

GUIDELINES TO CIVIL DISCOVERY PRACTICE IN THE MIDDLE DISTRICT OF ALABAMA

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[INTRODUCTION](#)

Discovery practice in this district of course follows the Federal Rules of Civil Procedure, where the rules apply. In addition, this district's Local Rules 26.1 - 37.1 should be consulted. Neither the rules nor the cases, though, expressly cover all aspects of discovery. Many of the gaps have been filled informally by trial lawyers and judges, and over the years in this district a custom and usage has developed in several recurring discovery situations. These guidelines are not intended as setting forth inflexible rules but as a guide to attorneys as to how discovery rules are normally applied in this district.

[I. Discovery in general.](#)

A. [Courtesy.](#) It may be appropriate to note first that discovery in this district is normally practiced with a spirit of ordinary civil courtesy and honesty. Local lawyers in the court are justifiably proud of the normally courteous practice which has been traditional in the bar of the Middle District of Alabama.

A telephone call or letter is appropriate before filing a notice of deposition or motion to compel discovery. The Federal Rules anticipate that discovery will proceed without the intervention of the court.

B. [Continuing obligation.](#) The Rules expressly provide that in many instances a party is under a duty to supplement prior answers [See F.R.C.P. 26(e)]. Fairness and personal integrity may suggest a broader range of such circumstances. A party may not, by placing supplementation language at the beginning of his discovery request, vary the provisions of the Federal Rules of Civil Procedure.

C. [Preamble matter in discovery requests.](#) Lengthy and complex preambles and definitions in discovery

requests are discouraged, particularly where they operate to give unexpected breadth or surprising effect to the meaning of words which are otherwise reasonably clear.

D. *Reasonable drafting and reading.* Discovery requests should be drafted, read and answered in a reasonable, common sense manner.

E. *Stipulations.* Stipulations in accordance with Rule 29 of the Federal Rules of Civil Procedure are encouraged and honored by the court, unless the stipulation is contrary to a court order.

F. *Commencement of Discovery.* This district's Local Rule 26.2 requires that no discovery be commenced until after a scheduling order is entered, and also requires the parties to engage in a discovery planning meeting. If there are exceptional circumstances which warrant earlier discovery, the parties may seek permission by motion.

G. *Timeliness of discovery responses; sanctions.* The Federal Rules of Civil Procedure set out explicit time limits for responses to discovery requests. Those are the dates by which a lawyer should answer; he should not await a court order. If a lawyer cannot answer on time, he should move for an extension of time in which to answer, and inform opposing counsel so that in the meantime no motion to compel a response will be filed.

Because lawyers are expected to respond when the rules provide, Rule 37(a)(4) provides that if an opposing lawyer must go to court to make the recalcitrant party answer, the moving lawyer is ordinarily awarded counsel fees spent in filing (and, if necessary, arguing) the motion to compel. Rule 37 will be enforced in this district strictly according to its tenor.

Once a court order is obtained compelling discovery, unexcused failure to provide a timely response is treated by the court with the special gravity which it deserves; violation of a court order is always serious and may be treated as contempt, or judgment may be entered, or some other appropriate and measured sanction used.

H. *Discovery cut-off.* The court ordinarily sets a discovery cut-off in its Rule 16 scheduling order. Normally the cut-off date for discovery precedes the pretrial conference, which is usually some four to six weeks prior to the trial date. Lawyers are reminded that discovery requests should be served more than 30 days prior to the cut-off date. Untimely discovery requests are subject to objection on that basis.

I. *Invocation of privilege or work product protection.* In those rare situations in which a privilege (or work product protection) is invoked, it should be invoked in the following manner:

1. An objection based upon privilege should identify the privilege relied upon, but need not be supported by any factual data at the time the objection is made, unless ordered to the contrary;

2. If a motion to compel is filed by the adversary, then the party asserting a privilege normally (and often as required by specific order) has the obligation to establish, by affidavit of a competent witness or other evidence, all facts essential to the establishment of the privilege. The attorney asserting the privilege should also file a brief of law specifically defining the privilege relied upon, and citing legal authorities for the proposition that it applies in the particular case. Where a document is involved, the document should also be in the possession of the attorney so that the court can request its production for in camera review where desirable.

