UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

TABLE OF CONTENTS
RULE 1 TASK FORCE DOCUMENTS

	Pages
Initial Order Regarding Planning and Scheduling	2-3
Rule 26(f) Report of Parties' Planning Conference	4-13
Scheduling Order	14-25
Pretrial Order	26-33
Guidelines for Cases Involving Electronically Stored Information (ESI)	34-45
Guidelines for Agreed Protective Orders (with pre-approved form order)	46-63
Summary Judgment Guidelines	64-65
Proposed Technical Amendments to Local Rules	66-72

Note: The page numbers as stated in this table of contents are as assigned by the combined Adobe Acrobat document.

(Rev. ___/___/13)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

_____,

Plaintiff(s),

v. Case No. _____

_____,

Defendant(s).

INITIAL ORDER REGARDING PLANNING AND SCHEDULING

Fed. R. Civ. P. 1 mandates the just, speedy, and inexpensive determination of civil cases. With that goal in mind, the undersigned U.S. Magistrate Judge, _____, will conduct a scheduling conference in this case in accordance with Fed. R. Civ. P. 16 on (date), at (time) *[approximately 60 days after this order is filed]*. The conference will be held [in Room ___ of the U.S. Courthouse at _____ in [Kansas City] [Wichita] [Topeka], Kansas] [by video conference] [by telephone]. [The court will initiate the conference call, and the attorneys who have entered an appearance must be available for the conference call at the telephone numbers listed in the pleadings.]

The parties, in person and/or through counsel, must confer as required by Fed. R. Civ. P. 26(f) by (date) *[at least 21 days before the Rule 16 scheduling conference with the court]*. Generally, discussion at this planning conference must address the nature and basis of the

parties' claims and defenses; the possibilities of settling or resolving the case, including the use of mediation or other methods of alternative dispute resolution; making or at least arranging for the disclosures required by Fed. R. Civ. P. 26(a)(1); any issues about preserving discoverable information; and development of a proposed discovery plan. More specifically, the agenda items that must be addressed during this conference include those set out in Fed. R. Civ. P. 16(c)(2)(A)-(P), Fed. R. Civ. P. 26(f)(3)(A)-(F), and the planning report form that is attached to this order and that is also posted on the court's website:

http://www.ksd.uscourts.gov/report-of-parties-planning-conference/

By (date) *[14 days after the Rule 26(f) meeting deadline]*, plaintiff(s) must submit the completed report of the parties' planning conference to the chambers of the undersigned magistrate judge, along with copies of the parties' Rule 26(a) initial disclosures. The report must follow the prescribed form and must be submitted electronically in .pdf format as an attachment to an e-mail sent to *ksd_[judge]_chambers@ksd.uscourts.gov.* It must not be filed with the Clerk's Office.

If you have questions concerning the requirements of this order, please contact the undersigned judge's courtroom deputy, _____, at _____, or by e-mail at *ksd_[judge]_chambers@ksd.uscourts.gov.*

IT IS SO ORDERED.

Dated _____ __, 20__, at _____, Kansas.

_____

_____
U.S. Magistrate Judge

(Rev. ___/___/13)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

_____,

Plaintiff(s),

v. Case No. _____

_____,

Defendant(s).

REPORT OF PARTIES' PLANNING CONFERENCE

[Completed form should be spaced as shown.]
[Use separate paragraphs or subparagraphs as necessary if the parties[1] disagree.]

Introductory Note: Rule 1 of the Federal Rules of Civil Procedure calls for the "just, speedy, and inexpensive" determination of civil cases. Careful planning is essential to efficient case management and discovery proceedings.

The court strongly encourages the parties to conduct their planning conferences under Fed. R. Civ. P. 26(f) in person instead of by telephone, to improve the quality of discussion. In any event it's unacceptable to simply exchange draft planning reports by e-mail. The court also strongly encourages "first chair" trial counsel to be meaningfully involved in this critical planning process.

---

[1]As used in this report, 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. However, when the parties actually complete and submit this report, they should accurately describe their posture in the case.

Before the parties conduct their planning conference and attempt to complete this required planning report form, instead of just mechanically filling in the blanks, the court expects them to review and be prepared to address all the specific agenda items mentioned in Fed. R. Civ. P. 16(c)(2)(A)-(O) and Fed. R. Civ. P. 26(f)(3)(A)-(F). The parties should think creatively and, to the extent possible, cooperatively, about how to structure this case in a way that leads to the efficient resolution of the factual and legal issues presented.

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/

Discovery of electronically stored information (ESI) is unduly expensive if it's not managed properly. Therefore, counsel must become generally knowledgeable about their clients' information management systems before the planning conference. That is, counsel must be prepared to discuss at the conference how their clients' information is stored and retrieved, and in turn be prepared to discuss and resolve the specific issues raised in the ESI guidelines posted on this court's website:

http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf

1. **Rule 26(f) Conference.** Pursuant to Fed. R. Civ. P. 26(f), a discovery and case management conference was held on (date), and was attended by *[list appearances]*. The conference was conducted [in person at _____ (place)] [by telephone].

2. **Preliminary Matters.**

    1. The following persons will appear at the upcoming Rule 16 scheduling conference with the magistrate judge:

    [Insert names of all parties and counsel who will appear at the scheduling conference and, if the conference is scheduled to occur by video conference or telephone, the telephone numbers where parties and/or counsel may be reached at the designated time.]

2. The parties provide the following information regarding themselves and their counsel:

[For each attorney, insert: (1) name; (2) business address; (3) home, business, and cellular telephone and facsimile numbers; and (4) e-mail address. For each party, insert: (1) name; (2) home and business addresses; (3) home and business telephone and facsimile numbers; and (4) e-mail address.]

3. The parties jointly submit the following case summary:

[Insert a brief summary of the case, preferably in a single paragraph and no more than one page, which states: (1) the general nature of the case, e.g., employment discrimination, personal injury, etc.; (2) the statutes asserted to confer subject matter jurisdiction, e.g., 28 U.S.C. § 1332; (3) the plaintiff's legal theories, and (4) the primary defenses pleaded by defendant.]

3. Plan for Alternative Dispute Resolution (ADR).

1. The parties already have engaged in the following good faith efforts to resolve this matter: *[describe efforts].*

2. Plaintiff will submit a written, good faith settlement proposal to defendant by (date). Defendant will make a written, good faith counter-proposal by (date). By (date), unless the parties have jointly filed a notice stating whom they have selected to serve as mediator, along with the firmly scheduled date, time, and place of mediation, each party will submit a confidential settlement report to the assigned magistrate judge.

[Note: In order to facilitate the ADR process, the court usually will require the parties to complete their exchange of settlement proposals within 30 days after the scheduling conference.]

3. The parties have agreed on the following ADR procedure, which will be accomplished by: *[insert agreed procedure, e.g., mediation, and a deadline, which usually should be within 90-120 days of the scheduling conference].*

4. Plan for Pre-Discovery Disclosures. The parties will exchange the information required by Fed. R. Civ. P. 26(a)(1) by (date) *[no later than 14 days after the planning conference].* [Optional: 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 documents described in the

parties' respective Rule 26(a)(1) disclosures will be [exchanged] [made available for inspection and copying] by (date).]

[Note: As indicated in the Initial Order Regarding Planning and Scheduling, copies of the parties' initial disclosures under Rule 26(a)(1) must be attached to the parties' completed Rule 26(f) planning report. These disclosures will be discussed with the magistrate judge during the upcoming scheduling conference in finalizing a discovery and case plan that achieves the objectives of Rule 1.]

5. **Plan for Discovery.** The parties jointly propose to the court the following discovery plan:

   1. Discovery is needed on the following specific subjects: *[list].*

      [Note: The parties should try to reach early stipulations about those matters that are <u>not</u> in dispute, to ensure that discovery, particularly involving ESI, is conducted only on those matters legitimately in dispute.]

   2. All discovery will be commenced or served in time to be completed by (date).

      [Note: In the court's experience, discovery usually can be completed in 4-6 months. If more time is necessary due to the complexity of this case, <u>specific</u> reasons for the request must be provided.]

   3. [If applicable] Discovery on (issue for early discovery) will be completed by (date).

