (and Va. Rules 4:1(c) and 4:12(a)(2)) mandate that any motion to compel discovery "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Good faith under Rule 37 "contemplates, among other things, honesty in one's purpose to meaningfully discuss the discovery dispute, freedom from intention to defraud or abuse the discovery process, and faithfulness to one's obligation to secure information without court action... Accordingly, good faith cannot be shown merely through the perfunctory parroting of statutory language on the certificate to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means." *Teays Valley*, 297 F.R.D. at 266 – 67.

Other federal courts (favorably cited in the Fourth Circuit) have elaborated on the requirements for personal consultation under Rule 37:

> The good faith conferment language incorporated into Rule 37 was based in part due on the successful experience of this and other federal districts in resolving discovery disputes. Previously, the District of Nevada local rules required a party moving to compel discovery to initiate sincere, "personal consultation," either in person or by telephone… **The mere sending of a letter demanding supplemental responses to interrogatories was insufficient.** Moreover, the personal consultation requirement had to be more than just a "formalistic prerequisite" to judicial resolution of a discovery dispute, but **rather a "sincere effort" where both parties presented the merits of their respective positions and meaningfully assessed the relative strengths of each.** Judicial intervention in discovery matters was therefore not appropriate unless (1) informal negotiations reached an impasse on a substantive issue in dispute, or (2) a party acted in bad faith either by refusing to engage in negotiations or by refusing to provide specific support for claims of privilege.

Shuffle Master v. Progressive Games, 170 F.R.D. 166, 172 (D. Nev. 1996) (citations omitted) (emphasis added).

A draft Motion to Compel (along with a terse cover letter) does not meet the standard for a meaningful meet and confer on discovery. Further, discussions must continue until the parties reach an impasse. *Hasbro, Inc. v. Serafino,* 168 F.R.D. 99, 101 (D. Mass. 1996) ("It is not up to the court to expend its energies when the parties have not sufficiently expended their own.*"); Burton v. R.J. Reynolds Tobacco Co.,* 203 F.R.D. 624, 626 – 627 (*D. Kan. 2001)* (denying motion to compel because parties had not engaged in meaningful meet and confer). If the movant has not satisfied this requirement, then its motion to compel should be denied. *Shuffle Master, supra,* at 173; *Hasbro, supra,* at 102; *see also Doe v. Nat'l Hemophilia Found.,* 194 F.R.D. 516, 521 (D. Md. 2000) (motion to compel discovery denied; parties ordered to meet and confer in person).

In conclusion, courts are not satisfied with formalistic, perfunctory "meet and confer" efforts. The efforts must be meaningful and open.

9. FRCP 37: Can A Prevailing Party Obtain Attorney Fees for Preparing Meet and Confer Letters?

Courts sometimes require parties who lose discovery disputes to pay the prevailing party's attorneys' fees and costs related to the dispute. The losing party will often concede that the time spent on the Motion to Compel, and the work subsequent to the Motion to Compel, is an appropriate litigation expense. However, those same parties dispute that any and all time spent before filing the Motion to Compel is an appropriate charge, and instead claim that those activities were "spent in the normal course of litigation." This argument seeks to exclude the often time consuming "meet and confer" process.

This limitation is inconsistent with the Federal Rules. Both the FRCP and the Va. Rules require the movant to have "conferred or attempted to confer" with the opposing party before filing a Motion to Compel. *See* Fed. R. Civ. P. 37(a)(1); Va. Sup. Ct. R. 4:1(c) and 4:12(a)(2). If a party prevails in a Motion to Compel and is awarded attorney's fees, the time spent in the (necessary and mandatory) "meet and confer" process should necessarily be included in the compensable attorney's fees.

10. Shotgun Complaints.

Related to the issue of written discovery is the problem of vague, "shotgun" complaints. Often, particularly in mass tort litigation, plaintiffs will file sweeping complaints against dozens (sometimes hundreds) of defendants alleging sundry facts and not specifying which facts apply to which defendants. In *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001), the Eleventh Circuit expressed its vigorous disapproval of shotgun complaints:

> The complaint is a quintessential shotgun pleading of the kind we have condemned repeatedly, beginning at least as early as 1991. It is in no sense the "short and plain statement of the claim" required by Rule 8 of the Federal Rules of Civil Procedure. It is fifty-eight pages long. It names fourteen defendants, and all defendants are charged in each count. The complaint is replete with allegations that "the defendants" engaged in certain conduct, making no distinction among the fourteen defendants charged, though geographic and temporal realities make plain that all of the defendants could not have participated in every act complained of. Each count incorporates by reference the allegations made in a section entitled "General Factual Allegations" – which comprises 146 numbered paragraphs – while also incorporating the allegations of any count or counts that precede it. The result is that each count is replete with factual allegations that could not possible be material to that specific count, and that any allegations that are material are buried beneath innumerable pages of rambling irrelevancies. This type of pleading completely disregards Rule 10(b)'s requirement that discrete claims should be plead in separate counts, and is the type of complaint that we have criticized time and time again.

Id. at 1284 (internal citations omitted).

In *Harold's Auto Parts, Inc., et al. v. Flower Mangialardi, et al.*, 889 So. 2d. 493 (Miss. 2004), the Mississippi Supreme Court referred to an asbestos shotgun complaint as an "abuse of, and failure to comply with, Rules 8, 9, 10 and 11 [of the Mississippi Rules of Civil Procedure – identical to the FRCP]." *Id.* at 494. The court insisted that each complaint must reflect sufficient information obtained by plaintiffs' counsel to form a "good faith" basis for each plaintiff has a valid cause of action against each defendant in the jurisdiction in which the complaint was filed." *Id.* The court noted that "to do otherwise is an abuse of the system, and is sanctionable." *Id.*

In *Aguirre v. Amchem Prods.*, No. CV 11-01907-PHX-FJM, 2012 U.S. Dist. LEXIS 30004, at *5 – 6 (D. Ariz. Mar. 7, 2012), the federal court dismissed a multi-defendant asbestos wrongful death action because the shotgun complaint filed in that case did not allege any specific facts against any specific defendants:

> Plaintiffs argue that their allegations that each defendant placed asbestos products into the stream of commerce and that Griego was exposed to these products, developed cancer, and died render their claims plausible. **Plaintiffs argue that requiring more facts as to "when, where and how" Griego was exposed to asbestos "would improperly impose burdensome and hyper-technical requirements." We disagree.** Although Rule 8, Fed. R. Civ. P. does not require plaintiffs to plead every single factual detail, it nevertheless demands that plaintiffs present enough information to "permit the court to infer more than the mere possibility of misconduct." **Plaintiffs' complaint is factually threadbare**. They allege that their father worked as a laborer "at various locations" in Arizona "for many years." **They do not provide any additional detail, such as what industries he worked in, what types of activities he performed, or even during what decades their father worked.**

Id. at *5 – 6 (citations omitted) (emphasis added).

The problem with shotgun complaints is that they demand an excessive amount of discovery to clarify plaintiffs' allegations. It is up to the defense to put a stop to the practice of shotgun complaints. When it is brought to their attention, judges often dismiss shotgun complaints and require plaintiffs to file more narrowly tailored complaints (which require less discovery).

11. Does Failure to Provide a Privilege Log Waive Privilege Claims?

Yes. Before asserting a claim of privilege, a party must provide a privilege log that identifies the factual elements supporting the privilege claim. *See* Va. Sup. Ct. R. 4:1(b)(6)(i); *Hirsch v. CSP Nova, LLC*, 98 Va. Cir. 286, 294 (Va. Cir. Ct. 2018) (overruling a privilege objection because the party failed to provide a privilege log as required by Rule 4:1(b)(6)(i); *Loudon Cnty. Asphalt L.L.C. v. Wise Guys Contracting L.L.C.*, 79 Va. Cir. 605, 605 – 06 (2009). Furthermore, Virginia courts reject broad-brush claims of "privilege" and require specific, case-by-case support for each document that is allegedly privileged. *See Piland v. White*, 85 Va. Cir. 45, 47 – 48 (2012) (collecting cases from Virginia circuit courts).

12. Can a Plaintiff Provide a Medical Record Authorization in Lieu of Producing Medical Records?

No. A Plaintiff cannot comply with a medical record Request for Production (or Interrogatory) simply by providing Defendants with a Medical Record Release Authorization. Such a response does not comply with Rule 34 and turns the discovery burden on its head.

