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FUNDAMENTALS 201: STRATEGIC DISCOVERY ISSUES IN FRANCHISE LITIGATION

Bethany L. Appleby
Wiggin and Dana LLP
New Haven, CT

Daniel J. Oates
Graham & Dunn PC
Seattle, WA

Julianne Cowan Lusthaus
Einbinder & Dunn, LLP
New York, NY

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Table of Contents

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I. INTRODUCTION

Discovery rules and procedures have evolved over the years to serve many functions in the dispute resolution process. The goal of discovery is to ensure that the parties have as much information as possible in order to effectively and efficiently develop claims and defenses.[1] Further, effective discovery is key to successful dispositive motions and meaningful trial preparation. It is also an important means of gaining leverage in a negotiated settlement. This paper will identify various methods for obtaining discovery from both parties and non-parties. It will also address certain ethical issues that counsel should consider, and review effective tools for compelling and objecting to, or otherwise preventing, unwarranted disclosure. Importantly for franchise counsel, this paper will examine discovery issues from the different perspectives of franchisor and franchisee counsel and will also discuss sometimes overlooked areas of inquiry in particular types of franchise litigation.[2]

Generally, parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense.[3] The client is, of course, usually the best initial source of information about the case and possible discovery. The client should identify the facts or series of events relevant to the claims or defenses, identify any individuals with knowledge of information supporting (or refuting) the client's factual contentions and provide background documents relating to the parties' relationship and dispute. The client should also be able to assist the attorney by identifying the location of documents and other tangible information in the client's possession as well as those which may be in another's possession but under the client's control.[4] As described below, there are multiple methods for obtaining discovery from adverse parties as well as non-parties, and counsel should consider each in any franchise dispute. Of course, the costs associated with litigation in general, and discovery in particular, will factor into the choices made as to the discovery to seek in a particular action.[5]

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[1] ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE, § 1.01 (2012); Fiona A. Burke & Himanshu M. Patel, *Common Discovery Issues in Franchising – From the Perspectives of the Advocates and a Decision-Maker* in ABA 32ND ANNUAL FORUM ON FRANCHISING, W10, 14 (2009).

[2] Discovery in arbitration is beyond the scope of this paper. However, for a detailed analysis of discovery in franchise arbitrations, *see* Bethany L. Appleby, Richard L. Rosen & David Steinberg, *Inside a Franchise Arbitration* in ABA 31ST ANNUAL FORUM ON FRANCHISING, W22 (2008).

[3] FED. R. CIV. P. 26(b)(1). Unless stated otherwise, we have followed the Federal Rules of Civil Procedure and counsel are cautioned to review the rules of the court in which they are litigating to determine the scope of available discovery. On June 3, 2013, the federal judiciary's Committee on Rules of Practice and Procedure approved for publication proposals to limit the scope of discovery under the Federal Rules of Civil Procedure. The final amendments may be enacted by December 2015. One of the proposed amendments would be to limit the broad scope of discovery to what is relevant to the claims or defenses of the parties. This amendment would eliminate the language extending discovery to information that appears 'reasonably calculated to lead to discovery of admissible evidence.' COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, JUNE 2013 AGENDA BOOK, at 64-67 (June 3-4, 2013) [hereinafter PROPOSED RULE AMENDMENTS], http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-06.pdf#pagemode=bookmarks.

[4] Kimberly S. Toomey & Arthur L. Pressman, *Discovery Dilemmas and Opportunities: Ethical, Practical and Legal issues in the Discovery Process* in ABA 24TH ANNUAL FORUM ON FRANCHISING, W13 (2001) at 15.

[5] MICHAEL EINBINDER & MICHAEL D. JOBLOVE, DISCOVERY IN FRANCHISE LITIGATION HANDBOOK 69, 71 (Dennis LaFiura & C. Griffith Towle eds., 2010).

A. Franchisor Perspective

In a typical franchise dispute, the franchisor often bears a heavier discovery burden than the franchisee. The franchisor generally has more documents and information about the claims and defenses asserted than does the franchisee. The reason for this disparity is that the franchisor usually has a more comprehensive document storage system and a more well-defined document retention policy. The franchisor will also likely have more locations to search for discoverable information and more employees with relevant documents or knowledge about the issues in the case. All of these factors can increase the franchisor's burden and costs associated with discovery.[6]

B. Franchisee Perspective

Conversely, the franchisee is typically at an advantage when responding to discovery requests because it likely has a much simpler data system and fewer storage locations to search for discovery than the franchisor.[7] However, franchisees do not always maintain their documents in a usable format or in an organized manner (if at all). Franchisee counsel may have to rely on the franchisor's production for evidence to support the franchisee's claims and defenses.

II. LITIGATION HOLDS

Once there is a reasonable likelihood that litigation will commence (or where litigation has already commenced), a party "must suspend its routine document retention/destruction policy and put in place a litigation hold to preserve relevant documents."[8] The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.[9] Of course, exactly when the obligation arises can be difficult to determine. Because a dispute *could* result in litigation does not mean that there is a *reasonable likelihood* of litigation. Nonetheless, counsel should ensure that a litigation hold is in effect when it appears that litigation is reasonably likely to occur.[10] A litigation hold should include preservation of electronically stored information ("ESI") as well as paper documents.[11] In order to implement an adequate litigation hold, counsel and parties should understand the types of ESI and other information that exist as

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[6] *Id.* at 72.

[7] *Id.*

[8] Danielle M. Kays, *Reasons to "Friend" Electronic Discovery,* 32 FRANCHISE L.J. 35, 35 (Summer 2012) (quotations omitted); Nathan M. Crystal, *Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds*, 43 AKRON L. REV. 715, 717 (2010).

[9] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).

[10] "The duty to preserve evidence begins when litigation is pending or reasonably foreseeable." *Micron Tech., Inc. v. Rambus, Inc.,* 645 F.3d 1311, 1320 (Fed. Cir. 2011) (citing *Silvestri v. Gen. Motors Corp.,* 271 F.3d 583, 590 (4th Cir. 2001)).

[11] A detailed analysis of these issues as well as ESI in general is set forth in the various decisions by the United States District Court for the Southern District of New York in *Zubulake v. UBS Warburg, LLC. See Zubulake*, 217 F.R.D. 309; *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake v. UBS Warburg LLC*, 231 F.R.D. 159 (S.D.N.Y. 2005); *Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536 (S.D.N.Y. 2005).

well as how it is stored and maintained.[12] Importantly, a failure to immediately preserve ESI can result in its destruction, even inadvertently.[13]

To ensure that all sources of potentially relevant information are identified and placed "on hold,"[14] counsel must become fully familiar with the client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information.[15]

A. Notice to Client

Counsel should send a litigation hold notice to the client as soon as there is a reasonable likelihood of litigation or, if litigation was not anticipated, as soon as the litigation commences. The litigation hold notice should indicate with as much detail as possible:

- the nature of the issues in the case;
- the individuals/entities involved;
- the time frame during which relevant documents and data may have been generated;
- individuals to whom the litigation hold should apply if they can be specified; and
- potential locations to search for documents including computer networks, computer hard drives, e-mail folders, contacts, personal digital assistants ("pdas"), smart phones, backup tapes, social media sites and text messages.

The litigation hold should also indicate that the individual(s) should suspend any paper document destruction policies as well as any deleting, overwriting or possible destruction of ESI even if the relevant systems have automatic deletion or overwriting in place or if deletion or overwriting is permitted under document retention policies. The notice should also identify the format of the documents to be preserved[16] and advise the individual(s) that the failure to abide by their obligation to preserve evidence may result in penalties including claims of spoliation of evidence. Finally, the notice should identify a single individual (for example, in-house counsel) with responsibility for the hold procedures, and direct employees and company agents to contact that person with any questions regarding the scope, extent, or applicability of the hold. Placing responsibility for the hold with a single individual will ensure that the hold procedures are consistently applied. It is also especially important when the client is a large organization because it ensures that errant employees who do not comply with the hold terms are operating

[12] Burke & Patel, *supra* note 1, at 2.

[13] *Id.*

[14] Kays, *supra* note 8, at 35.

[15] *Zubulake*, 229 F.R.D. at 432.

[16] Kays*, supra* note 9 at 36.

outside the scope of their authorization to act on behalf of the client, although that is no guarantee that sanctions will be avoided.[17]

B. Notice to Adversaries

Litigation holds should also be sent to the other parties in the litigation. This will provide an adversary with additional and specific notice of the information to be preserved. The fact that a notice was served on an adversary may prove helpful in obtaining sanctions or other adverse rulings if critical information or documents are destroyed after the obligation to preserve has attached.[18] As with notice to a client, a litigation hold notice to an adversary should inform the party of its obligation to preserve all documents and data (including ESI) relating to the dispute, the issues in the dispute and all other information that may be relevant. The notice should identify potential custodians (if known), identify the relevant time frame, identify the format in which the information must be preserved and advise that printed copies of electronic documents do not suffice to preserve the evidence because they do not contain the meta-data that is contained in the electronic file.[19] The notice should also inform the adverse party that the failure to comply may result in sanctions, including the preclusion of evidence at trial and even a directed verdict, default or nonsuit.[20]

C. Notice to Non-Parties Over Whom the Client Has 'Control'

Where a party may be deemed to have "control" over documents in the possession of a non-party, it may be necessary to ensure preservation of those documents.[21] Pursuant to Rule 34(a) of the Federal Rules of Civil Procedure ("FRCP"), a party may request that the party produce documents within that party's "possession, custody, or control." Federal courts construe 'control' very broadly for FRCP 34 purposes.[22] A party is not required to have physical possession of documents for control to be present.[23] Rather, there is control if a party "has the legal right or ability to obtain the documents from another source upon demand."[24] It logically follows that a litigating party has control of documents if a contractual obligation requires a non-party to

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[17] *See* Thomas Y. Allman, *Defining Culpability: The Search for A Limited Safe Harbor in Electronic Discovery*, 2006 FED. CTS. L. REV. 7 (2006) ("Many courts facing spoliation motions have been restrained in their approach and have typically required an affirmative showing of culpable conduct before imposing spoliation sanctions.") (citing *Morris v. Union Pac. R.R.*, 373 F.3d 896, 901 (8th Cir. 2004)).

[18] EINBINDER & JOBLOVE*, supra* note 5, at 71.

[19] *Id.* Metadata, for those unfamiliar with the term, is essentially data about the electronic data. Most electronic data files automatically create metadata each time a new electronic document is created or revised. Metadata can include information about the electronic file such as the date the document was created, if it was modified, and if so when and the author of the document. *See id.* at 71 n.8.

[20] *Id.* at 71.

[21] H. Christopher Boehning & Daniel J. Toal, *Third Party Litigation Holds: 'Control' Can Be Complicated*, N.Y.L.J., Feb. 5, 2013 *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202586871276&slreturn=20130422185039.

[22] *Commerce & Indus. Ins. Co. v. Grinnell Corp.,* No. 97-0775, 2001 WL 96377, at *3 (E.D. La. Feb. 1, 2001) (citing *Zervos v. S.S. Sam Houston,* 79 F.R.D. 593 (S.D.N.Y. 1978)).

[23] *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991).

[24] *Mercy Catholic Med. Ctr. v. Thompson,* 380 F.3d 142, 160 (3d Cir. 2004).

provide requested documents to the litigating party upon demand.[25]

Thus, counsel should consider the possibility that non-parties may possess documents that may be in the client's "control." Take for example a case where an area representative provides services to a franchisee on the franchisor's behalf and the franchisee pays fees directly to the franchisor. In a claim by the franchisor to recover unpaid royalties, the franchisee may respond with a defense that the franchisor failed to provide it with required services. The area representative, a separate entity from the franchisor, will likely have documents relevant to the franchisee's claim. Pursuant to the area representative agreement, the franchisor likely has the legal right and practical ability to obtain and review the area representative's documents. In that event, the franchisor may be deemed to have "control" over the area representative's documents and an obligation to preserve those documents.[26]

D. The Lawyer's Obligation

What must a lawyer do to ensure that the client retains relevant information? Certainly, the lawyer's obligation must be reasonable. "A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve."[27] However, at least one court has noted that "counsel is more conscious of the contours of the preservation obligation and a party cannot reasonably be trusted to receive the 'litigation hold' instruction once and to fully comply with it without the active supervision of counsel."[28]

A lawyer has an obligation to ensure that the client institutes a litigation hold once litigation is reasonably anticipated. Counsel may also want to periodically remind the client of the obligation to preserve evidence by reissuing the litigation hold. If the client has multiple employees who have discoverable information, the lawyer may want to communicate directly with those individuals to ensure that they understand their obligations to preserve evidence.[29]

A number of issues may arise relating to counsels' obligations when more than one attorney represents a party, such as when there are both in-house and outside counsel. The question arises as to which lawyer has the responsibility for implementing the litigation hold. The answer may be "both." Both attorneys represent the party and competent representation would require that both seek to ensure that the client comply with its obligations to preserve evidence. However, outside litigation counsel, if any, may be deemed to have the primary obligation as a court will likely look to litigation counsel to implement the hold and can even sanction litigation

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[25] *Haskins v. First Am. Title Ins. Co.*, No. 10–5044RMB, 2012 WL 5183908, at *1 (D.N.J. Oct. 18, 2012).

[26] In addition to ensuring that relevant documents are preserved, for practical reasons, a party may need to use the "custody or control" provisions of Rule 34 to obtain access to documents in the possession of non-parties. For example, the party requesting documents may not be aware of the non-party at the inception of the litigation. It is also possible that the non-party is not subject to the jurisdiction of the particular court's subpoena power, in which case the only way that the requesting party will gain access to the documents may be through the custody and control provisions of Rule 34. *See, e.g., United States v. James,* 980 F.2d 1314 (9th Cir. 1992) (holding that a subpoena issued to an Indian tribe is not enforceable because of tribal immunity).

[27] *Zubulake v. UBS Warburg LLC,* 229 F.R.D. 422, 433 (S.D.N.Y. 2004).

[28] *Id.*

[29] Crystal*, supra* note 8, at 719.

counsel for a failure to do so.[30] Similarly, the issue of allocating responsibility for maintaining the litigation hold may arise when a party is represented by both out-of state and local counsel. Each attorney of record is responsible to ensure that the client preserves evidence.[31] Perhaps counsel can agree which will have the primary responsibility for issuing the litigation hold and ensuring the client's obligation to preserve documents and data. In that event, counsel should commit such agreement to writing.

