The Iowa State Bar Association

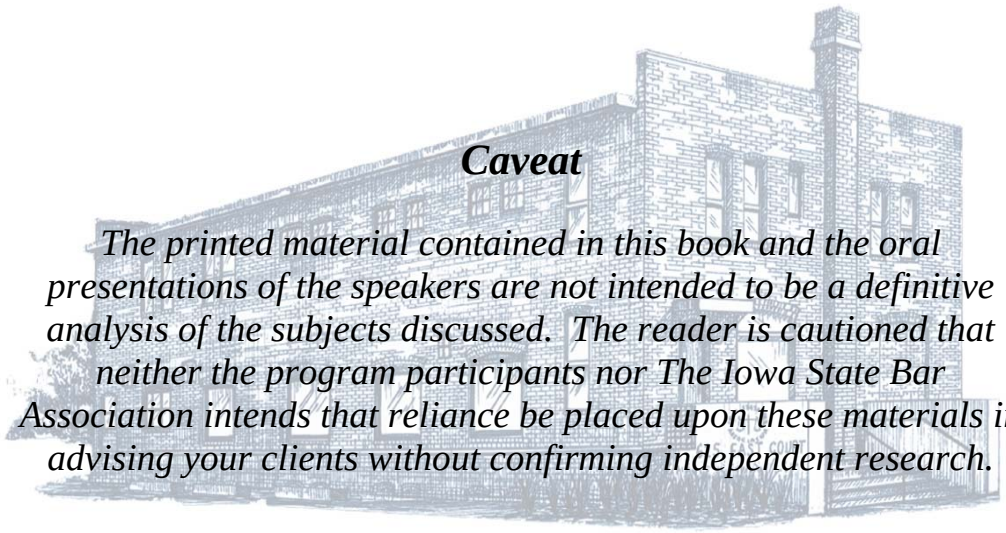
The Iowa State Bar Association's
Federal Practice Committee presents

2016 Federal Practice Seminar

Friday, December 16, 2016

Embassy Suites, Des Moines

The Iowa State Bar Association



Caveat

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THE IOWA STATE BAR ASSOCIATION'S
FEDERAL PRACTICE SEMINAR PRESENTS

2016 FEDERAL PRACTICE SEMINAR

FRIDAY, DECEMBER 16, 2016

8:30 - 9:30 - Article III Judges Panel – Moderator: Prof. Laurie Dore, Drake Law School

9:30 - 10:30 - Magistrate Judges Panel – Moderator: Prof. Emily Hughes, University of Iowa College of Law

10:30 - 11:00 - Break

11:00 - 12:15 - Current Freedom of the Press Issues Panel – Speakers: Gene Policinski, COO, Newseum Institute; David Hudson, Jr., Newseum Institute; Hon. Robert Pratt, Southern District of Iowa; Michael Gartner and Michael Giudicessi, Faegre, Baker, Daniels LLP

12:15 - 1:30 – Lunch (not provided with registration) - Speaker: Hon. Rebecca Goodgame Ebinger, Southern District of Iowa

1:30 - 2:30 - Ethics – Prof. Laurie Levenson, Loyola Law School

2:30 - 3:30 - Civil Breakout: Active Case Management
Panel: Hon. Helen Adams, United State Magistrate Judge for the Southern District of Iowa; Hon. Abbie Crites-Leoni, United State Magistrate Judge for the Eastern District of Missouri; Hon. Teresa James, United State Magistrate Judge for the District of Kansas; and Tim Hill, Bradley & Riley

2:30 - 3:30 - Criminal Breakout: Current Issues in Federal Criminal Practice
Moderator: Hon. C. J. William, United States Magistrate Judge for the Court Northern District of Iowa
Panel: Peter Deegan, U.S. Attorney's Office, Northern District of Iowa; Andrew Kahl, U.S. Attorney's Office; Jim Whalen, Federal Public Defender; Angela Campbell, Dickey & Campbell Law Firm PLC; and Nick Klinefeldt, Faegre Baker Daniels LLP

3:45 - 4:30 - New Local Rules – Speakers: Hon. Helen Adams, United State Magistrate Judge for the Southern District of Iowa and Hon. C.J. Williams, United States Magistrate Judge for the Court Northern District of Iowa

CLE CREDIT: 6 hours of State CLE which includes 6 hours of Federal CLE and 1 hour of Ethics
ACTIVITY ID: 247817

The Iowa State Bar Association's
Federal Practice Seminar presents

2016 Federal Practice Seminar

Friday, December 16, 2016

Hot Topics in Ethics

1:30-2:30 pm

Presented by
Prof. Laurie Levenson
Loyola Law School
919 S. Albany St.
Los Angeles, California 90015

Friday, December 16, 2016

FEDERAL PRACTICE SEMINAR

IOWA STATE BAR

"HOT TOPICS IN ETHICS"

Professor Laurie L. Levenson
Loyola Law School
December 16, 2016

Hypo #1

[Ready for Your Close Up?]

John Morelatch represents Acme Corporation. Acme was recently sued for employment discrimination against women under Title VII. The President of the company, Bill Crosby, is very upset about the lawsuit. The lawsuit has been highly publicized, threatening his reputation and that of his company.

Crosby wants to counter the negative publicity. In fact, he has spoken "off the record" to local reporters and is scheduled to do an interview with a local television station. Crosby is also up at 3:00 a.m. sending Twitter and Snapchat messages such as, "*Nasty allegations. So wrong. All incompetent employees know how to do is sue."* Finally, Crosby has commented that it will be "an uphill battle" to get a fair trial given that the judge's wife is well known in the community as being a "women's libber."

A. Which, if any, of Crosby's actions pose an ethical problem for Morelatch?

1 - Speaking to reporters
2 - Posting comments on social media
3 - Discussing the judge's possible bias
4 - All of the above
5 - None of the above

B. What is the best way for a lawyer to deal with this issue?

1 - Withdraw from the case
2 - Make the media appearances for the client
3 - Join the client during media interviews
4 - Provide a disclaimer regarding the client's remarks
5 - None of the above

Authorities

Iowa Rule of Professional Conduct 32:3.6 (Trial Publicity)

Iowa Rule of Professional Conduct 32:3.5 (Impartiality and Decorum of Tribunal)

Iowa Rule of Professional Conduct 32:1.8(f)(2) (Conflicts of Interest: Current Clients: Specific Rules – Interference with Lawyer's Independence of Professional Judgment)

Iowa Rule of Professional Conduct 32:2.1 (Advisor)

Hypo #2A

[Judicial Speech]

Judge Mark Bendet is handling another high-profile case in his courtroom. Frankly, he is rather fed up with the comments he hears from others regarding the case. He believes there has been a tremendous amount of misinformation regarding the case. Which of the following approaches would be appropriate for the judge to do to correct the public record:

1 - Talk privately to a reporter off the record regarding the problems with the reporting or ask his clerk to do so;
2 - Publish an op-ed regarding the case;
3 - Ask his local federal bar association to defend him in the press;
4 - Write an opinion addressing both the legal issues in the case and the misinformation in the press;
5 - Speak at an upcoming symposium where he can mention the inaccuracies regarding the coverage of the case
6 - None of the above

Authorities

Code of Judicial Conduct, Canon 2A (Appearance of Impropriety)

Code of Judicial Conduct, Canon 3A(6) (Judge May Not Make Public Comments)

Hypo #2B

[The Tweeting Judge]

If the President can do it, Judge Bendet thinks he should be able to do so too. Every morning, he sends out a short Tweet regarding his upcoming day. Yesterday, it read: "They're back. The lawyers who never stop talking." Judge Bendet also posts on his Facebook page a picture of himself at a recent Bar Association event. In the picture, Bendet is standing with lawyers who have recently had cases in his courtroom.

Has Judge Bendet acted ethically?

1 - Yes
2 - No

Authorities

Code of Judicial Conduct, Canon 3 (Judges' Impartiality)

Hypo #3

[Jurors Misbehavin']

Judge Erlinger has spent the last six weeks presiding over a complicated wire fraud case. Before trial, she instructed jurors "not to read anything about the case in the newspaper, not to listen to anything about the case on the radio, not to watch anything about the case on the television, not to do any independent investigation regarding the case, and not to discuss the case with anyone outside of the jury deliberation room."

During jury deliberations, the defense lawyer brings to the court's attention that one of the jurors has been posting comments about her jury service on her Facebook page. The comments range from, "I'm glad we'll be out of here soon" to "The defense is the most inarticulate guy I have ever heard. He couldn't argue his way out of a paper bag." The defense learned of these comments when his law clerk posed as one of the juror's friends to see the Facebook page.

Questions

A. Has the defense lawyer acted ethically?

1 - Yes
2 - No

B. Should Judge Erlinger consider the juror's comments on Facebook in deciding on a motion for a mistrial?

1 - Yes
2 - No

C. If a lawyer suspects a juror has been posting comments about a case on a Facebook page, can the judge order the juror to make the Facebook page available for inspection?

1 - Yes
2 - No

D. Finally, is it ethical for a lawyer to Google a juror for jury selection?

1 - Yes
2 - No

Authorities

ABA Model Rules of Professional Conduct 4.1 (Truthfulness in Statements to Others)

MRPC 4.1 (Truthfulness in Statements to Others)

Romano v. Steelcase, Inc., No. 2006-2233, 2010 N.Y. Slip Op. 20388 (N.Y. Sup. Ct. Sept. 21, 2010)

Philadelphia Bar Association, Professional Guidance Committee Opinion 2009-02 (March 2009)

Association of the Bar of the City of New York Committee on Professional Judicial Ethics, Formal Opinion 2010-2

N.Y. State Bar Ass'n Ethics Opinion 843 (2010)

A Trial Lawyer's Guide to Social Networking Sites, Part I, available at http://jurylaw.typepad.com/deliberations/2007/10/a-trial-lawyers.html

Kimball Perry, *Juror Booted for Facebook Comment*, Dayton Daily News, Feb. 1, 2009, at A6.

Brian Grow, *The Internet v. the Courts: First in a Series*, Westlaw News & Insight, available at http://westlawnews.thomson.com/National_Litigation/News/ 2010/12

Crino v. Muenzen, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010)

Johnson v. McCullough, M.D., 306 S.W.3d 551 (Mo. Sup. Ct. 2010)

Julie Kay, *Social Networking Sites Help Vet Jurors*, Law Technology News, Aug. 13, 2008, available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202423725315

Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, available at http://www.reuters.com/assets/print?aid=USTRE71G4VW20110217

Charles Toutant, *N.J. Court OKs Googling Jurors During Voir Dire*, N.J. Law Journal (Sept. 13, 2010)

Hypo #4

[Tweet, Tweet]

During trial, Judge Erlinger notices that one of the spectators is using a handheld device. It turns out that the spectator is "Tweeting" the highlights of the proceedings to lawyers who will be trying a similar case in a different courtroom in the near future.

Question

Is the Tweeting permissible?

Authorities

Fed. R. Crim. Proc. 53 (Courtroom Photographing and Broadcasting Prohibited)

United States v. Shelnutt, 2009 U.S Dist. LEXIS 101427 (M.D. Ga. Nov. 2, 2009)

Katie Mulvaney, New Rule Prohibits Blogging, Tweeting in Courtroom, Providence Journal (Jan. 4, 2011)

Thomas B. Scheffey, *Awaiting a Verdict on Tweeting from the Courtroom*, Conn. Law Trib. (Dec. 10, 2010)

Paul Lilly, *Federal Judge Nixes Courtroom Tweeting*, MAXIMUM PC, Nov. 10, 2009, available at http://www.maximumpc.com/pring/article/news/federal_judge_nixes_co

Hypo #5

[Too Busy for Court?]

Bruce Skywalker has requested an extension of the discovery hearing date because he claims that he is scheduled for major surgery on the currently scheduled date of the hearing, Friday, August 16, 2016. While surfing the Internet, the judge sees that the lawyer is listed as hosting an upcoming golf tournament on August 16, 2016.

Question

Can the court use the information you found while surfing the Internet to deny the motion for a continuance?

1 - Yes
2 - No

Authorities

Code of Conduct for United States Judges, Canon 3A(4)

ABA Model Code 2.9(C) & Commentary [6]

Fed.R.Evid. 201(b) (Judicial Notice)

Kiniti-Wairimu v. Holder, 312 Fed. Appx. 907 (9th Cir. Feb. 23, 2009) (unpublished opinion) (Immigration judge violated petitioner's due process rights by doing independent Internet research and using it to make credibility determination)

Henry Gottlieb, *3rd Circuit Appeal Challenges Judge's Outside Research in Bench Trial*, http://www.law.com (Aug. 20, 2009)

Cynthia Gray, *The Temptations of Technology*, 31 Judicial Conduct Reporter 1 (Summer 2009)

Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 Review of Litigation 1 (Fall 2008)

Hypo #6A

["Just Trying to be Helpful"]

John Warde writes a legal blog for his law firm. He regularly writes short commentaries regarding utility law and regulatory compliance. His recent blog discussed his brilliant work for a client. As touted in the blog, the client had made some colossal blunders, but with some keen legal maneuvering, Warde saved the client millions of dollars. In truth, Warde probably saved his client a few thousand dollars, but it was a savings nonetheless.

In a second blog entry, Warde dissects a recent decision by Judge Harvey. Warde notes that the judge was off base in his analysis of the case and seems to have a hard time handling certain types of matter.

Finally, Warde posts a blog analysis relating to an issue in one of his upcoming cases. Warde is fairly confident that one of the judge's law clerks may read the blog if the law clerk does any Internet research on the case.

Question:

Does Warde's conduct violate any ethical rules or are his blogs protected by the First Amendment?

1 - Yes, blog violates ethical rules
2 - No, Warde is protected by the First Amendment

Authorities

Christina Vassiliou Harvey, Mac R. McCoy, Brook Sneath, 10 Tips for Avoiding Ethical Lapses When Using Social
Media, http://www.americanbar.org/publications/blt/2014/01/03_harvey.html

Iowa Rule of Professional Conduct 32:4.1 (truthfulness in statements to others)

Iowa Rule of Professional Conduct 32:1.6 (confidentiality of information)

Iowa Rule of Professional Conduct 32:3.5(a) (improperly influencing judge)

ABA Formal Opinion No. 10-457 (posting information regarding clients on website)

ABA Formal Opinion No. 10-457 and 8.4 (false and misleading statements)

Hypo #6B

[Bench Blogging?]

Is a judge allowed to blog?

1 - Yes
2 - No

Authorities

- *Bench Blogging*, http://www.judges.org/pdf/cip_summer07.pdf
- Judges All Atwitter Over New Media: Social Networking Caveats for Judges and All Professionals, http://www.abanow.org/2009/08/judges-all-atwitter-over-new-media/#

Hypo #7

[Rate Your Judge]

One of Megan Flinn's favorite activities is to go on Avvo LinkedIn and other websites that evaluate attorneys and judges. She regularly poses as someone else and gives herself top rankings. She then rates, and asks her friends to rate, her opposing counsel and the judges before whom she appears. For judges who don't rule her way, she skewers them. For judges who rule in her favor, she showers them with praise. As for other lawyers, Flinn gives them favorable ratings if they send business to her. Otherwise, they get failing marks.

Has Flinn acted ethically?

Authorities

Christina Vassiliou Harvey, Mac R. McCoy, Brook Sneath, 10 Tips for Avoiding Ethical Lapses When Using Social Media,
http://www.americanbar.org/publications/blt/2014/01/03_harvey.html

South Carolina Ethics Opinion 09-10 (rules for use of Avvo and LinkedIn)

Hypo #8

[No Good Deed Goes Unpunished]

Laurie Flevinson has a client who is threatening to bring a malpractice claim, ethics complaint, and allegations of ineffective assistance of counsel. Flevinson has a file full of privileged and confidential information that shows she acted entirely properly in handling the case.

Flevinson wants to provide the confidential information to her insurance provider. Is it proper to do so?

1 - Yes
2 - No

Must she take any special steps before making such disclosures?

Authorities

Iowa Ethics Opinion 15-03 (July 15, 2015) (disclosure of confidential information)

Hypo #9

[Beware of E-mail]

You are involved in a contentious case when, suddenly, you receive a copy of an email that appears to be a confidential memorandum between opposing counsel and his client. Evidently, your adversary does not realize he has accidentally included you on the routing information.

You should:

1 - Buy a lottery ticket because today is your lucky day
2 - Read the email, but not use the information in your case
3 - Delete the email
4 - Inform opposing counsel of the mistake
5 - None of the above

Does it matter that your adversary never took steps to encrypt or otherwise protect communications with his client?

Authorities

Iowa Ethics Opinion 15-02 (January 28, 2015) (inadvertent disclosures of emails)

Iowa Ethics Opinion 15-01 (January 28, 2015) (confidentiality and emails)

Hypo #10

[Warning Shot]

You are at your wit's ends. Opposing counsel has played fast and loose with discovery, constantly harasses your witnesses, and has used heated rhetoric in speaking to the media about your case. You are considering sending a note to opposing counsel threatening to report him to the Bar authorities for discipline if he does not stop this behavior.

Would it be ethical to send such a note?

Authorities

Iowa Ethics Opinion 15-02 (January 28, 2015) (threatening attorney discipline)

Hypo #11

["Of Counsel"]

Catherine Crownie has been a Super Lawyer for years in your community. She is finally moving toward retirement and has decided to work "of counsel" to two or three health care firms in town.

Is it permissible for Crownie to be Of Counsel to more than one firm?

Authorities

Iowa Ethics Opinion 13-01 (July 9, 2013) (rules for "of counsel")

Hypo #12

[Mentor-Mentee]

Ryan Kuperman is a great mentor to young lawyers and law students interested in a career in mass torts and class actions. As it turns out, two of Kuperman's mentees are summer associates in another firm.

To what extent can Kuperman's mentees ask him about their work for their summer firms?

Authorities

Iowa Ethics Opinion 13-04 (August 27, 2013) (mentor-mentee rules)

Hypo #13

[Cheaper by the Dozen]

Steve Marzo is overwhelmed in his law practice. He doesn't really want to commit to hiring new associates, but he could use some additional help. He decides to hire several contract lawyers. These contract lawyers regularly provide assistance to other lawyers who handle insurance coverage cases.

What ethical responsibilities come with the hiring of a contract lawyer?

Authorities

Iowa Ethics Opinion 13-03 (August 27, 2013) (contract lawyers)

Additional Authorities

JUDICIAL ETHICS AND ETHICAL ISSUES IN USIN OF SOCIAL MEDIA

Link to the Committee's Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees (April 2010):

http://jnet.ao.dcn/social-media-resource-packet

Code of Judicial Conduct, Canon 2: Appearance of impropriety

Code of Judicial Conduct, Canon 3A(4): Ex Parte Communications

Code of Judicial Conduct, Canon 3C: Disqualification if Impartiality Reasonably Questioned

Leslie W. Abramson, *The Judicial Ethics of Ex Parte Communications*, 37 Hous. L. Rev. 1343 (2000)

Cynthia Gray, *The Temptations of Technology*, 31 Judicial Conduct Reporter 1 (Summer 2009).

So. Carolina Ethics Advisory Op. 11-05 ("daily deal" website)

2011 Formal Ethics Opinion 10 (group coupon websites)

New York State Bar Op. 897 (use of "daily deal" websites)

North Carolina State Bar Op. (2011) (use of websites to advertise)

Arizona State Bar Opinion 13-01 (Apr. 2013) (dangers of using social media during practice)

Hunter v. Virginia State Bar (Feb. 2013) (attorney blog posts)

LINKEDIN AND BLOGGING (IMPLICATIONS OF SOCIAL NETWORKING)

1. ***Our Linked-in Judiciary.*** The original article by Robert J. Amborgi, where he reveals which judges are on LinkedIn, and then discusses possible ethical pitfalls associated with this kind of networking:
http://legalblogwatch.typepad.com/legal_blog_watch/2009/08/our-linked-in-judiciary.html

2. ***Judicial Education on a Shoe String: (Suggestion #10) Join an Online Networking Group***. This Case-in-Point article supports social networking among judges because it can enhance public understanding of the judiciary; it also provides a vehicle (just as the bankruptcy discussion forum does) for judges to help each other with challenges involving caseloads and media contact: http://www.judges.org/pdf/caseinpoint_2009.pdf p. 6-7

3. ***Judges All Atwitter Over New Media: Social Networking Caveats for Judges and All Professionals.*** Judge Susan Criss suggests that social networking will enhance the jobs of legal professionals and allow them to do these job better.

http://www.abanow.org/2009/08/judges-all-atwitter-over-new-media/#

4. ***Social Networks Help Judges Do Their Duty***. This article points to three different judges who provide examples of how social networking helps them do their job better. One judge claims it helps in determining whether or not to grant continuances to lawyers and to monitor their (the lawyers') interaction with witnesses and parties. Another judge says that social networking allows her to supervise the activities of juvenile offenders, while another judge asserts that networking often produces evidence about clients' behavior to aid in rulings and sentencing.

http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202433293771

5. ***Bench Blogging:*** Where should judges, lawyers and court personnel draw the line when it comes to blogging and other communications on the Web? The Do's and Don'ts for blogging judges.

http://www.judges.org/pdf/cip_summer07.pdf Starting on p. 3

6. ***Judge reprimanded for discussing case on Facebook.*** A judge in North Carolina discussed a case with an attorney on Facebook, which resulted in a new trial granted to the defendant, disqualification of the judge, and a reprimand by the Judicial Standards Commission. This first link is the actual story from a North Carolina newspaper. The second link is the public reprimand by the JSC with the facts stating how the judge compromised ethical standards:

http://www.the-dispatch.com/article/20090601/ARTICLES/905319995/1005?Title=Judge-reprimanded-for-discussing-case-on-Facebook

http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf

7. John Schwartz, ***For Judges on Facebook, Friendship Has Limits***, N.Y. Times (Dec. 11, 2009). This article discusses Florida's Judicial Ethics Advisory Committee's decision to recommend against judges "friending" on Facebook because it creates an appearance of impropriety. In particular, when judges "friend" lawyers who may appear before them, it creates the appearance of a conflict of interest because it "reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge."

8. William Glaberson, ***Judge is Censured for Efforts to Secure a Pay Raise***, N.Y. Times (Dec. 29, 2009). This article discusses New York's discipline of a judge for sending a mass e-mail message to other judges suggesting that refusing to handle certain kinds of cases was "a tactic" and "a weapon" that could help pry a pay increase out of states' legislators ("those clowns") in Albany.

GOOGLE AND OTHER WEB SEARCH CASES

Search Engines Take the Stand: This article discusses cases where judges used Google searches to issue their opinions or rulings. Objections to such actions are also discussed:
http://news.cnet.com/2100-1032_3-5211658.html

Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case? The ABA's evaluation of judges using Web searches to discover additional facts, as well as to check alleged facts, that have influenced past court decisions. Proposed amendments to the current Model Code of Conduct are discussed which would prohibit judges from conducting independent Web searches pertinent to the case. (It appears that the suggestions for prohibition of Web search by judges were not implemented.)
http://www.abanet.org/judicialethics/resources/TPL_jethics_internet.pdf\
(This link does not open directly. To access, you'll need to Google "judicial ethics and the internet"; the very first result is the article.
It is authored by David H. Tennant and Laurie M. Seal

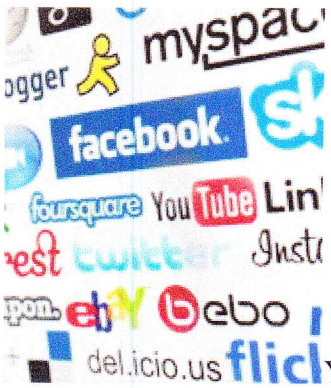
Dennis Kennedy, *Broadening Search: New Tools, Approaches Raise the Question: Is Google Enough*, ABA Journal, at 28 (November 2009). This article offers additional types of search engines and techniques that may be helpful when doing Internet research.

10 Tips for Avoiding Ethical Lapses When Using Social Media

Christina Vassiliou Harvey, Mac R. McCoy, Brook Sneath

About the Authors:

Christina Vassiliou Harvey is an associate at Lomurro Davison Eastman & Muñoz PA in Freehold, New Jersey. Mac R. McCoy is a shareholder at Carlton Fields Jorden Burt, P.A. in Tampa, Florida. Brook Sneath is a business development and marketing coordinator at Phelps Dunbar LLP in Tampa, Florida.



You may be among the thousands of legal professionals flocking to social media sites like LinkedIn, Facebook, Twitter, or Google+ to expand your professional presence in the emerging digital frontier. If so, have you paused to consider how the ethics rules apply to your online activities? You should. Some of the ethical constraints that apply to your social media usage as a legal professional may surprise you. Moreover, legal ethics regulators across the country are beginning to pay close attention to what legal professionals are doing with social media, how they are doing it, and why they are doing it. The result is a patchwork quilt of ethics opinions and rule changes intended to clarify how the rules of professional conduct apply to social media activities.

This article provides 10 tips for avoiding ethical lapses while using social media as a legal professional. The authors cite primarily to the ABA Model Rules of Professional Conduct (RPC) and select ethics opinions from various states. In addition to considering the general information in this article, you should carefully review the ethics rules and ethics opinions adopted by the specific jurisdiction(s) in which you are licensed and in which your law firm maintains an office.

1. Social Media Profiles and Posts May Constitute Legal Advertising

Many lawyers – including judges and in-house counsel – may not think of their social media profiles and posts as constituting legal advertisements. After all, legal advertising is limited to glossy brochures, highway billboards, bus benches, late-night television commercials, and the back of the phonebook, right? Wrong. In many jurisdictions, lawyer and law firm websites are

deemed to be advertisements. Because social media profiles (including blogs, Facebook pages, and LinkedIn profiles) are by their nature websites, they too may constitute advertisements.

For example, the Florida Supreme Court recently overhauled that state's advertising rules to make clear that lawyer and law firm websites (including social networking and video sharing sites) are subject to many of the restrictions applicable to other traditional forms of lawyer advertising. Similarly, California Ethics Opinion 2012-186 concluded that the lawyer advertising rules in that state applied to social media posts, depending on the nature of the posted statement or content.

2. Avoid Making False or Misleading Statements

The ethical prohibition against making false or misleading statements pervades many of the ABA Model Rules, including RPC 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), 7.1 (Communication Concerning a Lawyer's Services), 7.4 (Communication of Fields of Practice and Specialization), and 8.4 (Misconduct), as well as the analogous state ethics rules. ABA Formal Opinion 10-457 concluded that lawyer websites must comply with the ABA Model Rules that prohibit false or misleading statements. The same obligation extends to social media websites.

South Carolina Ethics Opinion 12-03, for example, concluded that lawyers may not participate in websites designed to allow non-lawyer users to post legal questions where the website describes the attorneys answering those questions as "experts." Similarly, New York State Ethics Opinion 972 concluded that a lawyer may not list his or her practice areas under the heading "specialties" on a social media site unless the lawyer is appropriately certified as a specialist – and law firms may not do so at all.

Although most legal professionals are already appropriately sensitive to these restrictions, some social media activities may nevertheless give rise to unanticipated ethical lapses. A common example occurs when a lawyer creates a social media account and completes a profile without realizing that the social media platform will brand the lawyer to the public as an "expert" or a "specialist" or as having legal "expertise" or "specialties." Under RPC 7.4 and equivalent state ethics rules, lawyers are generally prohibited from claiming to be a "specialist" in the law. The ethics rules in many states extend this restriction to use of terms like "expert" or "expertise." Nevertheless, many professional social networking platforms (e.g., LinkedIn and Avvo) may invite lawyers to identify "specialties" or "expertise" in their profiles, or the sites may by default identify and actively promote a lawyer to other users as an "expert" or "specialist" in the law. This is problematic because the lawyer completing his or her profile cannot always remove or avoid these labels.