> As to plaintiff's claim that his providing authorization to secure the information from the concerned medical providers suffices to fulfill any discovery obligation he might have, Judge Kollar-Kotelly has recently pointed out that merely providing an authorization for one's opponent to secure medical records from third party does not comply with obligations the Federal Rules impose upon a party.
>
> Bregman v. District of Columbia, 182 F.R.D. 352, 361 (D.D.C. 1998) citing Kifle v. Parks & History Association, 1998 U.S. Dist. LEXIS 22250, Ca No. 98-48 (D.D.C. Oct. 15, 1998).

13. Are "Scope of Discovery" Objections Permissible?

The parameters of discovery are broad and liberal. They were aptly summarized by Judge Fleming of the Circuit Court of Loudoun County:

> Virginia law contemplates **a rather liberal application of discovery rules in civil cases,** allowing the discovery of any information that **"is relevant to the subject matter involved in the pending action"** or that is **"reasonably calculated to lead to the discovery of admissible evidence."** Va. Sup. Ct. R. 4:1(b)(1). In Virginia, "[a]ll relevant evidence is admissible except as otherwise" excludable under the law. Va. R. Evid. 2:402(a). **It is well established in Virginia that "[e]very fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant."** *Virginia Elec. & Power Co. v. Dungee*, 258 Va. 235, 260, 520 S.E.2d 164 (1999). **"Evidence is relevant if it has any logical tendency, however slight, to establish a fact at issue in the case."** *Ragland v. Commonwealth*, 16 Va. App. 913, 918, 434 S.E.2d 675, 10 Va. Law Rep. 143 (1993) ; *see also* Rule 2:401 ("Relevant evidence[] means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence.").

Hirsch, 98 Va. Cir. at 292 – 93 (emphasis added).

Boilerplate "outside the scope of discovery" objections are improper if they ignore the fact that certain interrogatories and requests are relevant to claims, affirmative defenses, or counterclaims. *See Nizan v. Wells Fargo Bank Minn. Nat'l Ass'n*, 274 Va. 481, 501 (2007) (finding a circuit court abused its discretion in preventing a defendant from conducting discovery related to its defense because doing so "substantially affected [the defendant's] 'ability and right to

litigate' his defense"); *Hirsch*, 98 Va. Cir. at 292-93 (noting that "[e]very fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant" in Virginia); *Bosworth v. Vornado Realty L.P.*, 84 Va. Cir. 353, 356-57 (Va. Cir. Ct. 2012) (finding defendants' request for documents that supported Plaintiff's lost income claim was "not overly broad, burdensome, or vague," noting that "[d]iscovery is often a painful and expensive part of litigation, but Plaintiff has not alleged why these requests are *unduly* burdensome on him.")

Courts have held that evasive answers and boilerplate objections can be deemed "no response at all" which means that any objections are waived as untimely:

> If the responding party objects to an interrogatory, the grounds for objecting "must be stated with specificity." Fed. R. Civ. P. 33(b)(4); *see also* D. Md. Loc. R. 104.6. In other words, objections to interrogatories must be specific, non-boilerplate, and supported by particularized facts where necessary to demonstrate the basis for the objection. **The failure to state with specificity the grounds for an objection may result in waiver of the objection, unless the Court excuses the failure for good cause shown.** Fed. R. Civ. P. 33(b)(4);

Lynn v. Monarch Recovery Mgmt., 285 F.R.D. 350, 356 (D. Md. 2012) (emphasis added) citing *Hall v. Sullivan*, 231 F.R.D. 468, 470, 474 (D. Md. 2005); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 199 F.R.D. 168, 173 (D. Md. 2001); *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 38-39 (D. Md. 2000); and *Victor Stanley, Inc.*, 250 F.R.D. at 263-67. *See also Hirsch*, 98 Va. Cir. at 291 ("Under Rule 4:12(a)(3), [which governs motions to compel,] an evasive or incomplete answer is a failure to answer.")

14. <u>Are Unverified Interrogatories Timely?</u>

Parties sometimes serve unverified Interrogatory Answers and serve verifications later, (if at all). While the propounding party may have reason to accept a late verification, under established law in the Commonwealth, a party's service of unverified responses waives objections:

> [T]he failure to answer the interrogatories under oath constitutes a failure to make any written response to the interrogatories. Thus, the objections are a nullity without a motion for a protective order.

Whalen v. Nelson, 68 Va. Cir. 485, 486 (Cir. Ct. 2001). The federal courts follow the same rule and are arguably even stricter in requiring compliance:

> "The Rules require that answers to Interrogatories shall be made separately and fully under oath and signed by the party making them with the party's attorney signing any objections'. The course taken by Defendant's counsel has undermined the important function and utility of Interrogatories as they have been posed by the Plaintiff in this case. Seeking information through Interrogatories is an efficient and cost-effective method of discovery and marshaling evidence for trial. Indeed, the Rules anticipate that it could lead to the discovery of evidence worthy of admission at trial. Rule 33 (c) provides that Interrogatory answers may be used at trial "to the

> extent permitted by the rules of evidence." *Deviating from the course prescribed by the Rules in any significant manner or way therefore negates the significant opportunity to introduce evidence through Interrogatories at trial…* **The failure to meet the simple requirement of providing verification can only be seen as a flagrant disregard of these Rules, Advisory Notes, and case precedents.** The bickering between the parties herein as to the number of requests, Plaintiff's "pick-and-choose" approach to answering, and Plaintiff's answers which refer to pleadings rather than articulating responses are hardly examples of a "manner . . . consistent with the spirit and purposes of Rules 26 through 37. *Saria v. Mass. Mut. Life Ins. Co.*, 228 F.R.D. 536, 538, 540 (S.D. W. Va. 2005) (bold added; italics in original).
>
> First, the substantive portions of Defendant's Answers to Interrogatories and Request for Production of Documents (as opposed to the attorney-drafted objections) were not verified until approximately September 3, 2019 and **therefore were not technically answered until that date. As the parties know, this Court has previously ruled that failure to timely answer discovery results in the waiver of any and all objections**.

Slampak v. Nationwide Ins. Co. of Am., 2019 U.S. Dist. LEXIS 157845 at *12 (N.D.W. Va. Sep. 16, 2019) (emphasis added) citing *Tustin v. Motorists Mut. Ins. Co.*, No. 5:08-cv-111, 2009 U.S. Dist. LEXIS 4853, 2009 WL 10675150 at *10 (N.D.W.Va. January 23, 2009).

> Plaintiff's failure to provide answers to interrogatories under oath constitutes a **failure to answer** pursuant to FED. R. CIV. P. 37(a)(3), and gives rise to an award of fees and costs to Compton under FED. R. CIV. P. 37(b) & (d).

Elite Fin. Servs., Inc. v. Adams (In re Adams), 2005 Bankr. LEXIS 3551, at *7 (Bankr. D.S.C. Feb. 23, 2005) (emphasis added).

15. <u>Can a Party Respond to Requests for Production by Agreeing to Produce Documents "At a Mutually Convenient Time and Place" in the Future?</u>

Parties often respond to requests for production by agreeing to produce responsive documents "at a mutually convenient time and place" without specifying when the time will be and where the place will be. Courts have treated such vague promises as "non-responses" which waive a party's objections:

> It is improper to state, as Defendant did, that production will be made at some unspecified time in the future. *See Jayne H. Lee, Inc. v. Flagstaff Indus. Corp*., 173 F.R.D. 651, 656 (D. Md. 1997) ("[A] response to a request for production of documents which merely promises to produce the requested documents at some unidentified time in the future, without offering a specific time, place and manner… is treated as a failure to answer or respond."). Therefore, when Defendant stated that the documents would be produced, without indicating when or how they would be made available, Defendant failed to respond to Plaintiff's request for production

> of documents as required by Fed. R. Civ. P. 34(b)(2)(A). *See also* Fed. R. Civ. P. 37(a)(4) ("evasive or incomplete… response must be treated as a failure to… respond")

Mezu v. Morgan State Univ., 269 F.R.D. 565, 574 (D. Md. 2010). Requests for production responses that do not also produce documents (or at least promise documents on a date certain) are arguably a failure to respond, which waive objections and invite sanctions.

II. ORAL DISCOVERY

1. What to Do About Overbroad Corporate Deposition Notices.

Corporations are required, under Rule 4:5(b)(6) and FRCP 30(b)(6), to produce a witness (or multiple witnesses) who can testify about specific topics identified in the deposition notice. Sometimes, corporations are served with notices that have 20, 30 or 40 topics. It can be difficult, if not impossible, to prepare a witness for all of those topics. This creates a further risk to corporations because there is case law that provides that a corporation cannot offer evidence on a topic that was covered by a 30(b)(6) notice if the witness was not prepared to testify on that topic.