III. THE DISCOVERY PROCESS

Under FRCP 26(b)(1), parties are permitted to obtain discovery of "any nonprivileged matter that is relevant to any party's claim or defense" and "need not be admissible at the trial if [it] appears reasonably calculated to lead to the discovery of admissible evidence." Accordingly, early in the process counsel should become familiar with a client's document retention policies, its document and data storage methods and the accessibility of its ESI. Not only will these efforts prepare counsel for engaging in discovery, but it will also help with preparing counsel for a discovery conference. In addition, a working knowledge of the client's documents and retention policies will help counsel minimize discovery costs.[32] In federal courts, the parties engage in discovery pursuant to the FRCP. However, local federal court rules vary. State courts obviously follow their own procedures, which may be very different. In addition, individual judges and particular courts (both federal and state) may have specific discovery rules or standing orders, and counsel should carefully review those rules as early in the process as possible. As discussed below, the FRCPs require that the parties engage in a discovery conference, create a discovery plan and produce initial disclosures.

A. The Required Discovery Conference

Under the FRCP, a party may not seek discovery without court permission from any source before the parties have conferred as required by FRCP 26(f),[33] except in a proceeding exempted from initial discovery under FRCP 26(a)(1)(B).[34] Pursuant to FRCP 26(f), the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under FRCP 16(b). The reasons for this meeting are to (1) discuss the nature and basis of the claims and defenses and the possibilities for promptly settling or resolving the case; (2) make or arrange for the initial disclosures; (3) discuss any issues about preserving discoverable information; and (4) develop a proposed discovery plan.[35] Counsel for the parties are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the

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[30] *Id.* at 720.

[31] *Id.*

[32] EINBINDER & JOBLOVE, *supra* note 5, at 72.

[33] Another proposed change to the Federal Rules of Civil Procedure would permit service of Rule 34 requests relating to ESI prior to the parties' FRCP 26(f) conference. The time to respond to such requests would not begin to run until after the FRCP 26(f) conference. PROPOSED RULE AMENDMENTS, *supra* note 4, at 63-64.

[34] FED. R. CIV. P. 26(d).

[35] FED. R. CIV. P. 26(f)(2).

parties or attorneys to attend the conference in person or the conference can be accomplished by telephone.[36]

B. The Discovery Plan

As indicated, the conference should result in a discovery plan. A court will generally approve the parties' proposed schedule if it is sensible, practical and consistent with the court's calendar and stated scheduling requirements.[37] The plan should identify any changes that should be made in the timing, form or requirement for disclosures under FRCP 26(a) including (a) a statement of when initial disclosures were made or will be made; (b) subjects on which discovery may be needed, when discovery should be completed and whether discovery should be conducted in phases or be limited to, or focused on, particular issues; (c) any issues about disclosure or discovery of ESI including the form or forms in which it should be produced; (d) any issues about claims of privilege or of protection of trial-preparation materials; (e) any changes or limitations on discovery imposed by court rules or by local rule and what other limitations should be imposed; and (f) any other orders that the court should issue at that time.[38]

C. Initial Disclosures

Generally, pursuant to FRCP (26)(1)(a), within 14 days after the parties' FRCP 26(f) conference (unless a different time is set by stipulation or court order) each party must, without waiting for receipt of a discovery request, provide certain information to the other parties. This information includes the name and if known, the address and the telephone number, of individuals likely to have discoverable information. It must also include a description by category and location of all documents, including ESI, that the disclosing party has in its possession, custody or control and which the party may use to support its claims or defenses. This information will also include a computation of damages; and if applicable, any insurance agreement under which an insurance company may be liable to satisfy all or part of a judgment.[39] Other than these initial disclosures (and except in a proceeding exempted from initial disclosure under FRCP 26(a)(1)(B), or when authorized by court rules, by stipulation or by court order), a party may not seek discovery from any source before the parties have conferred as required by FRCP 26(f).[40]

D. Expert Disclosures

Expert testimony is often an important component in franchise cases on issues such as the nature of the franchise relationship generally, the regulatory scheme governing franchise sales and operations, the custom and practice in the particular franchise industry at issue, the relevant market at issue in the case, and the plaintiff's damages.[41] FRCP 26(a)(2) requires a party to

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[36] FED. R. CIV. P. 26(f); Burke & Patel, *supra* note 1, at 5-6; Toomey & Pressman, *supra* note 4,, at 37-38; EINBINDER & JOBLOVE, *supra* note 5, at 72.

[37] EINBINDER & JOBLOVE, *supra* note 5, at 72.

[38] FED. R. CIV. P. 26(f)(3).

[39] FED. R. CIV. P. 26(a)(1).

[40] FED. R. CIV. P. 26(d).

[41] For a detailed, informative discussion about expert discovery in franchise cases, *see* Rupert M. Barkoff, Charles G. Miller & Trishanda L. Treadwell, *Using Franchise Attorneys as Expert Witnesses—Not Just for Legal Malpractice Cases Anymore* in ABA 35TH ANNUAL FORUM ON FRANCHISING, W7 (2012).

disclose the identity of any witness that the party intends to call at trial to offer expert testimony under Federal Rules of Evidence 702, 703, or 705. The scope of the disclosure depends upon whether the expert is "retained" expressly for the purpose of providing expert testimony.[42] Retained witnesses must prepare, sign and submit a report accompanying the disclosures that contains all of the following information:

- a complete statement of all opinions the witness will express and the basis and reasons for them;
- the facts or data considered by the witness in forming those opinions;
- any exhibits that will be used to summarize or support those opinions at trial;
- the witness' qualifications, including a list of all publications authored in the previous 10 years;
- a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- a statement of any compensation to be paid for the study and testimony in the case.[43]

The failure to provide an expert report that complies with the disclosure requirements results in automatic exclusion of the witness.[44]

If the witness is not specially retained to provide expert testimony (such as where the witness is an employee), no formal report is necessary. Nonetheless, the party must still disclose the identity of the witness, the subject matter on which the witness is expected to testify and a summary of the facts and opinions to which the witness is expected to testify.[45] These so-called "unretained" expert witnesses are often used in franchise cases where the franchisor has internal accountants testify as to the franchisee's damages, or other professionals familiar with the terms and conditions of the franchise offering, or the franchisor's industry.

The time to make expert disclosures is typically set by court order, usually part way through discovery.[46] The party receiving the disclosure then has thirty days to disclose any rebuttal expert testimony.[47]

E. Sequence of Discovery

Once the conference has occurred (and unless the court orders otherwise for the parties' and witnesses' convenience or in the interests of justice), methods of discovery may be used in any

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[42] FED. R. CIV. P. 26(a)(2)(B). "Retained" witnesses include any person whose duties as the party's employee regularly involve giving expert testimony. *Id.*

[43] FED. R. CIV. P. 26(a)(2)(B)(i)-(vi).

[44] FED. R. CIV. P. 37(c)(1). The exclusionary sanction is described as "self-executing." *Id.* (1993 advisory committee's notes).

[45] FED. R. CIV. P. 26(a)(2)(C).

[46] *See* FED. R. CIV. P. 26(a)(2)(D). In the absence of a scheduling order setting a deadline, expert disclosures must be made at least 90 days before trial. FED. R. CIV. P. 26(a)(2)(D)(i).

[ar] FED. R. CIV. P. 26(a)(2)(D)(ii).

sequence; and discovery by one party does not require any other party to delay its discovery.[48] Like the federal courts, many states also do not require that discovery be conducted in a particular sequence.[49]

F. Discovery Before Action is Commenced

In certain circumstances, a potential plaintiff may want to take discovery before commencing an action in order to, for example, confirm a good faith basis for the lawsuit or identify the proper defendant. Pursuant to FRCP 27(a), a party can do so by court order. The party must file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony.[50] Similarly, many states have procedures whereby certain discovery can occur before commencement of the action.[51]

IV. INTERROGATORIES & REQUESTS FOR PRODUCTION OF DOCUMENTS

Written discovery, through interrogatories and document production requests, is a key component in any franchise dispute. Interrogatories are written questions directed to the opposing party that must be answered under oath.[52] A document production request is exactly what it purports to be; a request that the opposing party produce documents within its custody or control.[53] When preparing document production requests, counsel must identify the documents sought with reasonable particularity.[54] Both interrogatories and requests for production must be answered within thirty days and any objections must be signed by the lawyer.[55] A party that fails to respond to interrogatories or document production requests within thirty days waives any objections to the discovery.[56]

In some instances, interrogatories and document production requests are functionally identical because the FRCPs permit the responding party to produce documents (hard copy or electronic) in lieu of answering an interrogatory.[57] But for the most part, interrogatories and

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[48] *Id.*

[49] *See,* ARIZ. R. CIV. P. 26(d); MD. R. 2-401(b); MISS. R. CIV. P. 26(e); MONT. R. CIV. P. 26(d); OHIO CIV. R. 26; PA. R. CIV. P. 4007.3; S.C. R. CIV. P. 26(d).

[50] FED. R. CIV. P. 27.

[51] *See, e.g.,* ALA. R. CIV. P. 27; ME. R. CIV. P. 27; OHIO R. CIV. P. 27(A); TEX. R. CIV. P. 202; CONN. GEN. STAT. § 52-156a (2013).

[52] *See, e.g.,* FED. R. CIV. P. 33(a)(2); 33(b)(3).

[53] *See, e.g.,* FED. R. CIV. P. 34(a)(1).

[54] FED. R. CIV. P. 34(b)(1)(a).

[55] FED. R. CIV. P. 33(b)(2); FED. R. CIV. P. 34(b)(2); FED. R. CIV. P. 26(g)(1).

[56] *See, e.g.,* 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 33.174[2] (3d ed. 1999) ("Untimely objections normally are waived.") (collecting cases).

[57] FED. R. CIV. P. 33(d). Producing documents in lieu of answering an interrogatory is only permissible if the answer to the interrogatory may be determined by reviewing the documents, and the burden of reviewing the documents is the same on both parties. *Id.*

document production requests are more complimentary than duplicative. In addition, unlike requests for production of documents, which may be served on nonparties by subpoena under FRCP 45, interrogatories can only be served on parties to the litigation.[58]

A. Interrogatories

There are essentially two types of interrogatories: identification interrogatories and contention interrogatories.[59] Identification interrogatories seek factual information such as:

- an itemization of damages;
- the identification of the witness with the most knowledge or information on a given subject;
- the identification of nonparties who may have information relevant to the dispute;
- a timeline of the opposing party's version of events;
- the location or custodian of specified documents;
- the identification and location of documents containing specified information; or
- summaries or compilations of information.

Contention interrogatories seek to obtain binding statements about the opposing party's position on factual or legal issues in the case or the application of the law to specific facts.[60] By focusing on the opposing party's factual and legal contentions, contention interrogatories can be useful in pinning down or limiting claims or defenses, thereby setting the case up for summary judgment or simplifying issues for trial.[61] For example, counsel may request:

- an identification of the specific facts that the plaintiff alleges support each element of its claim for relief (*e.g.*, identify all facts supporting your contention that the franchisor's alleged statement in paragraph X of your complaint was false");
- an identification of the specific facts that the defendant alleges support each element of its affirmative defenses;
- an identification of the facts plaintiff relies upon to refute each of the defendant's affirmative defenses; or
- clarification as to whether the opposing party is in fact making a particular contention or claim.

Some counsel use contention interrogatories at early stages of the case before other discovery has taken place, in an effort to limit the plaintiff's claims or the defendant's defenses later on. Counsel should be hesitant to use interrogatories in this fashion for at least three reasons. First, by asking the opposing party to prepare responses regarding its contentions, counsel is

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[58] FED. R. CIV. P. 33(a)(1).

[59] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 33.02[2][a] (3d ed. 1999).

[60] *Id.* at ¶ 33.02[2][b].

[61] Mark McLaughlin & Javier H. Rubinstein, *Addressing the Threat of Punitive Damages Claims in Franchise & Dealer Litigation,* 15 FRANCHISE L.J. 10, 16 (Summer 1995) ("If the franchisor is unsuccessful in obtaining dismissal of a plaintiff's tort claims as a matter of law at the pleadings stage, defense counsel next should consider the use of contention interrogatories or other forms of discovery aimed at forcing the plaintiff to disclose the "separate and distinct" basis for any tort claims asserted in the complaint.") (citing Iain D. Johnston & Robert G. Johnston, *Contention Interrogatories in a Federal Court*, 148 F.R.D. 441 (1993)).

necessarily inviting the opposing party to examine its claims in detail and prepare answers to the interrogatories rather than surprising the opposing party at a deposition where the party has less opportunity to prepare answers. Second, by forcing the opposing party to spend significant resources evaluating its claims early in the litigation, it may impede settlement, as the responding party will have already invested a significant amount of time and money in its case. Third, contention interrogatories propounded early in the case often elicit objections seeking to postpone answering the interrogatories until the party has had time to fully examine its claims or defenses through more extensive discovery. By rule, courts have the discretion to sustain such objections pending completion of discovery.[62]

1. Procedural Requirements for Interrogatories

Absent leave of the court, a party may serve any other party with no more than twenty-five interrogatories, including all discrete subparts.[63] What constitutes a "discrete subpart" may depend upon the locality and some district courts have even adopted local rules to define the term.[64] The prevailing view is that a question containing subparts that are related to the same subject should be treated as a single question.[65]

When served with more than twenty-five interrogatories, responding counsel should first decide whether his or her client would like the opportunity to serve more than twenty-five interrogatories, and in that event, the parties can stipulate to permit service of more than twenty-five interrogatories, although this is not common.[66] If not, counsel may want to consult with the opposing attorney in an effort to agree on which interrogatories will be answered and which will be withdrawn. This is often a useful approach, particularly because the submission of an excessive number of interrogatories is often an unintentional mistake made by attorneys that spend most of their time litigating in state courts, and who are simply unaccustomed to the limit imposed on interrogatories in federal court. Generally, however, it is improper for counsel to pick and choose which interrogatories to respond to and which to ignore[67] and absent an agreement, the responding party should simply submit answers to the first twenty-five interrogatories and object to the remaining questions.

Another forum-specific consideration is whether interrogatories are available as a discovery tool. Some jurisdictions do not provide for the use of interrogatories, so when litigating in an

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[62] FED. R. CIV. P. 33(a)(2) ("[T]he court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.").

[63] *Id.* Pursuant to the proposed amendments to FRCP, the number of permitted Rule 33 interrogatories would be reduced from 25 to 15. PROPOSED RULE AMENDMENTS, *supra* note 4 at 67-70.

[64] E.D. OKLA. R. 33.1 (noting that an interrogatory inquiring into the existence, location and custodian of documents constitutes only one question for purposes of the 25 interrogatory limit set forth in FED. R. CIV. P. 33(a)(1)); *see also* N.D. OHIO R. 33.1(b).

[65] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 33.02[2] (3d ed. 1999) ("The better view is that subparts may be counted as part of one interrogatory if they are logically and necessarily related to the primary question.") (collecting local rules and cases).

[66] FED. R. CIV. P. 29.

