JUDGE KIM'S MODIFIED AND SUPPLEMENTAL REQUIREMENTS FOR PRE-FILING CONFERENCE OF COUNSEL UNDER LOCAL RULE 37-1

Effective January 1, 2022

1. Until further notice (due to the Covid-19 situation), the requirement that counsel located within the same county of the Central District meet and confer in person is optional. All the same, the required pre-filing discovery conference, no matter where counsel are located, must be done by at least video (e.g., Zoom, Teams, FaceTime). Conference by telephone instead of video may be done only if videoconference is technologically infeasible. **In no circumstances will exchanges of solely written electronic communications (via email, text, or the like) satisfy the pre-filing conference requirement; they may only supplement—but cannot substitute for—the mandatory in-person, video, or telephonic conference of counsel**.[1]

2. During the pre-filing discovery conference, counsel must address and discuss (along with the merits of their discovery dispute) whether compliance with the following discovery procedures would eliminate or narrow the disputed issues:

   a. **Development of a *substantive* discovery plan under Rule 26(f)**. Discovery plans that simply restate—usually in a handful of paragraphs—the non-exhaustive topics enumerated in subsections (f)(3)(A) through (F) with a perfunctory affirmation or pro forma response (e.g., "the parties intend to propound document requests and notice depositions on subjects relevant to the parties' claims or defenses") will not suffice and may be grounds for striking any discovery motion that could or should have been avoided with a substantive discovery planning conference.[2]

   b. **Use of early informal discovery to facilitate and streamline later formal discovery**. Resorting to formal discovery methods to conduct "discovery about discovery" is wasteful pretrial activity. That is why, for instance, the amended Federal Rules now encourage early Rule 34 document requests. *See* Fed. R. Civ. P. 26(d)(2) (2015). "This relaxation of the discovery moratorium [before the Rule 16 pretrial conference was] designed to facilitate focused discussion during the Rule 26(f) conference." 2015 Adv. Comm. Notes to Fed. R. Civ. P. 26(b)(1).[3]

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[1] See generally Roghanizad & Bohns, *Should I Ask Over Zoom, Phone, Email, or In-Person? Communication Channel and Predicted Versus Actual Compliance* (2021).

[2] Creating a meaningful discovery plan during the Rule 26(f) conference became mandatory in 1993—nearly three decades ago. *See* 1993 Adv. Comm. Notes to Fed. R. Civ. P. 26(f). Any doubt that the Federal Rules require a substantive—not pro forma—discovery planning conference was eliminated in 2015 when "Rule 1 [was] amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way." 2015 Adv. Comm. Notes to Fed. R. Civ. P. 1. The purpose of a substantive discovery conference is to rebalance information asymmetry between parties. Plaintiffs and defendants alike start a case "without a full appreciation" of the facts or without "information about the importance of the discovery in resolving the issues." 2015 Adv. Comm. Notes to Fed. R. Civ. P. 26(b)(1). That is why "these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference." *Id.*

[3] In truth, early informal discovery has long been the rule, not the exception. *See*, *e.g.*, 1993 Adv. Comm. Notes to Fed. R. Civ. P. 26(f) ("The parties should also discuss at the meeting what additional information, although not subject to the [initial] disclosure requirements, can be made available informally without the necessity for formal discovery requests.").

c. **Engagement in early informal discovery especially about electronically stored information**. When parties "anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution." 2006 Adv. Comm. Notes to Rule 26(f). That is why Rule 26(f) was amended in 2006 "to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference." *Id.* That conference is the place to agree on the "specific topics" and "time period for which [ESI] discovery will be sought." *Id.* It is when parties should "identify the various sources of such [electronically stored] information within a party's control that should be searched." *Id.* And it is the time to "discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information." *Id.*