Courts recognize the FRCP 30(b)(6) depositions can be a wellspring of discovery abuse. One judge described the issue:

> [A] 30(b)(6) deposition, which by its nature can be time-consuming and inefficient, must be productive and not simply an excuse to seek information that is already known. *See Banks v. Office of the Senate Sargeant of Arms*, 222 F.R.D. 7, 19 (D.D.C. 2004) (ordering the parties to find topics that will "insure that the 30(b)(6) depositions are meaningful exercises in ascertaining information that has not been previously discovered" and ordering the party seeking discovery "not [to] ask questions that duplicate questions previously asked of other witness or seek information that he already has by virtue of responses to other discovery devices").

Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118, 126 (D.D.C 2005); *see also Crocs, Inc. v. Effervescent, Inc.*, 2017 U.S. Dist. LEXIS 27082 (D. Colo. 2017) (affirming Magistrate Judge's ruling narrowing seventeen 30(b)(6) topics to one topic. Magistrate Judge ruled that the notice was not proportional and covered topics better suited to less onerous discovery).

Courts have held that the deposing party must designate topics for the deposition with "painstaking specificity":

> A deposition under Rule 30(b)(6) differs in significant respects from the normal deposition. To begin with, the notice of deposition must 'describe with reasonable particularity the matters for examination.'" 8A C. Wright, A. Miller, & R. Marcus, Federal Practice & Procedure § 2103 (3d ed. 2010) (hereinafter "Wright & Miller"). As several courts and commentators have pointed out, the goal of this requirement "is to enable the responding organization to identify the person who is best situated to answer questions about the matter, or to make sure that the person selected to

> testify is able to respond regarding that matter." *Id*. Accordingly, there is an implicit obligation on the deponent to prepare the witness. **However, the rule implies an equivalent obligation on the deposing party to designate with painstaking specificity, the particular subject areas that are intended to be questioned.**

Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc., 2013 U.S. Dist. LEXIS 22986, at *14 – 15 (D. Colo. Feb. 19, 2013) (emphasis added) (citations omitted). Courts have also quashed FRCP 30(b)(6) deposition notices when the topics listed are open-ended or vague:

> The court finds plaintiff's Rule 30(b)(6) notice to be overbroad. Although plaintiff has specifically listed the areas of inquiry for which a 30(b)(6) designation is **sought, she has indicated that the listed areas are not exclusive. Plaintiff broadens the scope of the designated topics by indicating that the areas of inquiry will "include, but not [be] limited to" the areas specifically enumerated.** An overbroad Rule 30(b)(6) notice **subjects the noticed party to an impossible task**. To avoid liability, the noticed party must designate persons knowledgeable in the areas of inquiry listed in the notice. Where, as here, the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.

Reed v. Nellcor Puritan Bennett & Mallinckrodt, 193 F.R.D. 689, 692 (D. Kan. 2000) (emphasis added) (citations omitted). In sum, corporate deposition notices can be a source of discovery abuse but courts will limit them.

2. <u>What Happens When a Corporate Representative "Does Not Know" about a Topic?</u>

The Federal Rules of Civil Procedure do not allow a party to disclaim knowledge in a Rule 30(b)(6) deposition and then later offer testimony about that topic. Courts have ruled that because a Rule 30(b)(6) designee testifies on behalf of the entity, the entity is not allowed to defeat a motion for summary judgment based on an affidavit that conflicts with its Rule 30(b)(6) deposition or contains information that the Rule 30(b)(6) deponent professed not to know. 7-30 Moore's Federal Practice – Civil § 30.25 (2016). Federal courts apply this principle to preclude evidence a corporate witness "did not know":

> [D]epending on the nature and extent of the obfuscation, the testimony given by the non-responsive deponent (e.g. "I don't know") may be deemed "binding on the corporation" so as to prohibit it from offering contrary evidence at trial.

Wilson v. Lakner, 228 F.R.D. 524, 530 (D. Md. 2005). Courts impose this proscription because the 30(b)(6) deposition is intended to ease the burden on corporations and, conversely, corporations have an obligation to present well-prepared witnesses:

> By commissioning the designee as the voice of the corporation, the Rule obligates a corporate party "**to prepare its designee to be able to give binding answers"** in its behalf**. Unless it can prove that the information was not known or was**

> **inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.**

Rainey v. American Forest & Paper Ass'n, 26 F. Supp. 2d 82, 94 – 95 (D.D.C. 1998) quoting *Ierardi v. Lorillard, Inc*., 1991 U.S. Dist. LEXIS 11320, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991); and *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (emphasis added).

> A notice of deposition made pursuant to Rule 30(b)(6) requires the corporation to produce one or more officers to testify with respect to matters set out in the deposition notice or subpoena. A party need only designate, with reasonable particularity, the topics for examination. The corporation, then must not only produce such number of persons as will satisfy the request, *but more importantly, prepare them so that they may give complete knowledgeable and binding answers on behalf of the corporation.*

Audiotext Communs. Network v. US Telecom, 1995 U.S. Dist. LEXIS 15416, at *38 – 39 (D. Kan. Oct. 5, 1995) quoting *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) (emphasis in original). The Western District of North Carolina has excluded evidence on "the central issue" because the FRCP 30(b)(6) witness was unprepared.

> [Movant] could not first take the position that it had no information on that subject and then later, after the close of discovery and the filing of the Defendant's dispositive motion, completely reverse itself.

Caraustar Indus. v. N. Ga. Converting, Inc., No. 3:04CV187-H, 2006 U.S. Dist. LEXIS 91829, at *21 – 22 (W.D.N.C. Dec. 19, 2006). In sum, if a corporate representative is unprepared to offer testimony about a topic, his testimony that he "does not know" about the topic is binding on the corporation; the corporation also "does not know."

3. Can A Corporate Representative be Forced to Testify About Litigation Contentions?

Many courts reject the use of Rule 30(b)(6) to require an adverse party to "marshal… its factual proof" and then put forward a witness to be cross-examined regarding such proof under oath. For example, *In re Independent Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651, 654 (D. Kan. 1996), upheld objections to these notices seeking "facts supporting numerous paragraphs of a party's denials and affirmative defenses." As the court explained, these 30(b)(6) notices improperly required the responding party "to marshal all of its factual proof and then provide it to [the 30(b)(6) designee] so that she could respond to what are essentially… contention interrogatories… [T]his would be highly inefficient and burdensome, rather than the most direct manner of securing relevant information." *Id.* at 645.

If a party seeks to learn his adversary's legal contentions, that party should serve interrogatories:

> The Rules also preclude proponents of discovery from wielding the discovery process as a club by propounding requests compelling the recipient to assume an excessive burden. *See United States v. District Council of New York City*, 1992 U.S. Dist. LEXIS 12307, 1992 WL 208284 at *15 (S.D.N.Y. Aug. 19, 1992). Consequently, **the recipient of a Rule 30(b)(6) request is not required to have its counsel muster all of its factual evidence to prepare a witness to be able to testify regarding a defense or claim.** This rule holds especially true when the information sought is likely discoverable from other sources. . . . **Defendants could readily have obtained the same information in a more efficient manner by propounding "standard" interrogatories upon its opponent.** By doing so, Defendants could obtain the same information with infinitely less intrusion upon privilege concerns, in a more workable form, and from the individuals who have actual knowledge of the matters at issue.

Smithkline Beecham Corp. v. Apotex Corp., 2000 U.S. Dist. LEXIS 667 at *27 – 28 (N.D. Ill. Jan. 21, 2000) (emphasis added) (citations omitted); *see also McCormick-Morgan, Inc. v. Teledyne Indus. Inc*., 134 F.R.D. 275, 286 (N.D. Cal. 1991) ("we are concerned that . . . no one human being can be expected to set forth, especially orally in a deposition, a fully reliable and sufficiently complete account of all bases for the contentions made and position taken by a party" in a complex case).

District courts in the Fourth Circuit routinely require parties to use written discovery rather than corporate depositions to ferret out an adversary's legal contentions:

> Plaintiffs can obtain the factual support for defendants' affirmative defenses in other less burdensome ways. Plaintiffs are entitled to know the factual basis for defendants' affirmative defenses, and defendants should provide through answers to written discovery responses**. A party may seek to discover by interrogatory facts that form the basis of pleaded affirmative defenses**.