[67] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 33.30[1] (3d ed. 1999).

unfamiliar forum, counsel should take care to examine the applicable civil rules before propounding interrogatories.[68]

2. Benefits of Using Interrogatories

Interrogatories are similar to depositions in that both require the opposing party to answer specific questions under oath. Unlike taking depositions, however, propounding interrogatories is relatively inexpensive, because the cost is limited to the amount of time it takes to draft the questions and serve them on the opposing party.[69]

Interrogatories are also useful in obtaining information that is not available in document form, because parties must respond to an interrogatory regardless of whether any documents might support the responding party's answer. Thus, a party may use interrogatories to ask questions regarding its opponent's opinions and contentions, or even the application of the law to specified facts.[70] The opposing party will not likely have documents that answer these types of questions and if any such documents do exist, they would almost certainly have been prepared in anticipation of litigation and would therefore be protected from discovery by the attorney work product doctrine.

Similarly, interrogatories can be used to obtain data that is not easily discernible from documents.[71] For example, interrogatories requesting the identity of the witness most knowledgeable on a given subject may be the best way to determine whom to depose, particularly in large cases where many depositions may be useful or necessary and the limits on the number of permitted depositions are an issue.

Interrogatories are also particularly helpful in obtaining concise descriptions of compiled information that is not readily apparent from documents, such as a timeline of events, or the opposing party's damages computations and theories. Obtaining a detailed timeline of events during a deposition is difficult because witnesses typically provide only general answers to questions and are hesitant to identify specific dates or monetary amounts from memory. The opposing party cannot refuse to answer a similar question in an interrogatory, however, because the rules impose a duty of diligence on the responding party.[72] Moreover, using a table of dates and events provided in response to an interrogatory is much easier at trial than it is for counsel to try to construct a timeline using chains of emails or calendar appointments. An interrogatory response with a timeline may be admissible as an exhibit at trial that the jury can have in the jury room during deliberations. Conversely, although counsel can prepare for use in closing argument an exhibit that is a summary of the various exhibits submitted at trial to cobble together a timeline, that exhibit typically cannot be reviewed by the jury during its deliberations.

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[68] "[I]nterrogatories are not permissible in Oregon." Tom Lininger, *Should Oregon Adopt the New Federal Rules of Evidence?*, 89 OR. L. REV. 1407, 1421 (2011) (citing OR. R. CIV. P. 36A ("Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.")).

[69] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 33.05[1] (3d ed. 1999).

[70] FED. R. CIV. P. 33(a)(2).

[71] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 33.02[2][a] (3d ed. 1999).

[72] *Id.*

Finally, much like a deposition pursuant to FRCP 30(b)(6) of a corporation (discussed in greater detail below), interrogatories can be particularly effective when the opposing party is a large corporation or organization, because interrogatories place the burden on the receiving party to prepare responses, and counsel need not identify specific individuals who must provide responses. As a result, franchisees in particular can use interrogatories to obtain information from large franchisors (including the knowledge of their employees), without the need to depose each individual who has knowledge about the dispute.[73]

To be weighed against these benefits in any particular dispute, however, is the potential problem that the wording of the answer is crafted by counsel after discussions with the client. Asking a particular interrogatory before a deposition may eliminate the element of surprise and prevent the more spontaneous answer that might have been given if the question were first asked during a deposition. Careful consideration should therefore be given to propounding certain interrogatories before key depositions are taken.

3. Using Interrogatories in Franchise Disputes

Interrogatories can provide a useful tool in many franchise disputes. Some common examples of interrogatories that may be effective include:

- asking the franchisee to identify specific dates in order to lock in the franchisee on timing for a statute of limitations defense;

- in cases alleging intentional fraud or misrepresentation, asking the franchisee to identify the specific false statements allegedly made by the franchisor, including (i) the identity of the speaker, (ii) the date of the statement, (iii) whether the statement was oral or written, (iv) the specific words used to make the statement, (v) where the statement was made, and (vi) the basis for the franchisee's claim that the statement was false;[74]

- asking the franchisee to identify all facts to support the franchisee's claimed damages, including the source of each component of the claimed damages and the method by which the franchisee calculated the damages;

- asking the identity of non-parties with information relevant to the franchisor's defense of the franchisee's claims. Such individuals may include the franchisee's lender, the franchisee's accountants and the franchisee's other professional business consultants;[75]

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[73] *Id.* at ¶ 33.102[2].

[74] FED. R. CIV. P. 9(b) imposes a heightened pleading standard, which requires the circumstances constituting fraud or mistake be stated with particularity. To satisfy the heightened requirements of Rule 9(b), a "[p]laintiff must allege the 'who, what, when, where, and how' of the purported fraud." *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). The plaintiff must also allege what the statements at issue were, what about them is false or misleading, and why they are false. *In re Glenfed, Inc. Sec. Litig*., 42 F.3d 1541, 1547-48 (9th Cir.1994). Due to the Rule 9(b) requirements, the plaintiff cannot postpone answering an interrogatory requesting information about the alleged fraud. By using interrogatories to pin down the specific alleged statements that comprise the alleged fraud, the defendant can position the case for early disposition on summary judgment.

[75] For example, when the franchisee brings claims for misrepresentation about the profitability of the franchise, an essential element of the franchisee's claim is proof that it relied on the franchisor's statements. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 537 (1977). Accordingly, the franchisor should always inquire about any consultant the franchisee retained prior to purchasing the franchise. Most lenders require pro forma projections

- in cases involving antitrust claims against the franchisor for price discrimination, asking the franchisee to identify franchisees with whom they compete that allegedly received more favorable treatment from the franchisor.

Unlike the franchisor, which is typically aware of the individuals participating in the franchisee's business (managers, operators, employees, etc.), most franchisees are at an informational disadvantage. The franchisee is typically less likely to know the identity of particular individuals who are responsible for specific aspects of the franchisor's business. Franchisees are also typically unaware of the various reports and other information that the franchisor prepares or retains in the course of its business operations. Franchisees can use interrogatories to identify these key individuals and documents for future depositions and document production requests. Common examples of how franchisees can use interrogatories effectively in franchise disputes include asking the franchisor to identify:

- documents within the franchisor's possession, custody or control that are relevant to the franchisee's claims;

- the head of the franchisor's information technology department;

- the employees or agents responsible for franchise sales, franchisee training, brand standards, and enforcement of franchise agreements;[76]

- the facts it contends support the affirmative defenses asserted;[77]

- other franchisees who have made similar claims against the franchisor;[78]

- the individual with knowledge of the documents and records that the franchisor maintains in the ordinary course of its business.

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before they will agree to make business loans, and franchisors can use these pro formas (which are often prepared by the franchisee's accountant at the franchisee's direction) to prove that the franchisee did not rely on the franchisor's statements.

[76] Depending on the claims raised in the case, the franchisor's policies and practices may be important to the franchisee's claims, particularly if they are relevant to show that the franchisor has a pattern or practice of engaging in a specific form of improper conduct, such as discrimination between franchisees or improper sales practices in violation of franchise disclosure laws.

[77] There is a split of authority as to whether the heightened pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) apply to affirmative defenses raised in a defendant's Answer. *Compare Perez v. Gordon & Wong Law Grp., P.C.,* No. 11-CV-03323-LHK, 2012 WL 1029425, at *8 (N.D. Cal. Mar. 26, 2012) *with Ramnarine v. CP RE Holdco 2009-1, LLC,* No. 12-61716-CIV, 2013 WL 1788503, at *2-*3 (S.D. Fla. Apr. 26, 2013). As a result, in those jurisdictions that do not require heightened fact pleading under *Twombly* and *Iqbal,* franchisees will likely receive little or no notice from the pleadings of the substance of the franchisor's affirmative defenses. Interrogatories are therefore particularly important for identifying the facts allegedly supporting any affirmative defenses, so the franchisee is prepared to elicit information in discovery to refute those defenses.

[78] Quite often, information relating to other franchisees provides a treasure trove of information. Most franchisors view these requests as a fishing expedition being conducted for the purpose of creating a class action or contaminating the jury pool, and will object to the disclosures on relevance grounds.

B. Document Production Requests

Requests for production of documents are governed by FRCP 34, although the Rule governs much more than production of documents. Indeed, FRCP 34 permits a party to inspect, copy, test, or sample electronically stored information or any tangible thing.[79] FRCP 34 also permits a party to enter onto the opposing party's land or property for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property.[80] Despite the broad reach of FRCP 34, however, it is most often used as a tool to obtain written information (hard copies and electronically stored documents) that are relevant to the case.

1. Procedural Requirements for Document Production Requests

As discussed in more detail above, if a party is concerned that the documents may be destroyed or lost before the parties have met and conferred, the party should issue a litigation hold notice to the opposing party, or alternatively, seek a court order permitting the discovery early, even if the case has not yet been filed.[81]

The party propounding the document requests may ask that the opposing party produce the documents, or alternatively, may request that it be permitted to inspect the documents itself.[82] The distinction can be a meaningful one. For example, counsel should request to inspect the opposing party's documents where the manner in which the documents are kept is itself relevant to the case, or where the requesting party is concerned that the opposing party will not produce complete records. If the requesting party is concerned that the request itself might cause the opposing party to destroy or hide documents,[83] it can seek relief from the Court ex parte and obtain an order permitting the inspection and copying.[84]

Documents under FRCP include ESI.[85] The responding party must produce ESI even if it is not specifically requested, if the information is responsive to the request. However, the responding party need not produce the information in more than one form.[86] If the requests do not specify the form for producing electronically stored information, the responding party must produce the information in the form in which it is ordinarily[87] maintained, or in a reasonably usable form.

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[79] FED. R. CIV. P. 34(a)(1).

[80] FED. R. CIV. P. 34(a)(2).

[81] FED. R. CIV. P. 27(a)(3) (permitting a party, with leave of the court, to conduct a deposition and propound document production requests before commencing an action for the purpose of perpetuating a witness' testimony).

[82] FED. R. CIV. P. 34(a)(1).

[83] Some common examples in franchising include cases where the franchisor believes that the franchisee may declare bankruptcy and dispose of assets and cases where the franchisor brings claims against the franchisee for underreporting its income. Stephen Horn & Robert I. Zisk, *Practical Considerations in Enforcing Standards,* 12 FRANCHISE L.J. 97, 122 (Spring 1993).

[84] *Id.* (citing *Tappan Motors, Inc. v. Volvo of America Corp.,* 64 N.Y.2d 168, 479 N.E.2d 804 (App. Div. 1985)).

[85] FED. R. CIV. P. 34(a)(1)(A).

[86] James M. Johnston, Jr. & Philip A. Whistler, *E-Discovery: A Critical Litigation Issue for Franchisors and Franchisees*, 26 FRANCHISE L.J. 20, 28 (Summer 2006).

[87] FED. R. CIV. P. 34(b)(2)(E)(ii).

Prior to preparing documents for production, counsel should discuss an appropriate procedure for marking the documents using bates stamping. A record of which documents were produced in response to specified document requests on specific dates is key to avoiding confusion later in the discovery process. One way to avoid confusion is to designate all documents with a party-specific prefix followed by sequential numbers (e.g., FZOR00001-FZOR05000; FZEE00001-FZEE05000). A similar convention should be used for documents produced by nonparties in response to subpoenas (e.g., VNDR00001-VNDR05000). Agreement on clear and consistent naming conventions will simplify things considerably once the parties have moved on to depositions, dispositive motions, and trial.

2. Using Document Production Requests in Franchise Disputes

In cases involving claims brought by the franchisor against the franchisee (usually for unpaid royalties), important documents relevant to the franchisor's claims are in the franchisee's possession. Some common examples of the types of documents that franchisors seek from franchisees include:

- the franchisee's financial records including sales reports, profit and loss statements, financial statements and bank statements; and
- all written communications (letters, emails, texts, etc.) between the franchisee and the franchisee's accountant, lender or other professional consultant (depending on the claim at issue).

Unlike the franchisor, the franchisee is not always in the best position to know what, if any, reports, documents or information that the franchisor retains in the ordinary course of its business. Nonetheless, there are many categories of documents that a franchisee will and should request from the franchisor at the outset of the litigation, including:

- all agreements between the parties;
- all Franchise Disclosure Documents ("FDD") provided to the franchisee;
- all communications between the parties;
- all documents relating to specific issues in the dispute (such as training materials provided to the franchisee or documents relating to a designated supplier);
- the franchisor's document retention policy;
- the franchisor's operations manuals and any drafts, alterations or changes to the manuals that are relevant to the franchisee's claims or defenses;
- communications between the franchisor and other franchisees regarding the franchisee's claims or related to the issues in the litigation; and
- communications between the franchisor and any of its brokers or agents relating to the sale of the franchise or the company's policies regarding the sale of franchises in general.

V. DEPOSITIONS

Depositions can be the best discovery tool for uncovering detailed information in litigation.[88] Unlike interrogatories and document production requests, which provide little opportunity for follow up or clarification, depositions are unique in that they allow litigators to probe deeply into a deponent's responses with follow up questions and newly-revealed lines of inquiry. Similarly, while interrogatory responses are reviewed and approved by the opposing party's counsel, depositions provide an unfiltered view of the opposing party's perspective.[89] For example, an unprepared or inexperienced witness may volunteer unanticipated information at a deposition in response to general background questions. It is not unheard of for parties to "give away the case" by testifying to facts that completely undermine their claims or defenses. Moreover, studies have shown that depositions provoke fewer objections than interrogatories, thereby decreasing interference by opposing counsel.[90]

Depositions are also an extremely important discovery tool for acquiring information from uncooperative nonparties before trial, because a deposition is the exclusive means by which a litigant may require a nonparty to answer questions regarding their involvement in the dispute. Other than depositions, nonparty discovery is limited to document production requests, which in many cases may provide little if any useful information.

A. Procedural Requirements for Conducting Depositions

The FRCP broadly permits parties to depose any person (including corporate entities) who may have information relevant to the deposing party's claims or defenses, so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[91] Parties may conduct any deposition without leave of the court, unless the parties have not otherwise stipulated to the deposition and (i) the deposition would result in more than 10 depositions being taken,[92] (ii) the deponent has already been deposed in the case, or (iii) the deposing party has noted the deposition prior to conducting the initial discovery conference required by FRCP 26(d).[93] Leave of the court is also required to depose an individual confined in prison.[94] As discussed below, a subpoena may be required to compel the attendance of non-party witnesses.

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[88] "Depositions are the factual battleground where the vast majority of litigation actually takes place." 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 33.02[2] (3d ed. 1999) (quoting *Hall v. Clifton Precision,* 150 F.R.D. 525, 531 (E.D. Pa. 1993)).

[89] DAVID M. MALONE & PETER T. HOFFMAN, THE EFFECTIVE DEPOSITION at § 3.1.1 (Rev. 2d ed. 2001).

[90] FED. R. CIV. P. 33 (1970 advisory committee's notes) ("The Columbia Survey shows that, although half of the litigants resorted to depositions and about one-third used interrogatories, about 65 percent of the objections were made with respect to interrogatories and 26 percent related to depositions.").