3. Avoid Making Prohibited Solicitations

Solicitations by a lawyer or a law firm offering to provide legal services and motivated by pecuniary gain are restricted under RPC 7.3 and equivalent state ethics rules. Some, but not all, state analogues recognize limited exceptions for communications to other lawyers, family

members, close personal friends, persons with whom the lawyer has a prior professional relationship, and/or persons who have specifically requested information from the lawyer.

By its very design, social media allows users to communicate with each other or the public at-large through one or more means. The rules prohibiting solicitations force legal professionals to evaluate – before sending any public or private social media communication to any other user – *whom* the intended recipient is and *why* the lawyer or law firm is communicating with that particular person. For example, a Facebook "friend request" or LinkedIn "invitation" that offers to provide legal services to a non-lawyer with whom the sending lawyer does not have an existing relationship may very well rise to the level of a prohibited solicitation.

Legal professionals may also unintentionally send prohibited solicitations merely by using certain automatic features of some social media sites that are designed to facilitate convenient connections between users. For instance, LinkedIn provides an option to import e-mail address books to LinkedIn for purposes of sending automatic or batch invitations. This may seem like an efficient option to minimize the time required to locate and connect with everyone you know on LinkedIn. However, sending automatic or batch invitations to everyone identified in your e-mail address book could result in networking invitations being sent to persons who are not lawyers, family members, close personal friends, current or former clients, or others with whom a lawyer may ethically communicate. Moreover, if these recipients do not accept the initial networking invitation, LinkedIn will automatically send two follow up reminders unless the initial invitation is affirmatively withdrawn. Each such reminder would conceivably constitute a separate violation of the rules prohibiting solicitations.

4. Do Not Disclose Privileged or Confidential Information

Social media also creates a potential risk of disclosing (inadvertently or otherwise) privileged or confidential information, including the identities of current or former clients. The duty to protect privileged and confidential client information extends to current clients (RPC 1.6), former clients (RPC 1.9), and prospective clients (RPC 1.18). Consistent with these rules, ABA Formal Opinion 10-457 provides that lawyers must obtain client consent before posting information about clients on websites. In a content-driven environment like social media where users are accustomed to casually commenting on day-to-day activities, including work-related activities, lawyers must be especially careful to avoid posting *any* information that could conceivably violate confidentiality obligations. This includes the casual use of geo-tagging in social media posts or photos that may inadvertently reveal your geographic location when traveling on confidential client business.

There are a few examples of lawyers who found themselves in ethical crosshairs after posting client information online. For example, in *In re Skinner*, 740 S.E.2d 171 (Ga. 2013), the Georgia Supreme Court rejected a petition for voluntary reprimand (the mildest form of public discipline permitted under that state's rules) where a lawyer admitted to disclosing information online about a former client in response to negative reviews on consumer websites. In a more extreme example, the Illinois Supreme Court in *In re Peshek*, M.R. 23794 (Ill. May 18, 2010) suspended an assistant public defender from practice for 60 days for, among other things, blogging about clients and implying in at least one such post that a client may have committed perjury. The

Wisconsin Supreme Court imposed reciprocal discipline on the same attorney for the same misconduct. *In re Disciplinary Proceedings Against Peshek*, 798 N.W.2d 879 (Wis. 2011).

Interestingly, the Virginia Supreme Court held in *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013), that confidentiality obligations have limits when weighed against a lawyer's First Amendment protections. Specifically, the court held that although a lawyer's blog posts were commercial speech, the Virginia State Bar could not prohibit the lawyer from posting non-privileged information about clients and former clients without the clients' consent where (1) the information related to closed cases and (2) the information was publicly available from court records and, therefore, the lawyer was free, like any other citizen, to disclose what actually transpired in the courtroom.

5. Do Not Assume You Can "Friend" Judges

In the offline world, it is inevitable that lawyers and judges will meet, network, and sometimes even become personal friends. These real-world professional and personal relationships are, of course, subject to ethical constraints. So, too, are online interactions between lawyers and judges through social media (e.g., becoming Facebook "friends" or LinkedIn connections) subject to ethical constraints.

Different jurisdictions have adopted different standards for judges to follow. ABA Formal Opinion 462 recently concluded that a judge may participate in online social networking, but in doing so must comply with the Code of Judicial Conduct and consider his or her ethical obligations on a case-by-case (and connection-by-connection) basis. Several states have adopted similar views, including Connecticut (Op. 2013-06), Kentucky (Op. JE-119), Maryland (Op. 2012-07), New York (Op. 13-39, 08-176), Ohio (Op. 2010-7), South Carolina (Op. 17-2009), and Tennessee (Op. 12-01).

In contrast, states like California (Op. 66), Florida, Massachusetts (Op. 2011-6), and Oklahoma (Op. 2011-3) have adopted a more restrictive view. Florida Ethics Opinion 2009-20, for example, concluded that a judge cannot friend lawyers on Facebook who may appear before the judge because doing so suggests that the lawyer is in a special position to influence the judge. Florida Ethics Opinion 2012-12 subsequently extended the same rationale to judges using LinkedIn and the more recent Opinion 2013-14 further cautioned judges about the risks of using Twitter. Consistent with these ethics opinions, a Florida court held that a trial judge presiding over a criminal case was required to recuse himself because the judge was Facebook friends with the prosecutor. *See Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012).

6. Avoid Communications with Represented Parties

Under RPC 4.2 and equivalent state ethics rules, a lawyer is forbidden from communicating with a person whom the lawyer knows to be represented by counsel without first obtaining consent from the represented person's lawyer. Under RPC 8.4(a) and similar state rules, this prohibition extends to any agents (secretaries, paralegals, private investigators, etc.) who may act on the lawyer's behalf.

These bright-line restrictions effectively prohibit lawyers and their agents from engaging in social media communications with persons whom the lawyer knows to be represented by counsel. This means that a lawyer may not send Facebook friend requests or LinkedIn invitations to opposing parties known to be represented by counsel in order to gain access to those parties' private social media content. In the corporate context, San Diego County Bar Association Opinion 2011-2 concluded that high-ranking employees of a corporation should be treated as represented parties and, therefore, a lawyer could not send a Facebook friend request to those employees to gain access to their Facebook content.

On the other hand, viewing publicly accessible social media content that does not precipitate communication with a represented party (e.g., viewing public blog posts or Tweets) is generally considered fair game. That was the conclusion reached by Oregon Ethics Opinions 2013-189 and 2005-164, which analogized viewing public social media content to reading a magazine article or a published book.

7. Be Cautious When Communicating with Unrepresented Third Parties

Underlying RPC 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), and 8.4 (Misconduct), and similar state ethics rules is concern for protecting third parties against abusive lawyer conduct. In a social media context, these rules require lawyers to be cautious in online interactions with unrepresented third parties. Issues commonly arise when lawyers use social media to obtain information from third-party witnesses that may be useful in a litigation matter. As with represented parties, publicly viewable social media content is generally fair game. If, however, the information sought is safely nestled behind the third party's privacy settings, ethical constraints may limit the lawyer's options for obtaining it.

Of the jurisdictions that have addressed this issue, the consensus appears to be that a lawyer may not attempt to gain access to non-public social media content by using subterfuge, trickery, dishonesty, deception, pretext, false pretenses, or an alias. For example, ethics opinions in Oregon (Op. 2013-189), Kentucky (Op. KBA E-434), New York State (Op. 843), and New York City (Op. 2010-2) concluded that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to circumvent social media users' privacy settings to reach non-public information. Ethics opinions by other bar associations, including the Philadelphia Bar Association (Op. 2009-02) and the San Diego County Bar Association (Op. 2011-2), have gone one step further and concluded that lawyers must affirmatively disclose their reasons for communicating with the third party.

8. Beware of Inadvertently Creating Attorney-Client Relationships

An attorney-client relationship may be formed through electronic communications, including social media communications. ABA Formal Opinion 10-457 recognized that by enabling communications between prospective clients and lawyers, websites may give rise to inadvertent lawyer-client relationships and trigger ethical obligations to prospective clients under RPC 1.18. The interactive nature of social media (e.g., inviting and responding to comments to a blog post, engaging in Twitter conversations, or responding to legal questions posted by users on a message

board or a law firm's Facebook page) creates a real risk of inadvertently forming attorney-client relationships with non-lawyers, especially when the objective purpose of the communication from the consumer's perspective is to consult with the lawyer about the possibility of forming a lawyer-client relationship regarding a specific matter or legal need. Of course, if an attorney-client relationship attaches, so, too, do the attendant obligations to maintain the confidentiality of client information and to avoid conflicts of interest.

Depending upon the ethics rules in the jurisdiction(s) where the communication takes place, use of appropriate disclaimers in a lawyer's or a law firm's social media profile or in connection with specific posts may help avoid inadvertently creating attorney-client relationships, so long as the lawyer's or law firm's online conduct is consistent with the disclaimer. In that respect, South Carolina Ethics Opinion 12-03 concluded that "[a]ttempting to disclaim (through buried language) an attorney-client relationship in advance of providing specific legal advice in a specific matter, and using similarly buried language to advise against reliance on the advice is patently unfair and misleading to laypersons."

9. Beware of Potential Unauthorized Practice Violations

A public social media post (like a public Tweet) knows no geographic boundaries. Public social media content is accessible to everyone on the planet who has an Internet connection. If legal professionals elect to interact with non-lawyer social media users, then they must be mindful that their activities may be subject not only to the ethics rules of the jurisdictions in which they are licensed, but also potentially the ethics rules in any jurisdiction where the recipient(s) of any communication is(are) located. Under RPC 5.5 and similar state ethics rules, lawyers are not permitted to practice law in jurisdictions where they are not admitted to practice. Moreover, under RPC 8.5 and analogous state rules, a lawyer may be disciplined in any jurisdiction where he or she is admitted to practice (irrespective of where the conduct at issue takes place) or in any jurisdiction where he or she provides or offers to provide legal services. It is prudent, therefore, for lawyers to avoid online activities that could be construed as the unauthorized practice of law in any jurisdiction(s) where the lawyer is not admitted to practice.

10. Tread Cautiously with Testimonials, Endorsements, and Ratings

Many social media platforms like LinkedIn and Avvo heavily promote the use of testimonials, endorsements, and ratings (either by peers or consumers). These features are typically designed by social media companies with one-size-fits-all functionality and little or no attention given to variations in state ethics rules. Some jurisdictions prohibit or severely restrict lawyers' use of testimonials and endorsements. They may also require testimonials and endorsements to be accompanied by specific disclaimers. South Carolina Ethics Opinion 09-10, for example, provides that (1) lawyers cannot solicit or allow publication of testimonials on websites and (2) lawyers cannot solicit or allow publication of endorsements unless presented in a way that would not be misleading or likely to create unjustified expectations. The opinion also concluded that lawyers who claim their profiles on social media sites like LinkedIn and Avvo (which include functions for endorsements, testimonials, and ratings) are responsible for conforming all of the information on their profiles to the ethics rules.

Lawyers must, therefore, pay careful attention to whether their use of any endorsement, testimonial, or rating features of a social networking site is capable of complying with the ethics rules that apply in the state(s) where they are licensed. If not, then the lawyer may have no choice but to remove that content from his or her profile.

Conclusion

Despite the risks associated with using social media as a legal professional, the unprecedented opportunities this revolutionary technology brings to the legal profession to, among other things, promote greater competency, foster community, and educate the public about the law and the availability of legal services justify the effort necessary to learn how to use the technology in an ethical manner. E-mail technology likely had its early detractors and, yet, virtually all lawyers are now highly dependent on e-mail in their daily law practice. Ten years from now, we may similarly view social media as an essential tool for the practice of law.

The Iowa State Bar Association's Federal Practice Seminar presents

2016 Federal Practice Seminar

Friday, December 16, 2016

CIVIL BREAKOUT SESSION

Active Case Management

2:30-3:30 pm

Presented by

Hon. Helen Adams
United State Magistrate Judge for the Southern District of Iowa

Hon. Abbie Crites-Leoni
United State Magistrate Judge for the Eastern District of Missouri

Hon. Teresa James
United State Magistrate Judge for the District of Kansas

Tim Hill
Bradley & Riley

Friday, December 16, 2016

"No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

-Felix Frankfurter, 1951

United States Magistrate Judge
Abbie Crites-Leoni

Cape Girardeau **(Duty Station)** **Courtroom 4A**	**Address** 555 Independence Street, Suite 4000 Cape Girardeau, MO 63703
Judicial Assistant Connie Keener	**Phone** (573) 331-8870
Law Clerk Erin McHugh-Dial	**Fax** (573) 331-8907

Requirements

1. Local and Federal Rules

Many answers to frequently asked questions are contained in the Local Rules (http://www.moep.uscourts.gov/local-rules) of the Eastern District of Missouri, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence. All counsel and *pro se* parties are expected to know these rules and follow them. Frequent review of the rules is recommended because they are often amended.

2. Informal Matters

I do not have a set time for informal matters (minor issues such as deadline changes or other minor disputes), but most days I can usually be available. If you have an informal matter, please notify opposing counsel, ascertain opposing counsel's availability, and call my Judicial Assistant, Connie Keener, to schedule a time for an in-court or telephone conference. Most minor, agreed deadline changes can be handled in writing, by filing a motion to extend the deadline and stating that opposing counsel consents. I will rule on

such consent motions as soon as possible. If you have an emergency motion that needs a formal hearing on the record, you should call my chambers to schedule a hearing.

3. Attorney Admissions
I am always happy to handle Oaths of Admission of new attorneys. You may call my chambers to schedule a time for an Oath of Admission. I welcome, but do not require, an admitted attorney to introduce the new attorney.

4. Court Docket
My court docket is managed by my Judicial Assistant. She handles all questions regarding my docket.

5. Rule 16 Conferences in Civil Cases
I conduct most Rule 16 conferences in person, but will conduct them via telephone upon request of the parties if an attorney is more than 120 miles away from Cape Girardeau. First, an Order Setting Rule 16 Conference will be issued requiring the parties to meet and prepare a proposed Joint Scheduling Plan (JSP). Unless otherwise ordered, the JSP is to be filed with the court no later than 10 days prior to the scheduled Rule 16 conference. Unless otherwise ordered, plaintiffs are responsible for initiating the meeting and filing the JSP.

The court encourages cooperation between the parties in preparing and filing the JSP. **A lack of cooperation does not relieve a party from complying with the requirement to file a JSP.** If a party finds the need to file a separate JSP, a memorandum should be attached to the JSP explaining why a joint plan cannot be filed. The Rule 16 conference will be at a scheduled time and any problems the parties have in working together will be addressed.

At the Rule 16 conference, you should be prepared to discuss the facts of your case and all other matters set out in the Rule 16 Order, including settlement and any potential problems or unusual issues that your case presents. Please do not send an unprepared substitute attorney or an attorney who cannot make a commitment regarding the calendar of trial counsel. I expect the attorneys who attend the conference to know the case and be prepared to discuss all issues, including changes to the proposed schedule and trial setting.

6. Scheduling and Status Conferences
Counsel may request a scheduling or status conference when the need arises by calling my chambers and setting up an appointment.

7. Case Management Orders in Civil Cases
A Case Management Order (CMO) is entered pursuant to the discussion at the Rule 16 conference. Any requests for changes, modification, or amendment of a CMO shall be made by written motion and filed electronically. Requests for changes in the CMO with respect to trial dates and deadlines for dispositive motions are not routinely granted and must be supported by statements of good cause.

Generally, the trial date and the date for filing dispositive motions are "etched in stone" and will not be moved absent exceptional circumstances. Other dates in the CMO may be

changed by written order of court. If both parties agree to adjust dates other than the trial date or dispositive motion dates in the CMO, counsel may file a consent motion to amend the CMO detailing the requested changes.

8. Alternative Dispute Resolution (ADR)

I refer most civil cases to mediation. Please be prepared to discuss the appropriate timing for referral to mediation at the Rule 16 conference. When setting a date for mediation in the proposed schedule, counsel should consider what discovery they need in order to conduct a meaningful mediation conference. Plaintiff's counsel, or any counsel the parties agree to, will be designated as lead counsel who shall work with opposing counsel to select a neutral and notify the Court Clerk of the agreed upon neutral, no later than twenty days from the start of the referral. Please note that once the case has been referred to ADR, those deadlines are binding and may only be extended by order of the Court. Lead counsel will be contacted by the Court if deadlines have expired.

List of the Court's neutrals: http://www.moep.uscourts.gov/sites/default/files/ADR.pdf.
For more information: http://www.moep.uscourts.gov/alternative-dispute-resolution-adr.

If a settlement is reached, the Court shall be notified immediately and parties shall file a Stipulation for Dismissal within thirty days. The Court shall also be notified immediately if a settlement is not reached so the case can proceed to trial.

9. Discovery Disputes

Before filing any discovery-related motion, you must confer with opposing counsel and attempt to resolve the dispute, and in accordance with the relevant local rule, your motion must contain a certification that you have done so. Motions that do not contain the required certification will be denied without prejudice. The requirement that the parties confer means that the moving party must actually speak to opposing counsel, in person or by telephone. If opposing counsel will not return your calls when you attempt to resolve the matter, you should detail those efforts in your certification with the motion. I expect the parties to make a good faith effort to resolve the dispute prior to filing a discovery-related motion.

When you cannot resolve legitimate disputes, and must file motions, I will either set the motions for hearing or rule on the papers, depending on what I think is appropriate after I have reviewed the motions. If you desire to have a hearing on the discovery motion, you should note that request in your motion or memorandum and, once the filings are complete, contact chambers to request a hearing. If you have an emergency, you should contact chambers and arrange a preliminary telephone conference.

10. Sealed Document and Protective Orders

Proposed protective orders submitted to the Court for approval that contemplate the filing of a file or documents under seal must contain a date certain on which the seal will be lifted or the documents returned to the parties. A proposed protective order lacking a date certain for lifting the seal or returning the documents to the parties will be denied without prejudice. Attorneys are

also referred to the provisions of E.D.Mo. Local Rule 13.05 concerning sealed documents and files.

11. Final Pretrial Conference

I will set a final pretrial conference on the week preceding the trial. At that conference, scheduling issues, evidentiary problems, motions in limine, and any other relevant matters will be discussed. A record may be made on those issues requiring such a record. Counsel will also be advised of the starting time of the trial for the following week, usually Tuesday at either 9:00 a.m. or 1:00 p.m. We will put any necessary argument and all rulings on the record.

12. Jury Instructions

The 8th Circuit Manual of Model Jury Instructions for the District Courts of the Eighth Circuit should be used when possible. The basic introductory and boilerplate instructions must be based on the 8th Circuit Model Jury Instructions. If instructions from any other source are proffered, they must be accompanied by case authority.

Parties are required to meet and confer regarding jury instructions and whenever possible submit one package of jury instructions to the Court on behalf of all the parties. Parties shall submit a "clean" copy and a "dirty" copy of each instruction proffered. A "clean" copy for the jury will reflect only "Instruction No. ___" at the top of each separate instruction page with no further explanatory comments.

The parties shall also submit their proffered jury instructions to the Court in Microsoft Word or other electronic format by e-mail to my Judicial Assistant, Connie Keener at the following e-mail address: connie_keener@moed.uscourts.gov.

13. Available Courtroom Technology

The Court has evidence presentation equipment available, including an evidence camera (e.g., ELMO), VCR, DVD, monitors, and hook-ups for computer stored evidence or computer presentation. An explanation on the use of this equipment is available on the Court's website, http://www.moep.uscourts.gov/courtroom-technology. Interested counsel should call the Clerk's Office to schedule training before trial. Training usually takes no more than 30 minutes, and gives you the opportunity to get comfortable with the equipment BEFORE trial. Please contact the Clerk's Office at least one week prior to trial to request a training session and time to practice with the equipment. No training will be provided on the day of trial. If you intend to use your computer with the Court's evidence presentation system, you must confer with the Clerk's Office before trial to be sure your settings and connections will successfully interface with the Court's system. The Court does not provide equipment to play an audio tape; you will need to bring your own tape player.

At the beginning of trial I will receive into evidence any exhibits that have not been objected to in the pretrial submissions. On the first day of trial, counsel should bring a joint list of all exhibits that can be admitted without objection.

14. Jurors and Voir Dire

Before the case is called, counsel must supply the Court with a joint brief statement of the nature of the case to be read to panel members during voir dire. Attorneys for both parties are expected to agree on this statement, which should be phrased in neutral terms. Counsel will be provided with a jury panel list as the jury arrives in the courtroom. The list contains the names, employer, former employer, occupation, spouse's employer and occupation, and the number of employees the prospective juror supervises in the work force. The list also contains the municipality in which the juror lives. The list must be returned to the deputy clerk after the jury is selected.

I will open voir dire by explaining its purpose and describing the voir dire procedure to the jury. I may ask a few basic introductory questions of the panel such as the nature of the case, burden of proof, prior jury service, length of the trial, etc. Each party must provide me with a list of potential witnesses on the morning the trial begins, so that I may ask if the potential jurors know any of the potential witnesses. Finally, I will read the brief stipulated statement of the nature of the case prepared by counsel as part of the pretrial package.

After initial questions by the Court, counsel may conduct additional voir dire subject to time limits. The voir dire specifics, such as time limits, will be outlined at the pretrial conference. In every case, the Court reserves the right to conduct the voir dire. In such cases, counsel will be encouraged to submit voir dire questions to the Court no later than five days before trial. If you want me to ask any specific questions that, for some reason, you prefer not to ask, please submit them to me in writing, with notice to opposing counsel. Otherwise, you may inquire about anything relevant to jury selection. You may not ask unnecessary questions such as asking the jurors to make promises to you, make speeches, argue your case, tell the jury about yourself or your family, or do anything else that is not directly designed to elicit relevant information about the potential jurors.

After all questioning has been completed, the venire panel will be removed from the courtroom and I will immediately ask for challenges for cause. No challenges for cause or statements that the panel is acceptable may be made in front of the jury panel. After any persons are stricken for cause, the parties will make their peremptory challenges. In civil cases, the first seven or eight jurors remaining after the strikes will be seated and will deliberate; no formal alternates will be designated.

For voir dire questioning, the venire panel is seated left to right in the jury box. The panel members numbered 1 through 7 will be seated in the front row of the jury box, while jurors numbered 8 through 14 will be seated in the back row. The rest of the venire panel members will be seated in the spectator's gallery, also seated numerically, left to right.

15. The Trial

a. *Time of Trial*: Times for starting and adjourning the trial day will be announced at the start of trial. Court will begin promptly to avoid keeping the jury waiting. In particular, counsel are discouraged from raising preliminary matters at the start of the trial day, when the jury and all others are ready to proceed. The Court will be available to resolve preliminary matters 30 minutes prior to the scheduled start of the trial day, or during the lunch break, or at the conclusion of the trial day.

b. *Use of Exhibits and Opening Statements*: This is permitted as long as you have consent from opposing counsel and advise the Court in advance. No exhibit shall be shown to the jury in opening statements or at any other time until it is received in evidence or the Court has granted permission for the exhibit to be shown to the jury, unless the parties stipulate to its use on the record in advance of its publication to the jury.

c. *Evidentiary Objections*: Counsel should stand for all objections, and state the legal basis for the objection in a word or, at most, a phrase without elaboration or argument (unless called to the bench). No evidentiary objections shall be argued in the presence of the jury. Bench conferences during trial are discouraged. I will either rule or ask you to approach for a sidebar conference. For purposes of "protecting the record" and assisting the Court of Appeals, counsel may explain their positions and the Court may explain its ruling on the record after the jury has been excused for a scheduled break or lunch. Counsel should instruct their witnesses not to answer a question while an objection is pending.

d. *Recross*: Recross is not allowed as a matter of right. Recross is only allowed if something new is brought out on redirect.

16. Courtroom Logistics and Procedures

a. *Use of the Lectern*: Voir dire, opening statements, examination of witnesses, and closing arguments must be made from the lectern. You may approach a witness to deliver an exhibit, but must then return to the lectern for questioning. You may never hover over the jury for any reason.

b. *Recording*: Except for trials, the proceedings in my courtroom are at a minimum electronically recorded. Therefore, anything you say must be directed into the microphone at the lectern. If you speak from one of the counsel tables or while you are returning to the lectern after handing an exhibit to a witness, your question or objection may not be part of the record.

c. *Exhibits*: You must pre-mark all exhibits, as set out in the Case Management Order. Do not ask the courtroom clerk to mark exhibits for you. The Case Management Order requires plaintiffs to use numbers and defendants to use letters for exhibits. The parties should attempt to stipulate to the admission of as many exhibits as possible prior to trial. I ask that you bring a list of all exhibits which may be received without objection at the beginning of trial. Unless otherwise stipulated, examining counsel must show each exhibit to opposing counsel prior to showing it to a witness. Demonstrative and summary exhibits must be shown to opposing counsel in advance of trial, even if not offered into evidence.

d. *Depositions and Video Depositions*: Please do not over designate portions of depositions you intend to use at trial. Prior to the start of trial, you must notify opposing counsel of what portions you actually intend to offer, so that opposing counsel can determine whether they still wish to object or to counter-designate. Counsel must attempt to resolve any objections and bring to my attention any objections that cannot be resolved well in advance of the proposed use of the deposition, so that I can rule on any objections without wasting

jury time. All objections to depositions will be ruled on before the jurors report daily, at noon, in the evenings, or after the jurors are excused. If you wish to play a video deposition, please let me know in advance, so that I can rule on objections in time for you to make the necessary edits or otherwise address the logistics.

e. *Use of Depositions at Trial*: If you are reading lengthy portions of a deposition, please bring a reader to sit on the witness stand and read the answers while you read the questions. Please caution your readers about being overly dramatic.

The court reporter does not transcribe deposition testimony. For the record you must provide a list of the pages and line showing the portions of each deposition that was actually read or shown to the jury. You may do this at the end of the day or the end of the trial, but it is your responsibility to provide a record of what is actually presented.

f. *Rule Excluding Witnesses from Courtroom*: If you wish to exclude potential witnesses from the courtroom during trial, you must advise me at the final pretrial conference. Once in place, the rule remains in place for the entire trial.

g. *Real Time Court Reporting*: Court reporters for my civil trials use real time court reporting. If you wish to order a daily copy of the trial transcript, please contact the court reporter well in advance of the trial so that the appropriate arrangements can be made. My Judicial Assistant will be able to confirm the assigned court reporter for your case.

17. Courtroom Decorum

Jurors form impressions of the operations of their courts based upon the performance of the judge, lawyers, and court personnel. Lawyers and persons representing themselves are expected to practice civility at all times in the courtroom. Jurors have a right to believe that their time will not be wasted. Jurors will not be expected to wait in the jury room while counsel and the Court are resolving motions or objections.

a. Please notify the Deputy Clerk upon arrival and introduce additional counsel, support staff and parties.

b. Please stand when the jury enters the courtroom and stand at all times when speaking. No eating, drinking (other than water), gum chewing or audible beepers or watches are allowed. Cell phones and other personal electronic devices should be turned off. Please relay these rules to your clients and witnesses.

c. Counsel shall treat all court employees, each other and all witnesses, including adverse witnesses, professionally and courteously. All witnesses must be addressed by their last names with appropriate titles. Additionally, please advise witnesses not to address counsel by their first names. This rule is intended to govern how we address one another in the courtroom - it is not a rule requiring witnesses to refer to one another in any certain way during their testimony. Only one lawyer per party may question a particular witness.

d. Children are not allowed as spectators unless they are accompanied by an adult seated with them in the spectators' area. A party to the suit (defendant, attorney, case agent, etc.) cannot qualify as the attending adult.

d. Persons seated at counsel table shall not make any verbal comments, facial expressions, laughter, or other expressions, verbal or non-verbal, to the jury which would be interpreted as conveying a comment one way or the other with respect to any testimony, argument, or event that may occur during trial.

e. All statements by counsel should be directed to the Court and not to opposing counsel.

f. Counsel shall disclose the identity and order of witnesses as far in advance as possible, but not less than 5:00 p.m. the evening before the beginning of the trial day on which the witnesses are to be called.