Proa v. NRT Mid-Atlantic, Inc., 2008 U.S. Dist. LEXIS 129572, at *46 (D. Md. June 20, 2008) (emphasis added) (citations omitted); *see also Cx Reinsurance Co. v. B&R Mgmt.*, 2018 U.S. Dist. LEXIS 56386, at *8 – 9 (D. Md. Apr. 3, 2018) ("I find that [Plaintiff's] probing of [Defendant's] affirmative defenses was more suitably explored by way of interrogatories and that [Plaintiff] is, therefore, foreclosed from inquiring into the factual bases of [Defendant's] affirmative defenses when deposing [the corporate representative]"); *BB & T Corp. v. United States*, 233 F.R.D. 447, 448 (M.D.N.C. 2006) (defining "contention discovery" as including "seek[ing] to discover [a party's] factual and legal bases for its defense" and stating that it "is usually made by serving contention interrogatories which are favored over contention depositions…")

Counsel should promptly object to such Rule 30(b)(6) notices and argue that the 30(b)(6) deposition is intended to identify facts, not poke holes in legal theories.

4. <u>FRCP 30(b)(5) and Overbroad Deposition Document Requests.</u>

FRCP 30(b)(6) deposition notices are frequently accompanied by a Rule 30(b)(5) request for documents. Often, discovering parties use these document requests to burden the party to be deposed while the party is trying to prepare for the Rule 30(b)(6) deposition. There is good authority for the proposition that FRCP 30(b)(5) is meant for narrow, focused document discovery related to the pending FRCP 30(b)(6) deposition, and is not intended to substitute for broad document discovery under FRCP 34. Rule 30(b)(5) states in relevant part as follows:

> The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.
>
> The pertinent portion of the Advisory Committee Notes to this subsection states that: ... [A] provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition… Whether production of documents or things should be obtained directly under Rule 34 or at the deposition under this rule will depend on the nature and volume of the documents or things. Both methods are made available. When the documents are few and simple, and closely related to the oral examination, ability to proceed via this rule will facilitate discovery. **If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rule 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone**.

Fed. R. Civ. Pro. 30(b)(5) advisory committee's notes (emphasis added).

Although made in a different context, the Court's comments and citation in *Canal Barge Co. v. Commonwealth Edison Co.*, 2001 U.S. Dist. LEXIS 10097 (N.D. Ill. 2001) are instructive:

> In essence, **a document request under Rule 30(b)(5) is a complement to a Rule 30 deposition, not a substitute for a Rule 34 document request…** Thus… re**quests which fall under the rubric of a Rule 30(b)(5) deposition should be "few and simple" and "closely related to the oral examination" sought**. Otherwise, the Court may assume that the document request falls under Rule 34 and, as such, is barred as untimely under the Court's scheduling order.

Id. at *13 (emphasis added) quoting *Carter v. United States*, 164 F.R.D. 131, 133 (D. Mass, 1995).

Courts also prohibit parties from using the Rule 30(b)(5) document request as a means of circumventing the written discovery cut-off in a Scheduling Order. The *Carter* court saw through this ruse:

> Plaintiff has made little secret of the fact that his deposition notices were directed more at the documents enumerated than the testimony sought… Plaintiff's own admission, one purpose of the depositions was to establish certain negatives with respect to the documents sought, for example, that certain documents did not exist

> and that certain psychiatric evaluations were not done… In the Court's view, the deposition notices**, heavily laden with document requests and divorced from any articulated bases for the oral testimony, were merely alternative means for Plaintiff to avoid the expiration of his right to written discovery. As such, Plaintiff's deposition notices were improper and his motion to compel must be denied.**

Carter v. United States at 133 (emphasis added).

5. <u>Where Is A Corporate Representative Deposed?</u>

Although not specifically stated in FRCP 30(b)(6), courts apply a presumption that a defendant's corporate representative will be deposed in the corporation's principal place of business.

> **Thus, courts have generally recognized the presumption that Rule 30(a)(1) or 30(b)(6) depositions of a foreign defendant corporation's officers or managing agents should be taken at the corporation's principal place of business**. This presumption is supported by the same sound reason noted above for applying the presumption to individual defendants. Further support for the presumption in the corporate context is the added potential for undue burdens on a corporation owing to the fact that unlike an individual defendant, a corporate defendant is subject to multiple depositions pursuant to Rules 30(a)(1) and 30(b)(6). Accordingly, a foreign corporation's Rule 30(b)(6) and managing agent witnesses should presumptively be deposed in the district of the corporation's principal place of business.

In re Outsidewall Tire Litig., 267 F.R.D. 466, 471 – 72 (E.D. Va. 2010) (emphasis added); *see also Williams v. Microbilt Corp.*, 2019 U.S. Dist. LEXIS 227601 at *75 (E.D. Va. Sep. 23, 2019) ("Moreover, as Plaintiffs point out, depositions of officers and agents of a nonresident corporate defendant presumptively should occur in the district of the corporation's principal place of business."); *Swimways Corp. v. Zuru, Inc.*, 2014 U.S. Dist. LEXIS 101713 (E.D. Va. June 6, 2014) (same). This presumption is not absolute and is subject to the discretion of the trial court: "To be sure, this presumption may be overcome, but only where circumstances exist distinguishing the case from the ordinary run of civil cases." *In re Outsidewall Tire Litig.*, 267 F.R.D at 472. The Eastern District of Virginia has cataloged the following "distinguishing factors" that can overcome the presumption that a corporate defendant is deposed in its principal place of business:

- When the deposition is noticed for a location where the defendant regularly conducts business; citing *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1365 – 66 (7th Cir. 1985);

- When the deposing attorneys would be subject to criminal penalties if the deposition is conducted in the defendant's principal place of business; citing *Fausto v. Credigy Svcs. Corp.*, 251 F.R.D. 427, 430 – 31 (N.D. Cal. 2008) (Illegal for American lawyers to take depositions in Brazil); and

- When the corporate defendant had disregarded previous orders of the Court; citing *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994) (Requiring officers of Hong Kong corporate defendant to be deposed in San Francisco because corporate defendant "had disregarded the previous deposition order" and further because the defendant had done business and filed suit in the district court located there.)

The Eastern District concluded by identifying the common theme that rebuts the presumption that a defendant's corporate representative must be deposed in the corporation's principal place of business:

> [T]hese three examples are merely illustrative, not exhaustive. But taken together, they indicate that the presumption is overcome where the record presents unique or distinctive circumstances demonstrating either (i) that taking the depositions at the corporation's principal place of business would be unduly burdensome, or (ii) that, by virtue of the corporation's regular course of activity in the alternative location, the burden of requiring the officer or managing agent to be deposed there is minimal and the savings to the deposing party are substantial.

In re Outsidewall Tire Litig., 267 F.R.D. at 473; *see also Swimways*, 2014 U.S. Dist. LEXIS 101713 at *5. In sum, federal courts apply a rebuttable presumption that a corporate defendant's 30(b)(6) representative will be deposed in the corporation's principal place of business. The presumption can be rebutted by showing "distinguishing factors" that demonstrate that a deposition taken at an alternative location is as convenient to the corporation or a showing that a deposition at the corporation's principal place of business would be unusually burdensome to the plaintiff.

On a related note, some authorities suggest that it is useful to hold the deposition at the corporate headquarters so the witness can retrieve documents from the corporation during the deposition. This is a bad idea. The defending attorney should never permit the witness to offer to retrieve documents during the deposition. The documents need to be reviewed for responsiveness and privilege and this is almost impossible during the pendency of the deposition.

6. Can a Deposing Party Demand the Documents Reviewed by the Corporate Witnesses in Preparation for Deposition?

As noted above, FRCP 30(b)(6) requires organizations to provide a witness to offer testimony on topics designated by the deposing party. The witness provided is typically an employee or agent of the organization. The attorney preparing the corporate witness has an attorney-client relationship with the organization, and therefore the witness. Often, an issue arises as to whether the deposing attorney is entitled to review the specific documents used to prepare the corporate witness. There is good case law to refuse to provide this information based on the attorney client privilege and work product doctrine.

In *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 474 U.S. 903, 106 S. Ct. 232 (1985), the defendant's attorney selected a large group of documents and reviewed them with the defendant's corporate witness in preparation for deposition. *Id.* at 314. At the defendant's deposition, plaintiff's counsel asked the corporate witness to identify all documents that were reviewed in preparation for the deposition. *Id.* Defendant's counsel refused, citing FRCP 26(b)(3) and *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 305 (1947). *Id.* The defending attorney did allow the deposing attorney to ask specific questions about specific documents. The District Court disagreed with defendant's privilege claim and ordered production of the documents pursuant to Fed. R. Evid. 612 (a document used to refresh a witness's memory must be shown to opposing counsel). On mandamus, the Third Circuit disagreed.