      [Note: The parties should consider whether any issues should be bifurcated, or whether a limited amount of highly focused discovery would enable them to participate in early mediation or present substantive issues on dispositive motions and in turn narrow the scope of remaining discovery.]

   4. One or more of the parties anticipate the following problem(s) in discovery, which should be discussed with the court and, if possible, resolved at the scheduling conference:

      [List problem(s), the positions and supporting authority of each party, and what efforts have been made to resolve the problems.]

5. Disclosure or discovery of electronically stored information (ESI) will be handled as follows:

[Provide a brief description of the parties' agreement or separate proposals.]

[Note: The court requires that the parties directly address the issue of ESI instead of avoiding it. Therefore, it's unacceptable for the parties to vaguely state in their planning report, for example, "that discovery of ESI will be conducted in accordance with the Fed. R. Civ. P." The parties must confer and then decide on a reasonably specific protocol for retrieving and producing ESI. However, the parties may agree, for economic reasons or otherwise in a small case, that no discovery of ESI will be conducted or that any limited ESI that does exist will simply be printed out in hard copy form.]

6. With regard to claims of privilege or of protection as trial-preparation material asserted after production, the parties have agreed to an order as follows:

[Provide a brief description of the parties' proposal. Also, state whether the parties wish their agreement to be reflected in the court's scheduling order or in a separate proposed protective order that will be submitted to the court.]

[Note: The parties should be mindful that Fed. R. Civ. P. 26(b)(5)(B), which generally contemplates such things as "quick peek" and "clawback" agreements with regard to attorney-client privileged communications and trial-preparation materials, is <u>not</u> limited to ESI. Also, under Fed. R. Evid. 502, an agreement on the effect of a disclosure in a federal proceeding is binding <u>only</u> on the parties to the agreement <u>unless</u> that agreement also is incorporated into a court order; a federal court's order that a privilege or protection is not waived by disclosure is binding in other federal court <u>and</u> state court proceedings.]

7. To encourage cooperation, efficiency, and economy in discovery, and also to limit discovery disputes, the following procedures have been agreed to by parties in this case: _____.

[Note: The parties are strongly encouraged to consider using the so-called *Susman* agreements that are posted on the following website:

http://www.trialbyagreement.com

8. There will be a maximum of ____ interrogatories, including all discrete subparts, served by any party on another party.

9. There will be a maximum of ____ depositions taken by plaintiff and ____ by defendant.

10. Each deposition [other than _____] will be limited to ___ hours; the depositions of _____ will be limited to ___ hours.

11. [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, will be served by plaintiff by (date), and by defendant by (date). [Option 1: The parties have stipulated that rebuttal experts will not be permitted in this case.] [Option 2: Disclosures and reports by any rebuttal experts will be served by (date).]

12. The parties [agree] [disagree] that physical or mental examinations pursuant Fed. R. Civ. P. 35 [are] [are not] appropriate in this case. In any event, all Rule 35-examinations will be completed by (date).

    [Note: 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, <u>and</u> for the examination to be conducted, all before the deadline expires.]

13. Supplementations of disclosures under Fed. R. Civ. P. 26(e) will be served at such times and under such circumstances as required by that rule. In addition, such supplemental disclosures will be served ([optional] dates or intervals), and in any event 40 days before the deadline for completion of all discovery.

    [Note: Based on the investigation and discovery conducted as of that date, 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.]

14. The parties [agree] [disagree] that there [is] [is not] a need for discovery in this case to 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 (date). A jointly proposed protective order 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). 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 by (date).

Jointly proposed protective orders 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/

A pre-approved form of protective order can be downloaded from the court's website:

*http://www.ksd.uscourts.gov/*_____

The parties should discuss whether any departures from this pre-approved form order would be appropriate in this case and also be prepared to explain such proposed modifications during the scheduling conference with the magistrate judge.

15. 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.

6. Deadlines for Amendments and Potentially Dispositive Motions.

1. A motion to dismiss [is] [is not] expected to be filed in this case, based on _____ (state the grounds). Provided that such defenses have been timely preserved, any motions to dismiss for lack of personal jurisdiction, venue, insufficiency of process or service of process, failure to state a claim upon which relief can be granted, or the propriety of the parties, will be filed by (date).

[Note: This deadline usually should be set 2-3 weeks after the scheduling conference. But to avoid cases getting bogged down with wasteful motion practice, during the planning conference, counsel must notify the opposing counsel or party of all curable defects in the pleadings that will be the subject of a motion to dismiss.]

2. Any motion for leave to join additional parties or to otherwise amend the pleadings will be filed by (date).

[Note: This deadline usually should be set 6-8 weeks after the scheduling conference.]

3. Other dispositive motions (e.g., summary judgment) [are] [are not] expected to be filed in this case. All such motions will be filed by (date).

[Note: This deadline usually should be set approximately 2-4 weeks after the pretrial conference.

The court will attempt to decide all dispositive motions, to the extent they've been timely filed and briefed without any extensions having been requested, approximately 60 days before trial. If the case is unusually complex, such that it would be more efficient to have a 90-120 day gap between dispositive motion rulings and trial, the parties should explain why that would be appropriate here.]

4. 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, will be filed by (date).

[Note: Generally, most judges in the District of Kansas tend to defer setting the *Daubert* motion deadline until 30-45 days before trial (unless counsel agree that resolution of the case would be fostered by having such motions filed and decided earlier). If *Daubert* motions potentially would be dispositive of the entire case or even certain claims in the case (e.g., a challenge to a standard-of-care expert in a medical negligence case), then this deadline should be the same as the dispositive motion deadline mentioned above. Counsel should be mindful that some judges in this district use a single deadline for dispositive motions and *Daubert* motions in <u>all</u> of their cases.

7. Other Items.

1. The parties agree that principles of comparative fault do not apply to this case. [By (date), any party asserting comparative fault must identify all persons or entities whose fault is to be compared for purposes 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.]

   [Note: This deadline, if applicable, usually should be set approximately 2 weeks before the deadline for filings motions to amend the pleadings.]

2. The parties [request] [do not request] a status conference before the pretrial conference, in order to discuss the following subjects: *[list]*. [The parties request a status conference in (month and year).]

3. The parties request that the court hold a pretrial conference in (month and year).

   [Note: The court generally schedules a pretrial conference approximately 2-3 weeks after the close of discovery and approximately 2-4 weeks before the dispositive motion deadline. If the case remains at issue after all timely filed dispositive motions have been filed and decided (or if the parties announce that no dispositive motions will be filed), then the trial judge usually will conduct another pretrial conference within 30 days of trial.]

4. Trial is expected to take approximately ___ trial days.

5. 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].

   [Note: Magistrate judges may preside over jury trials. Withholding consent will not have any adverse substantive consequences, but may delay the trial of the case.]

Date: __[Insert Date]____

[Here, add signatures of each unrepresented party and an attorney for each represented party. These signatures must be affixed according to the procedures governing multiple signatures set forth in paragraph II(C) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*. The report must be submitted electronically in .pdf format as an attachment to an Internet e-mail sent to the e-mail address of the assigned magistrate judge listed in paragraph II(E)(2)(c) of the administrative procedures guide.]

(Rev. __/__/13)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

_____,

Plaintiff(s),

v. Case No. _____

_____,

Defendant(s).

SCHEDULING ORDER

On (date), in accordance with Fed. R. Civ. P. 16, the undersigned U.S. Magistrate Judge, _____, conducted a scheduling conference in this case with the parties.[1] Plaintiff appeared [through counsel, (list attorneys)] [in person]. Defendant appeared [through counsel, (list attorneys)] [in person].

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	
Defendant's settlement counter-proposal	
Jointly filed mediation notice, or confidential settlement reports to magistrate judge	
Mediation completed	
Supplementation of initial disclosures	
All discovery completed	
Experts disclosed by plaintiff	
Experts disclosed by defendant	
Rebuttal experts disclosed	
Physical and mental examinations	
Jointly proposed protective order submitted to court	
Motion and brief in support of proposed protective order (only if parties disagree about need for and/or scope of order)	
Motions to dismiss	
Motions to amend	
All other potentially dispositive motions (e.g., summary judgment), and motions challenging admissibility of expert testimony	
Comparative fault identification	
Status conference	
Proposed pretrial order due	
Pretrial conference	
Trial	

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 (date). Defendant must make a good faith counter-proposal by (date). By (date), 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. Absent further order of the court, mediation must be held no later than (date). 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.