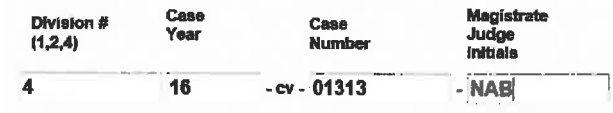
g. Sidebar conferences are disfavored, but may be had with Court approval. Scheduling or substantive issues should be addressed during breaks without the jury present.

E-filing Notice re: Magistrate Judge Jurisdiction

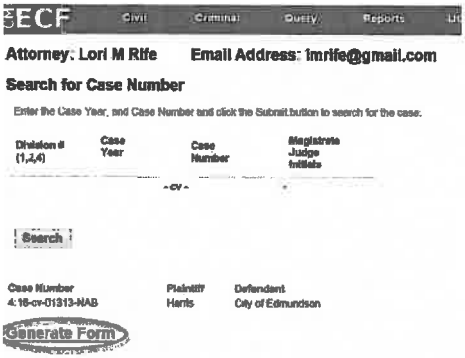
1. Login to CM/ECF using your e-filing login.

2. Select Notice re: Magistrate Judge Jurisdiction from the Civil Events menu. (Note: Do not use the drop down menu.)

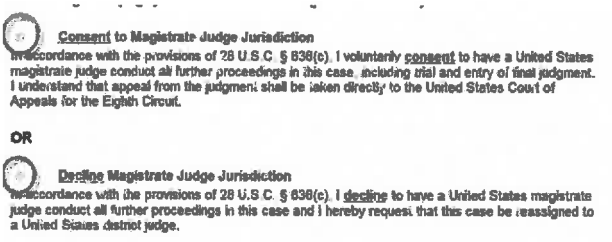
3. Enter the case number. You must enter the appropriate Magistrate Judge initals.



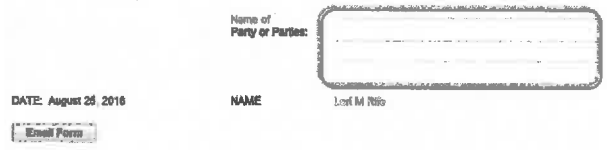
4. Click on the Search button. The Case Number will be displayed.
5. Click Generate Form.



6. Click the radio button for Consent or Decline.



7. Enter the party or parties that you represent.



8. Click on Email Form . The form will be sent to the case management team and you will receive an email verifying that the form has been submitted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

This form must be submitted in paper format and cannot be filed electronically.

IMPORTANT: Return this form to the Clerk's office promptly, but not later than twenty-one days after your appearance, answer or responsive pleading

Plaintiff(s),	)	
vs.	)	Case No.
Defendant(s)	)	

NOTICE REGARDING MAGISTRATE JUDGE JURISDICTION

Each party to the above-captioned civil matter is to select **one** of the following two options indicating whether the party **will consent** or **will not consent** to having the assigned Magistrate Judge conduct any and all proceedings in this case, including trial and entry of final judgment in accordance with the provisions of Title 28 U.S.C. Section 636(c)(1).

CHECK ONE:

☐ The party or parties listed below **consent** to the jurisdiction of the Magistrate Judge. (Note: Selecting this option does not affect your ability to challenge this court's subject matter or personal jurisdiction).

☐ The party or parties listed below **do not consent** to the jurisdiction of the Magistrate Judge. (Note: If you select this option, your case will be randomly reassigned to a District Judge).

Name of Party or Parties (please type or print):

_____

_____

_____

Submitted By: _____ Dated: _____
Signature of Counsel or Party if Pro Se

Note: Corporations may execute this election only by counsel.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice was served (by mail) (by hand delivery) on all parties of record in this cause, this_____day of_____, 20 .

Signature _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

***,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No.
	)	
***,	)	
Defendant.	)	

ORDER SETTING RULE 16 CONFERENCE

Consent: This case has been randomly assigned to a United States Magistrate Judge. Unless previously submitted, no later than **_____, 2016**, each party must submit to the Clerk's Office the Notice Regarding Magistrate Judge Jurisdiction form, either consenting to the jurisdiction of a United States Magistrate Judge or opting to have the case assigned to a United States District Judge. E-filing instructions are available at: http://www.moed.uscourts.gov/sites/default/files/moed-0041.pdf.

IT IS HEREBY ORDERED that,

1. **Scheduling Conference**: A Scheduling Conference pursuant to Rule 16, Fed.R.Civ.P, is set for **_____ a.m.** at the Rush H. Limbaugh, Sr. United States Courthouse, 555 Independence, Cape Girardeau, Missouri 63703, **in person, in the chambers of the undersigned Magistrate Judge.** At the scheduling conference counsel will be expected to discuss in detail all matters covered by Rule 16, Fed.R.Civ.P., we well as all matters set forth in their joint proposed scheduling plan described in paragraph 3, and a firm and realistic trial setting will be established at or shortly after the conference.

2. **Meeting of Counsel**: Pursuant to Fed. R. Civ. P. 26(f), prior to the date for submission of the joint proposed scheduling plan set forth in paragraph 3 below, counsel for the parties shall meet to discuss the following:

- the nature and basis of the parties' claims and defenses;

- the possibilities for a prompt settlement or resolution of the case;

- the formulation of a discovery plan including the nature and scope of any burdens associated with the preservation, retrieval, review, disclosure, and production of discoverable information relative to the likely benefit of the proposed discovery;

- costs, if any, the parties may be willing to share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor (if applicable) or other cost-saving measures;

- any issues specifically relating to disclosure or discovery of electronically stored information, including –

    i. the form or forms in which it should be produced;
    ii. the topics for such discovery and the time period for which such discovery will be sought;
    iii. the various sources of information and/or systems within a party's control that should be searched for electronically stored information; and
    iv. any issues relating to the preservation, retrieval, review, disclosure and/or production of electronically stored information;

- any issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the Court to include their agreement in an order under Federal Rule of Evidence 502; and

- any other topics listed below or in Fed. R. Civ. P. 16 and 26(f).

Counsel shall also have a meaningful discussion of the discovery anticipated in the case, and should plan for and work toward proportional discovery. This meeting is expected to result in the parties reaching agreement on the form and content of a joint proposed scheduling plan as described in paragraph 3 below.

Counsel will be asked to report orally on the matters discussed at the meeting when they appear before the undersigned for the Rule 16 conference, and will specifically be asked to: offer a summary of their case; report on the potential for settlement (whether settlement demands or offers have been exchanged, without revealing the content of any offers or demands, and, suitability for Alternative

Dispute Resolution); **and provide a description of the volume and nature of the discovery anticipated in the case**.

Only one proposed scheduling plan may be submitted in any case, and it must be signed by counsel for all parties. It will be the responsibility of counsel for the plaintiff to actually submit the joint proposed scheduling plan to the Court. If the parties cannot agree as to any matter required to be contained in the joint plan, the disagreement must be set out clearly in the joint proposal, and the Court will resolve the dispute at or shortly after the scheduling conference.

3. **Joint Proposed Scheduling Plan**: No later than **January 5, 2016**, counsel shall file with the Clerk of the Court (and provide a courtesy copy to the chambers of the undersigned) a joint proposed scheduling plan. **All dates required to be set forth in the plan shall be within the ranges set forth below for the applicable track:**

Track 1: Expedited	Track 2: Standard	Track 3: Complex
*Disposition w/in 12 mos of filing *120 days for discovery	*Disposition w/in 18 mos of filing *180-240 days from R16 Conf. for Discovery/dispositive motions	*Disposition w/in 24 mos of filing *240-360 days from R16 Conf. for discovery/dispositive motions

The parties' joint proposed scheduling plan shall include:

(a) whether the Track Assignment is appropriate; **NOTE: This case has been assigned to Track 2: Standard.**

(b) dates for joinder of additional parties or amendment of pleadings;

(c) a discovery plan including:

(i) a date or dates by which the parties will disclose information and exchange documents pursuant to Rule 26(a)(1), Fed.R.Civ.P.,

(ii) whether discovery should be conducted in phases or limited to certain issues,

(iii) dates by which each party shall disclose its expert witnesses' identities and reports, and dates by which each party shall make its expert witnesses available for deposition, giving consideration to whether serial or simultaneous disclosure is appropriate in the case,

(iv) whether the presumptive limits of ten (10) depositions per side as set forth in Rule 30(a)(2)(A), Fed.R.Civ.P., and twenty-five (25) interrogatories per party as set forth in Rule 33(a), Fed.R.Civ.P. should apply in this case, and if not, the reasons for the variance from the rules,

(v) whether any physical or mental examinations of parties will be requested pursuant to Rule 35, Fed.R.Civ.P., and if so, by what date that request will be made and the date the examination will be completed,

(vi) a date by which all discovery will be completed (**see applicable track range, Section 3. Above);**

(vii) any other matters pertinent to the completion of discovery in this case,

(d) the parties' positions concerning the referral of the action to mediation or early neutral evaluation, and when such a referral would be most productive;

(e) dates for filing any notice of motion pursuant to E.D.Mo. L.R. 4.05 as to any motions to dismiss or motions for summary judgment as well as dates for the filing of any completed motion packages (**see applicable track range, Section 3. above);**

(f) the earliest date by which this case should reasonably be expected to be ready for trial **(see applicable track range, Section 3. above);**

(g) an estimate of the length of time expected to try the case to verdict; and,

(h) any other matters counsel deem appropriate for inclusion in the Joint Scheduling Plan.

Dated this _____ day of _____, 2016.

_____
ABBIE CRITES-LEONI
UNITED STATES MAGISTRATE JUDGE

(Rev. 6/2016)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

,)		
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	
,)		
	)	
Defendant.	)	

SCHEDULING ORDER

On , in accordance with Fed. R. Civ. P. 16, the undersigned U.S. Magistrate Judge, Teresa J. James, conducted a scheduling conference in this case with the parties.[1] Plaintiff appeared through counsel . Defendant appeared through counsel, .

After consultation with the parties, the court enters this scheduling order, summarized in the table that follows:

[1] As used in this scheduling order, the term "plaintiff" includes plaintiffs as well as counterclaimants, cross-claimants, third-party plaintiffs, intervenors, and any other parties who assert affirmative claims for relief. The term "defendant" includes defendants as well as counterclaim defendants, cross-claim defendants, third-party defendants, and any other parties who are defending against affirmative claims for relief.

SUMMARY OF DEADLINES AND SETTINGS	
Event	Deadline/Setting
Plaintiff's settlement proposal	**n/a**
Defendant's settlement counter-proposal	**n/a**
Jointly filed mediation notice, or confidential settlement reports to magistrate judge	**n/a**
Mediation completed	**n/a**
Rule 26(a) Initial Disclosures	**n/a**
Exchange documents identified in Rule 26(a) Initial Disclosures	**n/a**
Final supplementation of initial disclosures	**40 days before deadline for completion of all discovery**
All discovery completed	**n/a**
Experts disclosed by plaintiff	**n/a**
Experts disclosed by defendant	**n/a**
Rebuttal experts disclosed	**n/a**
Physical and mental examinations	**n/a**
Jointly proposed protective order submitted to court	**n/a**
Motion and brief in support of proposed protective order (only if parties disagree about need for and/or scope of order)	**n/a**
Motions to dismiss	**n/a**
Motions to amend or join additional parties	**n/a**
All other potentially dispositive motions (e.g., summary judgment)	**n/a**
Response to dispositive motions	**n/a**
Reply to dispositive motions	**n/a**
Motions challenging admissibility of expert testimony	**n/a**
Comparative fault identification	**n/a**
Status conference Before Judge James Courtroom 236 **[Dial 888-363-4749 and enter Access Code 4901386]**	**n/a**
Proposed pretrial order due	**n/a**
Pretrial conference before Judge James – Courtroom 236 [**Dial 888-363-4749 and enter Access Code 4901386]**	**n/a**
Motions in limine and proposed jury instructions	**n/a**
In limine conference before Judge Marten **[Dial 888-363-4749 and enter Access Code 4079202]**	**n/a**
(Jury or Court) Trial – ETT _____ days	**n/a**

1) Alternative Dispute Resolution (ADR).

After discussing ADR during the scheduling conference, the court has determined that settlement of this case [potentially would] [would not] be enhanced by use of early mediation. Toward that end, plaintiff must submit a good-faith settlement proposal to defendant by **n/a**. Defendant must make a good-faith counter-proposal by **n/a**. By **n/a**, unless the parties have jointly filed a notice stating the full name, mailing address, and telephone number of the person whom they have selected to serve as mediator, along with the firmly scheduled date, time, and place of mediation, each party must submit a confidential settlement report by e-mail to the undersigned U.S. Magistrate Judge (but not the presiding U.S. District Judge). These reports must briefly set forth the parties' settlement efforts to date, current evaluations of the case, views concerning future settlement negotiations, the overall prospects for settlement, and a specific recommendation regarding mediation or any other ADR method. If the parties cannot agree on a mediator and any party wishes the court to consider a particular mediator or other ADR neutral, then up to three nominations may be provided in the confidential settlement reports; such nominations must include a statement of the nominee's qualifications and billing rates, and confirmation that the nominee already has pre-cleared all ethical and scheduling conflicts. These reports must not be filed with the Clerk's Office.

Mediation is ordered. Absent further order of the court, mediation must be held no later than **n/a**. An ADR report must be filed by defense counsel within 14 days of any scheduled ADR process, using the form located on the court's website:

http://www.ksd.uscourts.gov/adr-report/

2) Discovery.

a) The parties already have served their initial disclosures with regard to witnesses, exhibits, damage computations, and any applicable insurance coverage, as required by Fed. R. Civ. P. 26(a)(1).

The parties are reminded that, although Rule 26(a)(1) is keyed to disclosure of information that the disclosing party "may use to support its claims or defenses, unless solely for impeachment," the advisory committee notes to the 2000 amendments to that rule make it clear that this also requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. In addition to other sanctions that may be applicable, a party who without substantial justification fails to disclose information required by Fed. R. Civ. P. 26(a) or Fed. R. Civ. P. 26(e)(1) is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. See Fed. R. Civ. P. 37(c)(1).

b) In order to facilitate settlement negotiations and to avoid unnecessary expense, the parties have agreed that, without any need for formal requests for production, copies of the various items described in the parties' respective Rule 26(a)(1) disclosures shall be exchanged or made available for inspection and copying by Error! Reference source not found..

c) Supplementations of those disclosures under Fed. R. Civ. P. 26(e) must be served at such times and under such circumstances as required by that rule. [In addition, such supplemental disclosures must be served by **n/a**.] In any event, final supplemental disclosures must be served no later than 40 days before the deadline for completion of all discovery. The supplemental disclosures served 40 days before the deadline for completion of all discovery must identify all witnesses and exhibits that probably or even might be used at trial. The opposing party and counsel

should be placed in a realistic position to make judgments about whether to take a particular deposition or pursue follow-up "written" discovery before the time allowed for discovery expires. Should anything be included in the final disclosures under Fed. R. Civ. P. 26(a)(3) that has not previously appeared in the initial Rule 26(a)(1) disclosures or a timely Rule 26(e) supplement thereto, the witness or exhibit probably will be excluded from offering any testimony under Fed. R. Civ. P. 37(c)(1).

d) All discovery must be commenced or served in time to be completed by **n/a**. Under the December 1, 2015 amendments to the Federal Rules of Civil Procedure, the court reminds the parties and counsel that they are entitled to obtain pretrial discovery regarding any non-privileged matter *provided* it is (a) relevant to a party's claim or defense, AND (b) proportional to the needs of this case. Under Fed. R. Civ. P. 26(b)(1), whether any particular discovery is proportional is to be determined by considering, to the extend they apply, the following six factors: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

e) [**Optional**: The parties have stipulated that no expert testimony will be used in this case.] If expert testimony is used in this case, disclosures required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, must be served by plaintiff by **n/a**, and by defendant by **n/a**; disclosures and reports by any rebuttal experts must be served by **n/a**. The parties must serve any objections to such disclosures (other than objections pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law), within 14 days after service of the

disclosures. These objections should be confined to technical objections related to the sufficiency of the written expert disclosures (e.g., whether all of the information required by Rule 26(a)(2)(B) has been provided) and need not extend to the admissibility of the expert's proposed testimony. If such technical objections are served, counsel must confer or make a reasonable effort to confer consistent with D. Kan. Rule 37.2 before filing any motion based on those objections.

f) The parties [agree] [disagree] that physical or mental examinations pursuant Fed. R. Civ. P. 35 [are] [are not] appropriate in this case. [The parties must complete all physical or mental examinations under Fed. R. Civ. P. 35 by **n/a**. If the parties disagree about the need for or the scope of such an examination, a formal motion must be filed sufficiently in advance of this deadline in order to allow the motion to be fully briefed by the parties, the motion to be decided by the court, and for the examination to be conducted, all before the deadline expires.]

g) The court [considered] [resolved] the following discovery problem(s) raised by one or more of the parties:

-

h) Consistent with the parties' agreements as set forth in their planning conference report, electronically stored information (ESI) in this case will be handled as follows:

-

- [Optional] Additionally, the court instructed counsel to review the ESI Guidelines on the court's website and, if appropriate, to supplement in writing their agreement regarding preservation and production of ESI.

i) Consistent with the parties' agreements as set forth in their planning conference report, claims of privilege or of protection as trial-preparation material asserted after production

will be handled as follows:

-

j) To encourage cooperation, efficiency, and economy in discovery, and also to limit discovery disputes, the court adopts as its order the following procedures agreed to by parties and counsel in this case:

-

k) No party may serve more than ___ interrogatories, including all discreet subparts, on any other party.

l) No more than * depositions may be taken by plaintiff, and no more than * depositions may be taken by defendant. Each deposition must be limited to * hours. [except for the deposition(s) of _____ which must be limited to * hours]. All depositions must be governed by the written guidelines that are available on the court's website:

http://www.ksd.uscourts.gov/deposition-guidelines/

m) **[Optional**: A Protective Order (ECF No. ___) has already been entered in the case.] Discovery in this case may be governed by a protective order. If the parties agree concerning the need for and scope and form of such a protective order, they must confer and then submit a jointly proposed protective order by **n/a**. This proposed protective order should be drafted in compliance with the guidelines available on the court's website:

http://www.ksd.uscourts.gov/guidelines-for-agreed-protective-orders-district-of-kansas/

At a minimum, such proposed orders must include a concise but sufficiently specific recitation of the particular facts in this case that would provide the court with an adequate basis upon which to

make the required finding of good cause pursuant to Fed. R. Civ. P. 26(c). A pre-approved form of protective order is available on the court's website:

http://www.ksd.uscourts.gov/flex/?fc=9&term=5062

If the parties disagree concerning the need for, and/or the scope or form of a protective order, the party or parties seeking such an order must file an appropriate motion and supporting memorandum, with the proposed protective order attached, by **n/a**. The parties and counsel are strongly encouraged to consider emailing the chambers of the undersigned magistrate judge for further guidance before filing such a motion.

n) The parties do/do not consent to electronic service of disclosures and discovery requests and responses. See Fed. R. Civ. P. 5(b) and D. Kan. Rules 5.4.2 and 26.3.

o) The expense and delay often associated with civil litigation can be dramatically reduced if the parties and counsel conduct discovery in the "just, speedy, and inexpensive" manner mandated by Fed. R. Civ. P. 1. Accordingly, the parties are respectfully reminded that this court plans to strictly enforce the certification requirements of Fed. R. Civ. P. 26(g). Among other things, Rule 26(g)(1) provides that, by signing a discovery request, response, or objection, it is certified as (i) consistent with the applicable rules and warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. If a certification violates these restrictions without substantial justification, under Rule 26(g)(3), the court *must* impose an appropriate sanction on the responsible attorney or party, or both; the sanction *may* include an

order to pay the reasonable expenses, including attorney fees, caused by the violation. Therefore, *before* the parties and counsel serve any discovery requests, responses, or objections in this case, lest they incur sanctions later, the court *strongly* suggests that they carefully review the excellent discussion of Rule 26(g) found in *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

3) Motions.

a) The parties do not anticipate a motion to dismiss will be filed in this case. Provided that such defenses have been timely preserved, any motions to dismiss asserting lack of personal jurisdiction, improper venue, insufficient process or service of process, failure to state a claim upon which relief can be granted, or the propriety of the parties, must be filed by **n/a**.

b) Any motion for leave to join additional parties or to otherwise amend the pleadings must be filed by **n/a**.

c) All other potentially dispositive motions (e.g., motions for summary judgment), must be filed by **n/a**. responses shall be filed by **n/a**; and any reply shall be filed by **n/a**.

d) Compliance with Fed. R. Civ. P. 56 and D. Kan. Rule 56.1 is mandatory, i.e., summary-judgment briefs that fail to comply with these rules may be rejected, resulting in summary denial of a motion or consideration of a properly supported motion as uncontested. Further, the court strongly encourages the parties to explore submission of motions on stipulated facts and agreement resolving legal issues that are not subject to a good faith dispute. The parties should follow the summary-judgment guidelines available on the court's website:

http://www.ksd.uscourts.gov/summary-judgment/

e) All motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, must be filed by **n/a**.

f) **If issues remain unresolved after the parties have complied with the "meet and confer" requirements applicable to discovery-related motions under Fed. R. Civ. P. 37(a)(1) and D. Kan. Rule 37.2, the parties and counsel are [strongly encouraged to consider calling or emailing the undersigned Magistrate Judge's chambers to arrange a telephone or in-person discovery conference before filing such a motion. But such a conference is not mandatory.] OR [required to contact the undersigned Magistrate Judge's chambers to set a telephone or in-person discovery conference before filing the motion.] For purposes of complying with the "meet and confer" requirements, the court construes the term "confer" to require more than mere e-mail communication. The parties, in person and/or through counsel, shall have verbal communications with each other; that is, they must actually talk with each other about their discovery disputes before filing a motion to compel or similarly related discovery motion.**

g) Any motion to compel discovery in compliance with D. Kan. Rules 7.1 and 37.2 must be filed and served within 30 days of the default or service of the response, answer, or objection that is the subject of the motion, unless the time for filing such a motion is extended for good cause shown. Otherwise, the objection to the default, response, answer, or objection is waived. *See* D. Kan. Rule 37.1(b). In the event a telephone or in-person discovery conference is held, if appropriate the court will adjust the deadline for filing a motion to compel.

h) Motions in limine and the parties' proposed jury instructions shall be filed no later than **n/a**.

i) To avoid the filing of unnecessary motions, the court encourages the parties to utilize stipulations regarding discovery procedures. However, this does not apply to extensions of time that interfere with the deadlines to complete all discovery, for the briefing or hearing of a motion, or for trial. *See* Fed. R. Civ. P. 29; D. Kan. Rule 6.1(a). Nor does this apply to modifying the requirements of Fed. R. Civ. P. 26(a)(2) concerning experts' reports. *See* D. Kan. Rule 26.4(c).

j) The arguments and authorities section of briefs or memoranda submitted must not exceed 30 pages, absent an order of the court.

4) Pretrial Conference, Trial, and Other Matters.

a) [The parties agree/disagree that principles of comparative fault do not apply to this case.] By **n/a**, any part asserting comparative fault must identify all persons or entities whose fault is to be compared for purpose of Kan. Stat. Ann. 60-258a (or any other similar comparative-fault statute that might be applicable). If another person or entity is so identified, then the party asserting comparative fault also must specify the nature of the fault which is claimed.

b) [**Optional**: Pursuant to Fed. R. Civ. P. 16(a), a discovery status conference is scheduled for **n/a**. [before the undersigned Magistrate Judge by dial-in telephone conference call. Counsel and any pro se parties must dial **888-363-4749** and enter Access Code **4901386** to join the conference. The parties will timely advise the Court if they believe there is no reason to hold the status conference or it the prefer that it be held in person.] [in Courtroom #236, Robert J. Dole United States Courthouse, 500 State Avenue, Kansas City, Kansas. The attorneys who have entered an appearance and pro se parties must attend the conference in person, unless at least 5 days prior to the conference they obtain leave to appear by telephone. Such leave will be freely granted upon appropriate request, by e-mailing Judge James' chambers at

ksd_james_chambers@ksd.uscourts.gov. If counsel for any party or any pro se party is granted leave to participate by telephone, then all counsel and pro se parties will be notified by docket entry on the ECF System of the call-in number and all will be required to participate by phone in the conference at the scheduled time.]

c) [Pursuant to Fed. R. Civ. P. 16(e), an in person pretrial conference is scheduled for **n/a** in Courtroom #236, Robert J. Dole United States Courthouse, 500 State Avenue, Kansas City, Kansas. The attorneys who have entered an appearance and pro se parties must attend the conference in person, unless at least 5 days prior to the conference they obtain leave to appear by telephone. Such leave will be freely granted upon appropriate request, by e-mailing Judge James' chambers at ksd_james_chambers@ksd.uscourts.gov. If counsel for any party or any pro se party is granted leave to participate by telephone, then all counsel and pro se parties will be notified by docket entry on the ECF System of the call-in number and all will be required to participate by phone in the conference at the scheduled time. Unless otherwise notified, the undersigned Magistrate Judge will conduct the conference.] [Pursuant to Fed. R. Civ. P. 16(e), a pretrial conference is scheduled for **n/a**; this pretrial conference will be conducted by dial-in telephone conference call unless the judge determines that the proposed pretrial order is not in the appropriate format or that there are some problems requiring counsel to appear in person. Counsel and any pro se parties must dial **888-363-4749** and enter Access Code **4901386** to join the conference. Unless otherwise notified, the undersigned Magistrate Judge will conduct the conference.

No later than **n/a**, defense counsel must submit the parties' proposed pretrial order (formatted in Word or WordPerfect) as an attachment to an e-mail sent to

ksd_james_chambers@ksd.uscourts.gov. The proposed pretrial order must not be filed with the Clerk's Office. It must be in the form available on the court's website:

http://www.ksd.uscourts.gov/flex/?fc=9&term=5062

The parties must affix their signatures to the proposed pretrial order according to the procedures governing multiple signatures set forth in paragraphs II(C) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*.

d) An in limine conference will be held on **n/a, at 2:30 p.m.**, before Judge J. Thomas Marten [by dial-in telephone conference call. Counsel and any pro se parties must **dial 888-363-4749 and enter Access Code 4079202** to join the conference.] [in Courtroom 238, U.S. Courthouse, 401 North Market, Wichita, Kansas.-Wichita cases].

e) The parties expect the [jury] [non-jury] trial of this case to take approximately _____ trial days. The case will be tried in [Kansas City Topeka Wichita]**,** Kansas. This case is set for trial on the court's docket beginning on **n/a**. Unless otherwise ordered, this is not a "special" or "No. 1" trial setting. Therefore, during the month preceding the trial docket setting, counsel should stay in contact with the trial judge's courtroom deputy to determine the day of the docket on which trial of the case actually will begin. The trial setting may be changed only by order of the judge presiding over the trial. [FOR EFM CASES - The court will subsequently set the case for trial.] The parties and counsel are advised that any future request for extension of deadlines that includes a request to extend the dispositive motion deadline will likely result in a new (i.e., later) trial date.

f) The parties [are] [are not] prepared to consent to trial by a U.S. Magistrate Judge [at this time,] [or as a backup if the assigned U.S. District Judge determines that his or her schedule is unable to accommodate the scheduled trial date]. [The parties indicated they are prepared to consent to trial by a U.S. Magistrate Judge at this time. In order to accomplish this, they must email

to the Clerk of the Court the Notice, Consent, and Reference of a Civil Action to a Magistrate Judge located on the court's website under "forms" at http://www.ksd.uscourts.gov/.]

g) This court, like the Kansas Supreme Court, has formally adopted the Kansas Bar Association's *Pillars of Professionalism* (2012) as aspirational goals to guide lawyers in their pursuit of civility, professionalism, and service to the public. Counsel are expected to familiarize themselves with the *Pillars of Professionalism* and conduct themselves accordingly when litigating cases in this court. The *Pillars of Professionalism* are available on this court's website:

http://www.ksd.uscourts.gov/pillars-of-professionalism/

This scheduling order will not be modified except by leave of court upon a showing of good cause.