   But to do any of these things naturally requires an understanding "of the parties' information systems." *Id.* After all, "[f]raming intelligent requests for electronically stored information" depends on "detailed information about another party's information systems and other information resources." *Id.* And modern information systems or resources now extend well beyond just basic email and word processing programs. *See*, *e.g.*, The Sedona Conference *Database Principles: Addressing the Preservation and Production of Databases and Database Information on Civil Litigation* (2014). So it is vitally "important for counsel to become familiar with those systems *before* the [discovery] conference." 2006 Adv. Comm. Notes to Rule 26(f) (emphasis added). And that may require "*identification of, and early discovery from*, individuals with special knowledge of a party's computer systems." *Id.* (emphasis added).[4]

d. **Use of discovery methods in strategic sequences or in phases, including early limited Rule 30(b)(6) depositions, to learn predicate facts essential for later discovery requests**. *See* Fed. R. Civ. P. 26(d)(3)(A); *see also* Fed. R. Civ. P. 26(f)(3)(B) (contemplating discovery "in phases" and "limited to or focused on particular issues"). If informal discovery cannot lay the foundation for specific, targeted, and particularized formal discovery requests, then early and focused depositions (for instance) of persons most knowledgeable on limited topics may help set the stage. Dragnet-style document requests and interrogatories, in other words, need not always be the discovery tools of first choice.[5]

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[4] As in most states, California requires that attorneys licensed in the state maintain competence in technology. *See* Rule 1.1 of Cal. R. Prof. Conduct (eff. Mar. 22, 2021). "The duties set forth in [Rule 1.1] include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology." *Id.*, Cmt 1.

[5] That is why, for instance, parties have been urged since December 2020 to discuss Rule 30(b)(6) witnesses and topics in advance during the Rule 26(f) conference. *See* 2020 Adv. Comm. Notes to Fed. R. Civ. P. 30(b)(6). Such early discussions are rarely wasteful since Rule 30, as amended in 2020, requires parties to convene a separate conference in any event before noticing PMK depositions. The purpose of that conference is to have "[c]andid exchanges" and "good faith" discussions about the "organization's information structure," the "number of witnesses and the matters on which each witness will testify," and "any other issue that might facilitate the efficiency and productivity of the deposition." 2020 Adv. Comm. Notes to Fed. R. Civ. P. 30(b)(6). And since that "process of conferring" is intended to "be iterative," *id.*, there is little if anything lost by starting those discussions sooner than later.

e. **Document requests drafted with reasonable particularity and responses to those requests with no general or boilerplate objections.** *See* Fed. R. Civ. P. 34(b)(1)(A), (b)(2)(B)-(C).[6] For instance, requests for "all communications" or "all documents" that "refer or relate" to broad topics are certain to draw objections and present intractable enforceability problems.[7] So too are document requests with no reasonable and logical timeframe limits.[8] Likewise, responses to document requests that contain general or boilerplate objections and also fail to specify whether responsive documents are being withheld based on a specific stated objection violate amended Rule 34(b)(2). *See* 2015 Adv. Comm. Notes to Fed. R. Civ. P. 34.[9] The "confusion"—and thus needless discovery dispute—that inevitably ensues "when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections" is precisely what the 2015 amendments to Rule 34 were intended to "end." *Id.*

f. **Production of documents (and associated privilege logs) within reasonable—but set—deadlines**. *See* 2015 Adv. Comm. Note to Fed. R. Civ. P. 34(b)(2)(B) ("The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.").[10] Of course, the parties are expected to communicate and cooperate about deadlines: requesting parties may not unreasonably refuse to extend deadlines for rolling productions or short uncontrollable delays, nor may responding parties seek extensions for purposes of tactical delay or to cover for lack of diligence.

g. **Use of the Rule 33(d) option to produce business records in response to an interrogatory in the correctly narrow and limited way it is intended.** Rule 33(d) provides no basis to simply produce—and then refer to—documents when responding to an interrogatory. That rule, instead, supplies only an "option to produce business records"

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[6] *See also generally* The Sedona Conference *Primer on Crafting eDiscovery Requests with "Reasonable Particularity"* (2022); The Sedona Conference *Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests* (2018).

[7] *See, e.g.*, *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008); *In re Milo's Kitchen Dog Treats Consol. Cases*, 307 F.R.D. 177, 179–80 (W.D. Pa. 2015); *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 575 (N.D. Tex. 2018).