The Third Circuit concluded that while the documents themselves did not constitute work product, the defendant's counsel's selection and organization of the documents were work product. More importantly, the Third Circuit concluded that the selection of the documents was "opinion" work product and thus afforded almost absolute protection from discovery. *Id.* at 315 – 316.

The Fourth Circuit adopted the *Sporck* Court's reasoning in *In re Allen*, 106 F.3d 582 (4th Cir. 1997). In *In re Allen*, the Attorney General of West Virginia hired outside counsel, who assisted in preparing a witness for a deposition. Outside counsel selected a group of personnel records for a deponent to review in preparation for his deposition. *Id.* at 598 – 599. Opposing counsel sought discovery of the records that the deponent reviewed for preparation. *Id.* When counsel refused, the district court held him in contempt. *Id.* The Fourth Circuit reversed the decision, concluding that while the documents themselves were not work product, outside counsel's selection of documents constituted legal opinions about which documents were relevant to the case. *Id.* at 608. As such, the Fourth Circuit held that the documents were subject to almost absolute immunity as opinion work product. *Id.*

> Finally, we turn to Document no. 20. It contains pages of selected employment records concerning Donna Willis, which Allen requested that Carolyn Stafford and Charlene Vaughn provide to her. We have held that attorney-client privilege does not protect these records. Yet, just as Allen prepared the interview notes and summaries in anticipation of litigation, she also chose and arranged these records in anticipation of litigation. This choice and arrangement constitutes opinion work product because Allen's selection and compilation of these particular documents reveals her thought processes and theories regarding this litigation. *See, e.g., Shelton v. American Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986) ("In cases that involve reams of documents and extensive document discovery, the selection and compilation of documents is often more crucial than legal research… We believe [counsel's] selective review of [her clients'] numerous documents was based on her professional judgment of the issues and defenses involved in this case."); *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.) ("We believe that the selection and compilation of documents in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product."), *cert. denied*, 474 U.S. 903, 88 L. Ed. 2d 230, 106 S. Ct. 232 (1985). *See also James Julian v. Raytheon Co.*, [**75] 93 F.R.D. 138, 144 (D. Del. 1982) ("In selecting and

> ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case.")

Better Gov't Bureau v. McGraw (In re Allen), 106 F.3d 582, 608 (4th Cir. 1997). *See also Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 – 403 (4th Cir. 1999) (holding that work product doctrine precluded discovery of research memorandum prepared in connection with collection of a construction loan)." District courts in the Fourth Circuit also recognize the work product implications raised in *Sporck v. Peil*:

> [C]ourts should exercise great care before permitting the deposition of an attorney inasmuch as even seemingly innocent questions, such as the existence or nonexistence of documents or queries concerning which documents counsel has selected [*86] in preparing a witness for deposition, may implicate opinion work product. *Shelton v. American Motors Corp.*, 805 F.2d at 1327; *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 474 U.S. 903, 106 S. Ct. 232 (1985).

N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85-86 (M.D.N.C. 1987). There is also contrary law but it is scattered in district courts and does not address the work product doctrine as well as *Sporck* and *Allen*.

7. Can You Consult With Your Witness During a Deposition?

There are few issues more fraught with controversy than the issue as to whether a defending attorney can consult with his witness during a deposition break. The significance of depositions and the manner in which they are conducted was aptly summarized by Judge Gawthorp of the United States District Court for the Eastern District of Pennsylvania:

> Depositions are the factual battleground where the vast majority of litigation actually takes place. It may safely be said that Rule 30 has spawned a veritable cottage industry. The significance of depositions has grown geometrically over the years to the point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial – assuming there is a trial, which there usually is not. **The pretrial tail now wags the trial dog.**

Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993) (emphasis added).

There are generally two schools of thought on the issue in the federal courts. The two schools can be fairly called the "Hall" school and the "Stratosphere" school for *Hall, supra* and *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614 (D. Nev. 1998), respectively.

i. The *Hall* Standard.

In *Hall*, plaintiff's counsel was defending the deposition of his client, Mr. Hall. *Hall*, 150 F.R.D. at 526. At the beginning of the deposition, deposing counsel for the defendant advised plaintiff that, if he did not understand a question, he should advise defense counsel and defense counsel would seek to clarify the question. Plaintiff's counsel then added that if plaintiff was

uncertain about a question, he could ask plaintiff's counsel and plaintiff's counsel would clarify the question. Shortly after the deposition started, plaintiff asked for a break so that he could obtain clarification of a question with his counsel. *Id.* After the break, plaintiff asked defense counsel to clarify his question. *Id.* After a few more minutes, defendant's counsel presented plaintiff with a document. *Id.* Plaintiff's counsel took the document and said that he needed to review the document with his client. *Id.* At that point, defense counsel contacted the Court and the deposition was adjourned so that the court could resolve the deposition issues.

Before the federal district court, plaintiff's counsel argued that plaintiff had a right to consult with his counsel during deposition. *Id.* at 527. Plaintiff's counsel provided no citation to authority for his argument. *Id.* Defense counsel, on the other hand, argued that it was improper for a witness or a client to consult with counsel during a deposition. *Id.* Defense counsel presented several standing orders from other courts which precluded conferences between the witness and defending counsel, with the exception of those conversations necessary to determine whether to assert privilege. *Id.*

The *Hall* court ruled that the interests of preventing improper deposition coaching outweighed any concerns about a client's right to consult with counsel.

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did -- what the witness thinks. **A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers**. The witness comes to the deposition to testify, **not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record.** It is the witness – not the lawyer – who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop.

Id. (emphasis added). The district court was unimpressed with the claim that a client has a right to consult with counsel:

> Concern has been expressed as to the client's right to counsel and to due process. A lawyer, of course, has the right, if not the duty, to prepare a client for a deposition. **But once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth**. Under Rule 30(c), depositions generally are to be conducted under the same testimonial rules as are trials. During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. **Once a witness has been prepared and has taken the stand, that witness is on his or her own**. The same is true at a deposition. The fact that there is no judge in the room to prevent private conferences does not mean that such conferences should or may occur. **The underlying reason**

> **for preventing private conferences is still present: they tend, at the very least, to give the appearance of obstructing the truth.**

Id. (emphasis added).

The *Hall* court adopted a strict "no consultation" rule that applied to the entire deposition:

> To allow private conferences initiated by the witness would be to allow the witness to listen to the question, ask his or her lawyer for the answer, and then parrot the lawyer's response. Again, this is not what depositions are all about – or, at least, it is not what they are supposed to be all about. If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer. There is simply no qualitative distinction between private conferences initiated by a lawyer and those initiated by a witness. Neither should occur.
>
> **These rules also apply during recesses. Once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules.** Otherwise, the same problems would persist. A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences. **Therefore, I hold that conferences between witness and lawyer are prohibited both during the deposition and during recesses.**
>
> **The same reasoning applies to conferences about documents shown to the witness during the deposition.** When the deposing attorney presents a document to a witness at a deposition, that attorney is entitled to have the witness, and the witness alone, answer questions about the document. **The witness's lawyer should be given a copy of the document for his or her own inspection, but there is no valid reason why the lawyer and the witness should have to confer about the document before the witness answers questions about it**. If the witness does not recall having seen the document before or does not understand the document, the witness may ask the deposing lawyer for some additional information, or the witness may simply testify to the lack of knowledge or understanding. **But there need not be an off-the-record conference between witness and lawyer in order to ascertain whether the witness understands the document or a pending question about the document**.

Id. at 528 – 29 (emphasis added).

The *Hall* court allowed a narrow exception to the "no consultation" rule:

> "**[A] private conference between witness and attorney is permissible if the purpose of the conference is to decide whether to assert a privilege. With this exception I agree**. Since the assertion of a privilege is a proper, and very important, objection during a deposition, it makes sense to allow the witness the opportunity to consult with counsel about whether to assert a privilege. Further, privileges are violated not only by the admission of privileged evidence at trial, but by the very disclosures themselves. Thus, it is important that the witness be fully informed of his or her rights before making a statement which might reveal privileged information. **However, when such a conference occurs, the conferring attorney should place on the record the fact that the conference occurred, the subject of the conference, and the decision reached as to whether to assert a privilege.**

Id. at 529 – 30 (emphasis added).