IT IS SO ORDERED.

Dated December 2, 2016, at Kansas City, Kansas.

_____

Teresa J. James
U.S. Magistrate Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED INFORMATION [ESI]

These guidelines are intended to facilitate compliance with the provisions of Fed. R. Civ. P. 1, 16, 26, 33, 34, 37, and 45 relating to the discovery of electronically stored information ("ESI") and the current applicable case law. In the case of any asserted conflict between these guidelines and either the referenced rules or applicable case law, the latter should control.

INTRODUCTION

1. Purpose

The purpose of these guidelines is to facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention. Parties should consider proportionality, now an express component of the scope of discoverable evidence. *See* Fed. R. Civ. P. 26(b)(1); *see also* 26(g)(1)(B)(iii).

2. Principle of Cooperation

An attorney's representation of a client is improved by conducting discovery in a cooperative manner. The failure of counsel or the parties in litigation to cooperate in facilitating and reasonably limiting discovery requests and responses increases litigation costs and contributes to the risk of sanctions. For a more complete discussion of this principle, please review the Sedona Conference Cooperation Proclamation,[1] generally endorsed by the District, and "*Cooperation—What Is It and Why Do It?*" by David J. Waxse.[2]

DEFINITIONS

3. General

To avoid misunderstandings about terms, all parties should consult the most current edition of The Sedona Conference® Glossary[3] and "The Grossman-Cormack Glossary of Technology-Assisted Review."[4] In addition, references in these guidelines to counsel include parties who are not represented by counsel.

4. Form of Production

[1] http://www.thesedonaconference.org/dltForm?did=proclamation.pdf.
[2] David J. Waxse, *Cooperation— What Is It and Why Do It?*, 18 Rich. J.L. & Tech. 8 (2012) at http://jolt.richmond.edu/v18i3/article8.pdf.
[3] https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Glossary.
[4] Federal Courts Law Review, Vol. 7, Issue 1 (2013).

Parties and counsel should recognize the distinction between format and media. Format, the internal structure of the data, suggests the software needed to create and open the file (i.e., an Excel spreadsheet, a Word document, a PDF file). Media refers to the hardware containing the file (i.e., a flash drive or disc).

Electronic documents have an associated file structure defined by the original creating application. This file structure is referred to as the "native format" of the document.[5] Native format refers to the document's internal structure at the time of the creation. In general, a file maintained in native format includes any metadata embedded inside the document that would otherwise be lost by conversion to another format or hard copy. In contrast, a "static format," such as a .PDF or .TIF, creates an image of the document as it originally appeared in native format but usually without retaining any metadata. Counsel need to be clear as to what they want and what they are producing.

Counsel should know the format of the file and, if counsel does not know how to read the file format, should consult with an expert as necessary to determine the software programs required to read the file format.

5. Meta and Embedded Data

"Metadata" typically refers to information describing the history, tracking, or management of an electronic file. Some forms of metadata are maintained by the system to describe the file's author, dates of creation and modification, location on the drive, and filename. Other examples of metadata include spreadsheet formulas, database structures, and other details, which in a given context, could prove critical to understanding the information contained in the file. "Embedded data" typically refers to draft language, editorial comments, and other deleted or linked matter retained by computer programs.

Metadata and embedded data may contain privileged or protected information. Litigants should be aware of metadata and embedded data when reviewing documents but should refrain from "scrubbing" either metadata or embedded data without cause or agreement of adverse parties.

PRIOR TO THE FILING OF LITIGATION

6. Identification of Potential Parties and Issues

When there is a reasonable anticipation of litigation or when litigation is imminent,[6] efforts should be made to identify potential parties and their counsel to such litigation to facilitate early cooperation in the preservation and exchange of ESI that may be relevant to a potential claim or defense and proportional to the needs of the case. To comply with Rule 26(b)(1), counsel should consider determining the issues that will likely arise in the litigation. As soon as practicable and without waiting for a court order, counsel should discuss with opposing counsel which issues are actually in dispute and which can be

[5] http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf.

[6] The Tenth Circuit has not yet addressed the relevant standard on when parties should take action regarding ESI prior to litigation being initiated but has said action should have been taken when litigation is "imminent" in the general litigation context. Judges in the District of Kansas have used both that standard and the standard of when litigation is "reasonably anticipated" in the context of litigation involving ESI.

resolved by agreement. Agreement that an issue is not disputed can reduce discovery costs.

7. **Identification of Electronically Stored Information**

In anticipation of litigation, counsel should become knowledgeable about their client's information management systems and its operation, including how information is stored and retrieved. Counsel also should consider determining whether discoverable ESI is being stored by third parties, for example, in cloud-storage facilities or social media. In addition, counsel should make a reasonable attempt to review their client's relevant and/or discoverable ESI to ascertain the contents, including backup, archival, and legacy data (outdated formats or media).

8. **Preservation**

In general, electronic files are usually preserved in native format with metadata intact.

Every party either reasonably anticipating litigation or believing litigation is imminent[7] must take reasonable steps to preserve relevant ESI within the party's possession, custody, or control.[8] Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues immediately, and should continue to address them as the case progresses and their understanding of the issues and the facts improves. If opposing parties and counsel can be identified, efforts should be made to reach agreement on preservation issues. The parties and counsel should consider the following:

(a) the categories of potentially discoverable information to be segregated and preserved;

(b) the "key persons" and likely witnesses and persons with knowledge regarding relevant events;

(c) the relevant time period for the litigation hold;

(d) the nature of specific types of ESI, including email and attachments, word processing documents, spreadsheets, graphics and presentation documents, images, text files, hard drives, databases, instant messages, transaction logs, audio and video files, voicemail, Internet data, computer logs, text messages, backup materials, or native files, and how it should be preserved; and

(e) data maintained by third parties, including data stored in social media and cloud servers. Because of the dynamic nature of social media, preservation of this data may require the use of additional tools and expertise.

[7] *Ibid.*, p. 2.
[8] Counsel should become aware of the current Tenth Circuit law defining "possession, custody and control."

INITIATION OF LITIGATION

9. Narrowing the Issues

After litigation has begun, counsel should attempt to narrow the issues early in the litigation process by review of the pleadings and consultation with opposing counsel. Through discussion, counsel should identify the material factual issues that will require discovery. Counsel should engage with opposing counsel in a respectful, reasonable, and good-faith manner, with due regard to the mandate of Rule 1 that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." In addition, counsel should comply with their professional and ethical obligations including candor to the court and opposing counsel. Note that the issues discussed will need to be revisited throughout the litigation.

10. E-Discovery Liaison

To promote communication and cooperation between the parties, each party to a case with significant e-discovery issues may designate an e-discovery liaison for purposes of assisting counsel, meeting, conferring, and attending court hearings on the subject. Regardless of whether the liaison is an attorney (in-house or outside counsel), a third-party consultant, or an employee of the party, he or she should be:

- familiar with the party's electronic information systems and capabilities in order to explain these systems and answer relevant questions;
- knowledgeable about the technical aspects of e-discovery, including the storage, organization, and format issues relating to ESI; and
- prepared to participate in e-discovery dispute resolutions.

The attorneys of record are responsible for compliance with e-discovery requests and, if necessary, for obtaining a protective order to maintain confidentiality while facilitating open communication and the sharing of technical information. However, the liaison should be responsible for organizing each party's e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.

AT THE RULE 26(f) CONFERENCES

11. General

At the Rule 26(f) conference or prior to the conference if possible, a party seeking discovery of ESI should notify the opposing party of that fact immediately, and, if known at that time, should identify as clearly as possible the categories of information that may be sought. Parties and counsel are reminded that, under Rule 34, if the requesting party has not designated a form of production in its request, or if the responding party objects

to the designated form, the responding party must state the form it intends to use for producing ESI. In cases with substantial ESI issues, counsel should assume that this discussion will be an ongoing process and not a one-time meeting.[9]

12. **Reasonably Accessible Information and Costs**

a. The volume of, and ability to search, ESI means that most parties' discovery needs will be satisfied from reasonably accessible sources. Counsel should attempt to determine if any responsive ESI is not reasonably accessible, i.e., information that is only accessible by incurring undue burdens or costs. If the responding party is not searching or does not plan to search sources containing potentially responsive information that is not reasonably accessible, it must identify the category or type of such information. If the requesting party intends to seek discovery of ESI from sources identified as not reasonably accessible, the parties should discuss: (1) the burden and cost of accessing and retrieving the information, (2) the needs that may establish good cause for requiring production of all or part of the information, even if the information sought is not reasonably accessible, and (3) conditions on obtaining and producing this information such as scope, time, and allocation of cost.

b. Absent a contrary showing of good cause, the parties should generally presume that the producing party will bear all costs for reasonably accessible ESI. The parties should generally presume that there will be cost sharing or cost shifting for ESI that is not reasonably accessible.

13. **Creation of a Shared Database and Use of a Single Search Protocol**

In appropriate cases, counsel may want to attempt to agree on the construction of a shared database, accessible and searchable by both parties. In such cases, they should consider both hiring a neutral vendor and/or using a single search protocol with a goal of minimizing the costs of discovery for both sides.[10]

14. **Removing Duplicated Data and De-NISTing**

Counsel should discuss the elimination of duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians, also known as vertical and horizontal views of ESI.

In addition, counsel should discuss the de-NISTing of files which is the use of an automated filter program that screens files against the NIST list of computer file types to separate those generated by a system and those generated by a user. [NIST (National Institute of Standards and Technology) is a federal agency that works with industry to develop technology measurements and standards.] NIST developed a hash database of

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[9] For a more detailed description of matters that may need to be discussed, see Craig Ball, *Ask and Answer to Right Questions in EDD*, LAW TECHNOLOGY NEWS, Jan. 4, 2008, reprinted in these Guidelines with permission at Appendix 1.

[10] Vice Chancellor Travis Laster recently ordered, *sua sponte*, counsel to retain a single discovery vendor to be used by both sides and to conduct document review with the assistance of predictive coding. *EORHB, Inc., v. HOA Holdings, LLC*, C.A. No. 7409-VCL (Del. Ch. Oct. 15, 2012). Vice Chancellor Laster later modified these requirements. *See EORHB, Inc. v HOA Holdings, LLC*, No. CIV.A. 7409-VCL, 2013 WL 1960621, at *1 (Del. Ch. May 6, 2013).

computer files to identify files that are system generated and generally accepted to have no substantive value in most cases.[11]

15. **Search Methodologies**

If counsel intend to employ technology assisted review[12] (TAR) to locate relevant ESI and privileged information, counsel should attempt to reach agreement about the method of searching or the search protocol. TAR is a process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document collection.[13]

If word searches are to be used, the words, terms, and phrases to be searched should be determined with the assistance of the respective e-discovery liaisons, who are charged with familiarity with the parties' respective systems. In addition, any attempt to use word searches should be based on words that have been tested against a randomly-selected sample of the data being searched.

Counsel also should attempt to reach agreement as to the timing and conditions of any searches, which may become necessary in the normal course of discovery. To minimize the expense, counsel may consider limiting the scope of the electronic search (e.g., time frames, fields, document types) and sampling techniques to make the search more effective.

16. **E-Mail**

Counsel should attempt to agree on the scope of e-mail discovery and e-mail search protocol. The scope of e-mail discovery may require determining whether the unit for production should focus on the immediately relevant e-mail or the entire string that contains the relevant e-mail. In addition, counsel should focus on the privilege log ramifications of selecting a particular unit of production.[14]

17. **Deleted Information**

Counsel should attempt to agree on whether responsive deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration.

18. **Meta and Embedded Data**

Counsel should discuss whether "embedded data" and "metadata" exist, whether it will be requested or should be produced, and how to handle determinations regarding privilege or protection of trial preparation materials.

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[11] http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf.

[12] The Grossman-Cormack Glossary of Technology-Assisted Review.

[13] There is no current agreement on what to call the searches that are performed with the assistance of technology. Some currently used other terms include: (CAR) computer assisted review, predictive coding, concept search, contextual search, boolean search, fuzzy search and others.

[14] *In re Universal Service Fund Telephone Billing Practices Litig.*, 232 F.R.D. 669, 674 (D. Kan. 2005).

19. **Data Possessed by Third Parties**

Counsel should attempt to agree on an approach to ESI stored by third parties. This includes files stored on a cloud server and social networking data on services such as Facebook, Twitter, and Instagram.

20. **Format and Media**

The parties have discretion to determine production format and should cooperate in good faith to promote efficiencies. Reasonable requests for production of particular documents in native format with metadata intact should be considered.

21. **Identifying Information**

Because identifying information may not be placed on ESI as easily as bates stamping paper documents, methods of identifying pages or segments of ESI produced in discovery should be discussed.[15] Counsel is encouraged to discuss the use of a digital notary, hash value indices, or other similar methods for producing native files.

22. **Priorities and Sequencing**

Counsel should attempt to reach an agreement on the sequence of processing data for review and production. Some criteria to consider include ease of access or collection, sources of data, date ranges, file types, and keyword matches.

23. **Privilege**

Counsel should attempt to reach an agreement regarding what will happen in the event of inadvertent disclosure of privileged or trial preparation materials[16] If the disclosing party inadvertently produces privileged or trial preparation materials, it must notify the requesting party of such disclosure. After the requesting party is notified, it must return, sequester, or destroy all information and copies and may not use or disclose this information until the claim of privilege or protection as trial preparation materials is resolved.

A. To accelerate the discovery process, the parties may establish a "clawback agreement," whereby materials that are disclosed without intent to waive privilege or protection are not waived and are returned to the responding party, so long as the responding party identifies the materials mistakenly produced. Counsel should be aware of the requirements of Federal Rule of Evidence 502(d) to protect against waivers of privilege in other settings.

B. The parties may agree to provide a "quick peek," whereby the responding party provides certain requested materials for initial examination without waiving any privilege or protection.

[15] For a viable electronic alternative to bates stamps, see Ralph C. Losey, *HASH: The New Bates Stamp*, 12 J. Tech. L. & Pol'y 1 (2007).

[16] In addition, counsel should comply with current rules and case law on the requirement of creating privilege logs.

Other voluntary agreements should be considered as appropriate. Counsel should be aware that there is an issue of whether such agreements bind third parties who are not parties to the agreements. Counsel are encouraged to seek an order from the Court pursuant to Rule 502(d). However, the Court may enter a clawback arrangement for good cause even if there is no agreement. In that case, third parties may be bound but only pursuant to the court order.[17]

DISCOVERY PROCESS

24. Timing

Counsel should attempt to agree on the timing and sequencing of e-discovery. In general, e-discovery should proceed in the following order.

(a) Mandatory Disclosure

Disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) must include any ESI that the disclosing party may use to support its claims or defenses (unless used solely for impeachment). To determine what information must be disclosed pursuant to this rule, counsel should review, with their clients, the client's ESI files, including current, back-up, archival, and legacy computer files. Counsel should be aware that documents in paper form may have been generated by the client's information system; thus, there may be ESI related to that paper document. If any party intends to disclose ESI, counsel should identify those individuals with knowledge of their client's electronic information systems who can facilitate the location and identification of discoverable ESI prior to the Rule 26(f) conference.

(b) Search of Reasonably Accessible Information

After receiving requests for production under Federal Rule Civil Procedure 34, the parties shall search their ESI, other than that identified as not reasonably accessible due to undue burden and/or substantial cost, and produce responsive information in accordance with Rule 26(b).

(c) Search of Unreasonably Accessible Information

Electronic searches of information identified as not reasonably accessible should not be conducted until the initial search has been completed, and then only by agreement of the parties or pursuant to a court order. Requests for electronically stored information that is not reasonably accessible must be narrowly focused with good cause supporting the request. *See* Fed. R. Civ. P. 26(b)(2) advisory committee's note to 2006 amendment (good cause factors).

(d) Requests for On-Site Inspections

[17] *See Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010).

Requests for on-site inspections of electronic media under Federal Rule of Civil Procedure 34(b) should be reviewed to determine if good cause and specific need have been demonstrated.

25. **Discovery Concerning Preservation and Collection Efforts**

Discovery concerning the preservation and collection efforts of another party, if used unadvisedly, can contribute to unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matters. Routine discovery into such matters is therefore strongly discouraged and may be in violation of Rule 26(g)'s requirement that discovery be "neither unreasonable nor unduly burdensome or expensive." Prior to initiating any such discovery, counsel shall confer with counsel for the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Discovery into such matters may be compelled only on a showing of good cause considering these aforementioned factors. However, deponents who provide testimony on the merits are not exempt from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

26. **Duty to Meet and Confer When Requesting ESI from Non-Parties (Fed. R. Civ. P. 45)**

Counsel issuing requests for ESI from non-parties should attempt to informally meet and confer with the non-party (or counsel, if represented). During this meeting, counsel should discuss the same issues regarding ESI requests that they would with opposing counsel as set forth in Paragraph 11 above.

December 1, 2015

APPENDIX 1

Ask and Answer the Right Questions in EDD

Craig Ball
Law Technology News
January 4, 2008

Sometimes it's more important to ask the right questions than to know the right answers, especially when it comes to nailing down sources of electronically stored information, preservation efforts and plans for production in the FRCP Rule 26(f) conference, the so-called "meet and confer."

The federal bench is deadly serious about meet and confers, and heavy boots have begun to meet recalcitrant behinds when Rule 26(f) encounters are perfunctory, drive-by events. Enlightened judges see that meet and confers must evolve into candid, constructive mind melds if we are to take some of the sting and "gotcha" out of e-discovery. Meet and confer requires intense preparation built on a broad and deep gathering of detailed information about systems, applications, users, issues and actions. An hour or two of hard work should lie behind every minute of a Rule 26(f) conference. Forget "winging it" on charm or bluster and forget "We'll get back to you on that."

Here are 50 questions of the sort I think should be hashed out in a Rule 26(f) conference. If you think asking them is challenging, think about what's required to deliver answers you can certify in court. It's going to take considerable arm-twisting by the courts to get lawyers and clients to do this much homework and master a new vocabulary, but, there is no other way.

These 50 aren't all the right questions for you to pose to your opponent, but there's a good chance many of them are . . . and a likelihood you'll be in the hot seat facing them, too.

1. What are the issues in the case?
2. Who are the key players in the case?
3. Who are the persons most knowledgeable about ESI systems?
4. What events and intervals are relevant?
5. When did preservation duties and privileges attach?
6. What data are at greatest risk of alteration or destruction?
7. Are systems slated for replacement or disposal?
8. What steps have been or will be taken to preserve ESI?
9. What third parties hold information that must be preserved, and who will notify them?
10. What data require forensically sound preservation?
11. Are there unique chain-of-custody needs to be met?
12. What metadata are relevant, and how will it be preserved, extracted and produced?
13. What are the data retention policies and practices?
14. What are the backup practices, and what tape archives exist?
15. Are there legacy systems to be addressed?

16. How will the parties handle voice mail, instant messaging and other challenging ESI?
17. Is there a preservation duty going forward, and how will it be met?
18. Is a preservation or protective order needed?
19. What e-mail applications are used currently and in the relevant past?
20. Are personal e-mail accounts and computer systems involved?
21. What principal applications are used in the business, now and in the past?
22. What electronic formats are common, and in what anticipated volumes?
23. Is there a document or messaging archival system?
24. What relevant databases exist?
25. Will paper documents be scanned, and if so, at what resolution and with what OCR and metadata?
26. What search techniques will be used to identify responsive or privileged ESI?
27. If keyword searching is contemplated, can the parties agree on keywords?
28. Can supplementary keyword searches be pursued?
29. How will the contents of databases be discovered? Queries? Export? Copies? Access?
30. How will de-duplication be handled, and will data be re-populated for production?
31. What forms of production are offered or sought?
32. Will single- or multipage .tiffs, PDFs or other image formats be produced?
33. Will load files accompany document images, and how will they be populated?
34. How will the parties approach file naming, unique identification and Bates numbering?
35. Will there be a need for native file production? Quasi-native production?
36. On what media will ESI be delivered? Optical disks? External drives? FTP?
37. How will we handle inadvertent production of privileged ESI?
38. How will we protect trade secrets and other confidential information in the ESI?
39. Do regulatory prohibitions on disclosure, foreign privacy laws or export restrictions apply?
40. How do we resolve questions about printouts before their use in deposition or at trial?
41. How will we handle authentication of native ESI used in deposition or trial?
42. What ESI will be claimed as not reasonably accessible, and on what bases?
43. Who will serve as liaisons or coordinators for each side on ESI issues?
44. Will technical assistants be permitted to communicate directly?
45. Is there a need for an e-discovery special master?
46. Can any costs be shared or shifted by agreement?
47. Can cost savings be realized using shared vendors, repositories or neutral experts?
48. How much time is required to identify, collect, process, review, redact and produce ESI?
49. How can production be structured to accommodate depositions and deadlines?
50. When is the next Rule 26(f) conference (because we need to do this more than once)?

U.S. DISTRICT COURTS FOR THE NORTHERN/SOUTHERN DISTRICTS OF IOWA

INSTRUCTIONS AND WORKSHEET FOR PREPARATION OF SCHEDULING ORDER AND DISCOVERY PLAN

Effective December 1, 2009

ORDER REQUIRING SUBMISSION OF SCHEDULING ORDER AND DISCOVERY PLAN

Please carefully review the Local Rules, revised as of December 1, 2009 , for a more complete description of the District's requirements for pretrial case management (*available at www.iand.uscourts.gov* or *www.iasd.uscourts.gov*).

IT IS ORDERED THAT counsel for the parties shall confer, as required by Federal Rules of Civil Procedure 16 and 26 and Local Rules 16 and 26, and submit to the Clerk of Court on the attached form a stipulated proposed scheduling order and discovery plan. If counsel are not able to agree upon the deadlines required to complete the form or are requesting deadlines significantly beyond those suggested in the form, or if the case involves any special issues that require the early attention of the court, counsel should, in paragraph 11 of the form, request a Rule 16(b) and 26(f) scheduling and planning conference with the court.

/S/

_____

U.S. MAGISTRATE JUDGE

Follow this worksheet at your Rule 16(b) and 26(f) conference. The deadlines referred to in the worksheet are suggested deadlines except for the dispositive motion deadline, which MUST be at least 120 days before the trial ready date. File only the attached two-page proposed scheduling order and discovery plan. DO NOT FILE THE WORKSHEET.

1 **INITIAL DISCLOSURES AND ELECTRONICALLY STORED INFORMATION:** State whether the parties (a) entered into an agreement at the Rule 26(f) conference resolving all issues relating to the Federal Rule of Civil Procedure 26(a)(1) initial disclosures in this action, and (b) discussed the preservation, disclosure, and discovery of electronically stored information.

_____ yes _____ no

If any party objected at the Rule 26(f) conference either to making the initial disclosures or to the timing of the initial disclosures, then **within 10 days after the scheduling order and discovery plan is filed**, the objecting party must serve and file a document in which the objections are set forth with particularity.

> If the parties have entered into an agreement concerning the timing of the initial disclosures, state the date by which the initial disclosures will be made.
>
> _____
> (insert date)

Unless a different deadline is set by agreement of the parties or court order, or unless a party objects to making the initial disclosures or to the timing of the initial disclosures, Local Rule 26.a requires that the initial disclosures be made **within 14 days after the Rule 26(f) conference**.

Federal Rule of Civil Procedure 26(a)(1) requires that the parties must, without awaiting a discovery request, provide to other parties:

> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;
> (B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;
> (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and
> (D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

If the parties have any other disputes concerning initial disclosures or the preservation, disclosure, or discovery of electronically stored information, or are aware of any other issues relating to scheduling or planning that might benefit from the early intervention of the court, the parties may, in paragraph 11 of the proposed scheduling order and discovery plan, request a court-sponsored pretrial discovery and planning conference.

2. **ADDING PARTIES:** State the deadline for filing motions to add parties.

_____
(insert date)

This deadline should be **no more than 2 months after the date the proposed scheduling order and discovery plan is submitted to the court**.

3. **AMENDING PLEADINGS:** State the deadline for filing motions to amend pleadings.

_____
(insert date)

This deadline should be **no more than 2 months after the date the proposed scheduling order and discovery plan is submitted to the court**.

4. **EXPERT WITNESSES:** State the deadlines for the parties to disclose, in accordance with Federal Rule of Civil Procedure 26(a)(2)(A) and (B), all "expert witnesses" who may be used at trial to present evidence under Federal Rules of Evidence 702, 703, or 705.

Plaintiff's experts: _____
(insert date)

Defendant's experts: _____
(insert date)

Plaintiff's rebuttal experts: _____
(insert date)

The deadlines for the plaintiff to disclose experts, for the defendant to disclose experts, and for the plaintiff to disclose rebuttal experts should be no more than **3 months**, **5 months**, and **6 months**, respectively, after the date the proposed scheduling order and discovery plan is submitted to the Clerk of Court. Except as otherwise stipulated by the parties or ordered by the court, the parties must, by these deadlines, disclose to the other parties: (a) the identity of each expert witness; and (b) a written report prepared and signed by each expert witness, as required by Federal Rule of Civil Procedure 26(a)(2)(B). The report must contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

5. **DISCOVERY:** State the date by which all discovery will be ***completed***, not propounded.

_____
(insert date)

This deadline should be **no more than 8 months after the date the proposed scheduling order and discovery plan is submitted to the court**.

Federal Rule of Civil Procedure 26(e) imposes a continuing duty to supplement discovery responses as soon as practicable. **All discovery responses must be supplemented at least 30 days before the close of discovery**.

6. **DISPOSITIVE MOTIONS:** State the deadline for filing dispositive motions.

_____
(insert date)

This deadline **must be at least 120 days before the trial ready date**, but should be **no more than 9 months after the date the proposed scheduling order and discovery plan is submitted to the court**.

7. **TRIAL READY DATE:** State the date on which the parties anticipate the case will be ready for trial.

_____
(insert date)

This deadline should be **no more than 13 months after the date the proposed scheduling order and discovery plan is submitted to the court**, but **must not be less than 120 days after the dispositive motion deadline**.

8. **JURY DEMAND:** State whether a jury demand has been filed.

_____ yes _____ no

9. **ESTIMATED LENGTH OF TRIAL:** State your estimate of the number of days required for trial. For jury trials, include in your estimate the time required for jury selection, opening statements, closing arguments and instructions. If circumstances change, the parties should immediately so notify the court. **In any event, the parties should notify the court of any change in the time required for trial and of their new estimated length of trial by at least 30 days before the trial readiness date in paragraph 7.**

_____
(insert number of trial days)

10. **SETTLEMENT CONFERENCE:** Indicate one of the following two choices regarding a court-sponsored settlement conference:

_____ A court-sponsored settlement conference should be set by the court at this time for a date after: _____.
(insert date)

_____ A court-sponsored settlement conference is not necessary at this time.

11. **SCHEDULING AND PLANNING CONFERENCE:** State whether the parties believe a court-sponsored scheduling and planning conference pursuant to Federal Rules of Civil Procedure 16(b) and 26(f) would be appropriate in this case.

_____ yes _____ no

12. **CONSENT TO MAGISTRATE JUDGE:** State whether the parties unanimously consent, or do not unanimously consent, to trial, disposition, and judgment by a United States Magistrate Judge, with appeal to the Eighth Circuit Court of Appeals.