1. 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). 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 ([optional] insert dates or intervals), and in any event 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).

2. All discovery must be commenced or served in time to be completed by (date).

3. [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 (date), and by defendant by (date). [Option 1: The parties have stipulated that rebuttal experts will not be permitted in this case.] [Option 2: Disclosures and reports by any rebuttal experts must

be served by (date).] 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.

4. 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 (date). 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.]

5. The court [considered] [resolved] the following discovery problem(s) raised by one or more of the parties: *(List problem(s) and resolution(s), if any).*

6. 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: *(Describe any specific agreements set forth in the Rule 26(f) report).*

7. 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: *(Describe any "quick peek," "clawback," or other agreements set forth in the Rule 26(f) report).*

8. 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 [e.g., the *Susman* pretrial [trial] agreements, available at *http://www.trialbyagreement.com*]: _____.

9. No party may serve more than ___ interrogatories, including all discrete subparts, on any other party.

10. No more than ___ depositions may be taken by plaintiff, and no more than ___ depositions may be taken by defendant.

11. 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/

12. [Optional] 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 (date). 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/ _____

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 (date).

13. 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.

14. 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's certified as (i) consistent with the applicable rules and warranted by existing law or by a nonfrivolous 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, Rule 26(g)(3) *requires* the court to impose attorney fees as a sanction on the responsible attorney or party, or both. 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.

1. [Optional: The parties have stipulated that no motions 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 (date).

2. Any motion for leave to join additional parties or to otherwise amend the pleadings must be filed by (date).

3. All other potentially dispositive motions (e.g., motions for summary judgment), must be filed by (date). The court plans to decide dispositive motions, to the extent they are timely filed and briefed without any extensions, approximately 60 [or ____] days before trial.

4. 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:

www.ksd.uscourts.gov/ _____

5. 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 (date).

6. 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 arranging a telephone conference with the undersigned magistrate judge *before* filing such a motion. But such a conference is not mandatory.

7. 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).

8. 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).

9. 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.

1. The parties agree that principles of comparative fault do not apply to this case. [By (date), any party asserting comparative fault must identify all persons or entities whose fault is to be compared for purposes 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.]

2. [Optional: Pursuant to Fed. R. Civ. P. 16(a), a status conference is scheduled for (date) [by telephone conference call, to be initiated by the magistrate judge] [in the magistrate judge's courtroom (insert Courtroom #, building, street, and city)].

3. Pursuant to Fed. R. Civ. P. 16(e), a pretrial conference is scheduled for (date) and (time), in the U.S. Courthouse, Room ___, _____, _____, Kansas; this pretrial conference may be conducted by telephone if the judge determines that the proposed pretrial order is in the appropriate format and that there are no other problems requiring counsel to appear in person. [Pursuant to Fed. R. Civ. P. 16(e), a pretrial conference is scheduled for (date) and (time); this pretrial conference will be conducted by

telephone 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]. Unless otherwise notified, the undersigned magistrate judge will conduct the conference. No later than (date), defense counsel must submit the parties' proposed pretrial order (formatted in Word or WordPerfect) as an attachment to an e-mail sent to *ksd_[judge]_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:

*www.ksd.uscourts.gov/*_____

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*.

4. The parties expect the jury [non-jury] trial of this case to take approximately ____ trial days. [This case is set for trial on the court's docket beginning on (date). 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.] [The court will subsequently set the case for trial.]

5. 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].

6. 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 _____ __, 20__, at _____, Kansas.

_____
(Judge's name)
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PRETRIAL ORDER FORM

CAREFULLY REVIEW FED. R. CIV. P. 16 AND D. KAN. RULE 16.2, AND FOLLOW ALL BRACKETED INSTRUCTIONS.

The parties and counsel must confer in good faith, draft, and timely submit a proposed pretrial order to the court in accordance with the scheduling order and D. Kan. Rule 16.2. The proposed pretrial order must be a joint effort. The parties have an equal obligation to cooperate fully in drafting the pretrial order and to submit an agreed order that the judge can sign at the pretrial conference. It's essential that each party's factual contentions, legal claims, and defenses be clearly stated. If the parties disagree on any particulars, they must submit a single proposed order with bracketed notations revealing the nature of the disagreement in sufficient detail to enable the court to resolve the dispute at the conference; submission of separate orders is unacceptable. Don't precede the title of the proposed order with words such as "Plaintiff's," "Defendant's" or "Proposed."

By the date set in the scheduling order, defense counsel must submit the parties' proposed pretrial order (formatted in Word or WordPerfect) as an attachment to an e-mail sent to the chambers of the judge who will conduct the pretrial conference, as listed in paragraph II(E)(2)(c) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*. The proposed pretrial order must not be filed with the Clerk's Office. The proposed pretrial order must be in the form attached to this cover memorandum. Counsel and all unrepresented parties must affix their signatures according to the procedures governing multiple signatures set forth in paragraphs II(C)(2)(a) & (b) of the administrative procedures guide.

(Rev. ___/___/13)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

_____,

Plaintiff(s),

v. Case No. _____

_____,

Defendant(s).

PRETRIAL ORDER

A pretrial conference was conducted in this case on _____, 20__, by U.S. [Magistrate] [District] Judge _____. The plaintiff(s), _____, appeared through counsel, _____. The defendant(s), _____, appeared through counsel, _____. *[If the case involves other parties, such as a third-party defendant, add that here.]*

This pretrial order supersedes all pleadings and controls the subsequent course of this case. It will not be modified except by consent of the parties and the court's approval, or by order of the court to prevent manifest injustice. Fed. R. Civ. P. 16(d) & (e); D. Kan. Rule 16.2(c).

1. PRELIMINARY MATTERS.

[If subject matter jurisdiction, personal jurisdiction, or venue are disputed, briefly state the issue presented. Also, state whether a motion has been timely

filed under the court's scheduling order and whether the court has ruled on that motion.]

1. Subject Matter Jurisdiction. Subject matter jurisdiction is invoked under [28 U.S.C. § 1331] [28 U.S.C. § 1332] [28 U.S.C. § 1441] [28 U.S.C. § 1367, etc.], and [is] [is not] disputed.

2. Personal Jurisdiction. The court's personal jurisdiction over the parties [is] [is not] disputed.

3. Venue. Venue in this court [is] [is not] disputed.

4. Governing Law. Subject to the court's determination of the law that applies to the case, the parties believe and agree that the substantive issues in this case are governed by the following law:

[Describe what law applies to this case generally, or to particular claims or defenses. If choice-of-law is disputed, briefly state the issue presented and also whether the court already has ruled in this regard.]

2. STIPULATIONS.

1. The following facts are stipulated:

[Insert separate subparagraphs after carefully reviewing the complaint and answer, responses to requests for admissions, interrogatory answers, etc. Counsel must confer in good faith and try to make this list as comprehensive as possible to streamline the presentation of evidence for purposes of summary judgment and trial. As provided by Fed. R. Civ. P. 56(g), even if the court declines to grant all the relief requested in a summary judgment motion, the court may enter an order stating any material facts that aren't in dispute and treating those facts established in the case for purposes of trial.]

2. The parties have stipulated to the admissibility of the following exhibits for purposes of summary judgment [and trial]:

[Insert list with separate subparagraphs.]

3. FACTUAL CONTENTIONS.

[Provide a concise, non-argumentative narrative statement of each party's version of the facts as they pertain to the pertinent issues of this case. It's neither necessary nor appropriate to recite every factual nuance that will be presented at trial. In simple cases, each party's contentions typically should be no more than 3-4 paragraphs, and even in complex cases they should be no more than 4-5 pages.]

1. Contentions of Plaintiff(s).

2. Contentions of Defendant(s).

3. Contentions of Any Other Parties.

[Omit this subparagraph if there aren't any other parties.]