In sum, the *Hall* standard precludes any discussions between a witness and the defending attorney except to determine whether to assert a privilege. Within this narrow exception, the defending attorney must state (on the record) that a conference took place about a potential privilege and must advise as to whether a privilege will be asserted.

ii. The *Stratosphere* Standard.

The *Stratosphere* standard, established by *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614 (D. Nev. 1998), was crafted in response to the *Hall* standard. In *Stratosphere*, a class action plaintiff moved the court for an order governing deposition protocol. *Id.* at 616. The proposed protocol addressed a number of mundane matters, including deposition scheduling and videotaping. *Id.* Plaintiff also proposed strict compliance to the *Hall* standard; prohibiting all conferences during the deposition except to determine if a privilege exists and those conferences were subject to questioning by the deposing attorney. *Id.* at 619. Plaintiff cited *Hall* as his source of authority. *Id.* The *Stratosphere* court considered the *Hall* opinion but concluded that it went too far:

> This Court agrees with the underlying concern and essential purpose of the *Hall* court's ruling. However, this Court is of the opinion that the *Hall* decision goes too far and its strict adherence could violate the right to counsel.

Id. at 620. The *Stratosphere* court found that a party had a right to consult with counsel, even in a civil case as part of the Fifth Amendment requirement for due process.

> It is this Court's experience, at the bar and on the bench, that attorney's and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid morning or mid afternoon, the lunch recess, are the evening recess**. The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial).** What this Court, and the Federal Rules of Procedure seek to

> prevent is coaching the witness by telling the witness what to say or how to answer a specific question. **We all want the witness's answers, but not at the sacrifice of his or her right to the assistance of counsel.**

Id. at 621 (emphasis added).

Additionally, the *Stratosphere* court agreed that the witness or counsel could not *initiate* a conference but refused to preclude conferences during regular breaks:

> While this Court agrees with the *Hall* court's goals, it declines to adopt its strict requirements. This Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness. **So long as attorneys do not demand a break in the questions, or demand a conference between question and answers, the Court is confident that the search for truth will adequately prevail**.

Id. (emphasis added).

In the Fourth Circuit, *Hall* is cited favorably, on occasion, but mostly for the proposition that a defending attorney cannot act as an intermediary and thus forming the witness's response to questions. *See e.g. Francisco v. Verizon S., Inc.*, 756 F. Supp. 2d 705, 712 (E.D. Va. 2010) citing *Hall v. Clifton Precision*, 150 F.R.D. at 528 (Although counsel who is defending a deposition may prepare a witness, once the deposition begins, "[t]here is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.")

The most substantive analysis of the *Hall/Stratosphere* dichotomy was in *Callahan v. Toys "R" Us-Delaware, Inc.*, 2016 U.S. Dist. LEXIS 195833 (D. Md. July 15, 2016). The case involved the deposition of an expert, not a client. Defending counsel did not allow deposing counsel to inquire as to the substance of conversations that took place during deposition breaks. *Id.* at *7 – 8. The *Callahan* the court summarized the divergent views between *Hall* and *Stratosphere* as follows:

> In prohibiting attorney/deponent communications in Hall, the court emphasized the importance of avoiding witness coaching, so that the deponent, and the deponent alone, answers questions, which furthers the truth-seeking purpose of the deposition. 150 F.R.D. at 528-29. By contrast, in declining to impose an outright ban on attorney/client communications, the court in Stratosphere reasoned that the goals identified by the Hall court would not be frustrated by allowing attorneys to communicate with their clients to ensure that they understood questions and were adequately prepared.

Id. at *8 – 9. The *Callahan* court seemed to agree with the *Stratosphere* court's conclusion that the client's right to consult with counsel prevails but noted that the client was not the deponent in the *Callahan* case:

> The court's reasoning in *Stratosphere* thus highlights a critical distinction between both *Stratosphere* and *Hall*, and this case — **the deponents in both of those cases were clients of the attorneys**, whereas here, Mr. Logan was not a client of Defense Counsel, but rather Defendants' expert. **Thus, a client's right to the assistance of counsel, which was a factor in the courts' analyses in *Stratosphere* and *Hall*, does not factor into the Court's decision here**.

Id. at *9 (emphasis added).

The Callahan court concluded that the conversations that took place during breaks with the expert were, in fact, protected by the work product doctrine but also concluded that defense counsel had improperly coached the expert. *Id.* at *12 – 13. As a sanction, the court struck portions of defense counsel's re-direct of the expert. *Id.*

There are no reported Virginia state court cases that cite either Hall or Stratosphere. In sum, it appears that the law in Virginia and the Fourth Circuit is that a defending attorney may consult with his client during regular deposition breaks and those conversations are permissible and privileged. An attorney defending an expert witness may consult with an expert but may not coach the expert. It does not appear that the narrow strictures found in Hall have ever been applied in Virginia courts.

8. <u>What Are Proper Deposition Objections?</u>

Another contentious issue in depositions is whether, and to what extent, a defending attorney can object during a deposition. Fortunately, the law is clearer in this area.

First, it is clear, and has been for decades, that a defending attorney cannot instruct a witness not to answer a question unless he intends to invoke a privilege.

> **The action of plaintiff's counsel in directing Wagnon not to answer the questions posed to him was indefensible and utterly at variance with the discovery provisions of the Federal Rules of Civil Procedure.** The broad scope of discovery is evident in Rule 26(b)(1) which provides that "parties may obtain discovery regarding any matter, **not** privileged, which is relevant to the subject matter involved in the pending action." The Rule further states that "it is **not** ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Ralston Purina Co. v. McFarland, 550 F.2d 967, 973 (4th Cir. 1977) (emphasis added); *see also Smith v. US Sprint*, No. 92-2153, 1994 U.S. App. LEXIS 3630, at *14 – 15 (4th Cir. Feb. 28, 1994) (Affirming sanction of dismissal for deposition misconduct: "Furthermore, at the deposition

Smith's counsel repeatedly counseled his client to not answer questions, a direct violation of Ralston Purina Co. v. McFarland.")

More frequent, but equally improper, are "speaking objections" that tend to signal to the witness that trouble lies ahead. These speaking objections include:

- "The document speaks for itself';
- "The question calls for a legal conclusion";
- "I don't understand the question";
- "The question assumes facts not in evidence"; and
- "What you are asking him is X but you know that there is no proof of X."

Courts do not permit such objections. A good example of speaking objections and court's furious response is illustrated in *McDonough v. Keniston*, 188 F.R.D. 22 (D.N.H. 1998):

> During his client's deposition plaintiff's counsel repeatedly violated Rule 30(d). In particular, pages 93-107, 113-114, 119-122, 138-139, 162, 183-185 of Exh. A to document 85 **contain classic examples of witness coaching, speaking objections and improper instructions not to answer.** In his objection plaintiff's counsel has attempted to justify his conduct by recharacterizing the objections as justified by attacking defense counsel for berating plaintiff, and for being argumentative, sarcastic, oppressive and hostile. **He justifies his conduct as "an honest attempt by deponent's attorney to limit the questioning… under…Rule 30(d)(3)**." The objection is disingenuous at best.
>
> A few examples demonstrate the impropriety of counsel's conduct.
>
> a. *Speaking-coaching objections*.
> P.93 Q. . . . why don't you do your best to tell me what you say he did wrong?
>
> [Defending Counsel]: I think that's a very broad, broad question. I think it's too broad to be answered. It calls for legal characterizations. He had no connection, he had no contact directly with Chuck Douglas except for one hearing and –
>
> p.95 Q. . . . Can you tell me anything that you say Mr. Douglas did wrong that caused you to sue him?
>
> [Defending Counsel]:: Well, he read the deposition of
> Mr. Wheat: Wait a minute.
> [Defending Counsel]:: - Carlene Keniston, that states it right there.
>
> **The effectiveness of this coaching is clearly demonstrated when the plaintiff subsequently adopts his lawyer's coaching and complains of the broadness of the question** (Exh. A. p.105, line 21) and answers referencing the Keniston deposition (Exh. A, p.102, line 15). **Apparently encouraged by the effectiveness of his suggestive objections, plaintiff's counsel continued his antics**.

Id. at 24 (emphasis added).