_____ yes, we unanimously consent _____ no, we do not unanimously consent

You may consent in either a jury or non-jury case. Cases consented to the United States Magistrate Judge will be set for trial on a **date certain**.

13. **FILING OR DELIVERY OF FORM TO CLERK OF COURT:** Print or type the names, addresses, telephone and fax numbers, and e-mail addresses on the proposed scheduling order and discovery plan, sign the proposed order and plan, and (a) in the Southern District of Iowa, electronically file the form in the court's electronic case filing system, or (b) in the Northern District of Iowa, e-mail the form to the following e-mail address: efcmail@iand.uscourts.gov. **Be sure to include *both* pages of the proposed order and plan, and include the signature line for the magistrate judge.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA
DIVISION

_____,	)	
	)	
Plaintiff(s),	)	NO. _____
	)	
vs.	)	
	)	
_____,	)	**SCHEDULING ORDER AND**
	)	**DISCOVERY PLAN**
Defendant(s).	)	

Counsel have conferred and submit the following case information and proposed dates for case management:

1. Did the parties both (a) enter into an agreement at the Rule 26(f) conference resolving all issues relating to initial disclosures, and (b) discuss the preservation, disclosure, and discovery of electronically stored information? _ _ yes _ _ _ no
   If any party objected at the Rule 26(f) conference to making or to the timing of the initial disclosures, then the objecting party must, within 10 days after this order and plan has been filed, serve and file a document in which the objections are set forth with particularity. If the parties have agreed to a deadline for making the initial disclosures, state the date by which the initial disclosures will be made: _____
2. Deadline for motions to add parties: _____
3. Deadline for motions to amend pleadings: _____
4. Expert witnesses disclosed by: a) Plaintiff: _____
   b) Defendant: _____
   c) Plaintiff Rebuttal: _____
5. Deadline for ***completion*** of discovery: _____
6. Dispositive motions deadline (***at least 120 days before Trial Ready Date***):_____
7. Trial Ready Date (***at least 120 days after Dispositive Motions Date***):_____
8. Has a jury demand been filed? _____ yes __ ___ no
9. Estimated length of trial: _____ days
10. Settlement conference (choose one of the following): (a) _ __ A court-sponsored settlement conference should be set by the court at this time for a date after: _____; or (b) __ __ A court-sponsored settlement conference is not necessary at this time.
11. Should the court order a court-sponsored scheduling and planning conference pursuant to Fed. R. Civ. P. 16(b) and 26(f)? _____ yes _____ no
12. Do the parties unanimously consent to trial, disposition and judgment by a U.S. Magistrate Judge, with appeal to the Eighth Circuit Court of Appeals? 28 U.S.C. § 636(c).
    _____ yes __ ___ no

_____	_____
Attorney for Plaintiff(s):	Attorney for Defendant(s):
Address:	Address:
Telephone:	Telephone:
Facsimile:	Facsimile:
E-mail address:	E-mail address:

_____
Attorney for Third-Party Defendant\Other:

Address:

Telephone:

Facsimile:

E-mail address:

JUDGE'S REVISIONS

The deadline in Paragraph _____ is changed to _____.

The deadline in Paragraph _____ is changed to _____.

The deadline in Paragraph _____ is changed to _____.

IT IS ORDERED that this proposed Scheduling Order and Discovery Plan _____ **is** _____ **is not** approved and adopted by this court.

IT IS FURTHER ORDERED that a scheduling and planning conference:

___ will not be scheduled at this time.

___ will be held in the chambers of Judge _____ at the U.S. Courthouse in _____, Iowa, on the _____ day of _____, at _____ o'clock, ___.m.

___ will be held by telephone conference, initiated by the court, on the _____ day of _____, at _____ o'clock, ___.m.

DATED this _____ day of _____.

_____
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

ORDER OF REFERENCE

IT IS HEREBY ORDERED that this case is referred to a U.S. Magistrate Judge for the conduct of all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c) and the consent of the parties.

DATED this _____ day of _____.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

	)	
	)	
	)	CIVIL NO.
Plaintiff,	)	
vs.	)	CONSENT TO PROCEED
	)	BEFORE A UNITED STATES
	)	MAGISTRATE JUDGE
	)	
Defendant.	)	

In accordance with the provisions of 28 U.S.C. Section 636 (c), the parties to the above-captioned civil proceeding hereby waive their right to proceed before a judge of the United States District Court and consent to have a United States Magistrate Judge conduct any and all further proceedings in the case, and order the entry of judgment in the case.

The parties are aware and agree that in accordance with 28 U.S.C. Section 636 (c)(3), any aggrieved party shall appeal from the judgement directly to the United States Court of Appeals for this circuit in the same manner as an appeal from any other judgment of the District Court.

_____ _____

Attorney for Plaintiff(s) Attorney for Defendant(s)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

	*	CIVIL NO.
	*	
Plaintiff,	*	
	*	
v.	*	**ORDER FOR**
	*	**STATUS REPORT ON ESI**
	*	
	*	
Defendant.	*	

With regard to issues involving electronically stored information (ESI), the parties are directed to meet and confer, and to file a joint status report regarding matters set forth below:

1. The estimated number of custodians of electronically stored information who will be the subject of orders of retention, orders for search for information, or production.

2. Identification of relevant and discoverable ESI, including all methods agreed upon by the parties for identifying any initial subset sources of ESI which are most likely to contain relevant and discoverable information, as well as methodologies agreed upon for retrieving the relevant and discoverable ESI from the initial subset, and the persons or entities with possession, custody or control of such discoverable information.

3. The agreed time frame (this means the date parameters of the search, i.e. "2005 to 2014" or "the last 5 years", etc.) for all searches of computers maintained by any and all parties.

4. The agreed format for any computerized searches.

5. The agreed search terms to be utilized in any computerized search, including predictive coding, key word search or use of algorithms.

6. Whether the existence of, and retention of, ESI has been identified in the initial disclosures exchanged, or to be exchanged by the parties.

7. The implementation and existence of litigation holds on electronically stored information by all parties.

8. The existence, location and availability of information stored, maintained and collected in any "cloud" computing facilities or programs.

9. The extent to which social media sites will be subject to discovery, and the identity of such sites, and the person(s) who created, used, or have access to such sites.

10. Should there be phased discovery, and if so, set forth the bases or reasons for a phased discovery plan.

11. The use of experts or vendors regarding ESI issues.

12. The extent to which the parties have discussed, agreed upon, or disagreed upon methods to reduce, share or allocate costs of producing, reviewing, retrieving or storing ESI pursuant to Fed. R. Civ. P. 26(b)(2)(B).

13. Whether there will be any requests made to any party regarding the content, address, and participants in any social media sites of any type or nature, and if so identify the person or persons in whose name or identification such social media site or sites is listed.

14. Whether the parties have agreed upon a stipulation pursuant to Fed. R. Evid. 502(e), and/or whether the parties will seek or agree on the entry of an order pursuant to Fed. R. Evid. 502(d).

If the parties are unable to agree upon an appropriate protocol for the search of, and review of, electronically stored information in this case, they are to notify the Court within ten days of any meet and confer session regarding such failure, and the Court will then order a conference to discuss these issues.

The parties shall submit the joint status report by _____, with an attached joint proposed order for discovery of ESI if appropriate.

IT IS SO ORDERED.

Dated _____.

_____
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

INSTRUCTIONS AND WORKSHEET FOR PREPARATION OF TRIAL SCHEDULE AND DISCOVERY PLAN

Effective October 18, 2016

Counsel for the parties shall confer, as required by Federal Rules of Civil Procedure 16 and 26 and Local Rules 16 and 26, and submit to the Clerk of Court on the attached form a stipulated proposed scheduling and discovery plan. **Follow this worksheet during your Rule 16(b) and 26(f) conference. The deadlines referred to in the worksheet are suggested deadlines except for the dispositive motion deadline, which MUST be at least 120 days before the trial ready date. Submit only the attached two-page proposed scheduling and discovery plan to the Clerk of Court. DO NOT FILE EITHER THE WORKSHEET OR THE PROPOSED SCHEDULING AND DISCOVERY PLAN.**

Please carefully review the Local Rules for a more complete description of the District's requirements for pretrial case management (*available at www.iand.uscourts.gov*). After the Court receives the parties' proposed scheduling and discovery plan, it will schedule a Rule 16(b) and 26(f) conference call with the parties to discuss the proposed schedule and plan, along with other pretrial issues.

1. INITIAL DISCLOSURES AND ELECTRONICALLY STORED INFORMATION:

State whether the parties (a) entered into an agreement during the Rule 26(f) conference resolving all issues relating to the Federal Rule of Civil Procedure 26(a)(1) initial disclosures in this action, and (b) discussed the preservation, disclosure, and discovery of electronically stored information: _____ yes _____ no

If any party objects either to making the initial disclosures or to the timing of the initial disclosures, then **within 14 days after the scheduling and discovery plan is submitted**, the objecting party must serve and file a document in which the objections are set forth with particularity.

If the parties have entered into an agreement concerning the timing of the initial disclosures, state the date by which the initial disclosures will be made: _____
(insert date)

Unless a different deadline is set by agreement of the parties or court order, or unless a party objects to making the initial disclosures or to the timing of the initial disclosures, Local Rule 26(a) requires that the initial disclosures be made **within 14 days after the parties' Rule 26(f) conference**.

Federal Rule of Civil Procedure 26(a)(1) describes the information the parties must, without awaiting a discovery request, provide to other parties. Parties are required to comply fully with Rule 26(a)(1).

If the parties have any other disputes concerning initial disclosures or the preservation, disclosure, or discovery of electronically stored information, or are aware of any other issues relating to scheduling or planning that might benefit from the early intervention of the court, the parties should raise the dispute with the Magistrate Judge during the pretrial discovery and planning conference.

2. ADDING PARTIES:

State the deadline for filing motions to add parties: _____
(insert date)

This deadline should be **no more than 2 months after the date the proposed scheduling and discovery plan is submitted to the Clerk of Court**.

3. AMENDING PLEADINGS:

State the deadline for filing motions to amend pleadings: _____
(insert date)

This deadline should be **no more than 2 months after the date the proposed scheduling and discovery plan is submitted to the Clerk of Court**.

4. EXPERT WITNESSES:

State the deadlines for the parties to disclose, in accordance with Federal Rule of Civil Procedure 26(a)(2)(A), (B), and (C), all "expert witnesses" who may be used at trial to present evidence under Federal Rules of Evidence 702, 703, or 705:

Plaintiff's experts: _____
(insert date)

Defendant's experts: _____
(insert date)

Plaintiff's rebuttal experts: _____
(insert date)

The deadlines for the plaintiff to disclose experts, for the defendant to disclose experts, and for the plaintiff to disclose rebuttal experts should be no more than **3 months**, **5 months**, and **6 months**, respectively, after the date the proposed scheduling and discovery plan is submitted to the Clerk of Court. Except as otherwise stipulated by the parties or ordered by the court, the parties must, by these deadlines, provide full disclosure of expert information as required by Federal Rule of Civil Procedure 26(a)(2).

5. DISCOVERY:

State the date by which all discovery will be ***completed***, not propounded:_____
(insert date)

Note that this is the date for completion of discovery, not the date when discovery is to be propounded. This deadline should be **no more than 8 months after the date the proposed scheduling and discovery plan is submitted to the Clerk of Court**. Federal Rule of Civil Procedure 26(e) imposes a continuing duty to supplement discovery responses as soon as practicable. **All discovery responses must be supplemented at least 30 days before the close of discovery**.

6. DISPOSITIVE MOTIONS:

State the deadline for filing dispositive motions: _____
(insert date)

This deadline **must be at least 120 days before the trial ready date**, but should be **no more than 9 months after the date the proposed scheduling and discovery plan is submitted to the Clerk of Court**.

7. TRIAL READY DATE:

State the date on which the parties anticipate the case will be ready for trial: _____
(insert date)

This deadline should be **no more than 13 months after the date the proposed scheduling and discovery plan is submitted to the court**, but **must not be less than 120 days after the dispositive motion deadline**.

8. JURY DEMAND:

State whether a jury demand has been filed: _____ yes _____ no

9. ESTIMATED LENGTH OF TRIAL:

State your estimate of the number of days required for trial: _____
(insert number of trial days)

For jury trials, include in your estimate the time required for jury selection, opening statements, closing arguments, and instructions. If circumstances change, the parties should immediately notify the court. **In any event, the parties should notify the court of any change in the time required for trial and of their new estimated length of trial at least 30 days before the trial readiness date in paragraph 7.**

10. CONSENT TO MAGISTRATE JUDGE:

State whether the parties unanimously consent, or do not unanimously consent, to trial, disposition, and judgment by a United States Magistrate Judge, with appeal to the Eighth Circuit Court of Appeals.

_____ yes, we unanimously consent _____ no, we do not unanimously consent

You may consent in either a jury or non-jury case. Cases consented to the United States Magistrate Judge will be set for trial on a **date certain**.

11. FILING OR DELIVERY OF FORM TO CLERK OF COURT:

Print or type the names, addresses, telephone and fax numbers, and e-mail addresses on the proposed scheduling and discovery plan; sign the proposed and plan, and e-mail the form to the following e-mail address: ecfmail@iand.uscourts.gov. **Be sure to include *both* pages of the proposed schedule and plan.**

IN THE UNITED STATES DISTRICT COURT
FOR THENORTHERN DISTRICT OF IOWA
[WESTERN] [CENTRAL] [EASTERN] [CEDAR RAPIDS] [DUBUQUE] DIVISION

_____,	)	
	)	
Plaintiff(s),	)	NO. _____
	)	
vs.	)	
	)	
_____,	)	**SCHEDULING AND**
	)	**DISCOVERY PLAN**
Defendant(s).	)	

Counsel have conferred and submit the following case information and proposed dates for case management:

1. Did the parties both (a) enter into an agreement during the Rule 26(f) conference resolving all issues relating to initial disclosures, and (b) discuss the preservation, disclosure, and discovery of electronically stored information? ____ **yes** _____ **no**
If the parties have agreed to a deadline for making the initial disclosures, state the date by which the initial disclosures will be made:_____
If any party objected during the Rule 26(f) conference to making or to the timing of the initial disclosures, then the objecting party must, within 14 days after this schedule and plan has been submitted, serve and file a document in which the objections are set forth with particularity.

2. Deadline for motions to add parties:

3. Deadline for motions to amend pleadings:

4. Expert witnesses disclosed by: a) Plaintiff:

   b) Defendant:

   c) Plaintiff Rebuttal:

5. Deadline for ***completion*** of discovery:

6. Dispositive motions deadline (***at least 120 days before Trial Ready Date***):

7. Trial Ready Date (***at least 120 days after Dispositive Motions Date***):

8. Has a jury demand been filed? _____ **yes** _____ **no**

9. Estimated length of trial: _____ days

10. Do the parties unanimously consent to trial, disposition and judgment by a U.S. Magistrate Judge, with appeal to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 636(c)(3)? _____ **yes** _____ **no**

_____	_____
Plaintiff(s):	Defendant(s):
Address:	Address:
Telephone:	Telephone:
Facsimile:	Facsimile:
E-mail address:	E-mail address:

_____
Attorney for Third-Party Defendant\Other:
Address:
Telephone:
Facsimile:
E-mail address:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
(*) DIVISION

(*),		
Plaintiff,		No. (*)
vs.		**ORDER**
(*),		
Defendant.		

The parties have submitted for the Court's review and approval the Scheduling Order and Discovery Plan (attached) [stating that a court-sponsored scheduling and planning conference pursuant to Fed. R. Civ. P. 16(b) and 26(f) is not required.]

It is the practice in the Northern District of Iowa to schedule a Rule 16(b) and 26(f) scheduling and planning conference as a normal course of procedure to secure realistic deadlines in an effort to facilitate efficient case progression in a cost effective manner, thereby averting delays and expenses created by future requests for continuances of established deadlines.

A Rule 16(b) and 26(f) telephonic status conference hearing will take place before the undersigned on **(*), at (*) a/p.m.** The hearing will take place using the Court's conference bridge. The parties shall access the hearing by: (1) calling 888-684-8852, (2) enter access code 4670058 #, (3) press # to enter as a participant, (4) enter security code **5825#**.

The call will become active upon the "host" (the Court) entering the conference bridge.

IT IS SO ORDERED this (*) day of (*), 2016.

_____

C.J. Williams
United States Magistrate Judge
Northern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
Choose an item. DIVISION

, Plaintiff, vs. , Defendant.	No. C **TRIAL MANAGEMENT ORDER FOR CIVIL JURY TRIAL**

TABLE OF CONTENTS

I. ***INTRODUCTION:*** This order sets forth the deadlines and procedures applicable to this case.[1] All deadlines specified in this order apply to the original trial date, or any subsequent date to which the trial is continued, unless specified otherwise. A party who elects to represent himself/herself is held to the same deadlines and procedures as an attorney.[2] A chart setting the deadlines is attached hereto at ***Appendix A***.

II. ***TRIAL DATE:*** This case has been placed on the calendar of Choose an item. Judge Choose an item. for a jury trial scheduled to commence in the United States Courthouse in **Choose an item.**, Iowa, on **Click here to enter a date.**.

III. ***CONTINUANCE OF TRIAL:*** Unless requested within **14 days** after the date of this order, no continuance of the trial date will be granted except for exceptional cause.

IV. ***FINAL PRETRIAL CONFERENCE:*** A final pretrial conference (FPTC) is scheduled before Choose an item. Judge Choose an item. on the **Click here to enter a date.**, at **Choose an item.** The parties Choose an item. At the FPTC, the parties should be prepared to argue all pretrial motions, evidentiary issues, and procedural disputes.

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[1] This order was revised October 18, 2016. The parties are on notice that their duties and responsibilities have changed from what the court has required in prior orders.

[2] Accordingly, wherever the court makes reference herein to an attorney or counsel, it also means a party who is representing himself or herself.

V. ***FINAL PRETRIAL ORDER***: The parties are jointly responsible for the preparation of the proposed Final Pretrial Order. See LR 16.1(b). Before the FPTC, counsel must prepare, agree upon, and sign a proposed Final Pretrial Order prepared for the judge's signature in the format attached to this order at ***Appendix B***. The parties' **witness lists** must be included within the body of the proposed Final Pretrial Order. The proposed order must **not** be filed, but must be e-mailed, in MS Word format, to the judge's chambers at least **7 days**[3] before the FPTC. The parties' **exhibit lists**, prepared as set forth below in this order, must be attached to the proposed Final Pretrial Order, with the entire order, including the exhibit lists, constituting a single document.

VI. ***WITNESSES:***

A. ***Witness Lists.*** Each party shall list the names, addresses, and the purpose of the testimony of all witnesses whom the party will call at trial. Parties shall exchange witness lists at least **21 days** before the FPTC. Parties should list in good faith every witness whom they will call to establish their cases-in-chief, and indicate whether the witness will testify in person or by deposition. By listing a witness, counsel guarantees that witness's presence at the trial. Any witness not listed will not be allowed to testify at trial, unless the court modifies this order prior to trial to prevent manifest injustice. Parties are not, however, required to list rebuttal witnesses.

B. ***Protocol for Preparing and Calling Witnesses.*** Counsel who may call a witness to testify at trial, must, before the witness testifies, advise the witness of the accepted protocol for witnesses testifying in this court. This advice should include the following information: (1) the location of the witness box; (2) the proper route from the courtroom door to the witness box; (3) the fact that the witness will be placed under oath; (4) where the witness should stand while the oath is being administered; (5) that the

[3] Unless otherwise specified, any reference to "days" in this order refers to calendar days and not court days.

witness should adjust the witness chair and the microphone so the microphone is close to and directly in front of the witness's mouth; (6) that the witness should speak only in response to a question; (7) that the witness should wait for a ruling on any objections before proceeding to answer a question; (8) that the witness should answer all questions verbally; and (9) that substances such as food, beverages, and chewing gum should not be brought into the courtroom.

C. ***Proper Witness Attire***. Counsel must advise witnesses of proper dress for the courtroom. Proper dress does not include blue jeans, shorts, overalls, T-shirts, shirts with printed words or phrases on the front or back, tank tops or the like. No party or person testifying at trial may appear in court in the presence of the jury wearing a law enforcement uniform or other insignia of office (e.g., lapel pins, belt-badges, tie pins, etc.). Any such person must, at all times while in the presence of the jury, wear appropriate civilian clothing that does not identify the person as a representative of a law enforcement agency. The testimony of any party or witness who appears in court in the presence of the jury, in attire prohibited by this section, may be barred.

D. ***Exclusion of Witnesses***. A witness who may testify at the trial must not be permitted to hear the testimony of any other witnesses before testifying, and is excluded from the courtroom during the trial until after the witness has completed his or her testimony, unless exclusion of the witness is not authorized by Federal Rule of Evidence 615 or unless the court orders otherwise. A witness who is excluded from the courtroom pursuant to this paragraph is also prohibited from reviewing a record of the testimony of other witnesses at the trial until after the witness has completed his or her testimony, unless the court orders otherwise.

E. ***Restrictions on Communications with Witnesses***. Unless the court orders otherwise, after the commencement of the trial, and until the conclusion of the trial, a witness who may testify at the trial is prohibited from communicating with anyone about what has occurred in the courtroom during the trial. If the witness does testify at the trial, after the witness is tendered for cross-examination and until the conclusion of the witness's testimony, the witness is prohibited from communicating with anyone about the

subject matter of the witness's testimony. A witness may, however, communicate with his or her counsel about matters of privilege, and may communicate with anyone if the right to do so is guaranteed by the United States Constitution.

F. ***Parties***. The restrictions on witnesses in paragraphs (D) and (E) of this section do not apply to the parties or a party representative.

G. ***Duties of Counsel***. A party who may call a witness to testify at the trial must, before the trial, advise the witness of the restrictions in this section, and the court's ruling on any motions in limine.

VII. ***TESTIMONY BY DEPOSITION***: Any party intending to present testimony by deposition shall, at least **28 days** before trial, serve on the opposing parties a written designation, by page and line number, of those portions of the deposition the offering party intends to offer into evidence. At least **21 days** before trial, an opposing party who objects to the intended testimony must serve on the offering party any objections to the designated testimony and a counter-designation, by page and line number, of any additional portions of the deposition which the opposing party intends to offer into evidence. At least **14 days** before trial, the party offering the deposition testimony must serve upon the opposing parties any objections to the counter-designated testimony and a written designation, by page and line number, of any additional portions of the deposition the offering party intends to have read into evidence. At least **7 days** before trial, the parties must consult, either personally or by telephone, and attempt to resolve any objections to the proposed deposition testimony. At least **5 days** before trial, the party intending to offer the deposition testimony must provide the judge with the following: (a) a full copy of the deposition transcript or video recording; (b) a redacted exhibit containing only the lines of the deposition transcript or parts of the video recording to be admitted into evidence; (c) a statement listing all unresolved objections to the deposition testimony; and (d) the parties' combined list of all of the portions of the deposition to be admitted into evidence (listing transcript sections by page and line number and video recordings by counter number). The court will review any objections, make any

necessary rulings, and make whatever record may be necessary to establish which portions of the deposition testimony are being received into evidence. Parties will be responsible for editing any video recording to comply with the court's ruling.

Prior to the close of evidence, the party offering the deposition testimony must furnish the original deposition transcript to the court. The offering party must clearly highlight the portions of the transcript which were read into evidence. If a video recording is used at trial, it also must be furnished to the court. The transcript and/or video recording will be marked as a court exhibit and preserved as part of the official record.

VIII. EXHIBITS

A. ***Exhibit Lists***. The exhibit lists shall appear in the following format:

(Plaintiff=s)(Defendant=s) Exhibits	Category A, B, C	Objections [Cite Fed. R. Evid.]	Offered	Admit/Not Admit (A) - (NA)
[1.][A.] [describe exhibit]			*	*
[2.][B.] [describe exhibit]				
[3.][C.] [describe exhibit]				

[*These columns are for court use only.]

Parties are to use the following categories in the second column for objections to exhibits:

Category A. These are exhibits to which neither party objects. They will be deemed admitted in evidence at the commencement of the trial, and will be available for use by any party at any stage of the proceedings without further offer, proof, or objection.

Category B. These are exhibits to which a party objects on grounds **other than** foundation, identification, or authenticity. Parties are to use this category for objections such as hearsay or relevance. Parties are to identify in the third column the Federal Rule(s) of Evidence upon which the party relies in objecting to these

exhibits.

Category C. These are exhibits to which a party objects on grounds of foundation, identification, or authenticity. Parties are not to use this category for other objections, such as hearsay. Parties are to identify in the third column the Federal Rule(s) of Evidence upon which the party relies in objecting to these exhibits.

Parties are not required to list rebuttal exhibits or impeachment exhibits. Proposed exhibit lists must be exchanged by the parties (but not filed) at least **21 days** before the FPTC. At the time the parties exchange their exhibit lists, they must give written notice to all adverse parties of any intent to use a declaration under Federal Rules of Evidence 803(6), 902(11), or 902(12) to establish foundation for records of regularly-conducted activities, and, immediately thereafter, they must make the records and the declaration available for inspection. The parties have a continuing duty to keep the lists current and correct with opposing parties and the court.

B. ***Marking of Exhibits***. All exhibits must be marked by the parties before trial, in accordance with Local Rule 83.6(a). Unless the parties have previously agreed upon a different numbering system during the course of pretrial litigation, the plaintiff(s) must use numbers and the defendant(s) must use letters. See LR 83.6(a)(1). Exhibits must also be marked with the case number. See LR 83.6(a)(2). ***All exhibits longer than one page must contain page numbers at the bottom of each page***. See LR 83.6(a)(3). Personal Data Identifiers must be redacted from all exhibits. See LR 10(h).

C. ***Elimination of Duplicates***. The parties must compare their exhibits and eliminate duplicates. If more than one party wants to offer the same exhibit, then it should be marked with a number and listed as a joint exhibit on the plaintiff's exhibit list.

D. ***Listing of Exhibits and Objections***. The parties must list each exhibit separately in the exhibit lists, unless leave of court is granted for a group exhibit. If a party objects to parts of an exhibit, but not to other parts, the offering party must prepare separate versions of the exhibit, one that includes the parts to which objections are being asserted and the other that redacts those parts.

E. ***Exhibits Referenced in Deposition Testimony***. All references to exhibits in deposition testimony that is offered into evidence must correspond to the exhibit designation for trial. The parties are directed to number or letter their exhibits accordingly.

F. ***Copies for the Court***. At least **7 days** before the FPTC, each party must provide the judge with a hard copy of all exhibits to be used at trial. The judge's copies of exhibits should be placed in three-ringed binders, with a copy of the exhibit list at the front and with each exhibit tabbed and labeled. See LR 83.6(c). The parties may also supply the judge with a courtesy copy of the exhibits in PDF format on a thumb drive, DVD, or CD. The court's copies of exhibits shall be separate from the original trial exhibits for the official records of the Clerk of Court. See LR 83.6(d).

G. ***Electronic Filing of Exhibits***. All documentary trial exhibits are to be filed electronically on or before the date of the FPTC in accordance with Public Administrative Order 09-AO-03-P, filed May 29, 2009.

H. ***Demonstrative Aids***. At least **3 days** before trial, counsel using a demonstrative aid must show it to all other counsel and the judge. The term "demonstrative aid" includes charts, diagrams, models, samples and animations, but does not include, exhibits admitted into evidence, or outlines of opening statements or closing arguments. Any disputes or objections concerning demonstrative aids shall be brought to the court's attention and resolved before the demonstrative aid is displayed to the jury.