4. LEGAL CLAIMS AND DEFENSES.

[To avoid wasteful summary judgment motion practice, the court strongly encourages the parties and counsel to pare down their pleadings as much as possible, i.e., if certain claims or defenses can and reasonably should be abandoned (as is true in the vast majority of cases), or if claims or defenses already have been dismissed by the court, indicate that here.

Once the claims and defenses have been pared down as indicated above, provide a complete but concise list of each claimant's theories of recovery, with each theory of recovery correlated to a particular count of the complaint, counterclaim, cross-claim, or third-party complaint, e.g., "Defendant terminated plaintiff's employment in violation of Title VII, specifically, by discriminating against her based on race (Count 1 of complaint) and sex (Count 2 of complaint)."

Likewise, provide a complete but concise list of all defenses, regardless of whether the defense is a mere denial of a certain claim or whether the defense is affirmative in nature.

If applicable, identify all persons or entities whose fault is to be compared for purposes of Kan. Stat. Ann. § 60-258a (or any other similar comparative fault

statute that might be applicable). Also, list the specific grounds of comparative fault which is claimed.

If this case involves counterclaims, cross-claims, or third-party claims, then similar lists of claims and defenses should be provided.]

1. Legal Claims of Plaintiff(s).

_____ asserts that [he] [she] [it] is entitled to recover upon the following theory [alternative theories]:

2. Defenses of Defendant(s).

_____ asserts the following defenses:

3. Legal Claims of Any Other Parties.

[Omit this subparagraph if there aren't any other parties.]

4. Defenses of Any Other Parties.

[Omit this subparagraph if there aren't any other parties.]

5. DAMAGES AND NON-MONETARY RELIEF REQUESTED.

[State the nature and dollar amount of the damages allegedly sustained by each party making such a claim. In addition, if any non-monetary relief is sought, e.g., declaratory or injunctive relief, specific performance, or rescission, briefly explain the statutory and other bases for the requested relief. Finally, state whether any party claims an entitlement to attorney fees and, if so, the specific statutory or other basis for same.]

6. AMENDMENTS TO PLEADINGS.

[State "None" in the usual case. Otherwise, provide a concise statement of all proposed amendments beyond any abandoned claims and defenses previously noted, and indicate whether a motion to amend has been filed.]

7. DISCOVERY.

[State that discovery is "complete" in the usual case. However, if discovery is incomplete and one or more of the parties proposes that discovery be extended generally, or for limited purposes, state specifically what further discovery remains to be completed and whether any party objects to such discovery. In addition, state when that discovery can be completed and why, in the exercise of due diligence, the proposed discovery could not have been completed by the deadline earlier set by the court.]

Under the scheduling order and any amendments, all discovery was to have been completed by _____, 20__. Discovery is [complete] [incomplete, in that _____].

Unopposed discovery may continue after the deadline for completion of discovery so long as it does not delay the briefing of or ruling on dispositive motions or other pretrial preparations. Although discovery may be conducted beyond the deadline for completion of discovery <u>if</u> all parties are in agreement to do so, under these circumstances the court will <u>not</u> be available to resolve any disputes that arise during the course of such extended discovery.

8. MOTIONS.

1. Pending Motions.

[List any pending motions, including the date of filing and the ECF court document number.]

2. Additional Pretrial Motions.

After the pretrial conference, the parties intend to file the following motions:

[List all motions that the parties reasonably expect to file after the pretrial conference and before trial.]

The dispositive motion deadline, as established in the scheduling order and any amendments, is _____, **20__**.

The parties should follow the summary judgment guidelines available on the court's website:

www.ksd.uscourts.gov/ _____

Consistent with the scheduling order filed earlier in this case, the arguments and authorities section of briefs or memoranda must not exceed 30 pages, absent an order of the court.

3. Motions Regarding Expert Testimony. *[Choose one of the following.]* [Not applicable, i.e., the parties have stipulated that no expert testimony will be used in this case (or the parties have stipulated that no motions will be filed challenging the propriety of expert testimony in this case).] [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 no later than ___ days before trial.] [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 in accordance with the dispositive motion deadline stated above.]

9. TRIAL.

The trial docket setting, as established in the scheduling order and any amendments, is **_____, 20__, at _____ _.m., in _____, Kansas.** This case will be tried by jury [by the court sitting without a jury]. The court will attempt to decide any timely filed dispositive motions approximately 60 days before trial *[or as otherwise stated in the*

scheduling order]. If no dispositive motions are timely filed, or if the case remains at issue after timely dispositive motions have been decided, then the trial judge will convene another pretrial conference to discuss, among other things, the setting of deadlines for filing final witness and exhibit disclosures, exchanging and marking trial exhibits, designating deposition testimony for presentation at trial, motions in limine, proposed instructions in jury trials, and proposed findings of fact and conclusions of law in bench trials.

IT IS SO ORDERED.

Dated _____ 20__, at _____, Kansas.

_____
[Name]
U. S. District Judge (or)
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 the proportionality principle inherent within the Federal Rules in using these guidelines. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii) and 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] endorsed by seven judges[2] from Kansas and "Cooperation---What Is It and Why Do It?" by David J. Waxse.[3]

DEFINITIONS

3. General

To avoid misunderstandings about terms, all parties should consult the most current edition of The Sedona Conference® Glossary [4] and "The Grossman-Cormack Glossary of

[1] http://www.thesedonaconference.org/dltForm?did=proclamation.pdf
[2] Hon. Gerald J. Elliott, Johnson County District Court, Olathe
Hon. Kenneth Gale, U.S. District Court for the District of Kansas, Wichita
Hon. Karen M. Humphreys, U.S. District Court for the District of Kansas, Wichita
Hon. J. Thomas Marten ,U.S. District Court for the District of Kansas, Wichita
Hon. James P. O'Hara, U.S. District Court for the District of Kansas, Kansas City
Hon. Gerald L. Rushfelt, U.S. District Court for the District of Kansas, Kansas City
Hon. K. Gary Sebelius, U.S. District Court for the District of Kansas, Topeka
Hon. David Waxse, U.S. District Court for the District of Kansas, Kansas City
[3] http://jolt.richmond.edu.v18i3/article8.pdf
[4] https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Glossary.

Technology-Assisted Review.[5] In addition, references in these guidelines to counsel include parties who are not represented by counsel.

4. **Form of Production**

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.[6] 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[7],

[5] Federal Courts Law Review, Vol 7, Issue 1 (2013)
[6] http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf

[7] 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

efforts should be made to identify potential parties and their counsel to that litigation to facilitate early cooperation in the preservation and exchange of relevant electronically stored information. To comply with Fed. R. Civ. P. 26(b)(1) scope of discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense," counsel should consider determining the issues that will likely arise in the litigation. They should also consider discussing with opposing counsel which issues are actually in dispute and which can be 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 should also 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[8] must take reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control.[9] 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;

---

litigation is "reasonably anticipated" in the context of litigation involving ESI.

[8] Ibid p.2

[9] Counsel should become aware of the current 10th Circuit law defining "possession, custody and control".

(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, or backup materials, and native files, and how it should be preserved.

(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.

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 and administered 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 electronically stored information.

- 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 Fed. R. Civ. P. 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, then the responding party must state in its written response 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 onetime meeting.[10]

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, it should 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, *e.g.*, Fed. R. Civ. P. 26(b)(2)(c), 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 One 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 one search protocol with a goal of minimizing the costs of discovery for both sides.[11]

---

[10] 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, accessed on Feb. 1, 2008 at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1199441131702# and reprinted in these Guidelines with permission at Appendix 1.

[11] Vice Chancellor Travis Laster recently ordered counsel to use the same search protocol in EORHB, Inc., et al v. HOA Holdings, LLC, C.A. No. 7409-VCL (Del. Ch. Oct. 15, 2012). He more recently modified his order. See 2013 WL 1960621 May 6, 2013

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 computer files to identify files that are system generated and generally accepted to have no substantive value in most cases.[12]

15. **Search Methodologies**

If counsel intend to employ technology assisted review[13] (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.[14]

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

---

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

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

[14] 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.

contains the relevant e-mail. In addition, counsel should focus on the privilege log ramifications of selecting a particular unit of production.[15]

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.