3. Supporting factual detail which should be provided, to the extent that it will not destroy the privilege asserted (see paragraph 7 below), is as follows:

a. For documents.

- (i) Description of what the document is.
- (ii) Its date.
- (iii) Name, address and employer of the author of the document, or the person taking the statement or the like.
- (iv) Subject of the document.
- (v) Persons to whom the document is addressed.
- (vi) Persons indicated thereon as having received copies.
- (vii) Name, address, job title and employer of any person known or believed to have received or seen the document or any copy or summary thereof.
- (viii) Purpose for which the document was created and transmitted.
- (ix) Degree of confidentiality with which it was treated at the time of its creation and transmission, and since.
- (x) Any other facts relevant to the elements of the particular privilege asserted.

b. For oral communications.

- (i) Who made the communication.
- (ii) Date it was made.
- (iii) To whom it was made.
- (iv) Who was present or was in hearing distance at the time it was made.
- (v) Purpose of the communication.
- (vi) Subject matter of the communication.
- (vii) General circumstances regarding its confidentiality at the time it was made and since.
- (viii) Any other facts relevant to the element of the particular privilege asserted.

4. Where the objection is stated at a deposition, based upon privilege or work product protection, a clear statement of the precise privilege relied upon should be made. However, no recitation of facts at that time should be necessary to prevent the witness from answering a question asking for privileged information. On the other hand, a person asking the question should be given wide latitude in questioning the witness about all collateral facts in an effort to develop information as to whether or not the privilege does apply. The court ordinarily views a vague statement of privilege with a jaundiced eye, because that makes it difficult for the attorney asking the question to know what facts he should inquire about as being pertinent to the question of whether the privilege applies. Also, the court is normally

harsh on an attorney who asserts privilege and then obstructs inquiry into pertinent collateral facts.

5. Any affidavits used to support a claim of privilege, either with respect to documents or questions asked at depositions should be tested by the rules of evidence.

6. Any agreement between the attorneys to waive or alter the requirements set out above is normally accepted so long as it does not delay the progress of the case or otherwise interfere with court management.

7. In the very rare case in which disclosure of information listed above itself discloses the privileged information, the document may be produced in camera for the court to determine whether the detailed information shown above must be furnished to opposing counsel (the document should not be furnished in camera without prior court approval).

II. DEPOSITIONS

A. Scheduling. A courteous lawyer is normally expected to accommodate the schedules of opposing lawyers. In doing so he can either prearrange a deposition or notice the deposition while at the same time indicating a willingness to be reasonable about any necessary rescheduling.

B. Persons who may attend depositions. Each lawyer may ordinarily be accompanied at the deposition by one representative of each client, and in technical depositions, an expert.

Business necessity may suggest that the corporate representative be substituted, but this privilege should not be abused.

Lawyers may also be accompanied by records custodians, paralegals, secretaries, and the like, even though they may be called as technical witnesses on such questions as chain of custody or the foundation for the business record rule, or other technical matters.

Aside from these persons, any party may at the deposition invoke "the rule" in Rule 615 of the Federal Rules of Evidence.

While more than one lawyer for each party may attend, ordinarily only one should question the witness or make objections, absent contrary agreement.

C. "The usual stipulation". At the beginning of the deposition the court reporter will look at all the lawyers and say "usual stipulation?" One can normally say "yes" without fear. "The usual stipulation" simply waives a number of deposition technicalities, such as notice of the deposition, signature, competence of the officer administering the oath, filing, notice of filing, and the like and preserves all objections to the questions put to the witness, except for privileges and those to the form of the question.

If there is any question, the court reporter will read the stipulation and allow the lawyers to make desired modifications.

Of course, lawyers are not required to agree to the usual stipulation, but most lawyers ordinarily do.

D. *Objection to the form of the question.* Both Rule 32(d)(3)(B) and "the usual stipulation" provide, among other things, that an objection to the form of the question is waived unless made in the deposition.

Many lawyers simply make such objections (e.g., to leading questions) simply by stating "I object to the form of the question." This has the usual benefits of shorthand renditions and normally suffices, because it is usually apparent that the objection is directed to "leading", or to an insufficient or inaccurate foundation.

The interrogating lawyer may properly ask the objecting party to be more specific in his objection so that the problem with the question, if any, can be understood and if possible cured, as the rule contemplates.