IX. ***TRIAL BRIEFS***: If the trial of the case will involve significant issues not adequately addressed by the parties in connection with dispositive motions or other pretrial motions, the parties must prepare trial briefs addressing such issues. Trial briefs must be filed at least **7 days** before the FPTC. See also LR 16.1(d).

X. ***MOTIONS IN LIMINE***: The parties are required to notify the court by motion in limine or by motion under Federal Rule of Evidence 104(a) of any novel, unusual, or complex legal, factual, or procedural issues reasonably anticipated to arise at trial. Only

one motion, encompassing all such issues, should be filed by a party. All such motions must be served and filed at least **21 days** before the FPTC. Resistances to such motions must be served and filed within **7 days** after service of the motion. Motions in limine are intended to address the admissibility of evidence pursuant to the Federal Rules of Evidence. Motions in limine must specifically reference the rules the parties believe relate to the admissibility of the evidence. Motions in limine must also be sufficiently detailed such that the court may rule on the motion in advance of trial. Parties must include copies of transcripts, exhibits, or other documents that pertain to the evidence in dispute. Parties should not use motions in limine simply to alert the court to areas of testimony parties believe may generally be objectionable; rather, those matters should be brought to the court's attention in a trial brief.

XI. JURY INSTRUCTIONS: At least **7 days** before the FPTC, the parties must electronically file the following: (1) joint proposed jury statement; (2) joint proposed jury instructions; (3) proposed verdict forms; (4) any requested voir dire questions; (5) and any requested special interrogatories. These documents must be prepared and submitted in accordance with the following instructions:

A. Jury Statement: The judge will read the jury statement to the jury panel before voir dire, to provide a brief overview of the case, so the members of the panel will be able to give meaningful responses to voir dire questions. It has no other purpose. In general, the jury statement need not be as detailed as the statement of the case that is included with the actual jury instructions. The parties should make every effort to agree upon the language used in the statement. Any disputes about the proposed language should be noted in the document.

B. Jury Instructions: Jury instructions must be prepared and submitted in accordance with the following instructions:

1. At least **21 days** before the FPTC, the parties must serve on each other (but not file) proposed jury instructions.

2. At least **14 days** before the FPTC, counsel for the parties must consult, either personally or by telephone, and attempt to work out any differences in their proposed jury instructions.

3. Counsel for the plaintiff(s) then must organize the proposed jury instructions into one document, prefaced by a table of contents. Instructions proposed by opposing parties on the same subject matter must be grouped together. For example, if Instruction No. 10 is a proposed instruction on the elements of negligence, and each party proposes a different instruction, then Instruction No. 10A should be the instruction proffered by the plaintiff(s) and Instruction No. 10B should be the instruction proffered by the defendant(s).

4. Each instruction must address a single subject, and must be numbered individually, on a separate sheet of paper, and double-spaced.

5. At the bottom of each proposed jury instruction, the party proposing the instruction must cite the decisions, statutes, regulations, or other authorities supporting the proposed instruction. Except as to jury instructions as to which the parties agree, the following information also must be stated at the bottom of each proposed jury instruction: (a) the party offering the instruction; and (b) each objection to the instruction by an opposing party, and whether the objection is to (1) the language of the instruction, (2) the giving of the instruction, or (3) both. If a party is objecting to the language of a proposed instruction, the objectionable language must be identified. Objections must be supported by citations to applicable authorities.

6. Pattern instructions should not be reproduced, but may be requested by reference to the publication, page number, and instruction number. Any modification to a pattern instruction should be disclosed as follows: additions should be underscored and deletions should be set forth by striking out the language sought to be deleted or setting out the deletions in parentheses.

7. The parties should include proposed preliminary instructions **only to the extent** the judge's standard preliminary instructions would be inadequate or inappropriate in this case. A copy of the judge's standard preliminary instructions may be requested from the judge's judicial assistant, or found on the court's web site at: www.iand.uscourts.gov.

8. Instructions not requested as set forth above will be deemed waived, unless the subject of the instruction is one arising in the course of trial that reasonably could not have been anticipated before trial from the pleadings, discovery, or nature of the case.

9. Immediately upon the filing of the joint proposed jury instructions, counsel for the plaintiff(s) must provide those instructions to the judge in MS Word format, either by email to the judge's judicial assistant or by delivering them to chambers on a CD, DVD, or thumb drive.

10. Prior to trial, the parties will receive proposed jury instructions from the court, typically via email, along with deadlines for filing objections to the proposed instructions. The failure to serve and file timely objections to proposed jury instructions will constitute a waiver of the right to make objections to those instructions.

C. ***Reading of Jury Instructions***: The court does not require the court reporter to report the reading of the jury instructions, and considers the instructions read as published in the final written version. The parties should make a record as to any misreads of the instructions at the conclusion of the reading of the instructions.

It is the practice of the court to read all but the last two of the final instructions to the jury prior to closing arguments. See FED. R. CIV. P. 51(b)(3). The last two instructions, which concern the jury's duties during deliberations, will be read upon the conclusion of closing arguments, just prior to the jury retiring to consider its verdict(s).

If any party has an objection to any part of the procedure described in this Part, that objection must be raised at or before the FPTC.

D. ***Requested Voir Dire Questions***: As discussed below, the judge will conduct an initial, preliminary voir dire and will then allow the parties to conduct additional voir dire. For that reason, it will not be necessary in most cases for the parties to submit questions for the judge to ask. However, if either party believes that certain questions are best posed by the court, rather than by a particular party, those requested questions should be filed **7 days** prior to the FPTC.

XII. JURY SELECTIONS: The following procedures will be used in jury selection. See also LR 48.

A. On the first day of trial, approximately 32 randomly-selected potential jurors will be notified to appear at the courthouse at a time to be determined. About a week before trial, the parties may obtain from the Clerk of Court a list of the potential jurors, together with copies of their responses to juror questionnaires. The parties also will receive a list of the first 14 potential jurors in the order in which they were randomly

drawn. The court will be provided with a separate list of all of the potential jurors in the order in which they were randomly drawn.

B. The first 14 preselected potential jurors who appear for jury selection will be seated in order in the jury box, and will be the potential jurors first considered for impanelment on the jury.

C. The potential jurors will be escorted into the courtroom.

D. The judge will greet the jury, counsel, and the parties; announce the name of the case to be tried; and ask the parties if they are ready to proceed.

E. The judge will swear in all potential jurors.

F. The judge will make some introductory remarks to the potential jurors about the jury selection process.

G. The judge will ask all potential jurors if they are aware of any circumstance that might prevent their service on the jury, and may excuse anyone for whom the judge believes jury service would be an undue burden. The parties may not participate in this process. If the judge excuses a potential juror, the next randomly-selected potential juror shall be called to replace the excused person in the jury box.

H. The judge will make some brief opening remarks, and will read the jury statement.

I. The judge will introduce the courtroom staff. Then, the judge will ask the attorneys to identify themselves, the members of their firm, their clients, the witnesses they expect to call at trial, and any other individuals whose names may be discussed during the trial. Pro se parties will be asked to do the same.

J. The judge will engage the potential jurors in the jury box in an extensive voir dire.

K. After the judge has completed his or her questions, each side, beginning with the plaintiff, will be permitted to conduct up to 30 minutes of jury voir dire. A request for additional time for party voir dire because of the complexity or unusual nature of a case, or in multi-party cases, should be made at the FPTC. The parties are not permitted

to argue their case or engage in questioning unrelated to the potential jurors' ability to serve.

L. The parties will be permitted to challenge any potential juror for cause. These challenges may be made at sidebar. Any potential juror excused for cause will be replaced by the next potential juror on the jury list, who then will undergo the same questioning as the other potential jurors. There will be 14 potential jurors remaining in the jury box at the conclusion of voir dire.

M. The Deputy Clerk will give the plaintiff(s) a list of the names of the 14 remaining potential jurors. The plaintiff(s) shall strike one of the names by noting in the margin "π1." The Deputy Clerk then will take the list and hand it to the defendant(s), who shall strike one of the names by noting in the margin "Δ1." This procedure will be repeated until the plaintiff(s) and defendant(s) each have exercised 3 peremptory challenges, and 8 jurors remain on the list. After the defendant(s) has exercised the last strike, the Deputy Clerk will provide the plaintiff(s) with the list for review. The Deputy Clerk will take the list to the judge. The judge will then announce the 8 selected jurors and the rest of the potential jurors will be excused.

N. The judge will swear in the jury.

O. **THERE ARE NO ALTERNATE JURORS. ANY VERDICT MUST BE UNANIMOUS**. During trial, if any of the 8 jurors has to be excused from jury service for any reason, the case can be decided by as few as 6 jurors. See LR 48(a).

P. Upon stipulation of the parties, the verdict can be less than unanimous or decided by fewer than 6 jurors, or both. See LR 48(c).

Q. Any objection to the procedures for selecting jurors must be served and filed **at least 21 days** before the commencement of trial.

XIII. <u>OPENING STATEMENTS; CLOSING ARGUMENTS</u>: Opening statements will be limited to **30 minutes**. Closing arguments will be limited to **60 minutes**. A request for additional time for opening statements or closing arguments must be made no later than the FPTC. If, however, issues arise during trial which could not have

reasonably been foreseen, and which warrant additional time, the court may extend the time limits for closing arguments at the court's discretion.

XIV. CONDUCT OF TRIAL: It is anticipated that the first day of trial will last from 9:00 a.m. to 5:00 p.m. Thereafter, trial days may start or end at different times, depending on the other demands on the court's schedule. The court will notify the parties of the trial schedule no later than the FPTC. The parties are expected to have witnesses available so the court can take testimony throughout the full trial day with no undue delays in the receipt of evidence.

A Pretrial Conference will be held in the courtroom starting promptly at 8:30 a.m. on the day scheduled for the commencement of trial. The court expects all counsel and parties to be present for the pretrial conference at the scheduled time. After the first day of trial, the parties and their counsel are expected to be at the courthouse and available in the courtroom by no later than 8:15 a.m. on each morning of trial. The time between 8:15 a.m. and the start of testimony is to be used to review exhibits the parties anticipate introducing into evidence during that trial day, to set up any audiovisual equipment, and to take up any evidentiary or other issues which need to be addressed before the presentation of evidence resumes. In the event any party believes there may be particularly difficult issues requiring more than five or ten minutes to resolve, that party must advise the court and opposing counsel so an earlier time can be set to meet with counsel and the parties.

XV. COURTROOM TECHNOLOGY: Before the commencement of trial, counsel and witnesses who intend to utilize the technology available in the courtroom must familiarize themselves with the proper manner of operating the equipment. Instruction and training on the proper use of the equipment may be obtained from the court's automation staff, whose contact information is contained on the court's website at the following web address: www.iand.uscourts.gov.

If a party wishes to use video conferencing technology for the testimony of any witness, the party **must** contact the court's automation staff and complete a "Video Conference End-Point Certification" form **at least 10 days in advance of the start of the trial**. The court will require at least one test connection prior to the start of trial. **Failure to comply with the court's requirements for video conferencing will result in the court denying the opportunity to have a witness testify via video conferencing.**

If a party wishes to connect a laptop computer or other portable electronic device to the courtroom equipment, the party must have the laptop computer or device tested by the court's automation staff **at least 7 days in advance of the start of the trial. Failure to have the laptop computer or device tested will result in the court denying the connection of the laptop computer or device to the courtroom equipment.**

If a party wishes to present evidence in the form of a VHS tape, a DVD, an audio cassette, an audio CD, or any other form of media requiring use of the courtroom equipment, the party **must** have such items of evidence tested by the court's automation staff **at least 7 days in advance of the start of the trial** to ensure compatibility with the courtroom equipment.

XVI. SETTLEMENT CONFERENCE: The court's primary ADR procedure is private mediation. See Local Rule 16.2(a). The court disfavors judicial involvement in the settlement process. Thus, the parties are encouraged to arrange for private mediation if they believe it would be beneficial to involve a neutral party in their settlement negotiations. If, for some reason, private mediation is not a viable option, any party may contact the chambers of the United States Magistrate Judge assigned to this case to request a settlement conference. Such contact may be ex parte for the sole purpose of inquiring about a settlement conference. Absent extraordinary circumstances, a settlement conference will not be scheduled unless all parties express a willingness to participate. Even if all parties agree, the court retains discretion to decline to conduct a settlement conference. If conducted, a settlement conference will be subject to Local Rule 16.2, along with any additional requirements and limitations that may be imposed

by the judicial officer who agrees to conduct the conference.

XVII. ***SETTLEMENT DEADLINE***: The court hereby imposes a settlement deadline of **5:00 p.m., 7 days before the first scheduled day of trial.** If the case is settled after that date, the court may enter an order to show cause why costs and sanctions should not be imposed on the party or parties causing the delay in settlement.

IT IS SO ORDERED.

DATED this Choose an item. day of Choose an item., Choose an item..

_____

Choose an item.
Choose an item.
Northern District of Iowa

APPENDIX A
Deadlines Chart

Event	Deadline	Section	Page
Draft Final Pretrial Order to Judge	7 days before FPTC	V	2
Trial Briefs	7 days before FPTC	IX	7
Parties exchange witness lists	21 days before FPTC	VI(A)	2
Parties exchange exhibit lists	21 days before FPTC	VIII(A)	6
Exhibits to judge	7 days before FPTC	VIII(F)	7
Parties disclose demonstratives	3 days before trial	VIII(H)	7
Offering party identifies depos to be used in trial	28 days before trial	VII	4
Opposing party serves objections, identifies other portions of depos to be used in trial	21 days before trial	VII	4
Offering party serves objections to other portions of depos	14 days before trial	VII	4
Parties confer to resolve objections to depos	7 days before trial	VII	4
Judge provided with copies of depos & objections	5 days before trial	VII	4
Motions in limine filed	21 days before FPTC	X	8
Resistances to motions in limine filed	7 days after service of motion	X	8
Requests for additional time for opening/closing	No later than FPTC	XIII	13
Parties serve proposed jury instructions on each other	21 days before FPTC	XI(B)(1)	9
Parties confer to resolve differences re: jury instructions	14 days before FPTC	XI(B)(2)	9
Parties file joint proposed jury instructions	7 days before FPTC	XI	8
Parties file joint proposed jury statement	7 days before FPTC	XI	8
Parties file proposed verdict forms	7 days before FPTC	XI	8
Parties file requested special interrogatories	7 days before FPTC	XI	8
Parties file requested special voir dire questions	7 days before FPTC	XI	8
Parties file objections to jury selection procedures	21 days before trial	XII	13
Notify court automation staff of intent to use video conferencing technology	10 days before trial	XV	14
Notify court automation staff to connect laptop	7 days before trial	XV	14
Notify court automation staff to present electronic evidence	7 days before trial	XV	14

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
_____[1] DIVISION

[plaintiff], Plaintiff, vs. [defendant], Defendant.	No. C_____- FINAL PRETRIAL ORDER (PROPOSED)

This final pretrial order was entered after a final pretrial conference held on date. The court expects the parties to comply fully with this order.[2]

The following counsel, who will try the case, appeared at the conference:

1. For plaintiff(s):
   Name(s)
   Street Number, Street Name and/or Box Number
   City, State and Zip Code
   Phone Number [include area code]
   Facsimile Number [include area code]
   E-mail address

[1] [NOTE: Instructions for preparing this form appear in brackets and should not be reproduced in the proposed Final Pretrial Order. All material not appearing in brackets should be reproduced in the proposed Final Pretrial Order.]

[2] Full compliance with the order will assist the parties in preparation for trial, shorten the length of trial, and improve the quality of the trial. Full compliance with this order also will help "secure the just, speedy, and inexpensive determination" of the case. FED. R. CIV. P. 1.

2. For defendant(s):
Name(s)
Street Number, Street Name and/or Box Number
City, State and Zip Code
Phone Number [include area code]
Facsimile Number [include area code]
E-mail address

I. ***STIPULATION OF FACTS***: The parties agree that the following facts are true and undisputed:[The parties are to recite all material facts as to which there is no dispute. Special consideration should be given to such things, for example, as life and work expectancy, medical and hospital bills, funeral expenses, cause of death, lost wages, back pay, the economic value of fringe benefits, and property damage. The parties should stipulate to an undisputed fact even if the legal relevance of the stipulated fact is questioned by one or more party, but in such instances the stipulated fact should be followed by an identification of the objecting party and the objection (e.g. "Plaintiff objects to relevance.")]

A.
B.

II. ***EXHIBIT LIST***: The parties' exhibit lists are attached to this Order.[The parties are to attach to this order (not include in the body of the order) exhibit lists that list all exhibits (except for impeachment and rebuttal exhibits) each party intends to offer into evidence at trial. Exhibit lists are to be prepared in the attached format, indicating objections using the categories described in the form.

All exhibits are to be made available to opposing counsel for inspection at least 21 days before the date of the FPTC. Failure to provide an exhibit for inspection constitutes a valid ground for objection to the exhibit, and should be noted on the exhibit list.

Copies of all exhibits as to which there may be objections must be provided to the court at least 7 days before the FPTC. If an exhibit is not provided to the court in advance of the FPTC and an objection is asserted to the exhibit at the FPTC, the exhibit may be excluded from evidence by the court. Any exhibit not listed on the attached exhibit list is subject to exclusion at trial. The court may deem any objection not stated on the attached exhibit list as waived.]

III. ***WITNESS LIST***: The parties intend to call the following witnesses at trial:[Each

party must prepare a witness list that includes all witnesses (except for rebuttal witnesses) whom the party intends to call to testify at trial. The parties are to exchange their separate witness lists at least 21 days before the date of the FPTC. The witness lists are to be included in the following format. A witness testifying by deposition must be listed in the witness list with a designation that the testimony will be by deposition.]

A. ***Plaintiff(s) witnesses*** [list name, substance of testimony, whether any party objects to the witness, and the nature of and grounds for any objection]:

1.

2.

B. ***Defendant(s) witnesses*** [list name, substance of testimony, whether any party objects to the witness, and the nature of and grounds for any objection]:

1.

2.

All parties are free to call any witness listed by an opposing party. A party listing a witness guarantees his or her presence at trial unless it is indicated otherwise on the witness list. Any objection to the offer of testimony from a witness on the witness list is waived if it is not stated on this list.

V. ***EVIDENTIARY AND OTHER LEGAL ISSUES***:

A. ***Plaintiff(s) Issues***:

1.

2.

B. ***Defendant(s) Issues***:

1.

2.

[The parties must list all unusual evidentiary and legal issues which are likely to arise at trial, including such things as disputes concerning the admissibility of evidence or testimony under the Federal Rules of Evidence; the elements of a cause of action; whether recovery is barred as a matter of law by a particular defense; disputes concerning the measure, elements, or recovery of damages; and whether the Statute of Frauds or the

Parol Evidence Rule will be raised. The purpose of this listing of issues is to advise the court in advance of issues and problems that might arise at trial.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
Choose an item. **DIVISION**

[plaintiff],

Plaintiff,

vs.

[defendant],

Defendant.

No. C_____-

TRIAL MANAGEMENT ORDER FOR CIVIL BENCH TRIAL

TABLE OF CONTENTS

I. ***INTRODUCTION***: This order sets forth the deadlines and procedures applicable to this case.[1] All deadlines specified in this order apply to the original trial date or any subsequent date to which the trial is continued, unless specified otherwise. A party who elects to represent himself/herself is held to the same deadlines and procedures as an attorney.[2] A chart setting the deadlines is attached hereto at Appendix A.

II. ***TRIAL DATE***: This case has been placed on the calendar of Choose an item. Judge Choose an item. for a bench trial scheduled to commence in the United States Courthouse in Choose an item., Iowa, on Click here to enter a date..

III. ***CONTINUANCE OF TRIAL DATE***: Unless requested within 14 days after the date of this order, no continuance of the trial date will be granted except for exceptional cause.

IV. ***FINAL PRETRIAL CONFERENCE***: A final pretrial conference (FPTC) is scheduled before Choose an item. Judge Choose an item. on the Click here to enter a date., at Choose an item. The parties Choose an item. At the FPTC, the parties should be prepared to argue all pretrial motions, evidentiary issues, and procedural disputes.

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[1] This order was revised October 18, 2016. The parties are on notice that their duties and responsibilities have changed from what the court has required in prior orders.

[2] Accordingly, wherever reference is made herein to an attorney or counsel, it also means a party who is representing himself or herself.

V. ***FINAL PRETRIAL ORDER***: The parties are jointly responsible for the preparation of the proposed Final Pretrial Order. *See* LR 16.1(b). Before the FPTC, counsel must prepare, agree upon, and sign a proposed Final Pretrial Order prepared for the judge's signature in the format attached to this order at Appendix B. The parties' **witness lists** must be included within the body of the proposed Final Pretrial Order. The proposed Final Pretrial Order must **not** be filed, but must be e-mailed, in MS Word format, to the judge's chambers at least **7 days**[3] before the FPTC. The parties' **exhibit lists**, prepared as set forth below in this order, must be attached to the proposed Final Pretrial Order, with the entire order, including the exhibit lists, constituting a single document.

VI. ***WITNESSES***:

A. ***Witness Lists***: Each party shall list the names, addresses, and the purpose of the testimony of all witnesses whom the party will call at trial. Parties shall exchange witness lists at least **21 days** before the FPTC. Parties should list in good faith every witness whom they will call to establish their cases-in-chief, and indicate whether the witness will testify in person or by deposition. By listing a witness, counsel guarantees that witness's presence at the trial. Any witness not listed will not be allowed to testify at trial, unless the court modifies this order prior to trial to prevent manifest injustice. Parties are not, however, required to list rebuttal witnesses.

B. ***Protocol for Preparing and Calling Witnesses.*** Counsel who may call a witness to testify at trial must, before the witness testifies, advise the witness of the

[3] Unless otherwise specified, any reference to "days" in this order refers to calendar days and not court days.

accepted protocol for witnesses testifying in this court. This advice should include the following information: (1) the location of the witness box; (2) the proper route from the courtroom door to the witness box; (3) the fact that the witness will be placed under oath; (4) where the witness should stand while the oath is being administered; (5) that the witness should adjust the witness chair and the microphone so the microphone is close to and directly in front of the witness's mouth; (6) that the witness should speak only in response to a question; (7) that the witness should wait for a ruling on any objections before proceeding to answer a question; (8) that the witness should answer all questions verbally; and (9) that substances such as food, beverages, and chewing gum should not be brought into the courtroom.

C. ***Proper Witness Attire***. Counsel must advise witnesses of proper dress for the courtroom. Proper dress ***does not*** include blue jeans, shorts, overalls, T-shirts, shirts with printed words or phrases on the front or back, tank tops or the like.

D. ***Exclusion of Witnesses***. A witness who may testify at the trial must not be permitted to hear the testimony of any other witnesses before testifying, and is excluded from the courtroom during the trial until after the witness has completed his or her testimony, unless exclusion of the witness is not authorized by Federal Rule of Evidence 615 or unless the court orders otherwise. A witness who is excluded from the courtroom pursuant to this paragraph also is prohibited from reviewing a record of the testimony of other witnesses at the trial until after the witness has completed his or her testimony, unless the court orders otherwise.

E. ***Restrictions on Communications with Witnesses.*** Unless the court orders otherwise, after the commencement of the trial and until the conclusion of the trial, a

witness who may testify at the trial is prohibited from communicating with anyone about what has occurred in the courtroom during the trial. If the witness does testify at the trial, after the witness is tendered for cross-examination and until the conclusion of the witness's testimony, the witness is prohibited from communicating with anyone about the subject matter of the witness's testimony. A witness may, however, communicate with his or her counsel about matters of privilege, and may communicate with anyone if the right to do so is guaranteed by the United States Constitution.

F. ***Parties.*** The restrictions on witnesses in paragraphs (D) and (E) of this section do not apply to the parties or a party representative.

G. ***Duties of Counsel.*** A party who may call a witness to testify at the trial must, before the trial, advise the witness of the restrictions in this section and the court's ruling on any motions in limine.

VII. TESTIMONY BY DEPOSITION: In most cases, it is not productive or efficient for the parties to read deposition testimony to the court during a bench trial. Instead, and unless otherwise ordered, deposition testimony will be made part of the record by filing the transcripts, with the judge reading the designated portions privately. Any party intending to present testimony by deposition shall, at least **28 days** before trial, serve on the opposing parties a written designation, by page and line number, of those portions of the deposition the offering party intends to offer into evidence. At least **21 days** before trial, an opposing party who objects to the intended testimony must serve on the offering party any objections to the designated testimony and a counter-designation, by page and line number, of any additional portions of the deposition which the opposing party intends to offer into evidence. At least **14 days** before trial, the party offering the

deposition testimony must serve upon the opposing parties any objections to the counter-designated testimony and a written designation, by page and line number, of any additional portions of the deposition the offering party intends to have read into evidence. At least **7 days** before trial, the parties must consult, either personally or by telephone, and attempt to resolve any objections to the proposed deposition testimony. At least **5 days** before trial, the party intending to offer the deposition testimony must provide the judge with the following: (a) a full copy of the deposition transcript or video recording; (b) a redacted exhibit containing only the lines of the deposition transcript or parts of the video recording to be admitted into evidence; (c) a statement listing all unresolved objections to the deposition testimony; and (d) the parties' combined list of all of the portions of the deposition to be admitted into evidence (listing transcript sections by page and line number and video recordings by counter number). The court will review any objections, make any necessary rulings, and make whatever record may be necessary to establish which portions of the deposition testimony are being received into evidence. Parties will be responsible for editing any video recording to comply with the court's ruling.

If, in a particular case, a party believes it to be important to read deposition testimony aloud in open court, that party shall raise the issue during the FPTC. The court will not require the court reporter to report the reading of deposition transcripts or the playing of video deposition testimony. The court considers a deposition transcript to be read as published in the written version. The parties should make a record as to any misreads of the transcript at the end of the reading of the transcript.

Prior to the close of evidence, the party offering the deposition testimony must furnish the original deposition transcript to the court. The offering party must clearly highlight the portions of the transcript which were read into evidence. If a video recording is used at trial, it also must be furnished to the court. The transcript and/or

video recording will be marked as a court exhibit and preserved as part of the official record.

VIII. EXHIBITS:

A. ***Exhibit Lists.*** The exhibit lists shall appear in the following format:

(Plaintiff=s)(Defendant=s) Exhibits	Category A, B, C	Objections [Cite Fed. R. Evid.]	Offered	Admit/Not Admit (A) - (NA)
[1.][A.] [*describe exhibit*]			*	*
[2.][B.] [*describe exhibit*]				
[3.][C.] [*describe exhibit*]				

[**These columns are for court use only.*]

Parties are to use the following categories in the second column for objections to exhibits:

Category A. These are exhibits to which neither party objects. They will be deemed admitted in evidence at the commencement of the trial, and will be available for use by any party at any stage of the proceedings without further offer, proof, or objection.

Category B. These are exhibits to which a party objects on grounds **other than** foundation, identification, or authenticity. Parties are to use this category for objections such as hearsay or relevance. Parties are to identify in the third column the Federal Rule(s) of Evidence upon which the party relies in objecting to these exhibits.

Category C. These are exhibits to which a party objects on grounds of foundation, identification, or authenticity. Parties are not to use this category for other objections, such as hearsay. Parties are to identify in the third column the Federal Rule(s) of Evidence upon which the party relies in objecting to these exhibits.

Parties are not required to list rebuttal exhibits or impeachment exhibits. Proposed exhibit lists must be exchanged by the parties (but not filed) at least **21 days** before the FPTC. At the time the parties exchange their exhibit lists, they must give written notice to all adverse parties of any intent to use a declaration under Federal Rules of Evidence 803(6), 902(11), or 902(12) to establish foundation for records of regularly-conducted activities, and, immediately thereafter, they must make the records and the declaration available for inspection. The parties have a continuing duty to keep the lists current and correct with opposing parties and the court.