[91] FED. R. CIV. P. 30(a)(1); FED. R. CIV. P. 26(b)(1).

[92] The proposed changes to the FRCP would reduce the number of depositions presumptively permitted per side from 10 to five and would reduce the time limit for each deposition from seven to six hours. PROPOSED RULE AMENDMENTS, *supra* note 4 at 67-70.

[93] FED. R. CIV. P. 30(a)(2)(A).

[94] FED. R. CIV. P. 30(a)(2)(B).

A party who wants to conduct a deposition must provide reasonable advance written notice to every other party prior to the deposition.[95] The notice must include the following information: (a) the time and place of the deposition; (b) the deponent's name and address, if known; (c) the documentary materials to be produced at the deposition, if any; and (d) the method of recording (audio, video, or stenographic).[96]

1. Location of the Deposition

Absent a contrary agreement between the parties (and a non-party witness), the location where the deposition is to be taken varies depending on the identity of the witness, and the hardship associated with traveling to a distant locale. A deposition of the plaintiff typically must be taken in the district in which the action is pending, or the geographic area where the plaintiff resides, has a place of business, or is employed.[97] A deposition of a defendant typically must be taken in the geographic area where the defendant resides, has a place of business, or is employed.[98] A deposition of a corporation must typically be taken where the corporation has its principal place of business or in the geographic area where any of the corporation's officers or directors reside.[99] For nonparties, the location of the deposition is confined to the geographic area within 100 miles from where the witness regularly resides, is employed, or regularly transacts business.[100]

2. Method of Recording

Most depositions are recorded stenographically, in part because a written transcript is considerably less expensive than other alternatives. Following the 1993 amendments to the FRCP, however, parties are now permitted to record depositions on video.[101] From a strategic perspective, there are several advantages and disadvantages to taking video depositions.

Advantages of recording a deposition by video include:

- Preserving a visual record of the witness' testimony for trial. For non-party witnesses located outside the trial court's jurisdiction for issuing trial subpoenas, or for witnesses that may otherwise be unavailable at the time of trial, a video deposition allows the

[95] FED. R. CIV. P. 30(b)(1). As a practical matter, the best practice is to try to secure agreement on the date and time of a deposition with counsel before sending the required notice. Absent prior agreement, however, what constitutes "reasonable" advance written notice is not set forth in the rules, although some courts have, by local rule, designated a minimum advance notice of five days. D. KAN. R. 30.1; D. DEL. R. 30.1; N.D. OKLA. R. 30.1. As a general rule, practitioners who provide at least 14 days advance notice of the deposition probably satisfy the reasonableness requirement. *See* FED. R. CIV. P. 32(a)(5)(A). Of course, the reasonableness of the notice likely depends on the specific facts and circumstances in each case, such as the location of the deposition and whether it will require counsel to travel to a distant jurisdiction.

[96] FED. R. CIV. P. 30(b)(1)-(3).

[97] MALONE ET AL., *supra* note 89, at § 1.7.2.

[98] *Id.* at § 1.7.3; 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 30.20[1][b][ii] (3d ed. 1999).

[99] MALONE ET AL., *supra* note 89, at § 1.7.4.

[100] FED. R. CIV. P. 45(c)(3)(A)(ii).

[101] FED. R. CIV. P. 30 (1993 advisory committee's notes).

deposing party to preserve a visual record of the witness' testimony for trial. The visual record will permit the fact finder to evaluate the witness' tone, presentation, and demeanor in a way that a written transcript will not. As is often the case, a witness' credibility turns on the way in which they respond to questions, not the content of their answers. Similarly, a visual record allows the witness to depict actual events through the use of gestures and pointing. Finally, jurors are less likely to lose focus on the testimony if they are also examining on the visual cues being put out by the witness, rather than merely listening to the written transcript being read by counsel.

- Importing the seriousness of the proceedings on the witness. For the uninitiated, a video deposition appears to be a significant undertaking. In addition to the court reporter, a witness is confronted with a videographer who will set up a large camera across from the witness, usually with a collection of other audio-visual equipment with a host of buttons, dials, knobs, gauges, and blinking lights. The witness will typically be placed in front of a neutral background screen and all participants to the deposition will utilize microphones. Much like testifying in court, a witness confronted with a video camera will often take the proceedings more seriously and be more responsive to counsel's questioning.

- Controlling an otherwise non-compliant witness. Some witnesses feel that they are free to obstruct the discovery process by refusing to answer direct, simple questions. In the absence of a judge or jury, the tactic can be an effective means of preventing the opposing party from obtaining valuable information. By recording the deposition on video, however, the witness is forced to act as though the judge and jury are in the room.

- Keeping opposing counsel in line. Some attorneys will try to use inappropriate tactics to subvert the deposition process by making lengthy speaking objections, arguing with deposing counsel, and even overtly guiding the witness' answers. While a deposing attorney has other avenues for dealing with obstreperous opposing counsel, nothing, short of a court order, is more effective at keeping counsel in line than a video camera.[102]

Disadvantages of recording a deposition by video include:

- Cost. Taking a video deposition can double or even triple the cost of obtaining a written transcript from the court reporter. If the purpose of the deposition is to discover unknown information rather than to lock in a party's testimony for trial, the additional cost may not be necessary.

- Video depositions provide an opportunity for the opposing party to practice trial testimony. An opposing party that is on notice that a deposition will be videoed will probably spend more time preparing for the deposition and treat it as an opportunity to practice how they will testify at trial. A witness who would otherwise come across poorly in person can subsequently use the video of the deposition to correct inadequacies in his or her presentation at the time of trial.

[102] *See* MALONE ET AL., *supra* note 89, at § 11.3.4 ("For whatever reasons, lawyers who engage in the most outrageous conduct when only a court reporter is present, will be on their best behavior when their actions are being recorded on videotape.").

- Video depositions are hard to use. While they can be an effective method for presenting evidence both to the court and to a jury, video depositions are difficult to use when (i) preparing dispositive motions; (ii) preparing for trial; or (iii) impeaching a witness. It is simply easier (and faster) to review a written transcript than it is to watch a video recording.

As with any discovery tool, the utility of a video deposition depends upon the context of a particular case, the goals of the deposing attorney and the client's financial resources.

3. Additional Requirements for Deposing Corporations and Organizations

The FRCPs provide that a party may name a corporation or organization as a deponent by either designating a specific officer, director, or managing agent to testify on behalf of the corporation,[103] or by choosing not to identify a specific corporate representative, and instead including in the deposition notice (or subpoena, if the corporation is not a party to the lawsuit) a description of the subject matter of the questions that the deposing party intends to ask at the deposition.[104] The description must be made with reasonable particularity so that the corporation can designate one or more persons who can testify on its behalf as to the matters described in the notice. The person (or persons) designated by the corporation to testify on its behalf must testify about any information that is known or reasonably available to the corporation.[105]

There are a couple of benefits to conducting an organizational deposition under FRCP 30(b)(6) in lieu of identifying specific corporate officers for depositions. First, the deposing party may not know in advance who within the organization is the most knowledgeable about the subject matters to be addressed in the deposition. By using an organizational deposition, the deposing party shifts the burden to the corporation to identify the person most knowledgeable on that topic. Second, organizational depositions only count as one deposition for purposes of the ten deposition limit set forth in the rules even if the corporation designates more than one individual to testify on its behalf. As a result, conducting an organizational deposition pursuant to FRCP 30(b)(6) is preferable in large, complex cases, where the deposing party may want to take depositions beyond the permitted number. However, if the person with the most knowledge of the topic is no longer with the company, such a deposition may not reveal much if any information.

4. Other Procedural Limitations on Depositions

Absent agreement of the parties, or leave of the court, counsel must be physically present to conduct the deposition,[106] and depositions are each limited in duration to one day of seven hours.[107] The time limitation on the length of a deposition creates potential strategic

[103] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 30.03[2] (3d ed. 1999).

[104] FED. R. CIV. P. 30(b)(6).

[105] *Id.*

[106] FED. R. CIV. P. 30(b)(4) (permitting deposition by remote means, such as by telephone or video conferencing, by agreement of the parties, or with leave of the court).

[107] FED. R. CIV. P. 30(d)(1).

considerations because the order of questioning at a deposition proceeds as it will at trial.[108] Accordingly, the party that notices the deposition, like the party that calls the witness at trial, is the first to question that witness. When both parties want to depose the same witnesses (typically nonparties), counsel should consider carefully whether to notice the witness' deposition before the other party does so, to ensure that they get the first opportunity to question the witness.

If requested by the witness prior to the conclusion of the deposition, the witness has the right to review the transcript of the testimony and make changes.[109] Any changes made to the transcript must be accompanied by an explanation of the reasons for the changes.[110] There is a split of authority on the scope of the changes that the witness may make.[111] Some courts permit witnesses to make any changes, including changes to the substance of the testimony that contradicts the original answers.[112] Other courts refuse to allow any changes that substantially alter statements made under oath.[113] Counsel should be familiar with the case law in their jurisdiction when advising the client on the extent to which changes to the deposition testimony is permissible. In any case, the changes do not replace the original testimony, the original answers remain part of the record,[114] and the deponent can be cross-examined at trial regarding the changes made to the deposition.[115]

B. Conducting Depositions

1. Style of Questioning

The style of counsel's approach to conducting a deposition often depends upon the purpose of the deposition. Some depositions are purely informational and seek to uncover facts needed to prosecute or defend the action. In these depositions (which are the most common), counsel's questioning should consist largely of broad, open-ended questions that invite the witness to provide expansive responses and which can subsequently be dissected and examined in detail with follow up questions. For witnesses not prone to lengthy narration or explication, silence is a potent weapon in uncovering additional information. Witnesses new to the deposition process, and those who have not been trained on how the deposition process works, typically become uncomfortable during prolonged silences, and will often volunteer additional information to supplement their original response.

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[108] FED. R. CIV. P. 30(c)(1).

[109] FED. R. CIV. P. 30(e)(1).

[110] *Id.*

[111] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 30.60[3] (3d ed. 1999).

[112] *See, e.g., Foutz v. Town of Vinton,* 211 F.R.D. 293, 295 (W.D. Va. 2002). Moore's Federal Practice sides with the courts that allow any change to the deposition testimony. 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 30.60[3] (3d ed. 1999) ("Court's permitting the deponent to make wide-ranging changes to the deposition for any reason take the better view.").

[113] *See, e.g., Hambleton Bros. Lumber Co. v. Balkin Enters.*, 397 F.3d 1217, 1226 (9th Cir. 2005).

[114] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 30.60[4] (3d ed. 1999).

[115] *Id.* at ¶ 30.60[3] (citing *Aetna Inc. v. Express Scripts, Inc.,* 261 F.R.D. 72, 75 (E.D. Pa. 2009)).

Inexperienced counsel often make the mistake of remaining too "wedded" to their prepared deposition outlines. Concentrating on getting through an outline can prevent counsel from really listening to the deponent's responses and following up on potentially fruitful new and unexpected areas of inquiry. Counsel should keep in mind that questions may be asked out-of-order and that they can take a break to review their outlines before concluding to ensure that all planned topics were sufficiently covered.

Other depositions are more adversarial and therefore less likely to result in the disclosure of information. Often the deposition of the opposing party falls into this category. Instead of obtaining information, these depositions are generally more useful for purposes of locking in the opposing party's testimony. In particular, counsel should use party depositions as an opportunity to limit the universe of the opposing party's claims, defenses, and factual allegations. Locking in the opposing party's testimony is particularly important for dispositive motion practice, as deposition testimony is typically needed to obtain summary judgment. One particularly effective tactic is for counsel to summarize the witness' testimony at the conclusion of a line of questioning, and ask the witness to confirm the accuracy of the summary. These yes or no responses provide exactly the type of pithy facts that are ideal for insertion into a motion for summary judgment. However, a well-prepared witness is unlikely to provide a simple response and repeated attempts to obtain a succinct admission will likely result in objections by opposing counsel.

2. Ordering of Questions

The first order of business in any deposition is always for the court reporter to swear in the witness.[116] After that, however, the deposing attorney has carte blanche to proceed with any topic of interest. Nonetheless, most attorneys start with a series of questions designed to lay the ground rules for the deposition process so that the witness understands how and when to respond to questions.[117] Many attorneys also ask preliminary questions designed to preclude the witness from challenging the reliability of the deposition testimony at a later date.[118] Following these introductory questions, a common approach by many attorneys is to walk through the witness' background or education, and then proceed with a chronological review of the facts of the dispute. In informational depositions, proceeding in this fashion can be helpful if it puts the witness at ease. In a more adversarial deposition, counsel should consider jumping immediately into the most hotly contested facts before the witness has had an opportunity to acclimatize to the deposition process and be less likely to make a mistake. Similarly, it may be beneficial to avoid a chronological review of the disputed facts in the case when deposing an adversarial witness. A well-prepared witness may have a "story to tell," and asking about the dispute in chronological order will allow the witness to follow their preplanned internal script of events. By jumping around to different events, and returning to unfinished lines of inquiry later on in the deposition, the witness will not have an opportunity to settle in and get comfortable.

[116] FED. R. CIV. P. 30(b)(5)(A).

[117] Most questions setting out the ground rules for the deposition are really directions from counsel to the witness. For example, counsel typically ask the witness to provide oral answers to all questions (as opposed to gestures, head nodding, and the like), and to wait to respond until the deposing attorney has finished his or her question.

[118] For example, these questions commonly address whether the witness is intoxicated or on any medication which could influence the witness' ability to provide complete and accurate testimony.

3. Rules of Evidence & Using Documents

FRCP 30(c)(1) provides that all of the federal rules of evidence apply in a deposition except for Rules 103 (dealing with court rulings on evidentiary issues) and 615 (dealing with the exclusion of witnesses from trial). As a result, evidentiary rules regarding the admissibility of documents apply, and counsel must be careful to make sure that the record is adequate to support the admissibility of documents submitted as exhibits to the deposition.

The mechanics of ensuring that an exhibit marked in a deposition will be admissible at trial is no different than at trial. Counsel should make sure to lay an adequate foundation for the admission of the document, by eliciting testimony from the witness that he or she has personal knowledge of the exhibit and its contents, and further, that the document is authentic.

Exhibits should be marked sequentially for easy reference and identification at the deposition. Ideally, counsel should confer prior to beginning the deposition process, and reach an agreement on exhibit numbering (*e.g.,* plaintiff is assigned exhibits 1-100, defendant is assigned exhibits A1-A100) and submit exhibits in each deposition consistent with their agreement. Since nearly all federal district courts require parties to pre-number exhibits in their proposed pretrial order, an agreement that is in place between the parties prior to the commencement of depositions will substantially simplify trial preparations. A consistent numbering convention will also make it easier to prepare dispositive motions and review deposition transcripts.