E. *Objectionable questions.* Occasionally in a deposition another lawyer may say to his client, "I instruct you not to answer that question." That is a high-risk practice that is severely circumscribed by Rule 30(d) (i). If an instruction not to answer is made, the lawyers should nevertheless attempt if possible to complete the remainder of the deposition before approaching the court for a ruling on the propriety of the instruction.

The use of an instruction not to answer is normally disfavored by the court. A lawyer who improperly instructs a witness not to answer runs a serious risk that he and his client may be subject to substantial expense awards, including the cost of reconvening the deposition (travel expenses, attorneys' fees, court reporter fees, witness fees, and the like).

If a question is objectionable, a lawyer should simply object in the proper manner and allow the answer to be given subject to the objection, as required by Rule 30(c).

F. *Suggestive objections.* *Suggestive objections. Lawyers should not attempt to prompt answers by the use of suggestive objections. In the event of an abuse of this sort, the court normally enters an appropriate protective order.*

G. *Attorney-deponent conferences during deposition.* *Except during normal breaks and for purposes of determining the existence of privilege or the like, normally at the request of the client, a deponent and his attorney should not normally confer during a deposition. The fact and duration of the conference may be pointed out on the record and, in the event of abuse, an appropriate protective order may be sought.*

H. [Tape-recorded and telephone depositions.](#) Tape-recorded depositions [Rule 30(b)(4)] and telephone depositions [Rule 30(b)(7)] may be taken either by stipulation or by court order. In either event the parties should attempt to agree to the mechanical procedures involved, and for a deadline for the filing of a transcript if the agreement contemplates transcription.

I. [Videotape depositions.](#) Videotape depositions may be taken under the provisions of Rule 30(b)(2) without first having to obtain permission of the court or agreement from other counsel.

While the procedural details of a videotape deposition may vary from case to case, the following procedures should be followed, absent any stipulation to the contrary:

- 1. The deposition of the witness may be recorded on videotape but the testimony of the witness must also be recorded by a certified stenographic reporter and transcribed in the usual manner.*
- 2. The witness shall be first duly sworn on camera by an officer authorized to administer oaths, before whom the deposition is being taken.*
- 3. If any objections are made, the objections shall be ruled upon by the court on the basis of the stenographic transcript, and if any questions or answers are struck by the court, the videotape and sound recording must be edited to reflect the deletions so that it will conform in all respects to the courts rulings.*
- 4. The cameraman or person making the videotape recording shall certify the correctness and completeness of the recording, orally and visually at the conclusion of the deposition, just as would the stenographic reporter certifying a typed record of a deposition.*
- 5. A log index shall be made, to include the identity of the questioner (cross-referenced to the digital reading on the digital counter) a list of exhibits, and the names of all persons and parties present at the depositions.*
- 6. Copies of the videotape recording shall be made at the expense of any parties requesting them.*
- 7. The party desiring to take the videotape deposition shall bear the expenses of arranging for, recording and replaying the videotape of the deposition, and shall bear the usual expenses with respect to a stenographic recordation of the testimony and the transcription of the stenographic record.*
- 8. The original of the videotape recording shall be filed with the clerk of the court and preserved intact by him; deletions shall be made on a copy.*
- 9. The party presenting the videotape deposition at trial is responsible for the expeditious and efficient presentation of the testimony and is expected to see that it conforms in every respect possible to the*

usual procedure for the presentation of witnesses.

J. Depositions of doctors. The deposition of a medical doctor should ordinarily be scheduled by agreement with the doctor, almost always at the doctors office or hospital.

If the circumstances require issuance of a subpoena (duces tecum or otherwise), the deposition should still be scheduled by agreement unless impossible. As a courtesy the lawyer should, prior to or at the time of issuance of the subpoena, notify the doctor of the issuance of the subpoena, the time and place scheduled, and subpoenaed records (if any) and the general subject of examination.

III. Production of documents.

A. Oral requests for production of documents. As a practical matter many lawyers produce or exchange documents upon informal request, often confirmed by letter. Naturally a lawyers word that he will produce a document, once given, is his bond and should be timely kept.

Requests for production of documents should not ordinarily be made on the record at depositions and, if made, no adverse comment should be made on the record if the request is declined.