B. ***Marking of Exhibits***. All exhibits must be marked by the parties before trial, in accordance with Local Rule 83.6(a). Unless the parties have previously agreed upon a different numbering system during the course of pretrial litigation, the plaintiff(s) must use numbers and the defendant(s) must use letters. *See* LR 83.6(a)(1). Exhibits must also be marked with the case number. *See* LR 83.6(a)(2). ***All exhibits longer than one page must contain page numbers at the bottom of each page.*** *See* LR 83.6(a)(3). Personal Data Identifiers ***must*** be redacted from all exhibits. *See* LR 10(h).

C. ***Elimination of Duplicates***. The parties must compare their exhibits and eliminate duplicates. If more than one party wants to offer the same exhibit, then it should be marked with a number and listed as a joint exhibit on the plaintiff's exhibit list.

D. ***Listing of Exhibits and Objections.*** The parties must list each exhibit separately in the exhibit lists, unless leave of court is granted for a group exhibit. If a party objects to parts of an exhibit but not to other parts, the offering party must prepare separate versions of the exhibit, one that includes the parts to which objections are being asserted and the other that redacts those parts.

E. ***Exhibits Referenced in Deposition Testimony.*** All references to exhibits in deposition testimony that are offered into evidence must correspond to the exhibit designation for trial. The parties are directed to number or letter their exhibits accordingly.

F. ***Copies for the Court.*** At least **7 days** before the FPTC, each party must provide the judge with a hard copy of all exhibits to be used at trial. The judge's copies of exhibits should be placed in three-ringed binders with a copy of the exhibit list at the front and with each exhibit tabbed and labeled. *See* LR 83.6(c). The parties may also supply the judge with a courtesy copy of the exhibits in PDF format on a thumb drive, DVD, or CD. The court's copies of exhibits shall be separate from the original trial exhibits for the official records of the Clerk of Court. *See* LR 83.6(d).

G. ***Electronic Filing of Exhibits.*** All documentary trial exhibits are to be filed electronically on or before the date of the FPTC in accordance with Public Administrative Order 09-AO-03-P, filed May 29, 2009.

H. ***Demonstrative Aids.*** At least **3 days** before trial, counsel using a demonstrative aid must show it to all other counsel and the judge. The term "demonstrative aid" includes charts, diagrams, models, samples and animations, but does not include exhibits admitted into evidence or outlines of opening statements or closing arguments.

IX. ***TRIAL BRIEFS***: If the trial of the case will involve significant issues not adequately addressed by the parties in connection with dispositive motions or other

pretrial motions, the parties must prepare trial briefs addressing such issues. Trial briefs must be filed at least **7 days** before the FPTC. *See also* LR 16.1(d).

X. MOTIONS IN LIMINE: The court discourages the use of motions in limine in advance of a bench trial unless it is very apparent that the resolution of novel, unusual, or complex evidentiary issues in advance of trial will substantially streamline the presentation of evidence at trial. If a motion in limine is necessary, it must be served and filed at least **21 days** before the FPTC. Only one motion, encompassing all issues, should be filed by a party. Resistances to such motions must be served and filed within **7 days** after service of the motion. Motions in limine are intended to address the admissibility of evidence pursuant to the Federal Rules of Evidence. Motions in limine must specifically reference the rules the parties believe relate to the admissibility of the evidence. Motions in limine must be sufficiently detailed such that the court may rule on the motion in advance of trial. Parties must include copies of transcripts, exhibits, or other documents that pertain to the evidence in dispute. Parties should not use motions in limine simply to alert the court to areas of testimony parties believe may generally be objectionable; rather, those matters should be brought to the court's attention in a trial brief.

XI. OPENING STATEMENTS; CLOSING ARGUMENTS: Prior to the FPTC, the parties shall confer as to whether they wish to make opening statements and closing arguments or, instead, will rely on pre-trial and/or post-trial briefing to present their arguments. That issue will be addressed during the FPTC. Opening statements, if any, will be limited to **30 minutes.** Closing arguments, if any, will be limited to **60 minutes**. A request for additional time for opening statements or closing arguments must be made no later than the FPTC. If, however, issues arise during trial which could not have

reasonably been foreseen, and which warrant additional time, the court may extend the time limits for closing argument at the court's discretion.

XII. CONDUCT OF TRIAL: It is anticipated that the first day of trial will last from 9:00 a.m. to 5:00 p.m. Thereafter, trial days may start or end at different times, depending on the other demands on the court's schedule. The court will notify the parties of the trial schedule no later than the FPTC. The parties are expected to have witnesses available so the court can take testimony throughout the full trial day with no undue delays in the receipt of evidence.

After the first day of trial, the parties and their counsel are expected to be at the courthouse and available in the courtroom by no later than 8:15 a.m. on each morning of trial. The time between 8:15 a.m. and the start of testimony is to be used to review exhibits the parties anticipate introducing into evidence during that trial day, to set up any audiovisual equipment, and to take up any evidentiary or other issues which need to be addressed before the presentation of evidence resumes. In the event any party believes there may be particularly difficult issues requiring more than five or ten minutes to resolve, that party must advise the court and opposing counsel so an earlier time can be set to meet with counsel and the parties.

XIII. COURTROOM TECHNOLOGY: Before the commencement of trial, counsel and witnesses who intend to utilize the technology available in the courtroom must familiarize themselves with the proper manner of operating the equipment. Instruction and training on the proper use of the equipment may be obtained from the court's automation staff, whose contact information is contained on the court's website at the following web address: *www.iand.uscourts.gov*.

If a party wishes to use video conferencing technology for the testimony of any witness, the party **must** contact the court's automation staff and complete a "Video Conference End-Point Certification" form **at least 10 days in advance of the start of the trial.** The court will require at least one test connection prior to the start of trial. **Failure to comply with the court's requirements for video conferencing will result in the court denying the opportunity to have a witness testify via video conferencing.**

If a party wishes to connect a laptop computer or other portable electronic device to the courtroom equipment, the party must have the laptop computer or device tested by the court's automation staff **at least 7 days in advance of the start of the trial. Failure to have the laptop computer or device tested will result in the court denying the connection of the laptop computer or device to the courtroom equipment.**

If a party wishes to present evidence in the form of a VHS tape, a DVD, an audio cassette, an audio CD, or any other form of media requiring use of the courtroom equipment, the party **must** have such items of evidence tested by the court's automation staff **at least 7 days** in advance of the start of the trial to ensure compatibility with the courtroom equipment.

XIV. SETTLEMENT CONFERENCE: The court's primary ADR procedure is private mediation. *See* Local Rule 16.2(a). The court disfavors judicial involvement in the settlement process. Thus, the parties are encouraged to arrange for private mediation if they believe it would be beneficial to involve a neutral party in their settlement negotiations. If, for some reason, private mediation is not a viable option, any party may contact the chambers of the United States Magistrate Judge assigned to this case to request a settlement conference. Such contact may be *ex parte* for the sole purpose of inquiring about a settlement conference. Absent extraordinary circumstances, a settlement conference will not be scheduled unless all parties express a willingness to

participate. Even if all parties agree, the court retains discretion to decline to conduct a settlement conference. If conducted, a settlement conference will be subject to Local Rule 16.2, along with any additional requirements and limitations that may be imposed by the judicial officer who agrees to conduct the conference.

XV. ***SETTLEMENT DEADLINE:*** The court hereby imposes a settlement deadline of **5:00 p.m., 7 days** before the first scheduled day of trial. If the case is settled after that

date, the court may enter an order to show cause why costs and sanctions should not be imposed on the party or parties causing the delay in settlement.

IT IS SO ORDERED.

DATED this Choose an item. day of Choose an item., Choose an item..

Choose an item.
Choose an item.
Northern District of Iowa

APPENDIX A
Deadlines Chart

Event	Deadline	Section	Page
Draft Final Pretrial Order to Judge	7 days before FPTC	V	2
Trial Briefs	7 days before FPTC	IX	9
Parties exchange witness lists	21 days before FPTC	VI(A)	2
Parties exchange exhibit lists	21 days before FPTC	VIII(A)	7
Exhibits to judge	7 days before FPTC	VIII(F)	8
Parties disclose demonstratives	3 days before trial	VIII(H)	9
Offering party identifies depos to be used in trial	28 days before trial	VII	4
Opposing party serves objections, identifies other portions of depos to be used in trial	21 days before trial	VII	4
Offering party serves objections to other portions of depos	14 days before trial	VII	5
Parties confer to resolve objections to depos	7 days before trial	VII	5
Judge provided with copies of depos & objections	5 days before trial	VII	5
Motions in limine filed	21 days before FPTC	X	9
Resistances to motions in limine filed	7 days after service of motion	X	9
Requests for additional time for opening/closing	No later than FPTC	XI	10
Notify court automation staff of intent to use video conferencing technology	10 days before trial	XIII	11
Notify court automation staff to connect laptop	7 days before trial	XIII	11
Notify court automation staff to present electronic evidence	7 days before trial	XIII	12

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
_____[1] DIVISION

[plaintiff], Plaintiff, vs. [defendant], Defendant.	No. C_____- FINAL PRETRIAL ORDER (PROPOSED)

This final pretrial order was entered after a final pretrial conference held on date. The court expects the parties to comply fully with this order.[2]

The following counsel, who will try the case, appeared at the conference:

1. For plaintiff(s):
   Name(s)
   Street Number, Street Name and/or Box Number
   City, State and Zip Code
   Phone Number [include area code]
   Facsimile Number [include area code]
   E-mail address

[1] [NOTE: Instructions for preparing this form appear in brackets and should not be reproduced in the proposed Final Pretrial Order. All material not appearing in brackets should be reproduced in the proposed Final Pretrial Order.]

[2] Full compliance with the order will assist the parties in preparation for trial, shorten the length of trial, and improve the quality of the trial. Full compliance with this order also will help "secure the just, speedy, and inexpensive determination" of the case. Fed. R. Civ. P. 1.

2. For defendant(s):
Name(s)
Street Number, Street Name and/or Box Number
City, State and Zip Code
Phone Number [include area code]
Facsimile Number [include area code]
E-mail address

I. ***STIPULATION OF FACTS***: The parties agree that the following facts are true and undisputed:[The parties are to recite all material facts as to which there is no dispute. Special consideration should be given to such things, for example, as life and work expectancy, medical and hospital bills, funeral expenses, cause of death, lost wages, back pay, the economic value of fringe benefits, and property damage. The parties should stipulate to an undisputed fact even if the legal relevance of the stipulated fact is questioned by one or more party, but in such instances the stipulated fact should be followed by an identification of the objecting party and the objection (e.g. "Plaintiff objects to relevance.")]

A.
B.

II. ***EXHIBIT LIST***: The parties' exhibit lists are attached to this Order.[The parties are to attach to this order (not include in the body of the order) exhibit lists that list all exhibits (except for impeachment and rebuttal exhibits) each party intends to offer into evidence at trial. Exhibit lists are to be prepared in the attached format, indicating objections using the categories described in the form.

All exhibits are to be made available to opposing counsel for inspection at least 21 days before the date of the FPTC. Failure to provide an exhibit for inspection constitutes a valid ground for objection to the exhibit, and should be noted on the exhibit list.

Copies of all exhibits as to which there may be objections must be provided to the court at least 7 days before the FPTC. If an exhibit is not provided to the court in advance of the FPTC and an objection is asserted to the exhibit at the FPTC, the exhibit may be excluded from evidence by the court. Any exhibit not listed on the attached exhibit list

is subject to exclusion at trial. The court may deem any objection not stated on the attached exhibit list as waived.]

III. ***WITNESS LIST***: The parties intend to call the following witnesses at trial:[Each party must prepare a witness list that includes all witnesses (except for rebuttal witnesses) whom the party intends to call to testify at trial. The parties are to exchange their separate witness lists at least 21 days before the date of the FPTC. The witness lists are to be included in the following format. A witness testifying by deposition must be listed in the witness list with a designation that the testimony will be by deposition.]

A. ***Plaintiff(s) witnesses*** [list name, substance of testimony, whether any party objects to the witness, and the nature of and grounds for any objection]:

1.
2.

B. ***Defendant(s) witnesses*** [list name, substance of testimony, whether any party objects to the witness, and the nature of and grounds for any objection]:

1.
2.

All parties are free to call any witness listed by an opposing party. A party listing a witness guarantees his or her presence at trial unless it is indicated otherwise on the witness list. Any objection to the offer of testimony from a witness on the witness list is waived if it is not stated on this list.

V. ***EVIDENTIARY AND OTHER LEGAL ISSUES***:

A. ***Plaintiff(s) Issues***:

1.
2.

B. Defendant(s) Issues:

1.
2.

[The parties must list all unusual evidentiary and legal issues which are likely to arise at trial, including such things as disputes concerning the admissibility of evidence or testimony under the Federal Rules of Evidence; the elements of a cause of action; whether recovery is barred as a matter of law by a particular defense; disputes concerning the measure, elements, or recovery of damages; and whether the Statute of Frauds or the Parol Evidence Rule will be raised. The purpose of this listing of issues is to advise the court in advance of issues and problems that might arise at trial.]

United States District Court
Northern District of California

CHECKLIST FOR RULE 26(f) MEET AND CONFER REGARDING ELECTRONICALLY STORED INFORMATION

In cases where the discovery of electronically stored information ("ESI") is likely to be a significant cost or burden, the Court encourages the parties to engage in on-going meet and confer discussions and use the following Checklist to guide those discussions. These discussions should be framed in the context of the specific claims and defenses involved. The usefulness of particular topics on the checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter.

I. Preservation

- ❒ The ranges of creation or receipt dates for any ESI to be preserved.
- ❒ The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- ❒ The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved.
- ❒ Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material.
- ❒ The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., "HR head," "scientist," "marketing manager," etc.).
- ❒ The number of custodians for whom ESI will be preserved.
- ❒ The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- ❒ Any disputes related to scope or manner of preservation.

II. Liaison

- ❒ The identity of each party's e-discovery liaison.

III. Informal Discovery About Location and Types of Systems

- ❒ Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems).
- ❒ Description of systems in which potentially discoverable information is stored.
- ❒ Location of systems in which potentially discoverable information is stored.
- ❒ How potentially discoverable information is stored.
- ❒ How discoverable information can be collected from systems and media in which it is stored.

IV. Proportionality and Costs

- ❒ The amount and nature of the claims being made by either party.
- ❒ The nature and scope of burdens associated with the proposed preservation and discovery of ESI.
- ❒ The likely benefit of the proposed discovery.
- ❒ Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measures.

- ❒ Limits on the scope of preservation or other cost-saving measures.
- ❒ Whether there is relevant ESI that will not be preserved pursuant to Fed. R. Civ. P. 26(b)(1), requiring discovery to be proportionate to the needs of the case.

V. Search

- ❒ The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.
- ❒ The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

VI. Phasing

- ❒ Whether it is appropriate to conduct discovery of ESI in phases.
- ❒ Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.
- ❒ Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- ❒ Custodians (by name or role) most likely to have discoverable information and whose ESI
- ❒ will be included in the first phases of document discovery.
- ❒ Custodians (by name or role) less likely to have discoverable information and from whom discovery of ESI will be postponed or avoided.
- ❒ The time period during which discoverable information was most likely to have been created or received.

VII. Production

- ❒ The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- ❒ The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.
- ❒ The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- ❒ The production format(s) that ensure(s) that any inherent searchablility of ESI is not degraded when produced.

VIII. Privilege

- ❒ How any production of privileged or work product protected information will be handled.
- ❒ Whether the parties can agree upon alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification.
- ❒ Whether the parties will enter into a Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production.

The Iowa State Bar Association's Federal Practice Seminar presents

2016 Federal Practice Seminar

Friday, December 16, 2016

CRIMINAL BREAKOUT SESSION

Current Issues in Federal Criminal Practice

2:30-3:30 pm

Moderated by

Hon. C. J. William
United States Magistrate Judge for the Court
Northern District of Iowa

Presented by

Peter Deegan
U.S. Attorney's Office
Northern District of Iowa

Andrew Kahl
U.S. Attorney's Office
Southern District of Iowa

Angela Campbell
Dickey & Campbell Law Firm PLC

Jim Whalen
Federal Public Defender

Nick Klinefeldt
Faegre Baker Daniels LLP

Friday, December 16, 2016

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

June 30, 2016

MEMORANDUM

To: Chief Judges, United States District Courts
District Judges, United States District Courts
District Court Executives
Clerks, United States District Courts

From: Judge Wm. Terrell Hodges, Chair
Committee on Court Administration and Case Management

Judge Roger W. Titus, Chair, Privacy Subcommittee
Committee on Court Administration and Case Management

RE: INTERIM GUIDANCE FOR COOPERATOR INFORMATION

On behalf of the Committee on Court Administration and Case Management (CACM), we would like to share interim guidance that the Committee developed concerning the treatment of cooperator information in criminal cases. This guidance is "interim" because the issue has been referred to the Committee on Rules of Practice and Procedure for formal consideration. As discussed below, however, the Committee believes this is an issue of such importance that it requests each court to consider adopting the provisions of the guidance, in a manner consistent with local practice, applicable case law, and the court's rule-making authority, pending consideration through the Rules Enabling Act process.

Background

The CACM Committee has responsibility for issues relating to court operations, including the task of helping courts maintain their records in a way that protects both the public right of access to case filings and the legitimate privacy interests of litigants. Perhaps the most challenging example of this responsibility is balancing public access to criminal cases against the potential exposure of government cooperators. Remote electronic access dramatically increased

the potential for illicit use of case information regarding cooperators, and it is largely for this reason that the Judicial Conference initially delayed public electronic access to criminal case files. This concern also prompted the Committee in 2008 to endorse practices aimed at minimizing the use of case documents to identify cooperators, and encourage all courts to consider their implementation. March 2008 Report of the CACM Committee to the Judicial Conference, pp.8-9; *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350.

Since then, the CACM Committee has continued to track the use of criminal case information to identify cooperators. Despite courts' individual efforts, the problem continues to grow. Based on increasing concerns expressed by judges about harm to cooperators, this Committee, in August 2014, asked the Federal Judicial Center (FJC) to survey judges, U.S. attorneys, federal defenders, Criminal Justice Act panel representatives, and probation and pretrial services chiefs to measure the scope and severity of the problem.

The FJC analyzed the responses to these surveys and collected its findings in a report entitled "Survey of Harm to Cooperators," which is now available on the FJC website at http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf ("FJC Report"). The FJC Report fully substantiates the concern that harm to cooperators persists as a severe problem. For example, district judge respondents reported 571 instances of harms or threats – physical or economic – to defendants and witnesses between the spring of 2012 and the spring of 2015, including 31 murders of defendant cooperators.

The Committee believes these threats and harms should be viewed in the context of a systemic problem of court records being used in the mistreatment of cooperators. The FJC Report presents 363 instances in which court records were known by judges to be used in the identification of cooperators. This is a particular problem in our prisons, where new inmates are routinely required by other inmates to produce dockets or case documents in order to prove whether or not they cooperated. If the new inmates refuse to produce the documents, they are punished. The FJC Report confirms the existence and widespread nature of this problem,[1] which is aggravated by prison culture and the prevalence of organized gangs.

The conditions cooperators face in prison also impact the sentences imposed by the judiciary. Multiple respondents in the FJC Report noted that cooperators' fear of harm is so great that some forgo the potential benefits of U.S. Sentencing Guidelines Manual § 5K1.1 out of fear that the related case documents will identify them as cooperators. If they are identified as cooperators after arriving in prison, in many cases the only effective protection available is to move the threatened inmate into a segregated housing unit or solitary confinement, with an attendant loss of the privileges that would otherwise be available to that inmate – an ironic and more onerous form of punishment not typically contemplated by the sentencing judge.

Chief Judge Ron Clark of the Eastern District of Texas recently held a hearing regarding a motion to unseal plea agreements that involved extensive factfinding on these issues.[2] The hearing involved the participation of the local United States Attorney's Office, the Office of the

[1] *See* FJC Report, Appendix I: Open-Ended Comments (discussing practices in BOP facilities).

[2] *United States v. McCraney*, 99 F. Supp. 3d 651 (E.D. Tex. 2015).

Public Defender, counsel for five defendants, and counsel for the newspaper who had requested the unsealing, as well as an amicus filing by another newspaper. At the hearing, the court heard testimony from two Bureau of Prisons (BOP) representatives and a federal prosecutor concerning the experiences of cooperators in prison. Based on its factfinding, the court concluded that the disclosure of information in plea agreements that identifies cooperating defendants "puts those defendants at risk of extortion, injury, and death." It therefore found "an overriding interest in preventing disclosure of information that states or even hints that a defendant has agreed to be an informant or cooperating witness." The court's local rules regarding criminal case management were updated as a result, so that all plea agreements from that point forward include a sealed supplement containing any discussion of cooperation. *See* E.D. Tex. L. R. CR-49(c)-(d). The court found that this new procedure – which it applied to the case at hand – "balances the public's right of access against the higher need to protect the lives and safety of defendants" and other individuals, as well as "the need to encourage accused individuals to provide the truthful information that is crucial to the successful prosecution of serious offenses."

Certainly, U.S. attorneys and the BOP must continually strive to protect cooperators and ensure the safety of prisoners. The Committee believes, however, that the judiciary also has a role in finding solutions to these problems. Of particular concern for judges, apart from the need to protect the well-being of those we sentence, is the fact that our own court documents are being used to identify the cooperators who then become targets. In many instances these documents are publicly available online through PACER. Because criminal case dockets are being compared in order to identify cooperators, every criminal case is implicated.

Guidance

The CACM Committee believes a nationwide, uniform solution providing for greater control over access to cooperator information is required to address this systemic national problem. It has therefore asked the Committee on Rules of Practice and Procedure to consider the issues described in the FJC Report and determine whether changes to the criminal rules are warranted as a long-term remedy. In the interim, the CACM Committee is also asking courts to consider taking more immediate steps at the district level to address this problem. **The Committee has developed the attached guidance for protecting cooperator information found in criminal case documents and recommends that each district adopt it via local rule or standing order.** The guidance is based on practices for protecting cooperators already used in a number of courts.[3]

The guidance recommends that, in all criminal cases, courts restructure their practices so that documents or transcripts that typically contain cooperation information – if any – would include a sealed supplement. Any discussion of defendants' cooperation – or lack thereof – would then be limited to these sealed supplements. For example, any plea agreement docketed in a criminal case would be accompanied by a separate, sealed supplement containing either discussion of cooperation or a simple statement that there was no cooperation. As a result, any member of the public who reviews the docket would be unable to determine, based on the plea agreement, whether a given defendant has cooperated. By adding standardized sealed material that will appear in every case, whether or not there is a cooperator, and placing all discussion of

[3] Thirty-three district courts, or over one-third, have already adopted local rules or standing orders to make all criminal defendants appear identical in the record to obscure cooperation information. FJC Report at 26.

cooperation under seal, adoption of these practices would inhibit identification of cooperators through dockets and case documents. The public, however, would continue to have access to key criminal case files – albeit without sensitive information regarding cooperation.[4]

Importantly, the government's disclosure obligations to opposing counsel would not be affected by implementation of this guidance, and the public would still have access to much of the plea and sentencing material that is now available.

Discussion

The CACM Committee would like to emphasize that, in recommending this guidance, its members understand and embrace our duty as judges to vigilantly safeguard the public's right to access court documents and proceedings pursuant to the First Amendment and under common law. Nonetheless, the Committee finds that the harms to individuals and the administration of criminal justice in this instance are so significant and ubiquitous that immediate and effective action should be taken to halt the malevolent use of court documents in perpetuating these harms, consistent with each court's duty to exercise "supervisory power over its own records and files."[5]

The Committee is also mindful of the high burden that must be met before shielding particular case information from the public's eye,[6] but notes that this should not be seen as an absolute bar to exercising authority over court records and proceedings. Indeed, there are many well-established restrictions on access to criminal case information that address compelling government interests.[7] The CACM Committee believes that the need in this instance is as great as, if not greater than, the needs that supported adoption of restrictions in the past.

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[4] The guidance contains other provisions, including procedures for prisoners to access sealed case materials in a secure environment, consistent with local BOP policy and court rules. The Committee is in communication with the Executive Office for U.S. Attorneys and the BOP regarding the provisions and local implementation.

[5] *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("[A]ccess has been denied where court files might have become a vehicle for improper purposes.").

[6] *See Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 509-13 (1984) (recognizing that, where right of public access applies, a court may close court proceedings or deny access to transcripts, but must articulate reasons for doing so in specific and reviewable findings demonstrating "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"). Several circuits also have issued decisions that may impact court efforts to implement this guidance. *See, e.g., United States v. DeJournett*, 817 F.3d 479 (6th Cir. 2016) (vacating policy-based order that sealed the entirety of a plea agreement without case-specific findings); *In re Copley Press, Inc.*, 518 F.3d 1022 (9th Cir. 2008) (finding a public right of access to the cooperation addendum of a plea agreement, albeit with limited analysis of whether the right should apply); *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) (acknowledging that potential threats to criminal investigations or individuals "may well be sufficient to justify sealing a plea agreement," but vacating sealing of cooperator information as unwarranted where fact of cooperation was publicly known).

[7] *See, e.g.*, 18 U.S.C. § 3153(c) (making pretrial services reports confidential); Fed. R. Crim. P. 32 & 18 U.S.C. § 3552(d) (limiting distribution of presentence investigation reports); Fed. R. Crim. P. 49.1 (requiring redaction of personally identifiable information and minors' names); Fed. R. Crim. P. 49.1, 2007 Advisory Comm. Notes & *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 340 (categorizing as non-public a number of criminal case documents, including juvenile records); 18 U.S.C. § 5038 (making names and pictures of juveniles in delinquency proceedings non-public; safeguarding records from "unauthorized persons"); JCUS-MAR 01, p. 17 (dictating that statements of reasons are not to be disclosed to the public); 18 U.S.C. § 3662(c) (mandating that conviction records maintained by the Attorney General "not be public records").

It is important to emphasize that, to the extent possible, broad adoption of the CACM guidance is key to its effectiveness at addressing the problems discussed above. If districts continue to take different approaches toward addressing this problem, there is a real risk that well-intentioned measures to protect cooperators in one court might result in criminal dockets that indicate cooperation, rightly or wrongly, when compared to those of another court. The inadequacy of a patchwork approach to sealing cooperator-related material is highlighted in Chief Judge Clark's opinion and referenced by a number of responses in the FJC Report. It is for this reason that the Committee has requested the Committee on Rules of Practice and Procedure to consider this issue for national application.

Finally, in drafting and recommending this guidance, the CACM Committee emphasizes that it has acted to the best of its ability to narrow the scope of the proposed measures. The Committee also thoroughly considered other potential options for addressing this issue in each district, such as those it recommended for potential adoption in 2008.[8] These options, however, suffer from either failing to move the judiciary toward a uniform approach or by making a greater volume of case information unavailable to the public. For example, some courts presently seal the entirety of all plea agreements in an attempt to prevent identification of and harm to cooperators. By implementing the attached guidance and sealing only cooperator information, as the CACM Committee recommends, these courts may actually increase the amount of criminal case information available to the public.[9]

The CACM Committee believes that the misuse of court documents to identify, threaten, and harm cooperators is a systemic problem, and can only be addressed through a more uniform approach toward public access to cooperator information. To that end, the Committee believes uniform implementation of the attached guidance at the local level -- pending consideration of a national rule -- would be an important, measured step toward that goal, and one which is appropriately tailored to address the significant interests involved.

Thank you for the thoughtful consideration we know you and your colleagues will give to this issue.

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[8] *See* March 2008 Rep. of the CACM Committee to the Judicial Conf., pp. 8-9; *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350 (listing as potential measures (1) shifting cooperation information into non-case file documents, (2) sealing plea agreements, (3) restricting access to plea agreements, (4) redacting all cooperation information, (5) restructuring case records so that all criminal cases appear identical, and (6) delaying publication of plea agreements referencing cooperation).