[8] *Compare, e.g.*, *Guerra v. Balfour Beatty Communities, LLC*, 2015 WL 13794439, at *6-7 (W.D. Tex. Nov. 19, 2015); *Locke v. Swift Transp. Co. of Ariz. LLC*, 2019 WL 430930, at *1 (W.D. Ky. Feb. 4, 2019).

[9] *Accord Katz v. Shell Energy N. Am. (US), LP*, __F. Supp. 3d__, 2021 WL 4477626, at *2 (D. Mass. Sept. 30, 2021); *Infanzon v. Allstate Ins. Co.*, 335 F.R.D. 305, 311 (C.D. Cal. 2020); *Smash Tech., LLC v. Smash Sols., LLC*, 335 F.R.D. 438, 446 (D. Utah 2020); *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 580 (N.D. Tex. 2018); *Ceuric v. Tier One, LLC*, 325 F.R.D. 558, 561 (W.D. Pa. 2018); *Liguria Foods, Inc. v. Griffith Lab'ys, Inc.*, 320 F.R.D. 168, 186 (N.D. Iowa 2017).

[10] *Accord Evox Prods. v. Kayak Software Corp.*, 2016 WL 10586303, at *4 (C.D. Cal. June 14, 2016) (responses that do "not specify the date for completion of [] production" violate amended Rule 34); *Fischer v. Forrest*, 2017 WL 773694, at *3 (S.D.N.Y. Feb. 28, 2017) ("[R]esponses [that] do not indicate when documents and ESI that defendants are producing will be produced" violate amended Rule 34).

instead of a substantive response under a specific and narrow set of conditions. Fed. R. Civ. P. 33(d) (if the answer may be derived from "examining, auditing, compiling, abstracting, or summarizing" business records *and* the burden of deriving that answer is "substantially the same for either party"). It then specifies the form of the response that must be given if those conditions are met so that the "interrogating party" can "locate and identify" the pertinent business records "as readily as the responding party could." Fed. R. Civ. P. 33(d)(1). And last, it describes a procedure for the "interrogating party" to "examine and audit" the pertinent business records and then to make "copies, compilations, abstracts, or summaries." Fed. R. Civ. P. 33(d)(2). None of these things, separately or collectively, permits an interrogatory response that merely cross-references a parallel production of documents.

h. **Understanding the correct purpose and effect of Rule 26(e)**. The duty to supplement discovery responses or document productions under Rule 26(e) is no safe harbor to responding parties for belated responses or productions that they could or should have made sooner with due diligence and reasonable inquiry. *See In re Delta/AirTran Baggage Fee Antitrust Litig.*, 846 F. Supp. 2d 1335, 1357-58 (N.D. Ga. 2012); Fed. R. Civ. P. 26(g)(1). Rule 26(e), in other words, imposes an obligation to supplement prior document productions when new information is found that could not have reasonably been discovered before; it is not a license to produce documents whenever they may happen to be found so long as it happens to be before the fact discovery cutoff. There is no such "discovery is ongoing" escape hatch to excuse unjustified and unnoticed late or last-minute productions or responses. Any responsive documents or discovery responses produced late without good reason for why they were not disclosed sooner may subject the responding party to sanctions under Rules 37(b)(2)(A) and (C). *See also* Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(g)(3).

3. The filing of a motion to compel may not certify just in general terms that the pre-filing conference of counsel required by Local Rule 37-1 was satisfied. **Instead, the notice of that motion must certify, consistent with Rule 26(g), that**:

   a. Counsel of record for the parties held their pre-filing conference of counsel as required by Local Rule 37-1 [*in person/by video/via telephone (because videoconference was technologically infeasible)*] on [*date(s)*] for [*time*] hour(s).

   b. To eliminate or narrow the disputed discovery issues, counsel of record for the parties discussed not only the merits of their dispute(s) but also addressed compliance with the discovery procedures explained in Judge Kim's Modified and Supplemental Local Rule 37-1 Requirements.

   c. Counsel of record for the parties agree that the remaining disputed discovery issues cannot be eliminated or narrowed either by further discussion of their merits or by ensuring compliance with the discovery procedures explained in Judge Kim's Modified and Supplemental Local Rule 37-1 Requirements.

Failure to certify all three statements as specified here in the notice of any motion to compel may lead to the striking of that motion without further notice.