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 or social networking data on services like Facebook, Twitter, and MySpace.

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.[16] Counsel are encouraged to discuss the use of either 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

---

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

[16] 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)

inadvertent disclosure of privileged or trial preparation materials.[17] 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.

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. 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.[18]

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 Fed. R. Civ. P. 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 Fed. R. Civ. P. 26(f) conference.

---

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

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

(b) Search of Reasonably Accessible Information

After receiving requests for production under Fed. R. Civ. P. 34, the parties shall search their electronically stored information, other than that identified as not reasonably accessible due to undue burden and/or substantial cost, and produce responsive information in accordance with Fed. R. Civ. P. 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 Notes, December 2006 Amendment (good cause factors).

(d) Requests for On-Site Inspections

Requests for on-site inspections of electronic media under Fed. R. Civ. P. 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 matter. Routine discovery into such matters is therefore strongly discouraged and may be in violation of Fed. R.Civ. P 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 at least the aforementioned factors. Nothing herein exempts deponents on merits issues 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 Nonparties (Fed. R. Civ. P. 45)**

Counsel issuing requests for ESI from nonparties 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.

July 18, 2013

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)?

Rev. 7/2013

Guidelines for Agreed Protective Orders For the District of Kansas

Procedure for Requesting Entry of a Protective Order

Agreed Protective Orders

In certain cases, the parties may agree that discovery should be governed by a protective order limiting the disclosure, use, and dissemination of confidential information. If the parties agree concerning the need for a protective order and its scope and form, their counsel should confer and either (1) e-mail a copy of their jointly-proposed protective order (in WordPerfect or Word format) to KSD_<Judge's Last Name>chambers@ksd.uscourts.gov, or (2) file a joint motion for protective order with the parties' proposed protective order attached as an exhibit to the motion. If the parties choose to file a joint motion for protective order, they must also e-mail a copy of their jointly-proposed protective order (in WordPerfect or Word format) to KSD_<Judge's Last Name>chambers@ksd.uscourts.gov. If satisfactory, the court will sign and enter the proposed protective order. If not satisfactory, the court will deny the motion, notify counsel of any objectionable language or provisions, or modify and enter a revised protective order. Counsel and all unrepresented parties submitting an agreed protective order must affix their signatures in accordance with section II(C) of the court's civil administrative procedures. The court's administrative procedures, as well as a model form Protective Order are available on the court's website at: http://www.ksd.uscourts.gov.

Disputed Protective Orders

If the parties disagree concerning the need for a protective order and/or its scope or language, the party or parties seeking such an order should file an appropriate motion (with the proposed protective order attached) and supporting memorandum by the date provided in the Scheduling Order. Where there is an objection based upon the scope or form of a proposed order, the party or parties opposing the motion shall, as part of their written response to the motion, provide the court with proposed language that they believe would resolve their specific objections to the proposed order.

Guidelines for Proposed Protective Orders

The following guidelines have been developed to assist the parties in drafting stipulated or agreed protective orders:

1. Recitation of Facts Showing Good Cause Under Fed. R. Civ. P. 26(c)

As indicated in the Scheduling Order, any jointly-proposed protective order must include a concise but sufficiently specific recitation of the particular facts in the 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).

2. Scope of the Protective Order

The protective order must be narrowly tailored and not overbroad. It should include a sufficiently narrow identification of the categories of documents, information, items, or materials (which may include electronically created or stored information) that are subject to the protective order. Some examples are medical records, personnel files, and tax returns.

Language such as "this protective order shall apply to all documents the party designates as confidential" or "this protective order shall apply to all business records" would be deemed too vague and overbroad. The protective order should clearly reflect that its provisions only apply to the named categories of documents, information, items, or materials specifically set forth in the protective order. The protective order should not cover information or documents that are available to the public or that have not been previously maintained in a confidential manner.

3. Provisions for Filing Documents Containing Confidential Information Under Seal

The protective order should not contain a blanket "filing under seal" provision that requires or allows the parties to file documents containing confidential information under seal without the court's permission. If the parties wish to include a provision for filing confidential materials under seal, then the protective order should state that the party seeking to file confidential information must first file a motion with the court and be granted leave to file the particular document under seal. *See* D. Kan. Rule 5.4.6(a) (setting forth the procedure for requesting leave to file a document under seal). The mere designation of information as confidential pursuant to the parties' protective order may not be sufficient to satisfy the court's requirements for filing it under seal in light of the public's qualified right to access to court dockets. Before filing a motion for leave to file under seal, the parties should consider other steps to prevent the unnecessary disclosure confidential information in court filings such as filing a redacted document or other means short of filing under seal

4. Application to Non-Parties

The protective order should refrain from stating that it is binding on non-parties or that the court has jurisdiction over non-parties to enforce the provisions of the protective order. The court

cannot order a non-party to abide by the terms of a protective order or to consent to jurisdiction. Although the protective order itself may not order a non-party to abide by the terms of the protective order, the parties may attach a form agreement to the proposed protective order. By signing the agreement, the non-party may agree to be bound by the terms of the protective order. The protective order may include provisions that protect confidential information, documents, and materials produced by a non-party or parties who are later added to the action. Any new party to the lawsuit must be given the opportunity to review the protective order and decide whether to join it.

5. Jurisdiction

Ordinarily the court's jurisdiction, including jurisdiction to enforce the protective order, is terminated upon final disposition of the case. The parties may, however, include a provision in the protective order that a party may seek leave to reopen the case to enforce the provisions of the protective order.

While the protective order should not state that the court has continuing jurisdiction over the protective order, the protective order may appropriately state that its provisions continue in force after termination of the litigation.

6. Instructions to the Clerk of the Court

The protective order should not direct the clerk of the court to return or destroy confidential documents that are filed in the case. This language conflicts with the policy of the clerk's office to not remove or destroy any documents filed in a case.

7. Court Personnel and Jury Members

The protective order should not state that it is binding on court personnel or members of the jury or should provide an exception for court personnel and members of the jury.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

INSTRUCTIONS FOR USE OF FORM PROTECTIVE ORDER

The following model form agreed Protective Order is provided for the convenience of counsel, the parties, and the court. It is not intended to create a presumption in favor of its provisions or against any alternative provisions or language proposed by the parties. The model order may be modified as appropriate for each specific case. Any additions, deletions, and modifications to the model order should comply with the written guidelines for agreed protective orders that are available on the court's website at:
http://www.ksd.uscourts.gov/guidelines-for-agreed-protective-orders-district-of-kansas/
The court will make the final decision on the terms of any protective order submitted notwithstanding the agreement of the parties. Counsel and all unrepresented parties submitting an agreed protective order must affix their signatures in accordance with section II(C) of the court's administrative procedures that are available at the court's website at:
http://www.ksd.uscourts.gov/civil-cases-administrative-procedure-for-filing-signing-and-verifying-pleadings-and-papers-by-electronic-means/.

The parties should use the following procedures to request an agreed protective order. If the parties agree on the scope and form of a protective order, they should confer and either (1) e-mail a copy of their jointly-proposed protective order (in MS Word or WordPerfect format) to *KSD_<Judge's Last Name>_chambers@ksd.uscourts.gov*, or (2) file a joint motion for protective order with the parties' proposed protective order attached as an exhibit to the motion. If the parties choose to file a joint motion for protective order, they should also e-mail a copy of their jointly-proposed protective order (in MS Word or WordPerfect format) to *KSD_<Judge's Last Name>_chambers@ksd.uscourts.gov*. If satisfactory, the court will sign the proposed protective order and cause it to be filed. If not satisfactory, the court will either (1) deny the motion and notify counsel of any objectionable language or provisions or (2) sign a modified order.

(Rev. ___/___/13)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

_____,

Plaintiff(s),

v. Case No. _____

_____,

Defendant(s).

PROTECTIVE ORDER

The parties agree that during the course of discovery it may be necessary to disclose certain confidential information relating to the subject matter of this action. They agree that certain categories of such information should be treated as confidential, protected from disclosure outside this litigation, and used only for purposes of prosecuting or defending this action and any appeals. The parties jointly request entry of this proposed Protective Order to limit the disclosure, dissemination, and use of certain identified categories of confidential information.