4. Strategic and Practical Considerations for Conducting Depositions

Specific strategies for conducting deposition discovery in franchise disputes typically depend upon the type of claims at issue in the litigation. For obvious reasons, whether, when, and whom to depose will change depending upon the facts of the case. That said, below are some of the issues that are important to consider when conducting depositions in any franchise dispute.

a. Identifying the Right Witnesses to Depose

As in any litigation, a key component to success is identifying the witnesses with the crucial information supporting your client's claim or defense. This can be particularly difficult for franchisees attempting to navigate the franchisor's corporate hierarchy. Unless your client already knows who should be deposed, there are three ways to identify a deponent: (i) interrogatories; (ii) depositions of other witnesses; and (iii) FRCP 30(b)(6) depositions.

Franchisee counsel may want to use interrogatories to identify the specific individuals employed by the franchisor who supervise the sale process or who protect, preserve and enforce the franchisor's trademark and brand standards. Answers to interrogatories may also reveal corporate officers responsible for making specific decisions or overseeing implementation of specific policies or procedures. Franchisors, however, often know the identity of relevant decision makers in the franchisee's business. For their counsel, interrogatories may be useful to identify key nonparty witnesses who may have information relevant to the dispute, such as the franchisee's accountant, lender or other professional consultant.[119]

[119] Horn et al., *supra* note 83, at 122 ("If the franchisee is recalcitrant on the subject of his finances, and even if he is not, a deposition of his accountant locks in the defense regarding the income and sales reported both to the franchisor and to the Internal Revenue Service. Where the accountant has gone along with the scheme, a review of the books and his explanation for why he classified certain items as he did often provides valuable evidence.").

Attempting to identify witnesses through the use of depositions can be a cumbersome process, but may be the only alternative if the identity of the relevant individual is only known to a nonparty. However, as a deposition under FRCP 30(b)(6) does not require the deposing party to identify the correct witness, it is useful when counsel does not know the identity of the person most knowledgeable on the topic.

b. Current and Former Employees

A common question arising in franchise disputes is whether counsel may contact the other party's employees directly. The question raises ethical issues, and in particular, the prohibition against contacting a represented party without the consent of opposing counsel. Jurisdictions vary on their approach to this issue, and counsel would be wise to examine the local rules before contacting current employees directly.

Former employees, on the other hand, are not generally considered "clients." Consequently, a former employee can often be a good source of information. When contacting former employees, counsel should be wary about potential confidentiality agreements. Should counsel become aware of any confidentiality agreement that might otherwise prohibit the former employee from divulging information, the prudent course of action is to seek the agreement of the opposing party to speak with the witness. If the opposing party will not consent to the disclosure, a court order may be necessary. Otherwise, counsel may facilitate a breach of the witness' contractual obligations and by extension end up exposed to a lawsuit for intentional interference with contractual relations.

c. Expert Depositions

The expert witness disclosure obligations in the federal rules make the task of conducting expert witness depositions much simpler in most cases. As the expert's testimony is limited to the opinions set forth in the report, the report itself provides the outline for the attorneys' inquiry in the deposition. For unretained experts (*e.g.*, an employee of a party), depositions are more important because these experts need not prepare a report to accompany the disclosures. Counsel should inquire into the substance of the expert's opinions, the bases for those opinions, and any assumptions underlying those opinions.[120] Counsel should also ask questions testing the soundness of the witness' opinions and qualifications, such as whether the witness has considered alternative explanations or theories, or whether the witness is even capable of testifying to the opinions set out in his or her report.[121] When the witness is an attorney (as is often the case in franchise disputes), the deposing attorney should frame questions in a manner that best portrays the witness' testimony as legal rather than factual, in order to maximize the prospect of excluding the testimony.[122]

[120] MALONE ET AL., *supra* note 89, at § 19.

[121] *Id.*

[122] Barkoff, et al., *supra* n.41 at 7 ("[E]xpert testimony that merely states a legal conclusion will be excluded.").

C. Defending Depositions

1. Preparing Witnesses

Counsel's first task in defending a deposition is to prepare the witness who is going to be deposed. Except for certain expert witnesses who testify on a regular basis, most witnesses will need guidance from counsel on what to expect once the deposition commences, and how to cope with an undeniably stressful experience. To help reduce the witness' stress levels, counsel should begin by first explaining the deposition process. The witness should be informed that a deposition is essentially the same as testimony at trial, except that the setting is much more informal (typically a conference room at the lawyer's offices). The witness should also understand that he or she is permitted to take reasonable breaks to use the restroom, get a snack or beverage, or the like. Nonetheless, the witness should understand that despite the informal setting, the attorney for the opposing party will ask the witness questions which must be answered under oath, and the consequences of the testimony are potentially critical to the case. As such, the witness should take his or her preparations seriously, and should expect to project that seriousness at the deposition (particularly if the deposition is being recorded by video).

After explaining the basics of the deposition process, it is usually helpful to explain the defending attorneys' role in the deposition, and in particular objections. The witness should understand that unless the defending attorney instructs the witness not to answer a question, the witness must answer the deposing attorney's questions, even if the defending attorney makes an objection. In order to assist the defending attorney, the witness should be advised to follow some of these basic rules when answering questions:

- Tell the truth. Above all, this must be the message of the deposition preparation session. This seemingly obvious point may be lost on the witness, particularly if the witness is a party that is heavily invested in the outcome of the case.

- Wait to hear the entire question before answering. The second most important piece of advice that a witness should take to heart is to try their best to listen to the deposing attorney's entire question before answering. Waiting to hear the entire question has a number of benefits, including (i) providing defending counsel an opportunity to object to the question; (ii) making the witness less likely to accept an erroneous factual statement incorporated into the deposing attorney's question; and (iii) improving the accuracy of the witness' responses.

- Answer the question that is asked. Nearly all witnesses feel an innate desire to be helpful. It is an aspect of human nature. Notwithstanding the societal benefits, however, the need to be helpful is often a hindrance in a deposition. In particular, witnesses often ignore the question that is asked, and instead answer the question that they think the deposing attorney wants answered. An extremely simple example that illustrates this principle is as follows:

  Q: Do you know what time it is?
  A: (witness checks watch) 9:00 a.m.

  Technically, the witness did not answer the question that was asked. The correct answer would be "no," or "not without checking my watch." Of course, this example greatly oversimplifies the principle. In a real deposition, the witness'

response to this particular question is not only appropriate, it is preferable. Due to the simplicity of the question, the technically correct answer would look evasive. But the example highlights the principle that the witness should always have in the back of his or her mind: strive to answer only the question that is asked, but don't be intentionally evasive.

- Don't speculate. Witness speculation about what might or could have happened is another negative consequence of the desire to be helpful. The witness should be advised that rather than speculating, if the witness does not in fact know or remember what happened, the best answer is simply "I don't know" or "I don't remember." The witness should also understand that a deposition is not a memory test, and that there is no shame in not remembering the details of a long-ago event, no matter how incredulous the deposing counsel sounds.

- Don't volunteer unnecessary explanations. A deposition is often the witness' first real exposure to the raw facts of the dispute since they occurred. Yet the purpose of the deposition is often to make a record for dispositive motions, and as a result, a good deposing attorney will try to frame the facts in the light most favorable to his or her client. The combination of these factors often drives a witness to try to provide an explanation that goes beyond the question asked. In some circumstances, when a question is misleading, a brief explanation is appropriate and necessary. But in most cases, a deposition is not the witness' opportunity to tell their side of the story and the witness should be cautioned that the case cannot be won at a deposition. Explanations often result in unforced errors or misstatements, and provide additional information to opposing counsel that allows the other party to revise its theory of the case, or to prepare a response to a ready-made defense.

- Pay attention to defending counsel's objections. To the extent possible, the witness should try to pay attention to defending counsel's objections, as they often provide insight into problems with the deposing counsel's question.

- Don't be afraid of silence. Most people have a natural desire to fill the void of silence with words. Doing so can relieve the awkwardness associated with prolonged silence. Most deposing attorneys know this, and use it to their advantage to obtain additional information from the witness. The witness should not be afraid to let their answer stand, even if it results in a prolonged silent stare from deposing counsel.

- Ask for a break when one is needed. The deponent should be made aware that he or she is not a prisoner and can freely ask to take a break at any time as long as no question is pending.

- Be aware of "tricks." Sometimes counsel will use non-verbal cues to try to trick the witness into giving preferred answers. For example, some counsel have been taught to nod when they want to elicit a "yes" answer. The deponent should note when the deposing lawyer begins nodding while asking a particular question and then think very carefully before responding.

Conveying these points to a witness is the easy part. Getting the witness to actually remember, much less adhere to these rules once the deposition begins, is the difficult, if not impossible task of a defending attorney. The only way to truly ingrain some of these rules into a witness is to practice asking questions. At this stage of the preparation process, the defending attorney should spend some time conducting a mock deposition to get the witness accustomed to the process. Counsel should provide constructive advice about the witness' performance. With practice, most witnesses will improve significantly. Practice will also make the actual deposition less stressful and awkward.

After the witness has had some time to get accustomed to the deposition process, counsel should spend some time preparing the witness on the substantive issues that are likely to be the focus of the deposition. Prior to the meeting, counsel should prepare an outline of anticipated lines of inquiry and questions that the witness is likely to face during the deposition. Counsel should then run the witness through these questions to see how the witness will respond. Due to the (likely) adversarial nature of the substantive questions, it is often helpful to have a second attorney present to ask these questions, particularly if the witness has never worked with the defending attorney before the deposition. Otherwise, the witness may walk away with the mistaken impression that the defending attorney is overly aggressive or dismissive, rather than supportive.

Finally, a witness without any prior deposition experience will probably be concerned about some practical matters that counsel should also address before concluding the preparation session. Some practical considerations to discuss with the witness include:

- Attire. Counsel should advise the witness to wear comfortable clothing, but not to dress casually. Typically, business casual attire is appropriate. However, if the deposition is going to be recorded by video, the witness may want to consider wearing more formal attire, unless the circumstances would make that seem inappropriate. For example, if the case involves a claim brought by an unsophisticated franchisee against a franchisor alleging that the franchisor took advantage of the franchisee's inexperience by making misrepresentations about the business prior to sale, when the franchisee is deposed by video, formal attire would convey the wrong impression about the franchisee's experience level.

- Location and time of the Deposition. Typically, depositions are conducted in the offices of the deposing attorney, and the witness may not know where the deposition is taking place, where to park, and the like. The witness should be comfortable with the location, and if not, may want to arrange to travel to the deposition with counsel to ensure that the deposition commences on time.

- Keep to a Regular Schedule. Counsel should advise the witness not to change his or her regular schedule if possible. The witness should try to get the same amount of sleep and eat a regular breakfast before coming to the deposition. There is nothing worse than arriving at a deposition and discovering that to alleviate her anxiety, the witness decided to drink seven additional cups of coffee to try to pump herself up for the deposition.

- Do not bring anything to the deposition. The witness should be advised not to bring anything to the deposition. That means no notes, documents, or electronic

devices (computers, tablets, or cell phones). Anything that the witness brings to the deposition is fair game for opposing counsel to review.

2. Strategic and Practical Considerations for Defending Depositions

a. Designating FRCP 30(b)(6) Witnesses

FRCP 30(b)(6) requires a corporation to designate the person most knowledgeable on the identified topics to appear and testify at the deposition. This Rule does not require that the designated witness have personal knowledge of the facts. Consequently, the corporation is free to designate anyone to testify. Companies should select the best witness based upon the witness' knowledge of the designated topics and prior experience with depositions. Witnesses who have had bad previous showings in a deposition should not be called upon simply because they are the most knowledgeable. Instead, the corporation should select the most competent witness available, and then take the necessary steps to prepare that witness to testify on behalf of the corporation.

b. When Should the Defending Attorney Examine the Witness

When the deposing attorney finishes asking questions at a deposition, the defending attorney then has the opportunity to question the witness. Most attorneys take the position that it is never a good idea to prolong a deposition by asking additional questions. There are good reasons not to ask questions of a witness that you are defending, including the possibility that the witness may say something unexpected, particularly after a long day of questioning. Asking additional questions also gives opposing counsel an additional opportunity to ask more questions following the conclusion of defense counsel's examination. But there are some circumstances when it is necessary to ask questions of a witness you are defending including:

- Current employees that the defending lawyer believes, or has reason to believe, may be terminated by the client prior to trial;
- Witnesses that will or may be unavailable to testify at the time of trial; and
- Witnesses who the lawyer knows have testified inaccurately or incompletely on a topic that should properly be corrected at the time of the deposition to avoid the appearance at trial that the witness is trying to change his or her testimony.

D. Using Depositions at a Hearing or at Trial

A party may submit all or part of a deposition at a hearing or trial if (i) the deposition is being offered for purposes of impeachment; (ii) it is a deposition of a party, its agent, or designee; (iii) the witness is not available to testify in person because the witness is dead, lives more than 100 miles from the courthouse and is therefore not subject to a trial subpoena, or is otherwise incapable of testifying due to age, infirmity, illness, or imprisonment.[123] Even if one of the foregoing conditions applies, the deposition is inadmissible if the party against whom the deposition is being used was not present at the deposition, or did not have reasonable notice of it, or if the deposition is not admissible under the rules of evidence for the purpose it has been

[123] FED. R. CIV. P. 32(a)(2)-(4).

submitted.[124] If a party offers only a portion of a deposition, the opposing party has the right to offer any other portion of the deposition.[125]

Understanding how a deposition can be used is important for several reasons. First, if a nonparty witness (including employees of a corporate party) is located within the trial court's jurisdiction, the witness' deposition is essentially admissible only for impeachment purposes (unless, the witness is in a poor state of health or in jail).

Second, if a party is deposing a witness that resides outside the jurisdiction of the trial court (more than 100 miles from the courthouse), the deposition is probably the only testimony that will be available at trial. Accordingly, counsel should take care to fully prepare for the deposition in advance, so that any questions or factual issues that need to be examined for trial are fully discussed and evaluated. Otherwise, at trial, counsel may be unable to obtain the information necessary to prosecute or defend their client's case.

Finally, since a party's deposition may be used for any purpose (even if the party is available, and indeed, physically present, at trial) counsel may seek to conduct an early deposition of the opposing party to lock in their testimony for trial. This is a particularly helpful strategy for defense counsel. By deposing the plaintiff early on in the case, before the plaintiff has had an opportunity to fully evaluate his or her claims, defense counsel can lock the plaintiff in to an inconvenient legal theory or factual assertion. At trial, because a deposition of a party is admissible for any purpose, when the plaintiff is ready to present a more polished version of a legal theory or series of events, defense counsel can instead submit the unflattering deposition testimony.