B. Production of documents. When documents are being produced (unless the case is a massive one) the following general guidelines, though varied to suit the needs of each case, are normally followed:

1. Place. The request may as a matter of convenience suggest production at the office of either counsel. The court expects lawyers to make reasonable accommodation to one another with respect to the place of production of documents.

2. Timing. If a request for production is filed in connection with a deposition notice, lawyers are expected to cooperate to produce the documents before the deposition, to encourage cheaper, shorter, and more meaningful depositions.

Although Rule 30(b)(5) of the Federal Rules of Civil Procedure provides a party responding to a request for production at the time of a deposition has the normal 30 or 33 days in which to respond, the court naturally expects parties to act reasonably in that context. In practice shorter periods are routinely agreed to, and if not, the court may be asked to shorten the time. Lawyers are expected to cooperate on such routine matters without court intervention.

3. Manner of production. All of the documents should be made available simultaneously, and the inspecting attorney can determine the order in which he looks at the documents. While the inspection is in progress, the inspecting attorney shall also have the right to review again any documents which he

has already examined during the inspection.

Under Rule 34(b), the producing party of course has the option to produce the documents either as they are kept in the usual course of business, or labeled to correspond with the categories in the request. In either event, the producing party, if asked, ought to provide a reasonable informal explanation of records keeping procedures.

If a portion of a document is covered by a request, but another portion either is not or is privileged, the producing party is expected to first seek cooperation in the reasonable excision or redaction of non-discovered or non-discoverable matter, only in extraordinary situations approaching the court on the matter.

Simple honesty of course requires that the existence of a requested but protected document be pointed out, not simply ignored.

Naturally whatever comfort and normal trappings of civilization are reasonably available should be offered.

4. [Listing or marking](#). *The parties may want to use some means of listing or marking the documents which have been produced, so that later the produced documents can be differentiated from those which have not been produced. For a relatively few documents, a listing prepared by the inspecting attorney (which should be exchanged with opposing counsel) may be appropriate; when more documents are involved, the inspecting attorney may want to stamp each document with a sequential number. The producing party should allow such stamping to be done so long as marking the document does not materially interfere with the intended use of the document. Of course, originals of certain documents (e. g., promissory notes) should be listed rather than marked.*

A discovering party may take any reasonable measures to insure an accurate record of what was produced, on what date, from whom, and to whom. A responding party is expected to cooperate reasonably.

5. [Copying](#). *While photocopies are often prepared by the producing party for the inspecting party as a matter of convenience or accommodation, the inspecting party has the right to insist on seeing originals.*

The photocopying of documents will generally be the responsibility of the inspecting party, but the producing party must render reasonable assistance and cooperation. In the routine case where documents are produced in a manageable number, the producing party should allow its personnel and its photocopying equipment to be used with the understanding that the inspecting party will pay reasonable charges. If a particularly large quantity of documents is produced, it may be reasonable for the inspecting party to furnish personnel who will make the copies on the producing party's equipment. If still larger quantities of documents are produced, it may be reasonable for the inspecting party to furnish both the personnel and the photocopying equipment (perhaps by delivery of rental equipment to

the premises of the producing party). On occasion it may be reasonable for the documents to be photocopied at some other location.

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

7. General. In most situations the lawyers should be able to reach agreement based upon considerations of reasonableness and convenience. Since the discovery rules contemplate that lawyers and parties will act reasonably in carrying out the objectives of the rules, the court can be expected to deal harshly with a lawyer or party who acts unreasonably to thwart these objectives.

C. Requests for "all documents" and the like. A request for production of documents should be reasonably particularized. A request for "each and every document supporting your claim" is objectionably broad in many cases, but will be evaluated by the court according to the circumstances of the particular case. If a producing party has a reasonably limited number of documents which can be identified in response to such request, then the request is not overly broad. However, if the range of documents which might conceivably be within the scope of such a request is unreasonably large, or investigation of the matter would be unreasonably burdensome, then the request will generally be considered objectionable. As in all discovery matters, the court expects the use of reason and common sense, and expects compliance with Rule 26(g).

IV. Interrogatories.

A. Number of interrogatories. Because every case is different, this court has not adopted a single procrustean limit on the number of interrogatories in every case. In many cases, though, limits on the amount of permissible discovery may be imposed by order.