The parties assert in support of their request that protection of the identified categories of confidential information is necessary because _____.

> *[The parties should provide a concise but sufficiently specific recitation of the particular facts in the case that would warrant limiting disclosure and/or use of the information. This will provide the court with a basis upon which to make the required finding of good cause under Fed. R. Civ. P. 26(c).]*

For good cause shown under Fed. R. Civ. P. 26(c), the court grants the parties' [joint

request] [Joint Motion for Protective Order (ECF No. ___)] and hereby enters the following Protective Order:

1. **Scope.** All documents and materials produced in the course of discovery of this case, including initial disclosures, responses to discovery requests, all deposition testimony and exhibits, and information derived directly therefrom (hereinafter collectively "documents"), are subject to this Order concerning Confidential Information as set forth below. As there is a presumption in favor of open and public judicial proceedings in the federal courts, this Order will be strictly construed in favor of public disclosure and open proceedings wherever possible.

2. **Definition of Confidential Information.** As used in this Order, "Confidential Information" is defined as information that the producing party designates in good faith has been previously maintained in a confidential manner and should be protected from disclosure and use outside the litigation because its disclosure and use is restricted by statute or could potentially cause harm to the interests of disclosing party or nonparties. For purposes of this Order, the parties will limit their designation of "Confidential Information" to the following categories of information or documents:

> *[The parties should identify the specific and narrow categories of information they seek to protect such as medical records, personnel files, tax returns, financial statements and records, proprietary business records, trade secrets, records whose disclosure is restricted or prohibited by statute, etc.]*

Information or documents that are available to the public may not be designated as Confidential Information.

3. Form and Timing of Designation. The producing party may designate documents as containing Confidential Information and therefore subject to protection under this Order by marking or placing the words "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER" (hereinafter "the marking") on the document and on all copies in a manner that will not interfere with the legibility of the document. As used in this Order, "copies" includes electronic images, duplicates, extracts, summaries or descriptions that contain the Confidential Information. The marking will be applied prior to or at the time of the documents are produced or disclosed. Applying the marking to a document does not mean that the document has any status or protection by statute or otherwise except to the extent and for the purposes of this Order. Copies that are made of any designated documents must also bear the marking, except that indices, electronic databases, or lists of documents that do not contain substantial portions or images of the text of marked documents and do not otherwise disclose the substance of the Confidential Information are not required to be marked. By marking a designated document as confidential, the designating attorney or party appearing *pro se* thereby certifies that the document contains Confidential Information as defined in this Order.

4. Inadvertent Failure to Designate. Inadvertent failure to designate any document or material as containing Confidential Information will not constitute a waiver of an otherwise valid claim of confidentiality pursuant to this Order, so long as a claim of confidentiality is asserted within _____ days after discovery of the inadvertent failure.

5. **Depositions**. Deposition testimony will be deemed confidential only if designated as such when the deposition is taken or within a reasonable time period after receipt of the deposition transcript. Such designation must be specific as to the portions of the transcript and/or any exhibits to be protected.

6. **Protection of Confidential Material.**

(a) **General Protections.** Designated Confidential Information must be used or disclosed solely for purposes of prosecuting or defending this lawsuit, including any appeals, [or any other related legal proceeding brought by one of the parties to this litigation].

(b) **Who May View Designated Confidential Information.** Except with the prior written consent of the designating party or prior order of the court, designated Confidential Information may only be disclosed to the following persons:

[The parties should list out to whom confidential information may be disclosed. The following list contains commonly listed categories.]

(1) The parties to this litigation, including any employees, agents, and representatives of the parties;[1]

(2) Counsel for the parties and employees and agents of counsel;

(3) The court and court personnel, including any special master appointed by the court, and members of the jury;

---

[1]If the confidential documents contain highly sensitive trade secrets or other highly sensitive competitive or confidential information and disclosure to another party would result in demonstrable harm to the disclosing party, then the parties may stipulate or move for the establishment of an additional category of protection, (e.g., Attorneys' Eyes Only) that prohibits disclosure of such documents or information to category or that limits disclosure only to specifically designated in-house counsel or party representative(s) whose assistance is reasonably necessary to the conduct of the litigation and who agree to be bound by the terms of the Order.

(4) Court reporters, recorders, and videographers engaged for depositions;

(5) Any mediator appointed by the court or jointly selected by the parties;

(6) Any expert witness, outside consultant, or investigator retained specifically in connection with this litigation, but only after such persons have completed the certification contained in Attachment A, Acknowledgment and Agreement to be Bound;

(7) Any potential, anticipated, or actual fact witness and his or her counsel, but only to the extent such confidential documents or information will assist the witness in recalling, relating, or explaining facts or in testifying, and only after such persons have completed the certification contained in Attachment A;

(8) The author or recipient of the document (not including a person who received the document in the course of the litigation);

(9) Independent providers of document reproduction, electronic discovery, or other litigation services retained or employed specifically in connection with this litigation; and

(10) Other persons only upon consent of the producing party and on such conditions as the parties may agree.

(c) Control of Documents. The parties must take reasonable efforts to prevent unauthorized or inadvertent disclosure of documents designated as containing Confidential Information pursuant to the terms of this Order. Counsel for the parties must maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Order.

7. Filing of Confidential Information. In the event a party seeks to file any

document containing Confidential Information subject to protection under this Order with the court, that party must take appropriate action to insure that the document receives proper protection from public disclosure including: (a) filing a redacted document with the consent of the party who designated the document as confidential; (b) where appropriate (e.g., in relation to discovery and evidentiary motions), submitting the document solely for in camera review; or (c) when the preceding measures are inadequate, seeking permission to file the document under seal by filing a motion for leave to file under seal in accordance with D. Kan. Rule 5.4.6.

> *[The mere designation of information as confidential pursuant to the protective order provisions may not be sufficient to satisfy the court's requirements for filing it under seal in light of the public's qualified right to access to court dockets. Before filing a motion for leave to file under seal, the parties should consider other steps to prevent the unnecessary disclosure confidential information in court filings such as filed redacted documents or other means short of filing under seal.]*

Nothing in this Order will be construed as a prior directive to allow any document to be filed under seal. The parties understand that the requested documents may be filed under seal only with the permission of the court after proper motion. If the motion is granted and the requesting party permitted to file the requested documents under seal, only counsel of record and unrepresented parties will have access to the sealed documents. Pro hac vice attorneys must obtain sealed documents from local counsel.

8. Challenges to a Confidential Designation. The designation of any material or document as Confidential Information is subject to challenge by any party. Before filing any motion or objection to a confidential designation, the objecting party must meet and

confer in good faith to resolve the objection informally without judicial intervention. A party that elects to challenge a confidentiality designation may file and serve a motion that identifies the challenged material and sets forth in detail the basis for the challenge. The burden of proving the necessity of a confidentiality designation remains with the party asserting confidentiality. Until the court rules on the challenge, all parties must continue to treat the materials as Confidential Information under the terms of this Order.

9. **Use of Confidential Documents or Information at Trial or Hearing.** Nothing in this Order will be construed to affect the use of any document, material, or information at any trial or hearing. A party that intends to present or that anticipates that another party may present Confidential Information at a hearing or trial must bring that issue to the attention of the court and the other parties without disclosing the Confidential Information. The court may thereafter make such orders as are necessary to govern the use of such documents or information at the hearing or trial.

10. **Obligations on Conclusion of Litigation.**

(a) **Order Remains in Effect.** Unless otherwise agreed or ordered, all provisions of this Order will remain in effect and continue to be binding after conclusion of the litigation.

(b) **Return of Confidential Documents.** Within ____ days after this litigation concludes by settlement, final judgment, or final order, including all appeals, all documents designated as containing Confidential Information, including copies as defined above, must be returned to the party who previously produced the document unless: (1) the

document has been offered into evidence or filed without restriction as to disclosure; (2) the parties agree to destruction of the document to the extent practicable in lieu of return;[2] or (3) as to documents bearing the notations, summations, or other mental impressions of the receiving party, that party elects to destroy the documents and certifies to the producing party that it has done so.