VI. REQUESTS FOR ADMISSION

Requests for Admission ("RFAs") under FRCP 36 are similar to cross-examination questions at trial in that a lawyer should rarely ask one without knowing the answer beforehand. RFAs are arguably not really discovery at all because, rather than helping "discover" information, they are used to obtain binding admissions. Those admissions can reduce uncertainty and streamline proof at trial or establish undisputed facts for summary judgment.

RFAs are "the mechanism by which parties may, for the purpose of a pending action only, make written requests for admission by other parties regarding facts, the application of law to fact, and the genuineness of documents."[126] RFAs are not used to "elicit facts and information [or] obtain production of documents" but rather "to establish admission of facts about which there is no real dispute."[127] Because it is generally necessary to be reasonably certain of key facts before propounding RFAs, they are sometimes served towards the end of the scheduled discovery period after interrogatories, document production and key depositions. However, parties may

[124] FED. R. CIV. P. 32(a)(1).

[125] FED. R. CIV. P. 32(a)(6).

[126] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 36.1 (3d ed. 1999) (comments by The Honorable Claudia Wilken with updates by Professor Robert M. Bloom).

[127] *Id. at ¶* 36.02[1]; *see also id.* at ¶ 36.02 (discussing possibility that discovery cutoff deadline may not apply to RFAs in some jurisdictions and that the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters do not consider RFAs to be "discovery" and, "[t]herefore, the Convention's procedural requirements to not apply to [RFAs] directed at a party in a foreign country that is a signatory to the Convention.").

be able to save time and money by serving at least some RFAs early in the discovery process to avoid potentially unnecessary interrogatories, production requests or depositions.[128]

A. Scope of RFAs

A party may serve RFAs to ask the other party to admit "for purposes of the pending action only, the truth of any matters within the scope of FRCP 26(b)(1) [the general scope of discovery] relating to: (A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described documents."[129]

As discussed above in Section III, the scope of discovery is extremely broad.[130] Since the point of RFAs is to establish relevant facts and other information for trial or summary judgment, a party should never have to worry about whether a particular request is beyond the permissible RFA scope. However, care should be taken that they not be "unnecessarily burdensome or duplicative," which could draw an objection.[131]

B. Requesting Admission of the Genuineness of Documents

RFAs can be used to authenticate documents produced by the opposing party or obtained elsewhere.[132] A separate RFA must be asserted for each document sought to be authenticated.[133] A copy of each document in question must accompany the RFA "unless it is, or has been, otherwise furnished or made available for inspection and copying."[134] Unless the documents are very voluminous, it is usually preferable to attach the documents to the RFA. Not only can it prevent any possible ambiguity about which particular documents (or versions of documents) are referenced, but counsel will likely find that it saves time and effort to have the RFAs and documents together in one place when preparing dispositive motions or trial. Local rules may affect the form, number or other aspects of RFAs.[135]

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[128] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 36.02[1] (3d ed. 1999).

[129] FED. R. CIV. P. 36(a).

[130] FED. R. CIV. P. 26(b)(1).

[131] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 36.10[6] (3d ed. 1999).

[132] While RFAs are a useful tool in federal court for overcoming objections made at trial to the authenticity of documents, they may not be necessary in some jurisdictions. For example, Washington state courts have procedures in place that allow for the wholesale admission of documents at trial, provided the party seeking admission provides advance notice of its intent to submit the documents, and the opposing party interposes no objections. *See* WASH. R. EVID. 904.

[133] FED. R. CIV. P. 36(a)(2)("Each matter must be separately stated.").

[134] FED. R. CIV. P. 36 (a)(2).

[135] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶¶ 36.10[1], [5], 36.11[2] (3d ed. 1999).

C. Time to Respond

Responses and objections to RFAs must be signed by the responding party's attorney or pro se party and are due within thirty days of service.[136] "A shorter or longer time for responding may be stipulated under [FRCP] 29[137] or be ordered by the court."[138]

D. Consequences of Not Timely Responding (Note: They can be Dire)

If a party does not timely respond or object in writing to an RFA, it "is admitted."[139] *See* the "Effect of an Admission" discussion in Section VI(H) below.

E. How to Respond

A responding party cannot evade an RFA by simply stating that it does not know the answer because:

> The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.[140]

A denial must be narrowly tailored to the request, and a party cannot simply deny an RFA if it is partially true because:

> If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest.

This portion of the Rule highlights the importance of avoiding any complicated or potentially compound RFAs.[141] If the jurisdiction does not limit the number of RFAs that a party may propound, each RFA should be as short and simple as possible and ask only one very simple question. In other words, figure out what you need to know and then break your questions down to the smallest building blocks possible. The cleanest answers are generally the most useful, and responses to direct and simple questions are harder for the respondent to obfuscate.

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[136] FED. R. CIV. P. 36(a)(3).

[137] FED. R. CIV. P. 29 provides , among other things, that parties may stipulate that "procedures governing or limiting discovery may be modified – but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial."

[138] FED. R. CIV. P. 36(a)(3).

[139] *Id.*

[140] FED. R. CIV. P. 36(a)(4).

[141] *See* discussion in 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 36.10[6] (3d ed. 1999).

It is permissible to object to RFAs if, for example, they seek privileged information.[142] In an appropriate case, a protective order may also be sought.[143] For a discussion of protective orders, please see Section D(5) below.

F. Sufficiency of Responses and Objections to RFAs

"The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request represents a genuine issue for trial."[144] If the requesting party wants to challenge the sufficiency of any answer or the appropriateness of any objection to an RFA, that "party may move to determine the sufficiency of an answer or objection."[145] When considering a motion under this provision:

> Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served.[146]

Under certain circumstances, the court may also award attorney's fees and other expenses "incurred in making the motion."[147] No motion is necessary, however, to deem unanswered RFAs to be conclusively established.[148]

G. Withdrawing or Amending a Response

An RFA admission may be withdrawn or amended only with court permission.[149] A "court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits."[150] However, the court may do so "after a final pretrial conference only to prevent manifest injustice."[151]

H. Effect of an Admission

If an admission is not amended or withdrawn with court permission, the "matter admitted . . . is conclusively established" for the case in which the RFA was propounded but "is not an admission for any other purpose and cannot be used against the party in any other

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[142] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 36.11[5][c] (3d ed. 1999).

[143] *Id.* at ¶¶ 36.11[4], [5][e].

[144] FED. R. CIV. P. 36(a)(5).

[145] *Id.*

[146] *Id.* The court may also "defer its final decision until a pretrial conference or a specified time before trial." *Id.*

[147] *Id.*; FED. R. CIV. P. 37(a).

[148] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 36.03[1] (3d ed. 1999).

[149] FED. R. CIV. P. 35(a)(6).

[150] *Id.*

[151] *Id.*; FED. R. CIV. P. 16(e).

proceeding."[152] "Consequently, admissions made in accordance with [FRCP] 36 have no collateral estoppel effect. In multiparty litigation, therefore requests for admission may have to be addressed to each party in each related action."[153] Admissions also cannot bind any co-party.[154] A party may use the opposing party's RFA responses as undisputed facts in support of summary judgment[155] or at trial, and those admissions are not considered hearsay under the Federal Rules of Evidence.[156] When admitted, RFAs constitute binding admissions but are not just useful for preventing the opposing party from changing its story at trial. Indeed, the facts admitted need not be proven at all at trial – they are deemed already proven. Accordingly, "[a]n admission that has not been amended or withdrawn cannot be rebutted by contrary testimony; nor can it be ignored by the court even if the party against whom it is to operate offers evidence that appears to be more credible."[157] The RFA-requesting party, however, is not similarly bound and may introduce contrary evidence at trial if it chooses to do so.[158]

I. Effect of a Denial

If a party denies an RFA, the requesting party may seek to recover its attorneys' fees and costs incurred in proving the matter to be true.[159] The court must award the requested fees and costs unless (a) the request was objectionable; (b) the admission sought was of no substantial importance; (c) the party failing to admit had a reasonable ground to believe that it would prevail; or (d) there was other good reason for the failure to admit.[160]

J. Common RFA Topics in Franchise Disputes

Specific RFAs will, of course, vary significantly by case. However, they are commonly used in franchise cases to, among other things:

- Authenticate franchise agreements and correspondence, including e-mails. Establishing the authenticity of documents at trial can be a particularly vexing problem in franchise disputes, which often cross many state lines. As is often the case, an out-of-state non-party cannot be compelled to testify at trial and, as a result, the authenticity of documents produced by the non-party in response to a document-only subpoena must be established by other means. While a records custodian deposition is the simplest method for establishing the authenticity and admissibility of a document for trial, it is often impractical. Absent agreement among the parties, the federal rules limit the

[152] FED. R. CIV. P. 35(a)(6).

[153] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 36.03[3] (3d ed. 1999) (footnotes omitted).

[154] *Id.* at ¶ 36.03[6].

[155] Courts can be wary of granting summary judgment on the basis of facts deemed admitted by default because of a party's failure to timely respond. *See id.* at ¶ 36-03[4].

[156] FED. R. EVID. 801.

[157] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 36.03[5] (3d ed. 1999).

[158] *Id.*

[159] FED. R. CIV. P. 37(c)(2).

[160] *Id.*

number of depositions that may be taken without leave of the Court,[161] making depositions impractical in large disputes. Depositions are also expensive endeavors, particularly if they require counsel to travel. RFAs present an inexpensive alternative to a deposition of the non-party's records custodian. The FRCPs encourage the use of RFAs for the purpose of obtaining admissions regarding the authenticity of documents by providing for a mandatory award of attorneys' fees and costs incurred by the requesting party in proving the genuineness of a document if a request is improperly denied.[162]

- Establish facts to prove contractual default. These requests can be combined with requests authenticating the contract(s) at issue or requesting admission that the contract contains certain provisions for which the admitted facts would establish breach. It is risky, however, simply to ask the party to admit that doing x "breached the contract" because the party will often deny on the basis of a defense asserted. For example, a franchisor could ask a franchisee to admit that a certain amount was billed for royalties and then simply ask the franchisee to admit that this amount was not paid. But asking the franchisee to admit that it did not pay what it owed, or breached the contract by failing to pay could give the franchisee too much potential leeway to deny.

- Establish dates when events took place, or dates that the party first learned certain facts for statute of limitation purposes.

- Establish facts that could defeat or undermine vicarious liability claims based on a franchisee's conduct. For example, a franchisor could ask a customer-plaintiff to admit that there was a sign or plaque stating that the franchised unit was independently owned and operated.

- Establish facts to prove a franchisor's fraud or the improper provision or omission of information under state or federal franchise laws. For example, in a case involving improper financial performance representations, a franchisee may want to ask the franchisor to confirm that no specific compliance training program is in place to train sales personnel or that the salesperson at issue did not receive any particular training.

VII. OBTAINING INFORMATON FROM NON-PARTIES AND OTHER OVERLOOKED SOURCES OF INFORMATION

In addition to obtaining information from parties, counsel should consider whether any non-parties may have information relevant to the dispute. Moreover, there may be additional sources of information that may prove useful in litigating a franchise dispute. Such sources include the internet and a party's current and past website as well as social media sites on which an individual or business may have posted comments or pictures. Court dockets may also provide relevant information about parties and witnesses. For franchisee counsel in particular, state franchise regulators may possess and be willing to disclose valuable information about a franchisor and the system. Similarly, former and current franchisees in a franchise system may have useful information. Given the nature of the franchise relationship, it is useful for franchise counsel to think "outside the box" when seeking information relevant to a

[161] FED. R. CIV. P. 30(a)(2)(A)(i).

[162] FED. R. CIV. P. 37(c)(2).

particular case. In order to obtain such information, counsel may need to serve a subpoena or file a Freedom of Information Act ("FOIA") request, depending on the non-party's identity.

A. Subpoenas

Although a party to litigation is required to provide discovery to the other side, a third party cannot typically be compelled to do so unless it receives a validly issued and served subpoena. A subpoena can be used to compel appearance at a deposition or the production of various material things and ESI.[163] A subpoena ad testificandum compels the attendance of a witness; a subpoena duces tecum calls for the production of documents and things. In the federal courts, FRCP 45 regulates both kinds of subpoenas.[164] In state courts, it can be difficult to compel out of state witnesses to appear for a deposition or to produce documents, and counsel are advised to consult local statutes and court rules in both the jurisdiction where the lawsuit is pending and the jurisdiction where the witnesses or documents are located.

Historically, the FRCP required that a subpoena issue out of the federal district court located where the witness is located or where the production is to be made,[165] although the rules authorize a party's attorney to issue the subpoena under his or her own signature.[166] Commencing on December 1, 2013, however, subpoenas must issue from the court where the action is pending.[167] The subpoena must also be accompanied by statutory witness fees and mileage fees (usually paid by check made out to the deponent).[168] The subpoena must be personally served on the non-party.[169] Prior to service, notice must be given to each of the other parties to the litigation.[170] This provides the other parties the opportunity to object to the subpoena, and if necessary, the opportunity to move to quash it.[171] When subpoenaing

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[163] FED. R. CIV. P. 45, *amended effective December 1, 2013 by* 2013 US ORDER 0022 (C.O. 0022); 9A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2452 (3d ed. 2013). The amendments to Rule 45 substantially alter the rules regarding the enforcement of subpoenas. Where applicable, the authors have noted important changes that will take effect on December 1.

[164] 9A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2451 (3d ed. 2013).

[165] FED. R. CIV. P. 45(a)(2)(C). The requirement that the subpoena be issued out of the U.S. District Court where the documents are to be produced or where the witness is located arose because it has historically been the case that the only court with jurisdiction to compel compliance is the court where the discovery is to be made. FED. R. CIV. P. 45(e). But beginning on December 1, 2013, the rules for enforcing subpoenas will change so that the subpoena is enforceable by the court where compliance is required, even if the subpoena is issued out of a different jurisdiction. FED. R. CIV. P. 45(d), *amended effective December 1, 2013 by* 2013 US ORDER 0022 (C.O. 0022). More importantly, the rules now permit any attorney authorized to practice before the issuing court to file papers and appear in the enforcing court as an officer of the issuing court. FED. R. CIV. P. 45(f), *amended effective December 1, 2013 by* 2013 US ORDER 0022 (C.O. 0022).

[166] FED. R. CIV. P. 45(a)(2)(B); FED. R. CIV. P. 45(a)(3)(B).

[167] FED. R. CIV. P. 45(d), *amended effective December 1, 2013 by* 2013 US ORDER 0022 (C.O. 0022).

[168] FED. R. CIV. P. 45(b)(1); 28 U.S.C. § 1821 (2013).

[169] FED. R. CIV. P. 45(b)(1).