With respect to the common objection: "I don't understand the question", one court characterized the issue as follows:

> Unless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear. Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question. The *witness*—not the lawyer—gets to decide whether he or she understands a particular question: **Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed. This duty is traditionally explained to the witness by the questioner before the deposition. If defending counsel feels that an answer evidences a failure to understand a question, this may be remedied on cross-examination.**

Sec. Nat'l Bank of Sioux City v. Abbott Labs., 299 F.R.D. 595, 605-06 (N.D. Iowa 2014) *rev'd on other grounds sub nom. Sec. Nat. Bank of Sioux City, IA v. Day*, 800 F.3d 936 (8th Cir. 2015). Courts in the Fourth Circuit apply these rules as well:

> Counsel interjected comments after questions in ways that could have suggested answers by the witness or otherwise improperly interrupted the question and answer process. *See* Fed. R. Civ. P. 30(c)(2) ("An objection must be stated concisely in an nonargumentative and nonsuggestive manner.")

Osborne v. Mt. Empire Operations, LLC, 2015 U.S. Dist. LEXIS 76732 at *4 (W.D. Va. June 15, 2015) citing *Sec. Nat'l Bank of Sioux City, Iowa v. Abbott Labs.*, 299 F.R.D. 595 (admonishing counsel for "repeatedly object[ing] and interject[ing] in ways that coached the witness to give a particular answer or to unnecessarily quibble with" opposing counsel). Similarly, the courts of the Commonwealth discipline speaking objections:

> The deponent's opening objection that there was insufficient time to prepare for a corporate designee deposition was appropriate; **however, the numerous speaking objections during the deposition were not**. They were improper both in form and in substance. **For example, the speaking objections included the objection, and at some points discussion, that a document "speaks for itself."** This objection commonly stated at depositions or at trial is premised on outdated habits within the trial bar and does not fall under any recognized rule of evidence or procedure. **The error of interposing such an objection was compounded here by the deponent's adoption of that objection as well, parroting the objection that a question asked for a legal conclusion…** Otherwise, Va. Sup. Ct. R. 4:5(c) requires t**hat after a concise and non-argumentative objection is noted, the evidence objected to shall be taken subject to the objection. That is, the deponent answers the question**.**"**

Sea Bay Hotel, LLC v. Gosnell, 97 Va. Cir. at 263 – 64 (emphasis added).

While it is clear that speaking objections are prohibited, it is not enough for a defending attorney to simply object to "form" without specifying what is objectionable about the form:

> Thus, if a question is propounded in an improper form, the objection should be stated concisely on the record during the deposition [*5] in a manner that provides the questioner with a reasonable opportunity to correct the form of the question. Failure to do so waives the objection. **Simply stating "objection to form" does not necessarily preserve the objection. When "objection to form" does not indicate what is wrong with the form so that the questioner can correct the problem, it becomes nothing more than a statement that the objector finds the question "objectionable."**

Henderson v. B&B Precast & Pipe, LLC, 2014 U.S. Dist. LEXIS 112441, at *3 – 5 (M.D. Ga. Aug. 14, 2014); *see also Ethox Chem., LLC v. Coca-Cola Co.,* 2016 U.S. Dist. LEXIS 192840, at *21 (D.S.C. Feb. 29, 2016) (It appears that counsel for both sides adopted the unfortunate practice of interposing an "Object to Form" to most questions without specifying the specific defect so as to allow the questioner to cure the objection - as is contemplated by the Rules" and citing *B & B Precast, supra.*)

In summary, it appears that the rules for objecting in deposition are as follows:

- A defending attorney cannot instruct a witness not to answer a question unless he seeks to assert a privilege;

- A defending attorney cannot engage in speaking objections; and

- A defending attorney can object to the form of a question but must concisely, and non-suggestively identify the defect in the form of the question.

9. Are Treating Physicians Entitled to An Expert Fee for Fact Witness Depositions?

Treating physicians are often critical fact witnesses in litigation. They are also sometimes expert witnesses. Physicians are busy and have unique skills, so it is not unusual for them to ask for (and expect) expert witness fees even when testifying as a fact witness. The fees requested can be substantial. Additionally, many physicians tack on mandatory minimum fees and mandatory "pre-deposition conferences." Courts are divided as to whether a physician fact witness is entitled to expert witness fees or simply witness fees:

> The discovery question presented here regarding the proper rate of reimbursement for a treating physician deponent-witness does not admit of a single, simple, easy answer. Quite the contrary, this legal question is defined by two sharply divergent lines of authority.

R.D. v. Shohola Camp Ground & Resort, 2017 U.S. Dist. LEXIS 70972 at *3 (M.D. Pa. May 10, 2017) (collecting cases pro and con). On balance, however, the stronger argument is that attorneys are not obligated to pay treating physicians' "expert witness fees" for offering fact witness testimony. When deposed as a fact witness, a physician stands in the same position as any other fact witness. They are entitled to mileage and the standard witness fee.

> "While physicians certainly have significant overhead costs and a special expertise, so do a myriad of other professions. For instance, should fact witnesses who happen to be engineers, attorneys, accountants or consultants — professions also with special expertise and significant overhead costs — similarly be allowed more than the statutory fee prescribed by § 1821? If the answer is in the affirmative, then does § 1821 merely apply to less prestigious professions? Who decides what professions fall under § 1821 versus the more lucrative "reasonable fee" under [Federal Rule of Civil Procedure] 26(b)(4)(C)? This Court declines to set precedent in this jurisdiction that, essentially, singles out physicians for special treatment. Rather, the more prudent course of action is to follow the unambiguous tenets of [Federal Rule of Civil Procedure] 26(b)(4)(C) [***21] and § 1821, which provide that expert witnesses — *independent of their profession* — obtain compensation at a "reasonable fee", while fact witnesses — *independent of their profession* — receive compensation at the statutory fee of $40. If Congress wishes to single out certain professions for higher compensation, that is certainly its prerogative, but this Court declines to enter that arena, which is, essentially, a slippery slope."

Demar v. United States, 199 F.R.D. 617, 619 – 20 (N.D. Ill. 2001); *see also McDermott v. FedEx Ground Sys.*, 247 F.R.D. 58, 61 (D. Mass. 2007) (there is no "logical explanation as to why [a special]… rule applies to physicians and no other class of professional or otherwise with 'specialized knowledge' about the testimony to be provided"); *Mangla v. Univ. of Rochester*, 168 F.R.D. 137, 140 (W.D.N.Y. 1996) (Physicians will "suffer no more inconvenience than many other citizens called forward to be deposed or testify as a trial witness in a matter in which they have first-hand factual knowledge.")

The contrary view holds that physicians have special training and experience and, consequently, their fact testimony about treatment and diagnosis is better analyzed as expert opinion testimony for which an expert witness fee is appropriate. *See, e.g., Wirtz v. Kan. Farm Bureau Servs., Inc.*, 355 F. Supp. 2d 1190, 1211 (D. Kan. 2005) ("[A] treating physician responding to discovery requests and testifying at trial is entitled to his or her 'reasonable fee' because such physician's testimony will necessarily involve scientific knowledge and observations that do not inform the testimony of a simple 'fact' or 'occurrence' witness."); *Mock v. Johnson*, 218 F.R.D. 680, 683 (D. Haw. 2003) ("As opposed to the observations that ordinary fact witnesses provide, the observations and *opinions* that medical professionals provide derive from their highly specialized training."); *Grant v. Otis Elevator Co.*,199 F.R.D. 673, 676 (N.D. Okla. 2001) ("[T]reating physicians who testify under Fed. R. Evid. 702 as to their diagnoses, treatment and prognoses are experts within the meaning of [Fed. R. Civ. P.] 26(b)(4)(C) and are entitled to a reasonable fee."); and *Coleman v. Dydula*, 190 F.R.D. 320, 323 (W.D. N.Y. 1999) ("Physicians

provide invaluable services to the public and should be remunerated for their time when they cannot deliver medical care." (citation omitted)).

In sum, an attorney is not obligated to pay a physician fact witness an expert witness fee, only a witness fee. With that said, an attorney may be wise to provide something more than the nominal fee to insure the cooperation of the physician.