(c) **Retention of Work Product.** Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product, including an index which refers or relates to designated Confidential Information, so long as that work product does not duplicate verbatim substantial portions of the text or images of designated documents. This work product will continue to be confidential under this Order. An attorney may use his or her own work product in subsequent litigation provided that its use does not disclose Confidential Information.

11. **Order Subject to Modification**. This Order is subject to modification by the court on its own motion or on motion of any party or any other person with standing concerning the subject matter. The Order must not, however, be modified until the parties have been given notice and an opportunity to be heard on the proposed modification.

12. **No Prior Judicial Determination.** This Order is entered based on the

---

[2]The parties may choose to agree that the receiving party must destroy documents containing Confidential Information and certify the fact of destruction, and that the receiving party must not be required to locate, isolate and return e-mails (including attachments to e-mails) that may include Confidential Information, or Confidential Information contained in deposition transcripts or drafts or final expert reports.

representations and agreements of the parties and for the purpose of facilitating discovery. Nothing in this Order will be construed or presented as a judicial determination that any document or material designated as Confidential Information by counsel or the parties is entitled to protection under Fed. R. Civ. P. 26(c) or otherwise until such time as the court may rule on a specific document or issue.

13. **Persons Bound by Protective Order.** This Order will take effect when entered and is binding upon all counsel of record and their law firms, the parties, and persons made subject to this Order by its terms.

14. **Jurisdiction.** The court's jurisdiction to enforce the provisions of this Order will terminate on the final disposition of this case. But a party may file a motion to seek leave to reopen the case to enforce the provisions of this Order.

[OPTIONAL PROVISIONS. The following optional provisions may be helpful to the parties.]

15. **Applicability to Parties Later Joined.** If additional persons or entities become parties to this lawsuit, they must not be given access to any Confidential Information until they execute and file with the court their written agreement to be bound by the provisions of this Order.

16. **Protections Extended to Third-Party's Confidential Information.** The parties agree to extend the provisions of this Protective Order to Confidential Information produced in this case by third parties, if timely requested by the third party.

17. **Confidential Information Subpoenaed or Ordered Produced in Other**

Litigation. If a receiving party is served with a subpoena or an order issued in other litigation that would compel disclosure of any material or document designated in this action as Confidential Information, the receiving party must so notify the designating party, in writing, immediately and in no event more than three business days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

The receiving party also must immediately inform in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is the subject of this Order. In addition, the receiving party must deliver a copy of this Order promptly to the party in the other action that caused the subpoena to issue.

The purpose of imposing these duties is to alert the interested persons to the existence of this Order and to afford the designating party in this case an opportunity to try to protect its Confidential Information in the court from which the subpoena or order issued. The designating party bears the burden and the expense of seeking protection in that court of its Confidential Information, and nothing in these provisions should be construed as authorizing or encouraging a receiving party in this action to disobey a lawful directive from another court. The obligations set forth in this paragraph remain in effect while the party has in its possession, custody, or control Confidential Information by the other party to this case.

18. Inadvertent Disclosure of Confidential Information Covered by Attorney-Client Privilege or Work Product. The inadvertent disclosure or production of any information or document that is subject to an objection on the basis of attorney-client

privilege or work-product protection, including, but not limited, to information or documents that may be considered Confidential Information under the Protective Order, will not be deemed to waive a party's claim to its privileged or protected nature or estop that party or the privilege holder from designating the information or document as attorney-client privileged or subject to the work product doctrine at a later date. Any party receiving any such information or document must return it upon request to the producing party. Upon receiving such a request as to specific information or documents, the receiving party must return the information or documents to the producing party within _____ days, regardless of whether the receiving party agrees with the claim of privilege and/or work-product protection. Disclosure of the information or document by the other party prior to such later designation will not be deemed a violation of the provisions of this Order. The provisions of this section constitute an order pursuant to Rules 502(d) and(e) of the Federal Rules of Evidence.

IT IS SO ORDERED.

Dated:

_____
U.S. District Judge or U.S. Magistrate Judge

[Delete signature blocks if not wholly by agreement]

WE SO MOVE
and agree to abide by the terms of this Order

WE SO MOVE
and agree to abide by the terms of this Order

ATTACHMENT A

ACKNOWLEDGMENT
AND
AGREEMENT TO BE BOUND

The undersigned hereby acknowledges that he/she has read the Protective Order dated _____ in the case captioned, _____, and attached hereto, understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the United States District Court for the District of Kansas in matters relating to this Protective Order and understands that the terms of the Protective Order obligate him/her to use materials designated as Confidential Information in accordance with the order solely for the purposes of the above-captioned action, and not to disclose any such Confidential Information to any other person, firm, or concern, except in accordance with the provisions of the Protective Order.

The undersigned acknowledges that violation of the Protective Order may result in penalties for contempt of court.

Name: _____

Job Title: _____

Employer: _____

Business Address: _____

_____

Date: _____ _____
Signature

_____	_____
Signature	Signature
_____	_____
Printed Name	Printed Name
Counsel for: _____	Counsel for: _____
Dated:	Dated:

Summary Judgment Guidelines

1. Summary judgment is appropriate if the movant shows there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.

2. A dispute of fact is genuine when a reasonable jury viewing the evidence could find in favor of either party. But evidence that is totally one-sided or rests only on speculation or conjecture does not present a genuine issue for trial.

3. Only disputes about facts that could affect the outcome under the governing law will prevent summary judgment.

4. A motion for summary judgment should clearly identify each claim, defense, and/or party as to which summary judgment is sought.

5. The parties' statements of fact on summary judgment must be numbered and refer with particularity to the portions of the record relied on, with the cited materials attached to the brief.

6. Legal arguments should not be set forth in a party's statement of the facts.

7. Individual judges of the court may adopt particular guidelines or standing orders for summary judgment motions in their cases. These may be found on the court's website (www.ksd.uscourts.gov) under the heading "Rules" and subheading "D. Kan. Guidelines & Orders."

8. The "Guidelines & Orders" page also has links to the courts' Administrative Procedures for civil cases and CM/ECF User's Guide. These contain detailed information about how to attach exhibits to briefs.

9. Exhibits attached to summary judgment briefs should be clearly and adequately described when they are entered in the CM/ECF system. [E.g., Attachments: #1 Index of Exhibits, #2 Exhibit A - Bill Smith Affidavit]. This allows the court to easily locate them when they are cited.

10. Common errors in summary judgment briefs include stating facts with no accompanying citation to the record; failing to attach the portions of the record cited; ignoring evidence that is contrary to the movant's position; incorrectly characterizing deposition testimony; and failing to specify the relevant portions of testimony or other evidence.

11. If a factual assertion is controverted only in part, the response should make clear which portion is controverted and which part is not controverted.

12. An affidavit or other summary judgment material may be objected to when it contains something that could not be presented in a form that would be admissible at trial.

13. Objections to summary judgment materials should be as specific as possible.

14. The court may disregard affidavits or deposition testimony on summary judgment if they are "conclusory" - that is, if they state a conclusion without a supporting factual basis.

15. Affidavits must be based on the personal knowledge of the witness. The basis for the witness's knowledge of the facts should be stated or described in the affidavit.

16. Absent a court order granting permission to do so, separate or multiple motions for summary judgment should <u>not</u> be filed to avoid compliance with D. Kan. Rule 7.1(e), which imposes a 30-page limit on the argument and authorities section of briefs or memoranda.

17. If the court has not yet ruled on a party's early motion for summary judgment and the movant files another motion after discovery has been completed, the first motion probably will be deemed moot.

Please read carefully and follow Fed. R. Civ. P. 56, D. Kan. R. 56.1, and D. Kan. R. 7.1.

RULE 7.1
MOTIONS IN CIVIL CASES

(f) Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's final brief has been filed -- or after oral argument but before a decision -- a party may promptly advise the court clerk by letter filed on the CM/ECF system, with a copy to all other parties, setting forth the citations. The letter must state reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally; if the supplemental citations refer to a brief, the letter must be linked in the ECF system to that brief. The body of the letter must not exceed 350 words. Any response must be made within 5 business days and must be similarly linked and limited.