[170] *Id.*

[171] FED. R. CIV. P. 45 (1993 advisory committee's notes).

documents from non-parties, counsel should provide copes to the other parties in the litigation. Otherwise, counsel may be prevented from introducing the documents into evidence.[172]

B. FOIA Requests

FOIA requests can be used to obtain information from United States government agencies.[173] In franchise disputes, however, litigants (and in particular franchisees), may need to gain access to state records, which can be particularly important in disputes arising in states that have agencies regulating the sale of franchises through disclosure or registration requirements. For these records, many states have statutes similar to the federal FOIA statute that permit the public to obtain information maintained by state government agencies. For example, the Michigan FOIA gives "a person the right to inspect, copy or receive copies of public records of a 'public body,'" which generally includes the state and every other governmental agency in Michigan.[174] Although Michigan's FOIA provides for limited exemptions (governor, lieutenant governor and the judiciary), most governmental or quasi-governmental agencies will likely be subject to the statute.[175] Similarly, California law provides that except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request, shall make records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable.[176]

However, not all states provide the public with access to government records. For example, access to Virginia public records is limited to Virginia citizens.[177] This limitation on access was recently upheld by the United States Supreme Court.[178] Thus, depending on the state and requesting party, access to public records may not be available pursuant to a FOIA request.

C. Websites, Past and Present

A party's website may provide information useful in a dispute. Not only can the pages in a current website contain valuable information, but previous websites published by the party may be useful as well. One way to locate previously published web pages is to use "The Wayback Machine" which is currently available at no charge on Archive.org.[179] After entering Archive.org in the address bar, there is a space provided with http:// where one can insert the webpage

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[172] FED. R. CIV. P. 26(e).

[173] 5 U.S.C. § 552 (2009).

[174] MICH. COMP. LAWS ANN. § 15.231, *et seq.* (West 2013).

[175] 2 THEODORE E. HUGHES, MICHIGAN LITIGATION FORMS & ANALYSIS § 35:1 (2011).

[176] CAL. GOV'T CODE § 6253 (West 2002).

[177] VA. CODE ANN. § 2.2-3700 (West 2012).

[178] *McBurney v. Young*, 133 S. Ct. 1709, 1712 (2013). In *McBurney,* the Supreme Court upheld the statute and rejected the claim that the Virginia statute violates the Privileges and Immunities Clause of the United States Constitution by denying non-citizens of the state the right to access public information on equal terms with Commonwealth citizens. *Id.* at 1715-16. The Court held that the right to access public information is not a "fundamental" privilege or immunity of citizenship, and further determined that the Virginia FOIA does not violate the dormant Commerce Clause because it neither prohibits access to an interstate market nor imposes burdensome regulation on that market. *Id.* at 1720.

[179] http://archive.org/web/web.php.

address. Thereafter, click on the "Take Me Back" button and the search should reveal archived versions of that web page as it changed over time. This can be helpful for a franchisee seeking to prove that it received improper financial performance representations where the same information was published on the franchisor's website. Similarly, franchisors may find valuable information about the franchisee's historical practices that can be used to contradict the franchisee's subsequent allegations of fraud, often by rebutting the franchisee's alleged reliance on the franchisor, or lack of knowledge about particular statements.

When improper web material is called to the opposing party's attention, such as when the lawsuit is filed or a demand or cease and desist letter is sent, that party often removes or modifies the offending content. It is therefore advisable to have a non-lawyer individual, who will be able to authenticate the material at a deposition or trial, create and capture a screen shot or create an electronic copy of the entire website in its then-existing form. This procedure should make it easier to prove the offending activities rather than simply relying on discovery responses from the opposing party.

D. Social Media

Social media are the "interactive web sites that connect users based on common interests and that allow subscribers to personalize individual web sites."[180] Examples include Facebook, Twitter, MySpace, Google+, YouTube and the like. Such web sites permit individuals to create public or semi-public profiles within a bounded system; articulate a list of other users whom they share a connection and view those connections and those made by others on the site.[181] Generally, there are three sources of information contained on social media sites: the user; those with access to the user's page and the site owner, *e.g.*, Facebook.[182] Postings on social media can be a valuable source of information. Indeed, many people now use social media in the same way they previously used e-mail without regard to the fact that their postings are often publicly available.[183] Counsel should consider locating social media sites which may contain statements posted by or about a party or a witness. Such postings, which may evidence a witness's activities, relationships, emotions or thoughts, are "not hidden in some undisclosed location or locked securely in some personal safe . . . rather this evidence is either publicly posted for the world to see or 'privately' posted for the witness's closest . . . friends."[184] Either way, such information may be discoverable and prove useful as evidence at trial.[185]

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[180] Kristen Mix, *Discovery of Social Media*, 5 FED. CTS. L. REV. 119, 120 (2011) (quoting John S. Wilson, *Myspace, Your Space or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1204 (2007)).

[181] *Id.* at 120.

[182] *Id.* at 121.

[183] Sashe D. Dimitroff, *Social Media and Discovery in The Role of Technology in Evidence Collection – Leading Lawyers on Preserving Electronic Evidence, Developing New Collection Strategies, and Understanding the Implications of Social Media*, *Aspatore,* July 2011, *available at,* 2011 WL 2941026 at *4.

[184] Lawrence Morales II, *Social Media Evidence: "What You Post or Tweet Can and Will Be Used Against You in A Court of Law",* 60 THE ADVOC. (TEXAS) 32 (2012).

[185] *Id.*

Discovery of social media creates additional challenges for producing parties, requesting parties and potentially nonparties.[186] Some social media communications will likely be stored on servers maintained by electronic service providers rather than by a party. One might think that the proper process would be to serve a subpoena on the service provider such as AOL or Facebook.[187] However, several courts have determined that service providers are precluded by the Electronic Communications Privacy Act from divulging the private communications of their subscribers.[188] Therefore, such an approach may not be successful where the communications at issue are deemed private. In that event, if counsel can demonstrate that those communications and postings are within the party's control (albeit not within the party's possession), counsel may be able to require that party to consent to the provision of that information under FRCP 34.[189]

E. Court Dockets

Court dockets may also contain useful information. In the federal courts, documents, including pleadings, affidavits, letters to the court, motions, etc. are filed electronically through the Public Access to Court Electronic Records service ("PACER"). A search for the name of the franchisor on PACER may reveal other litigation in which the franchisor was or is a party. Filed documents in those actions may involve similar claims or defenses as the matters currently in dispute, and affidavits or other statements made under oath in those actions may be useful to counsel in the case at bar. Further, PACER searches may reveal the existence of litigation not included (or not properly included) in the franchisor's disclosure document. Court documents may also prove useful when challenging a witness' credibility. Bankruptcy filing information may also be useful in precluding a plaintiff from pursuing a claim not disclosed in bankruptcy.[190]

State courts vary widely in the degree to which they have adopted electronic filing (and thus a usable search functionality). However where available, counsel should consider reviewing those databases for relevant information. Once the existence of a state court case is discovered, private document retrieval services should be able to obtain at least relatively recent

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[186] The Honorable Shira A. Scheindlin & Jonathan Redgrave, *Discovery of Electronically Stored Information*, 3 BUS. & COM. LITIG. FED. CTS. § 25:65 (2012).

[187] Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 26 (2012).

[188] *See, e.g., Viacom Int'l Inc. v. Youtube, Inc.,* 253 F.R.D. 256, 264 (S.D.N.Y. 2008)*; In Re Subpoena Duces Tecum to AOL, LLC,* 550 F.Supp.2d 606, 609 (E.D.Va 2008).

[189] Gensler, *supra* note 187 at 27.

[190] "In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." *Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778, 783 (9th Cir. 2001); *In re Coastal Plains,* 179 F.3d 197, 208 (5th Cir. 1999); *Payless Wholesale Distrib. Inc. v. Alberto Culver (P.R.) Inc.,* 989 F.2d 570, 572 (1st Cir. 1993); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3rd Cir. 1988); *see also Parker v. Wendy's Int'l, Inc.,* 365 F.3d 1268, 11th Cir. 2004) (holding that since the property of the debtor becomes the property of the bankruptcy estate at the time of filing, only the trustee has standing to pursue claims of the estate, and the debtor has no standing to pursue claims arising prior to the bankruptcy filing, even if the claims are not disclosed to the trustee); *Linklater v. Johnson*, 53 Wash. App. 567, 570, 768 P.2d 1020 (1989) ("When the trustee is unaware of an accrued right of action and, as a consequence, it is neither abandoned nor administered in the bankruptcy nor the subject of a court order, it remains property of the estate.... Thus, a discharged debtor lacks legal capacity to subsequently assert title to and pursue an unscheduled claim simply because the trustee, without knowledge of the claim, took no action with respect to it.")*; In re JZ LLC*, 371 B.R. 412, 418 (B.A.P. 9th Cir. 2007).

court filings that may not be available online, as long as those documents were not filed under seal.

F. Regulators

State franchise regulators can sometimes prove to be a terrific resource for information in franchise litigation. For example, if a franchisee is asserting a claim based on a franchisor's failure to provide proper disclosure in a registration state, franchisee counsel may want to see whether the franchisor was properly registered at the time of sale. Counsel may also want to review the franchisor's subsequent disclosure documents to determine whether certain information should have been included in the FDD provided to the client. At a minimum, contacting the regulator may provide counsel with the name of the attorney that filed for registration on behalf of the franchisor. While obtaining some of this information may require use of a state-equivalent FOIA request, frequently, counsel can obtain this information simply by searching the state's website. For example, California and Minnesota both permit the public to electronically obtain without charge, copies of franchisors' FDDs (both those that are current as well as previously registered FDDs.)[191] Connecticut allows the public to view a list of registered business opportunities as well as registration dates.[192] Virginia and Wisconsin both provide viewers with the opportunity to search by name for franchisors to determine if they are registered in those states.[193] For information that is not easily accessible, counsel may want to contact the state regulators directly as some will provide certain information via telephone or in response to a written request. Most franchisors' FDDs may also be purchased for a fee from third party service providers.

G. Other Franchisees

Another possible source of relevant information, particularly for franchisee counsel, may be former and current franchisees in the system. These franchisees likely have information about the system as well as the franchisor's business practices. Moreover, other franchisees may have witnessed some of the events which gave rise to the party's claims or defenses. While some franchisees may provide information voluntarily, others may require a subpoena.

VIII. COMPELLING AND OBJECTING TO OR OTHERWISE PREVENTING DISCLOSURE

There are many legitimate reasons for opposing or otherwise preventing discovery of certain information. Unfortunately, "I don't want to produce that document or that person for deposition" is not good enough. It is also very important that timely, written objections be asserted in the proper form because in most cases, even the strongest objections may be waived through inaction.

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[191] California Department of Corporations, *California Electronic Access to Securities Information,* http://www.corp.ca.gov/CalEASI/caleasi.asp (last visited May 23, 2013); Minnesota Department of Commerce, *Franchises,* http://mn.gov/commerce/topics/securities/franchises (last visited May 23, 2013).

[192] Connecticut Department of Banking, *Registered Business Opportunities,* http://www.ct.gov/dob/cwp/view.asp?a=2230&q=297790&dobNAV_GID=1662 (last visited May 23, 2013).

[193] Commonwealth of Virginia - State Corporation Commission, *Division of Securities & Retail Franchising*, http://www.scc.virginia.gov/srf/bus/franch_regis.aspx (last visited May 23, 2013); Wisconsin Department of Financial Institutions, *Franchising,* http://www.wdfi.org/fi/securities/franchise (last visited May 23, 2013).

A. Grounds for Opposing Discovery Generally

Discovery fights can be some of the most time consuming skirmishes and battles in the war of litigation. Some disputes are genuine and well-founded. Others may be manufactured for strategic reasons or to increase the burden and expense on the other party. These manufactured disputes are, of course, improper and unethical.[194] As with any discovery issue, it is important to consult all applicable local rules. As a reminder, this paper focuses on the Federal Rules of Civil Procedure, which may be quite different from the rules that may apply in a state court lawsuit.

1. Scope of Discovery

It can be difficult to prevail on an objection to discovery that the material sought is irrelevant or "beyond the scope of discovery" because the permissible scope of discovery is so broad.[195] Unfortunately, it can be difficult to establish that specific requested information is not "reasonably calculated" to lead to the discovery of admissible evidence without disclosing the evidence sought. Parties are required to produce documents within their "possession, custody, or control."[196] As discussed in detail above in part II(3), disputes can arise as to whether documents located off-site or in the possession of a non-party, such as a lawyer, accountant, consultant, subsidiary or affiliate, are in the responding party's "possession, custody, or control."[197]

2. Undue Burden

The discovery process is, by its very nature, often burdensome, expensive and tedious and almost universally detested by in-house and outside lawyers alike. But, it is also useful and necessary, and the information learned helps the parties prepare for trial and often facilitates

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[194] *See, e.g.*, *Curtis T. Bedwell & Sons, Inc. v. Int'l Fid. Ins. Co.*, 843 F.2d 683, 690 (3d Cir. 1988) (affirming default judgment as a sanction where court found "pattern of abuse" and bad-faith delays); *SCM Societa Commerciale S.P.A. v. Indus. & Commercial Research Corp.*, 72 F.R.D. 110, 113 (N.D. Tex. 1976) (finding unnecessary discovery as a way to increase the expense of litigation "indefensible"); *LM Ins. Corp. v. ACEO, Inc.*, 276 F.R.D. 592, 593 (N.D. Ill. 2011) (granting fees for motion to compel, stating that counsel's conduct was "unacceptable," and that fee shifting was necessary to "curtail the ability of litigants…to heap detriments on adversaries…without regard to the merits of the claims.").

[195] FED. R. CIV. P. 26(b)(1). *But see* possible revisions, discussed in note 3, *supra.*.,

[196] FED. R. CIV. P. 34(a)(1).

[197] For documents outside of the litigating party's possession, the key question is whether it has "control" of those documents within the meaning of Rule 34. Courts have held that "control" exists when the party "has the right, authority, or practical ability to obtain the documents from a non-party to the action."*In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007); *see also Steele Software Sys., Corp. v. DataQuick Info. Sys.*, Inc., 237 F.R.D. 561, 564 (D. Md. 2006) ("It is well established that a district court may order the production of documents in the possession of a related nonparty entity under Rule 34(a) if those documents are under the custody or control of a party to the litigation."). Courts frequently undergo the "control" analysis in cases where the non-party is a corporate affiliate. For example, in *Steele Software*, the District of Maryland stated three additional factors in determining whether the party-company has control in this context. *Steele Software*, 237 F.R.D. at 564. There, the court considered (1) the corporate structures of the party and non-party, (2) the nonparty's connection to the transaction at issue in the litigation, and (3) the degree that the nonparty will benefit from the outcome of the case. *Id.* Where companies are found to be alter egos of one another, or share management, a court will likely find sufficient evidence of control to require production. *See Uniden Am. Corp. v. Ericsson Inc.,* 181 F.R.D. 302, 306 (M.D.N.C. 1998) (finding the litigating party had control where it shared management with the non-litigating party).

settlement. Because of its nature, a discovery request is not objectionable simply because it is "burdensome." It must be "unduly" so.