10. <u>Can a Witness Make Wholesale Changes to Depositions Under FRCP 30(e)?</u>

FRCP 30(e) allows a witness to make changes to "form and substance" if the changes are made within 30 days of submission to the witness. There is some dispute as to whether a witness can make wholesale changes to the deposition transcript. One view is that the Rule allows changes to "form or substance" so a witness can make wholesale changes. Another view is that a deposition is not a "take home exam" that can be revised by the lawyers after the witness has testified. Both views are discussed and the District of Maryland expresses a preference for the "no take home exam" perspective:

> Some courts hold that if the procedural requirements of Rule 30(e) are met, a deponent may, by the literal language of the rule, change any and all of the "substance" of the deposition testimony. See, e.g., *Foutz v. Town of Vinton, Virginia,* 211 F.R.D. 293, 295 (W.D. Va. 2002). Other courts interpret the rule as foreclosing changes that materially alter the testimony or contradict the testimony. See, e.g., *Rios v. Bigler*, 847 F. Supp. 1538, 1546-47 (D. Kan. 1994). The Court agrees with the latter line of cases. Quoting the opt-cited decision *Greenway v. International Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992) the district court in Kansas described the types of corrections that are intended to be remedied by Rule 30(e).The court recognizes that Fed. R. Civ. P. 30(e) allows a deponent to make changes to deposition testimony in form or substance. Nevertheless, the court finds that [the deponent's] errata sheets exceed the scope of the type of revisions contemplated by the Rule and serve only to improperly alter what was testified under oath.
>
> A**s has been aptly acknowledged by the Tenth Circuit, a deposition is not a take home exam.** See *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 (10th Cir. 2002) (quoting Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992)). **The errata sheet "clarifications" in this case are akin to a student who takes her in-class examination home, but submits new answers only after realizing a month later that the import of her original answers could possibly result in a failing grade.** ***Id.;*** *see also* Paul Harris Stores, Inc. v. PricewaterhouseCoopers, LLP, 2006 U.S. Dist. LEXIS 65840, 2006 WL 2644935, at *3 (S.D. Ind. Sept. 14, 2006) (stating that where it is "apparent to the Court that [a party] seeks to 'undo' the testimony of its 30(b)(6) witnesses by adding errata," the errata should be stricken as "really no more than 'lawyers' statements,' attempting to deflect potentially detrimental testimony"); *Eckert v. Kemper Fin. Servs., Inc.*, 1998 U.S. Dist. LEXIS 15788, 1998 WL 699656 at *5 (N.D. Ill. Sept.

> 30, 1998) (precluding "wholesale changes to previous sworn testimony" that was, in fact, a "damaging [party] admission").

Wyeth v. Lupin LTD, 252 F.R.D. 295, 296 – 97 (D. Md. 2008) (emphasis added). The United States District Court for the Eastern District of Virginia also adopts the "no take home exam" approach:

> [T]he purpose of an errata sheet is to *correct alleged inaccuracies* in what the deponent *said* at his deposition, not to modify what he wishes that he had said… Rule 30(e) (allowing the submission of errata sheets), 'cannot be interpreted to allow one to alter what was said under oath. **If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination**.

E.I. du Pont de Nemours & Co. v. Kolon Indus., 277 F.R.D. 286, 297 (E.D. Va. 2011) quoting *Touchcom, Inc. v. Bereskin & Parr*, 790 F. Supp. 2d 435, 465, 2011 U.S. Dist. LEXIS 72905 at *9 (E.D. Va. July 7, 2011) (emphasis added). Even if a Court allows wholesale changes to a deposition, the original and unedited transcript is still admissible. The United States Bankruptcy Court for the Eastern District of Virginia in *Parker v. Grant (In re Grant)*, 237 B.R. 97 (Bankr. E.D. Va. 1999) extensively discussed the law in this area:

> The Court in *Blackthorne v. Posner*, 883 F. Supp. 1443, 1454 (D. Ore. 1995) ruled that plaintiff made handwritten corrections to his deposition transcript after the 30 day limitation and, therefore, found plaintiff to have waived his privilege to read, review and amend. See *Barlow v. Esselte Pendaflex Corp*., 111 F.R.D. 404, 406 (M.D. N.C. 1986) (holding that where plaintiff made so many changes to his deposition testimony that it became impossible for the reporter to enter the alterations and deeming "plaintiff to have refused to have signed, or to have waived signing of… the transcript as set out in Rule 30(e)").
>
> The *Blackthorne* court subsequently allowed plaintiff to admit his deposition testimony into evidence without the untimely corrections. The court held: [Plaintiff's] opportunity to amend changes to the deposition had lapsed, and plaintiff's errata sheet will not be received as part of the deposition testimony." *Blackthorne*, 883 F. Supp. at 1454 n.16. The Second Circuit ruled similarly in *Podell v. Citicorp Diners Club*, 112 F.3d 98 (2nd Cir. 1997). **The *Podell* court held that notwithstanding any errata modifications, Rule 30(e) allows the original deposition to be admitted at trial.** *Id.* at 103 (emphasis added).
>
> The court in *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981) reached an analogous result, holding that where a deponent amends his deposition, his original deposition testimony shall remain admissible at trial. **The *Lugtig* court stated that "nothing in the language of Rule 30(e) requires or implies that the original answers are to be stricken when changes are made… ," implying that the original deposition is admissible at trial, regardless of deponent's decision to amend his deposition or waive that privilege**. Id. at 641-42.

Id. at 108 (emphasis added).

11. Deposing Fact Witnesses Who Were Not Disclosed on Fed. R. Civ. Pro. 26(a)(1)(A)(i) Initial Disclosures.

The Federal Rules of Civil Procedure require parties to identify the "names and if know, the address and telephone number of each individual likely to have discoverable information… which the disclosing party may use to support its claims or defenses unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(i).

Sometimes a party will try to depose a fact witness in order to memorialize testimony that is helpful to that party, even though the deposing party never identified the witness on its Initial Disclosures. The federal rules prohibit this. If a party intends to use a witness's testimony to support its claims or defenses, it must disclose that individual in the Initial Disclosure (or on a Supplemental Initial Disclosure). Failure to identify the witness in the Initial Disclosure (or the supplement) with the individual's name and identifying information is a basis to quash a fact witness deposition of that witness.

FRCP 26(a)(1)(A)(i) requires parties to disclose all fact witnesses that may have discoverable information. FRCP 37 prevents a party from using undisclosed witness testimony: "If a party fails to provide information or identify a witness as required by Rule 26(a)… the party is not allowed to use that information or witness." Fed. R. Civ. P. 37(c)(1). Courts have previously excluded late-identified witnesses even when those witnesses were added due to the untimely death of an opponent's expert witness:

> Plaintiffs' contention that they have been prejudiced by this lost opportunity relies on speculation that Mr. Litton would have attended large parts of the trial, seen plaintiffs' product demonstration there, then fallen to his knees when confronted on cross-examination with evidence adduced by plaintiffs. While this was a possibility, it was far from a certainty. Accordingly, plaintiffs' explanation for their late disclosure is lacking.

SMD Software, Inc. v. EMove, Inc., No. 5:08-CV-403-FL, 2013 U.S. Dist. LEXIS 146864, at *27 (E.D.N.C. Oct. 10, 2013). It is not enough that the undisclosed fact witness may have been identified in documents, depositions or even (collaterally) in interrogatory responses. A witness must be disclosed in an Initial Disclosure or its supplement.

To the extent that a party argues that they already disclosed late-identified witnesses in written discovery, this argument is without merit. The fact that a witness' name might have appeared in produced documents or interrogatory answers does not amount to proper disclosure under FRCP 26(a)(1). *See Hoyle v. Freightliner, LLC*, 650 F.3d 321, 328 – 30 (4th Cir. 2011) (References to a witness in an interrogatory response and in deposition testimony did not prevent preclusion of the witness and was not a substitute for actual FRCP 26(a)(1) disclosure).

12. Privilege for Corporate Consultants.

Corporations use consultants, and sometimes the consultants address matters that wind up in litigation. Litigation consulting experts are protected from disclosure by the work product doctrine and the attorney-client privilege, but can a corporation assert privilege over work product of consultants that are hired to advise the corporation on business matters, independent of litigation? The answer seems to be "No." The attorney-client privilege does not extend to consultants where the communications are intended to assist in a client's business decisions

> It appears in this instance that Segal [the consultant] chose to undertake legal research either **on its own or at the suggestion of a non-lawyer at Empire, and then provided the fruits of that research to the non-lawyer client and to Empire's counsel. Such work by a non-attorney, undertaken without a request by the attorney to assist her, is not within the privilege**…
>
> This document consists of handwritten notes by [consultant] of a meeting of the "Board", presumably of Empire. **The notes do not, on their face, reflect any legal advice by counsel, and appear to refer to a discussion of non-legal aspects of the decision whether to modify Empire's benefit plans**. Since defendant offers no competent evidence that this document reflects attorney-client privileged communications, we conclude that it has not met its burden to demonstrate the applicability of the privilege."

Byrnes v. Empire Blue Cross Blue Shield, 1999 U.S. Dist. LEXIS 17281, at *8 – 9; 12 (S.D.N.Y. Nov. 2, 1999) (emphasis added) citing *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 435 (W.D.N.Y. 1997) (No privilege absent proof that non-attorney was hired to assist counsel).