RULE 16.2
~~FINAL~~ PRETRIAL CONFERENCES

(a) General Provisions. In most cases, the court will conduct a pretrial conference after discovery is complete and before the filing of dispositive motions (e.g., summary judgment). If the case remains at issue after dispositive motions have been decided, the judge who will preside at trial usually will conduct another pretrial conference (or conferences) to formulate a trial plan to facilitate the admission of evidence at trial; the court will set deadlines for filing and ruling on any objections to final witness and exhibit disclosures and deposition designations, motions in limine, proposed instructions in jury cases, proposed findings of fact and conclusions of law in non-jury cases, and any other matters calculated to make trial more efficient.

The pretrial conferences contemplated by Fed. R. Civ. P. 16(d) ~~shall~~will be held before a judge or magistrate judge with court participation throughout unless otherwise directed by the court. ~~Ordinarily discovery shall have been completed and the parties shall be prepared to complete the procedural steps set out in this rule. If additional witnesses or evidence are discovered after the pretrial conference, the discovering party shall immediately make this known to all parties and to the court in writing.~~ Parties may be present at the pretrial conference and ~~shall~~they must be present when ordered by the court.

The court ~~shall~~will prepare the pretrial order or designate counsel to do so. At a time as may be ordered by the court under Fed. R. Civ. P. 16(b)(~~5~~3)(B)(v), the parties ~~shall~~must submit a proposed ~~final~~ pretrial order in the form prescribed ~~form~~by the court. The parties have joint responsibility to attempt in good faith to formulate an agreed order which the judge can sign at the conference. If the parties disagree on any particulars, they are each to submit proposed language on the points in controversy, for the judge to rule on at the conference. To attempt in good faith to formulate an agreed order means more than mailing or faxing a form or letter to the opposing party. It requires that the parties in good faith converse, confer, compare views, consult and deliberate, or in good faith attempt to do so. Objections to the pretrial order ~~shall~~must be made in writing and within such time as the

court may specify.

~~**(b) Procedure at Final Pretrial Conference.** The pretrial conference shall be conducted substantially in conformity with the following procedural steps:~~

~~(1) The parties shall state the basis for the court's jurisdiction and any objections to jurisdiction, venue or propriety of the parties.~~

~~(2) The parties shall state concisely their factual contentions and the theories of their claims, defenses, and claims for relief.~~

~~(3) The court may rule upon any proposed amendments.~~

~~(4) Court and counsel will confer as to matters not disputed and requests will be made for admissions and stipulations.~~

~~(5) The issues of fact and issues of law shall be stated.~~

~~(6) Discovery remaining to be completed in the case shall be discussed and provision shall be made for its completion if further discovery is permitted by the court.~~

~~(7) Provision shall be made for the exchange and filing of lists of witnesses to be called at trial and exhibits intended to be offered at trial.~~

~~(8) Pending motions shall be enumerated and anticipated motions shall be stated.~~

~~(9) A determination as to whether the case is for trial to the court or to a jury shall be made.~~

~~(10) The position of the parties relative to settlement shall be considered and the possibility of settlement explored, including the feasibility of a settlement conference, summary trial, mediation, arbitration, or other alternative methods of dispute resolution.~~

~~(11) Ordinarily, only witnesses listed pursuant to pretrial orders may be called to give testimony at trial. However, the court may, in its discretion, permit a party to call a witness not listed by that party or any party under such circumstances as the court deems just.~~

(~~c~~b) Effect of Pretrial Order. The pretrial order, when approved by the court

and filed with the clerk, together with any memorandum entered by the court at the conclusion of the ~~final pre-trial~~pretrial conference, will control the subsequent course of the action unless modified by consent of the parties and court, or by an order of the court to prevent manifest injustice.

(~~d~~c) Sanctions. Should counsel or a pro se litigant fail to appear at the pretrial conference or fail to comply in good faith with the provisions of this rule, the court may, in its discretion, enter a judgment of dismissal or default. Alternatively, or in addition thereto, the court may impose any sanction provided for in Fed. R. Civ. P. 16(f) or D. Kan. Rule 11.1.

(~~e~~d) Witness and Exhibit Disclosures. At times ordered by the court under Fed. R. Civ. P. 16(b) and Fed. R. Civ. P. (c)(~~7~~1)(G), the parties will exchange and file witness and exhibit disclosures pursuant to Fed. R. Civ. P. 26(a)(3).

(1) Content of Disclosures. Witness disclosures ~~shall~~must set forth the address of each witness~~;~~ as well as the subject matter~~, and a brief synopsis of the substance of the facts to~~ about which each witness is expected to testify. Witness and exhibits disclosed by one party may be called or offered by the other party. If a witness or exhibit appears on a final Rule 26(a)(3) disclosure that has not previously been included in a Rule 26(a)(1) disclosure (or timely supplement thereto), that witness or exhibit probably will be excluded at trial. See Fed. R. Civ. P. 37(c)(1). This restriction does not apply, however, to rebuttal witnesses or documents, the necessity of which could not reasonably be anticipated as of the deadline for filing final witness and exhibit disclosures. The parties' disclosures ~~shall~~must also specifically identify specific deposition exhibits to be used. Witnesses expected to testify as experts ~~shall~~must be so designated.

(2) Trial Exhibits. Before meeting with the courtroom deputy to mark exhibits, the parties ~~shall~~must exchange copies of all proposed exhibits and attempt to agree as to their authenticity and relevancy.

(3) Testimony by Deposition. With respect to any witness who will appear by deposition, the disclosure ~~shall~~must designate by page and line (or other appropriate

designation in the case of a videotaped deposition) those portions of the deposition the offering party intends to read into evidence. The opposing party ~~shall~~must then serve upon the offering party a counter designation of those portions of the deposition which the opposing party believes in fairness ought to be considered with the part the offering party has designated in accordance with Fed. R. Civ. P. 32(a)(4). Any disputes between the parties concerning deposition testimony, including any unresolved evidentiary objections, ~~shall~~must be brought to the attention of the ~~C~~court by a separate filing with the Clerk of Court, by the deadline set forth in the pretrial order. The objecting party ~~shall~~must deliver a copy of the deposition to the judge along with this filing. A party intending to offer deposition evidence at trial ~~shall~~must provide the trial judge a copy of the deposition before the commencement of trial. For any depositions used at trial, all exhibit designations ~~shall~~must be re-marked by the offering party to correspond to the trial exhibit designations.

~~* * *~~

~~As amended 3/04, 9/00, 3/20/92.~~

RULE 56.1

MOTIONS FOR SUMMARY JUDGMENT

(f) Notice to Pro Se Litigant Who Opposes a Summary Judgment Motion. Any represented party moving for summary judgment against a party proceeding pro se must serve and file as a separate document, together with the papers in support of the motion, the following "Notice To Pro Se Litigant Who Opposes a Motion For Summary Judgment" with the full texts of Fed. R. Civ. P. 56 and D. Kan. Rule 56.1 attached. Where the pro se party is not the plaintiff, the movant must amend the form notice as necessary to reflect that fact.

Notice To Pro Se Litigant Who Opposes a Motion For Summary Judgment

The defendant in this case has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This means that the defendant has asked the court to decide this case without a trial, based on written materials, including affidavits, submitted in support of the motion. The claims you assert in your complaint may be dismissed without a trial if you do not respond to this motion on time by filing sworn affidavits and/or other documents as required by Rule 56(c) of the Federal Rules of Civil Procedure and by Local Rule 56.1 of the U.S. District Court for the District of Kansas. The full text of these two rules is attached to this notice.

In short, Rule 56 provides that you may not oppose summary judgment simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statements or documents, countering the facts asserted by the defendant and raising specific facts that support your claim. If you have proof of your claim, now is the time to submit it. Any witness statements must be in the form of affidavits. An affidavit is a sworn statement of fact based on personal knowledge stating facts that would be admissible in

evidence at trial. You may submit your own affidavit and/or the affidavits of others. You may submit affidavits that were prepared specifically in response to defendant's motion for summary judgment.

If you do not respond to the motion for summary judgment on time with affidavits and/or documents contradicting the material facts asserted by the defendant, the court may accept defendant's facts as true, in which event your case may be dismissed and judgment entered in defendant's favor without a trial.