If a party considers the number or breadth of interrogatories to be burdensome in the context of a particular case, it may of course move to a protective order.

B. Form interrogatories. The indiscriminate use of "form" interrogatories is inappropriate. Interrogatories should be carefully reviewed to make certain that they are not irrelevant or meaningless in the context of an individual case. Sanctions may be imposed by the court for filing form interrogatories where it reasonably appears that the questions are not relevant to any legitimate inquiry.

C. Reference to deposition or document. Since a party is (absent court order) entitled to discovery both by deposition and interrogatories (subject of course to the rather stringent limitations in Rule 26(g) of the Federal Rules of Civil Procedure), it is ordinarily insufficient to answer an interrogatory by saying something such as "see deposition of James Smith," or "see insurance claim." There are a number of reasons for this. For example, a corporation may be required to give its official corporate response even though one of its high-ranking officers has been deposed, since the testimony of an officer may not

necessarily represent the full corporate answer. Similarly, a reference to a single document is not necessarily a full answer, and the information in the document unlike the interrogatory answer is not ordinarily set forth under oath.

In rare circumstances it may be appropriate for a corporation or partnership to answer a complex interrogatory by saying something such as "Acme Roofing Company adopts as its answer to this interrogatory the deposition testimony of James Smith, its Secretary, shown on pages 127-145 of the deposition transcript." In the rare circumstance in which an individual party has already fully answered an interrogatory question in the course of a previous deposition, the deposition may be adopted as the interrogatory answer. The practice must be used carefully and in good faith, however, since for purposes of discovery sanctions "an evasive or incomplete answer is to be treated as a failure to disclose, answer or respond." F.R.C.P. 37(a)(3).

D. "Each and every" question. Interrogatories should be reasonably particularized. For example, an interrogatory such as "identify each and every document upon which you rely in support of your claim in Count Two" may well be objectionably broad in an antitrust case, though it may not in a suit upon a note or one under the Truth-in-Lending Act.

While there is no bright line test, common sense, good faith, and Rule 26(g) usually suggest whether such a question is proper.

E. Rule 33(d). Rule 33(d) of the Federal Rules of Civil Procedure allows a party in very limited circumstances to produce documents in lieu of answering interrogatories. To avoid several recurring abuses of Rule 33(d), the court often enters a Rule 33(d) order which (though it may vary from case to case) usually contains some or all of the following terms, among others:

- 1. The specification of documents to be produced shall be in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the answer as readily as could the party from whom discovery is sought.*
- 2. The producing party shall make its records available in a reasonable manner [i.e., with tables, chairs, lighting, air conditioning or heat if possible, and the like] during the normal business hours, or in lieu of agreement on that, from 8:00 to 5:00.*
- 3. The producing party shall designate one of its regular employees to be available to instruct the interrogating party in the nature and use of the records retention system involved. That person shall be one who is fully familiar with the records system and, if a question arises concerning the records which the designated person cannot answer, the court expects the producing party to act reasonably and cooperatively in locating someone who knows the answer to the question.*
- 4. The producing party shall make available any computerized information or summaries thereof which it either has, or can compute by a relatively simple procedure (for example, a little additional*

programming and computer time).

5. The producing party shall provide any relevant compilations, abstracts or summaries either in its custody or reasonably obtainable by it, not prepared in anticipation of litigation. If it has any documents even arguably subject to this clause but which it declines to produce for some reason, it shall object on the record and call the circumstances to the attention of the parties and the court.

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

7. If it appears likely that the full answer may not or will not be in the documents produced, the order may contain a clause recommending that the court at trial not admit evidence covered by the scope of the interrogatory to the extent that any portion of the answer was not contained in the documents produced under the Rule 33(c) election. Other provisions or sanctions may also be appropriate.

V. Requests for admissions.

Rule 36 of the Federal Rules of Civil Procedure is of course followed in this district in accordance with its terms and, in the light of the serious consequences of an improper response (or failure to respond), every responding party should carefully reread Rule 36, which required more of a response than many lawyers or other courts seem to believe. For example, an answering party may not give lack of information as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.

These guides to discovery are already being followed by most lawyers practicing in this district. Where a question arises, however, it is hoped that attorneys will consult these guidelines for an answer rather than immediately filing a motion with the court.