[9] The CACM Committee recognizes that there is no complete or perfect solution. If a cooperator testifies during a trial, for example, or is sentenced below a statutory mandatory minimum where the "safety valve" does not apply (18 U.S.C. § 3553(f)), his cooperation is apparent. This obviously does not mean, however, that solutions should not be adopted for those cases in which they are available and can be effectively applied.

If you have any questions or concerns, please feel free to contact either of us, Judge Terry Hodges (Chair, CACM Committee) or Judge Roger Titus (Chair, CACM Committee's Privacy Subcommittee). You can also contact Sean Marlaire, Administrative Office Policy Staff, Court Services Office, at 202-502-3522 or by email at Sean_Marlaire@ao.uscourts.gov.

Attachment

cc: Honorable Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure
Chief Probation Officers
Federal Public and Community Defenders
CJA Panel Attorney District Representatives

Guidance on Access to Plea Agreements and Other Documents That May Reveal Cooperation

A. On the basis of the following findings of the Court Administration and Case Management Committee, arrived at in consultation with the Criminal Law Committee and Defender Services Committee (which takes no position on the proposed guidance), the Committee recommends prompt local adoption of the guidance set forth in subsection (b) by each district court via local rule or standing order.

1. As indicated by the Survey of Harm to Cooperators: Final Report prepared by the Federal Judicial Center in June 2015, and the findings contained in the memorandum order of Chief Judge Clark of the Eastern District of Texas dated April 13, 2015 (Case No. 14-CR-80), there is a pervasive, nationwide problem regarding the use of criminal case information to identify and harm cooperators and their families.

2. The problem has been exacerbated by widespread use of PACER and other systems that provide ready public access to case information, including documents containing cooperation information and criminal dockets indicating whether cooperation did or did not occur in a case.

3. The problem threatens public safety. It also interferes with the gathering of evidence, the presentation of witnesses, and the sentencing and incarceration of cooperating defendants, and therefore poses a substantial threat to the underpinnings of the criminal justice system as a whole. The Court Administration and Case Management Committee agreed that there is a compelling government interest in addressing these issues.

4. Other possible less-restrictive alternatives have been considered before selecting this guidance and, to the greatest extent possible, the guidance has been narrowly tailored. To be effective, any action intended to address these issues must be implemented universally across all criminal cases; any rules, standing orders, or policies that provide for case-to-case variation in the treatment of criminal documents for cooperators and non-cooperators are ineffective and may compound the problem.

5. Uniform nationwide measures regarding access to particular criminal court documents and transcripts are necessary in order to prevent the improper use of those documents to harm or threaten government cooperators in the long term. As a result, the Committee will continue to work with other committees of the Judicial Conference, and in particular the Committee on Rules of Practice and Procedure, along with the Department of Justice and the Bureau of Prisons, in

order to investigate and establish nationwide measures that are most effective at protecting cooperators while avoiding unnecessary restrictions on legitimate public access.

B. Recommended Document Standards to Protect Cooperation Information

1. In every case, all plea agreements shall have a public portion and a sealed supplement, and the sealed supplement shall either be a document containing any discussion of or references to the defendant's cooperation or a statement that there is no cooperation agreement. There shall be no public access to the sealed supplement unless ordered by the court.

2. In every case, sentencing memoranda shall have a public portion and a sealed supplement. Only the sealed supplement shall contain (a) any discussion of or references to the defendant's cooperation including any motion by the United States under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1; or (b) a statement that there has been no cooperation. There shall be no public access to the sealed supplement unless ordered by the court.

3. All transcripts of guilty pleas shall contain a sealed portion containing a conference at the bench that will either contain any discussion of or references to the defendant's cooperation, or simply state that there is no agreement for cooperation. There shall be no public access to the text of the conference at the bench provided under this paragraph unless ordered by the court.

4. All sentencing transcripts shall include a sealed portion containing a conference at the bench, which reflects either (a) any discussion of or references to the defendant's cooperation, including the court's ruling on any sentencing motion relating to the defendant's cooperation; or (b) a statement that there has been no cooperation. There shall be no public access to the text of the conference at the bench provided under this paragraph unless ordered by the court.

5. All motions under Rule 35 of the Federal Rules of Criminal Procedure based on the cooperation with the government shall be sealed and there shall be no public access to the motion unless ordered by the court.

6. Copies of presentence reports and any other sealed documents, if requested by an inmate, shall be forwarded by the Chief Probation Officer or the Clerk of the Court to the warden of the appropriate institution for review by the inmate in an area designated by the warden and may neither be retained by the inmate, nor reviewed in the presence of another inmate, consistent with the institutional policies of the Bureau of Prisons. Federal court officers or employees (including probation officers and federal public defender staff), community defender staff, retained counsel, appointed CJA panel attorneys, and any other

person in an attorney-client relationship with the inmate may, consistent with any applicable local rules or standing orders, review with him or her any sealed portion of the file in his or her case, but may not leave a copy of a document sealed pursuant to this guidance with an inmate.

7. Clerks of the United States district courts, when requested to provide a copy of docket entries in criminal matters to an inmate or any other requesting party, shall include in a letter transmitting the docket entries, a statement that, pursuant to this guidance, all plea agreements and sentencing memoranda contain a sealed supplement which is either a statement that there is cooperation, including the terms thereof, or a statement that there is no cooperation, and, as a result, it is not possible to determine from examination of docket entries whether a defendant did or did not cooperate with the government.

8. All documents, or portions thereof, sealed pursuant to this guidance shall remain under seal indefinitely until otherwise ordered by the court on a case-by-case basis.

9. Nothing contained herein shall be construed to relieve the government in any case of its disclosure obligations, such as those under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Jencks v. United States*, 353 U.S. 657 (1957) (as codified at 18 U.S.C. § 3500).

10. Judicial opinions involving defendants or witnesses that have agreed to cooperate with the government, where reasonably practicable, should avoid discussing or making any reference to the fact of a defendant's or witness's cooperation.

Amendments to the Sentencing Guidelines

April 28, 2016

Effective Date
November 1, 2016

This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary submitted to Congress, and is provided only for the convenience of the user. Official text of the amendment can be found on the Commission's website at www.ussc.gov and will appear in a forthcoming edition of the *Federal Register*.

4. IMMIGRATION

Reason for Amendment: *This multi-part amendment is a result of the Commission's multi-year study of immigration offenses and related guidelines, and reflects extensive data collection and analysis relating to immigration offenses and offenders. Based on this data, legal analysis, and public comment, the Commission identified a number of specific areas where changes were appropriate. The first part of this amendment makes several discrete changes to the alien smuggling guideline, §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), while the second part significantly revises the illegal reentry guideline, §2L1.2 (Unlawfully Entering or Remaining in the United States).*

Alien Smuggling

The first part of the amendment amends the alien smuggling guideline (§2L1.1). A 2014 letter from the Deputy Attorney General asked the Commission to examine several aspects of this guideline in light of changing circumstances surrounding the commission of these offenses. See Letter from James M. Cole to Hon. Patti B. Saris (Oct. 9, 2014). In response, the Commission undertook a data analysis that, in conjunction with additional public comment, suggested two primary areas for change in the guideline.

Unaccompanied Minors

The specific offense characteristic at §2L1.1(b)(4) provides an enhancement "[i]f the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent." The amendment makes several changes to this enhancement.

First, the amendment increases the enhancement at subsection (b)(4) from 2 levels to 4 levels, and broadens its scope to offense-based rather than defendant-based. These two changes were made in light of data, testimony, and public comment indicating that: (1) in recent years there has been a significant increase in the number of unaccompanied minors smuggled into the United States; (2) unaccompanied minors being smuggled are often exposed to deprivation and physical danger (including sexual abuse); (3) the smuggling of unaccompanied minors places a particularly severe burden on public resources when they are taken into custody; and (4) alien smuggling is typically conducted by multimember commercial enterprises that accept smuggling victims without regard to their age, such that an individual defendant is likely to be aware of the risk that unaccompanied minors are being smuggled as part of the offense.

Second, the amendment narrows the scope of the enhancement at subsection (b)(4) by revising the meaning of an "unaccompanied" minor. Prior to the amendment, the enhancement did not apply if the minor was accompanied by the minor's parent or grandparent. The amendment narrows the class of offenders who would receive the enhancement by specifying that the enhancement does not apply if the minor was accompanied by the minor's "parent, adult relative, or legal guardian." This change reflects the view that minors who are accompanied by a parent or another responsible adult relative or legal guardian ordinarily are not subject to the same level of risk as minors unaccompanied by such adults.

Third, the amendment expands the definition of "minor" in the guideline, as it relates to the enhancement in subsection (b)(4), to include an individual under the age of 18. The guideline currently defines "minor" to include only individuals under 16 years of age. The Commission determined that an expanded definition of minor that includes 16- and 17-year-olds is consistent with other aspects of federal immigration law, including the statute assigning responsibility for unaccompanied minors under age 18 to the Department of Health and Human Services. See 6 U.S.C. § 279(g)(2)(B). The Commission also believed that it was appropriate to conform the definition of minor in the alien smuggling guideline to the definition of minor in §3B1.4 (Using a Minor to Commit a Crime).

Clarification of the Enhancement Applicable to Sexual Abuse of Aliens

The amendment addresses offenses in which an alien (whether or not a minor) is sexually abused. Specifically, it ensures that a "serious bodily injury" enhancement of 4 levels will apply in such a case. It achieves this by amending the commentary to §2L1.1 to clarify that the term "serious bodily injury" included in subsection (b)(7)(B) has the meaning given that term in the commentary to §1B1.1 (Application Instructions). That instruction states that "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

The Commission's data indicated that the (b)(7)(B) enhancement has not been applied in some cases in which a smuggled alien had been sexually assaulted. The Commission determined that this clarification is warranted to ensure that the 4-level enhancement is consistently applied when the offense involves the sexual abuse of an alien.

Illegal Reentry

The second part of the amendment is the product of the Commission's multi-year study of the illegal reentry guideline. In considering this amendment, the Commission was informed by the Commission's 2015 report, Illegal Reentry Offenses; its previous consideration of the "categorical approach" in the context of the definition of "crimes of violence"; and extensive public testimony and public comment, in particular from judges from the southwest border districts where the majority of illegal reentry prosecutions occur.

The amendment responds to three primary concerns. First, the Commission has received significant comment over several years from courts and stakeholders that the "categorical approach" used to determine the particular level of enhancement under the existing guideline is overly complex and resource-intensive and often leads to litigation and uncertainty. The existing guideline's single specific offense characteristic provides for enhancements of between 4 levels and 16 levels, based on the nature of a defendant's most serious conviction that occurred before the defendant was "deported" or "unlawfully remained in the United States." Determining whether a predicate conviction qualifies for a particular level of enhancement requires application of the categorical approach to the penal statute underlying the prior conviction. See generally United States v. Taylor, 495 U.S. 575 (1990) (establishing the categorical approach). Instead of the categorical approach, the amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. The level of the sentencing enhancement for a prior conviction generally will be determined by the length of the sentence imposed for the prior offense, not by the type of offense for which the defendant had been convicted. The definition of "sentence imposed" is the same definition that appears in Chapter Four of the Guidelines Manual.

Second, comment received by the Commission and sentencing data indicated that the existing 16- and 12-level enhancements for certain prior felonies committed before a defendant's deportation were overly severe. In fiscal year 2015, only 29.7 percent of defendants who received the 16-level enhancement were sentenced within the applicable sentencing guideline range, and only 32.4 percent of defendants who received the 12-level enhancement were sentenced within the applicable sentencing guideline range.

Third, the Commission's research identified a concern that the existing guideline did not account for other types of criminal conduct committed by illegal reentry offenders. The Commission's 2015 report found that 48.0 percent of illegal reentry offenders were convicted of at least one offense (other than their instant illegal reentry conviction) after their first deportations.

The amendment addresses these concerns by accounting for prior criminal conduct in a broader and more proportionate manner. The amendment reduces somewhat the level of enhancements for criminal conduct occurring before the defendant's first order of deportation and adds a new enhancement for criminal conduct occurring after the defendant's first order of deportation. It also responds to concerns that prior convictions for illegal reentry offenses may not be adequately accounted for in the existing guideline by adding an enhancement for prior illegal reentry and multiple prior illegal entry convictions.

The manner in which the amendment responds to each of these concerns is discussed in more detail below.

Accounting for Prior Illegal Reentry Offenses

The amendment provides at subsection (b)(1) a new tiered enhancement based on prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. A defendant who has one or more felony illegal reentry convictions will receive an increase of 4 levels. "Illegal reentry offense" is defined in the commentary to include all convictions under 8 U.S.C. §§ 1253 (failure to depart after an order of removal) and 1326 (illegal reentry), as well as second or subsequent illegal entry convictions under § 1325(a). A defendant who has two or more misdemeanor illegal entry convictions under 8 U.S.C. § 1325(a) will receive an increase of 2 levels.

The Commission's data indicates that the extent of a defendant's history of illegal reentry convictions is associated with the number of his or her prior deportations or removals from the United States, with the average illegal reentry defendant having been removed from the United States 3.2 times. Illegal Reentry Offenses, at 14. Over one-third (38.1%) of the defendants were previously deported after an illegal entry or reentry conviction. Id. at 15. The Commission determined that a defendant's demonstrated history of violating §§ 1325(a) and 1326 is appropriately accounted for in a separate enhancement. Because defendants with second or successive § 1325(a) convictions (whether they were charged as felonies or misdemeanors) have entered illegally more than once, the Commission determined that this conduct is appropriately accounted for under this enhancement.

For a defendant with a conviction under § 1326, or a felony conviction under § 1325(a), the 4-level enhancement in the new subsection (b)(1)(A) is identical in magnitude to the enhancement the defendant would receive under the existing subsection (b)(1)(D). The Commission concluded that an enhancement is also appropriate for defendants previously convicted of two or more misdemeanor offenses under § 1325(a).

Accounting for Other Prior Convictions

Subsections (b)(2) and (b)(3) of the amended guideline account for convictions (other than illegal entry or reentry convictions) primarily through a sentence-imposed approach, which is similar to how Chapter Four of the Guidelines Manual determines a defendant's criminal history score based on his or her prior convictions. The two subsections are intended to divide the defendant's criminal history into two time periods. Subsection (b)(2) reflects the convictions, if any, that the defendant sustained before being ordered deported or removed from the United States for the first time. Subsection (b)(3) reflects the convictions, if any, that the defendant sustained after that event (but only if the criminal conduct that resulted in the conviction took place after that event).

The specific offense characteristics at subsections (b)(2) and (b)(3) each contain a parallel set of enhancements of:

- *10 levels for a prior felony conviction that received a sentence of imprisonment of five years or more;*
- *8 levels for a prior felony conviction that received a sentence of two years or more;*
- *6 levels for a prior felony conviction that received a sentence exceeding one year and one month;*
- *4 levels for any other prior felony conviction*
- *2 levels for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.*

The (b)(2) and (b)(3) specific offense characteristics are to be calculated separately, but within each specific offense characteristic, a defendant may receive only the single greatest applicable increase.

The Commission determined that the new specific offense characteristics more appropriately provide for incremental punishment to reflect the varying levels of culpability and risk of recidivism reflected in illegal reentry defendants' prior convictions. The (b)(2) specific offense characteristic reflects the same general rationale as the illegal reentry statute's increased statutory maximum penalties for offenders with certain types of serious pre-deportation predicate offenses (in particular, "aggravated felonies" and "felonies"). See 8 U.S.C. § 1326(b)(1) and (b)(2). The Commission's data analysis of offenders' prior felony convictions showed that the more serious types of offenses, such as drug-trafficking offenses, crimes of violence, and sex offenses, tended to receive sentences of imprisonment of two years or more, while the less serious felony offenses, such as felony theft or drug possession, tended to receive much shorter sentences. The sentence-length benchmarks in (b)(2) are based on this data.

The (b)(3) specific offense characteristic focuses on post-reentry criminal conduct which, if it occurred after a defendant's most recent illegal reentry, would receive no enhancement under the existing guideline. The Commission concluded that a defendant who sustains criminal convictions occurring before and after the defendant's first order of deportation warrants separate sentencing enhancement.

The Commission concluded that the length of sentence imposed by a sentencing court is a strong indicator of the court's assessment of the seriousness of the predicate offense at the time, and this approach is consistent with how criminal history is generally scored in the Chapter Four of the Guidelines Manual. In amending the guideline, the Commission also took into consideration public testimony and comment indicating that tiered enhancements based on the length of the sentence imposed, rather than the classification of a prior offense under the categorical approach, would greatly simplify application of the guideline. With respect an offender's prior felony convictions, the amendment eliminates the use of the categorical approach, which has been criticized as cumbersome and overly legalistic.

The amendment retains the use of the categorical approach for predicate misdemeanor convictions in the new subsections (b)(2)(E) and (b)(3)(E) in view of a congressional directive requiring inclusion of an enhancement for certain types of misdemeanor offenses. See Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104–208, § 344, 110 Stat. 3009.

The amendment also addresses another frequent criticism of the existing guideline – that its use of a single predicate conviction sustained by a defendant before being deported or removed from the United States to impose an enhancement of up to 16 levels is often disproportionate to a defendant's culpability or recidivism risk. The Commission's data shows an unusually high rate of downward variances and departures from the guideline for such defendants. For example, the Commission's report found that less than one-third of defendants who qualify for a 16-level enhancement have received a within-range

sentence, while 92.7 percent of defendants who currently qualify for no enhancement receive a within-range sentence. Illegal Reentry Report, at 11.

The lengths of the terms of imprisonment triggering each level of enhancement were set based on Commission data showing differing median sentence lengths for a variety of predicate offense categories. For example, the Commission's data indicated that sentences for more serious predicate offenses, such as drug-trafficking and felony assault, exceeded the two- and five-year benchmarks far more frequently than did sentences for less serious felony offenses, such as drug possession and theft. With respect to drug-trafficking offenses, the Commission found that 34.6 percent of such offenses received sentences of between two and five years, and 17.0 percent of such offenses received sentences of five years or more. With respect to felony assault offenses, the Commission found that 42.1 percent of such offenses received sentences of between two and five years, and 9.0 percent of such offenses received sentences of five years or more. With respect to felony drug possession offenses, 67.7 percent of such offenses received sentences of 13 months or less, while only 21.3 percent received sentences between two years and five years and only 3.0 percent received sentences of five years or more. With respect to felony theft offenses, 57.1 percent of such offenses received sentences of 13 months or less, while only 17.4 percent received sentences between two years and five years and only 2.0 percent received sentences of five years or more.

The Commission considered public comment suggesting that the term of imprisonment a defendant actually served for a prior conviction was a superior means of assessing the seriousness of the prior offense. The Commission determined that such an approach would be administratively impractical due to difficulties in obtaining accurate documentation. The Commission determined that a sentence-imposed approach is consistent with the Chapter Four criminal history rules, easily applied, and appropriately calibrated to account for the seriousness of prior offenses.

Departure Provision

The amendment adds a new departure provision, at Application Note 5, applicable to situations where "an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense." This departure accounts for three situations in which an enhancement based on the length of a prior imposed sentence appears either inadequate or excessive in light of the defendant's underlying conduct. For example, if a prior serious conviction (e.g., murder) is not accounted for because it is not within the time limits set forth in §4A1.2(e) and did not receive criminal history points, an upward departure may be warranted. Conversely, if the time actually served by the defendant for the prior offense was substantially less than the length of the original sentence imposed, a downward departure may be warranted.

Excluding Stale Convictions

For all three specific offense characteristics, the amendment considers prior convictions only if the convictions receive criminal history points under the rules in Chapter Four. Counting only convictions that receive criminal history points addresses concerns that the existing guideline sometimes has provided for an unduly severe enhancement based on a single offense so old it did not receive criminal history points. The Commission's research has found that a defendant's criminal history score is a strong indicator of recidivism risk, and it is therefore appropriate to employ the criminal history rules in this context. See U.S. Sent. Comm'n, Recidivism Among Federal Offenders: A Comprehensive Overview (2016). The limitation to offenses receiving criminal history points also promotes ease of application and uniformity throughout the guidelines. See 28 U.S.C. § 994(c)(2) (directing the Commission to establish categories of offenses based on appropriate mitigating and aggravating factors); cf. USSG §2K2.1, comment. (n.10) (imposing enhancements based on a defendant's predicate convictions only if they received criminal history points).

Application of the "Single Sentence Rule"

The amendment also contains an application note addressing the situation when a defendant was simultaneously sentenced for an illegal reentry offense and another federal felony offense. It clarifies that, in such a case, the illegal reentry offense counts towards subsection (b)(1), while the other felony offense counts towards subsection (b)(3).

Because the amendment is intended to make a distinction between illegal reentry offenses and other types of offenses, the Commission concluded that it was appropriate to ensure that such convictions are separately accounted for under the applicable specific offense characteristics, even if they might otherwise constitute a "single sentence" under §4A1.2(a)(2). For example, if the single sentence rule applied, a defendant who was sentenced simultaneously for an illegal reentry and a federal felony drug-trafficking offense might receive an enhancement of only 4 levels under subsection (b)(1), even though, if the two sentences had been imposed separately, the drug offense would result in an additional enhancement of between 4 and 10 levels under subsection (b)(3).

Definition of "Crime of Violence"

The amendment continues to use the term "crime of violence," although now solely in reference to the 2-level enhancement for three or more misdemeanor convictions at subsections (b)(2)(E) and (b)(3)(E). The amendment conforms the definition of "crime of violence" in Application Note 2 to that adopted for use in the career offender guideline effective August 1, 2016. See Notice of Submission to Congress of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 FR 4741 (Jan. 27, 2016). Uniformity and ease of application weigh in favor of using a consistent definition for the same term throughout the Guidelines Manual.

Amendment:

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level:

(1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);

(2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or

(3) **12**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(3), decrease by **3** levels.

(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

	Number of Unlawful Aliens Smuggled, Transported, or Harbored	Increase in Level
(A)	6-24	add **3**
(B)	25-99	add **6**
(C)	100 or more	add **9**.

(3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

(4) ~~If the defendant smuggled, transported, or harbored~~ If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor's parent ~~or grandparent~~, adult relative, or legal guardian, increase by ~~24~~ levels.

(5) (Apply the Greatest):

(A) If a firearm was discharged, increase by **6** levels, but if the resulting offense level is less than level **22**, increase to level **22**.

(B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by **4** levels, but if the resulting offense level is less than level **20**, increase to level **20**.

(C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

(6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

(7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

	Death or Degree of Injury	Increase in Level
(A)	Bodily Injury	add **2** levels
(B)	Serious Bodily Injury	add **4** levels
(C)	Permanent or Life-Threatening Bodily Injury	add **6** levels
(D)	Death	add **10** levels.

(8) (Apply the greater):

(A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by **2** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by **6** levels.

(9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by **2** levels.

(c) Cross Reference

(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *Definitions.—For purposes of this guideline:*

"The offense was committed other than for profit" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

"Number of unlawful aliens smuggled, transported, or harbored" does not include the defendant.

"Aggravated felony" ~~is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States)~~ has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

"Child" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

"Spouse" has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

"Immigration and naturalization offense" means any offense covered by Chapter Two, Part L.

"Minor" means an individual who had not attained the age of ~~16~~18 years.

"Parent" means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father.

"Bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

~~4~~2. *Prior Convictions Under Subsection (b)(3).—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

~~5~~3. *Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements). If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).*

4. *Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.—Consistent with Application Note 1(L) of §1B1.1 (Application Instructions), "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.*

~~6~~5. *Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).*

~~2~~6. *Interaction with §3B1.1.—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.*

~~3~~7. *Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:*

(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).

(C) The offense involved substantially more than 100 aliens.

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986.

* * *

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels if the conviction receives criminal history points under Chapter Four or by **8** levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by **8** levels;

(D) a conviction for any other felony, increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General. For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

~~(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.~~

~~(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.~~

~~(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.~~

~~(B) Definitions. For purposes of subsection (b)(1):~~

~~(i) "Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).~~

~~(ii) "Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

~~(iii) "Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.~~

~~(iv) "Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.~~

~~(v) "Firearms offense" means any of the following:~~

~~(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).~~

~~(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).~~

~~(III) A violation of 18 U.S.C. § 844(h).~~

~~(IV) A violation of 18 U.S.C. § 924(c).~~

~~(V) A violation of 18 U.S.C. § 929(a).~~

~~(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

~~(vi) "Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

~~(vii) "Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.~~

~~(viii) "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).~~

~~(C) Prior Convictions. In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.~~

~~2. Definition of "Felony". For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.~~

~~3. Application of Subsection (b)(1)(C).~~

~~(A) Definitions. For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.~~

~~(B) In General. The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).~~

~~4. Application of Subsection (b)(1)(E). For purposes of subsection (b)(1)(E):~~

~~(A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.~~

~~(B) "Three or more convictions" means at least three convictions for offenses that are not treated as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).~~

~~5. Aiding and Abetting, Conspiracies, and Attempts. Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.~~

~~6. *Computation of Criminal History Points.* A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).~~

~~7. *Departure Based on Seriousness of a Prior Conviction.* There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. *Examples:* (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.~~

~~8. *Departure Based on Time Served in State Custody.* In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). *See* §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.~~

~~*Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.*~~

~~9. *Departure Based on Cultural Assimilation.* There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.~~

~~*In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.*~~

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) (Apply the Greater) If the defendant committed the instant offense after sustaining—

(A) a conviction for a felony that is an illegal reentry offense, increase by **4** levels; or

(B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by **2** levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

(3) (Apply the Greatest) If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. In General.—

(A) "Ordered Deported or Ordered Removed from the United States for the First Time".—For purposes of this guideline, a defendant shall be considered "ordered deported or ordered removed from the United States" if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. "For the first time" refers to the first time the defendant was ever the subject of such an order.

*(B) Offenses Committed Prior to Age Eighteen.—Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.**

2. Definitions.—For purposes of this guideline:

"Crime of violence" means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. "Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

"Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance

* The provision marked with an asterisk (*) currently appears in note 1(A)(iv). The amendment only renumbers the provision without making substantive changes to the text.

*(or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.***

*"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.***

"Illegal reentry offense" means (A) an offense under 8 U.S.C. § 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. § 1325(a).

*"Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.***

"Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

3. Criminal History Points.—For purposes of applying subsections (b)(1), (b)(2), and (b)(3), use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of subsections (b)(1)(B), (b)(2)(E), and (b)(3)(E), use only those convictions that are counted separately under §4A1.2(a)(2).

A conviction taken into account under subsection (b)(1), (b)(2), or (b)(3) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Cases in Which Sentences for An Illegal Reentry Offense and Another Felony Offense were Imposed at the Same Time.—There may be cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time and treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). In such a case, use the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), if it independently would have received criminal history points. In addition, use the prior sentence for the other felony offense in determining the appropriate enhancement under subsection (b)(3), if it independently would have received criminal history points.

5. Departure Based on Seriousness of a Prior Offense.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (see §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.

6. Departure Based on Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of

** The definitions marked with double asterisks (**) currently appear in the commentary scattered throughout the application notes. The amendment places these definitions without substantive changes as part of new application note 2.

Imprisonment). See §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

*Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.****

7. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

*In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.****

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§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment

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Commentary

Application Notes:

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2. Application of Subsection (b).—

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**** The application notes marked with three asterisks (***) appear in the current guideline at the end of the commentary. The amendment only renumbers these notes without making substantive changes to the text.

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is ~~an aggravated felony~~ a prior conviction for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

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U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[1]

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

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[1] The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

[2] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct").

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.**

The Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether

it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department's investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[1]

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

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[1] The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

[2] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct").

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

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