FRCP 26(b)(2) sets forth only some of the limitations on the frequency and extent of discovery. Courts may, for example, further limit the number depositions or interrogatories by order or, in some cases, local rule.[198] A party also "need not provide discovery of [ESI] from sources . . . not reasonably accessible because of undue burden or cost."[199] Courts may also "limit the frequency or extent of discovery otherwise allowed" if it is: (i) unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;" (ii) "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action;" or (iii) "the burden or expense . . . outweighs its likely benefit" considering various listed factors, including the "parties' resources," the "importance of the discovery," and "the amount in controversy."[200]

3. Privilege and Work Product

Some of the most common litigation objections involve assertions of the attorney-client privilege and the attorney work product doctrine. The FRCPs also provide explicit protection for materials "prepared in anticipation of litigation or for trial."[201] There are many good resources discussing the parameters of these protections generally.[202] Encompassed in protected trial preparation materials are information about, and communications with, certain retained experts, as well as draft reports of testifying experts.[203]

Medium-sized and large franchisors often have a general counsel or, in some cases, large legal departments. The franchisor is, of course, its in-house counsel's "client." Questions often arise as to when the attorney-client privilege attaches for internal franchisor communications involving in-house counsel. The answer generally depends on whether the in-house lawyer is wearing his or her "business hat" or "legal hat." That is because the "attorney-client privilege applies only where legal advice, not business advice, is sought and given."[204] Generally, the test is

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[198] FED. R. CIV. P. 26(b)(2)(A).

[199] FED. R. CIV. P. 26(b)(2)(B). Rule 26(b)(2)(B) also sets forth the standards applicable to motions to compel or for protective order relating to objections asserted on this ground.

[200] FED. R. CIV. P. 26(b)(2)C).

[201] FED. R. CIV. P. 26(b)(3).

[202] *See, e.g.*, PAUL RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES (ed. 2012); EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE (5th ed. 2007).

[203] FED. R. CIV. P. 26(b)(4).

[204] *Urban Box Office Network, Inc. v. Interfase Managers, L.P.,* No. 01 Civ. 8854(LTS)(THK), 2006 WL 1004472, at *4 (S.D.N.Y. Apr. 18, 2006); *see also United States v. Ruehle,* 583 F.3d 600, 608 n.8 (9th Cir. 2009); *Christofferson v. United States,* 78 Fed. Cl. 810, 814 (2007); *Burden-Meeks v. Welch,* 319 F.3d 897, 899 (7th Cir. 2003); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984); *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962) (investment advice given by an attorney is not privileged); *Anaya v. CBS Broad., Inc.*, 251 F.R.D. 645, 650 (D.N.M. 2007); *Neuder v. Battelle Pac. Nw. Nat. Lab.*, 194 F.R.D. 289, 293 (D.D.C. 2000); *Softview Computer Prods. Corp. v. Haworth, Inc.*, No. 97 Civ. 8815 KMWHBP, 2000 WL 351411, at *18 (S.D.N.Y. Mar. 31, 2000); *Stratagem Dev. Corp. v. Heron Int'l, N.V.*, 153 F.R.D. 535, 543 (S.D.N.Y. 1994) (where advice is primarily legal, as opposed to business in nature, the privilege attaches); *United States v. IBM Corp.*, 66 F.R.D. 206, 210 (S.D.N.Y. 1974) (same); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 26.49[4][a] (3d ed. 1999) ("Corporate in-house counsel are treated in the same manner as counsel retained from the outside. However,

whether a document was created primarily, or a communication took place, for the purpose of seeking legal advice.[205] "Where there are several possible interpretations of a document based upon the surrounding circumstance, the party asserting the privilege must produce evidence sufficient to satisfy a court that legal, not business, advice is being sought."[206] Where an attorney is called upon to give solely business advice based on an expertise that is distinct from his legal calling, his communications with his client are plainly not protected. Similarly, if the lawyer is serving as a business representative of his client, those functions that he performs purely in that capacity – *such as negotiation of the provisions of a business contract or relationship* – are not the source of a privilege."[207] One might compare this approach to the view taken by the European Court of Justice, which declined to extend legal professional privilege to in-house communications on the basis that in-house attorneys lack sufficient independence from their employers to give legal advice that is uninformed by commercial strategies.[208]

It is also important to know the parties' rights and obligations if, in a gut-wrenching moment, you discover that privileged or otherwise protected documents have been produced, either by your client or opponent. These rights and obligations can vary significantly.[209] For example, in some jurisdictions, privilege may be waived if documents are inadvertently produced.[210] Under this line of cases, the inadvertency of the disclosure is irrelevant. Instead, the relevant question asks whether the disclosure was voluntary or made without opportunity to claim the privilege.[211] Other jurisdictions are kinder, gentler and more forgiving, applying the "no waiver" rule. Under this theory, absent intent or gross negligence, an inadvertent disclosure never amounts to waiver.[212] Most jurisdictions have adopted a middle ground approach, allowing a party to maintain the privilege by timely requesting return of the inadvertently disclosed documents and by imposing on the receiving party an obligation to inform the other side when documents that appear to be privileged are produced.[213] This middle ground is embraced by the Federal Rules

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communications made by and to a corporate in-house counsel with respect to business matters, management decisions, or business advice- and neither soliciting nor predominantly delivering legal advice- are not protected by the privilege.").

[205] *Urban Box Office Network, Inc.* No. 01 Civ. 8854(LTS)(THK), 2006 WL 1004472, at *5.

[206] *Id.*

[207] *Note Funding Corp. v. Bobian Inv. Co.*, No. 93 Civ. 7427(DAB), 1995 WL 662402, at *2-3 (S.D.N.Y. Nov. 9, 1995) (emphasis added).

[208] Case C-550/07, *P. Akzo Nobel Chemicals Ltd. v. European Comm'n.*, 2010 E.C.R. II-03523.

[209] For a general discussion of the different approaches to inadvertent disclosure under state law, *see* 51 A.L.R. 5th 603 (collecting cases).

[210] *Porter v. Bell Helicopter Textron*, Nos. 93-0619, 1995 WL 550976 (E.D. La. Sept. 13, 1995); *Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769 (Tex. Civ. App. 1985) (holding documents waived when turned over voluntarily, albeit inadvertently); *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (finding the privilege is lost even if the disclosure is inadvertent).

[211] *Gulf Oil Corp.*, 695 S.W.2d at 773.

[212] *See Trilogy Commc'ns, Inc. v. Excom Realty, Inc.*, 279 N.J. Super. 442, 445 (Law Div. 1994); *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 451 (S.D.N.Y. 1995); *Ciba-Geigy Corp. v. Sandoz Ltd.,* 916 F. Supp. 404, 410 (D.N.J. 1995).

[213] *E.g.*, *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 291 (D. Mass. 2000) (applying the middle approach). The *Amgen* court explained the critical factors in the analysis include (1) the reasonableness of the

of Evidence, which codifies the inadvertence exception in Rule 502.[214] Parties may also enter into "clawback" agreements that allow them to recover inadvertently produced documents and maintain privilege. Under these agreements, the litigants agree to a set of procedures that must be followed in the event of inadvertent disclosure. The parties might ask the court to incorporate the agreement into a Protective Order.[215] Under Rule 502, this would have the effect of ensuring that, not only would there be no waiver in the current action, but also that the privilege is intact for any other federal or state proceeding.[216] In some jurisdictions, such as the District of Connecticut, judges will mandate the procedures to be followed in the event of inadvertent disclosure by way of standing order.[217] Clawback agreements may also be referenced or incorporated into the parties' report from their FRCP 26(f) planning meeting.[218]

Most jurisdictions, including all federal courts, require the identification of documents withheld on the basis of privilege,[219] and local rules may provide more detailed privilege log requirements.[220]

4. Confidentiality and Other Possible Protections

Certain types of material beyond privileged communications or trial preparation material may be entitled to protection from discovery. For example, a party may be able to prevent production of its trade secrets, research and development information and other confidential business information, at least if the information is not directly at issue in the lawsuit.[221]

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precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice. *Id.*

[214] FED. R. EVID. 502(b) provides: (b) Inadvertent disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error.

[215] FED.R. EVID. 502(d).

[216] *Id.; see also Zivali v. AT&T Mobility LLC*, No. 08 Civ. 10310(JSR), 2010 WL 5065963 (S.D.N.Y. Dec. 6, 2010) (the "claw back" provision of a protective order rendered unnecessary any inquiry into the "reasonable steps" the disclosing party did to rectify the error).

[217] *See* the Standing Protective Order employed by Judge Janet Hall in the District of Connecticut, *available at* http://www.ctd.uscourts.gov/content/janet-c-hall (last visited on May 20, 2013) (requiring receiving party to notify disclosing party of the mistake within three business days). The Supreme Court of Illinois also recently approved an amendment to that state's court rules that would specifically require the receiving party to "return, sequester or destroy" inadvertently disclosed information upon notification. ILL. SUP. CT. R. 201.

[218] *See, e.g.,* United States District Court, Civil Appendix, Form 26(f). *See also* District of Maryland Form Stipulated Order Regarding Confidentiality of Discovery Material and Inadvertent Disclosure of Privileged Material pursuant to Local Rule 104.13; W.D. PA., R. 16.1(d).

[219] FED. R. CIV. P. 26(b)(5).

[220] *See, e.g.,* D. CONN. R. 26(e); N.D. OKLA., R. 26.4; FLA. R. CIV. P. 1.280(b)(6).

[221] FED. R. CIV. P. 26(c)(1)(g) (stating that the court may issue a protective order requiring that "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.").

While virtually all jurisdictions recognize the attorney-client privilege in some form, some jurisdictions expressly recognize additional privileges such as the accountant privilege[222] and the marital privilege, which covers confidences shared with the spouse during the marriage.[223] Under the *Kovel* doctrine, which recognizes that attorneys may need outside assistance to understand the nature of some legal problems, privilege might also extend to other non-parties.[224] Certain consultants, financial advisors, bankers and appraisers can fall into this category, if a court finds them necessary to facilitate the attorney's ability to give legal advice.[225] There are also, of course, lesser used constitutional privileges, such as the 5th Amendment right against self-incrimination.[226]

In house investigations and intra-organizational communications present unique challenges for application of the various privilege doctrines. While it is generally accepted that interviews with current employees at the direction of counsel fall within the privilege,[227] courts have struggled to define the full reach of the protection in the context of large-scale investigations. To remain within the privilege, the interviewees must be employees or "the functional equivalent" of an employee. Thus interviews with former or part-time employees may not be covered.[228] It is important to note, however, that not all factual investigations implicate the privilege doctrines, as "legal advice or assistance must be the purpose behind the investigation" for attorney-client protection to attach.[229] With respect to lawyers hired to investigate insurance claims, for example, many courts have held the services provided do not constitute legal advice because they are prepared in the regular course of business.[230] Courts vary across jurisdictions with

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[222] Some of these jurisdictions include Florida, Pennsylvania, and Missouri. *See* FLA. STAT. § 90.5055 (2013); 63 PA. CONS. STAT. § 9.11a (2013); MO. REV. STAT. § 326.322 (2013).

[223] Various jurisdictions that recognize the marital privilege include Oregon, Massachusetts, and Kansas. *See* OR. REV. STAT. § 40.255 (2013); MASS. GUIDE EVID. § 504(b)(1) (2013); KAN. STAT. ANN. § 60-428 (2013).

[224] *United States v. Kovel,* 296 F.2d 918 (2d Cir. 1961).

[225] *Farzan v. Wells Fargo Bank*, No. 12 Civ. 1217(RJS)(JLC), 2012 WL 6763570 (S.D.N.Y. Dec. 28, 2012) (shielding investigative consultant from deposition under the work-product doctrine); *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000) (investment banker's involvement otherwise privileged communications did not cause a waiver); *Steele v. First Nat. Bank of Wichita*, No. 90-1592-B, 1992 WL 123818 (D. Kan. May 26, 1992) (presence of a third-party appraiser at certain meetings did not break the privilege).

[226] The Fifth Amendment generally does not apply to protect against the disclosure of documents, because it only extends a privilege against self-incrimination to communications that are testimonial in character. *United States v. Hubbell,* 530 U.S. 27, 34-36 (2000). The Fifth Amendment also does not provide a blanket privilege against appearing to testify, and instead must generally be invoked in response to a specific question. *See, e.g., United States v. Pierce,* 561 F.2d 735, 741 (9th Cir. 1977). Therefore, unless the witness has a compelling argument that any relevant testimony is subject to the privilege, the witness will have to appear at a deposition to answer specific questions in order to invoke his or her right not to testify.

[227] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[228] *See In re Refco Inc. Sec. Litig.,* No. 08 Civ. 3065(JSR), 2012 WL 678139 (S.D.N.Y. Feb. 28, 2012) (former employee); *In re High-Tech Employee Antitrust Litig.,* No. 11-CV-2509-LHK-PSG, 2013 WL 772668 (N.D. Cal. Feb. 28, 2013) (part-time employee). For further discussion regarding the "functional equivalent" test and its various applications, *see* RICE, *supra* note 202, at §§ 4:18-19.

[229] RICE, *supra* note 202, at § 7:17.

[230] *See, e.g. Flagstar Bank v. Fed. Ins. Co.,* No. 05-CV-70950-DT, 2006 WL 6651780, at *4 (E.D. Mich. Aug. 21, 2006) (stating the attorney served as claims examiner, acting in the regular course of business); *Stephenson Equity Co. v. Credit Bancorp., Ltd.*, 51 Fed. R. Serv. 3d 1429 (S.D.N.Y. 2002) (reports and recommendations prepared by attorneys did not constitute legal advice); *see also* RICE, *supra* note 202, at § 7:19 (collecting cases).

respect to their treatment of incident and self-critical-analysis reports. A few courts have acknowledged a self-critical privilege that is distinct from attorney-client privilege, reasoning that protecting such information from disclosure encourages companies to evaluate safety and quality more frequently.[231] Other courts decline to apply the privilege, maintaining that companies do not prepare these reports with an expectation of confidentiality and most courts have yet to recognize the privilege.[232]

Different jurisdictions may also provide statutory protection from disclosure, such as medical, psychological or personnel records for which a subpoena or discovery request may not be sufficient. There are also, for example, federal protections for certain medical[233] and substance abuse treatment records.[234]

As discussed below, the party seeking to prevent or limit discovery may have to move for a protective order. Alternatively, if sensitive or confidential documents must be produced, it may be possible to protect them from public disclosure when submitted to the court by filing them under seal. However, the requirements for doing so vary by local rule and can be quite stringent given the public nature of civil litigation.

B. Objecting to Document Production and Interrogatories

Specific substantive and formatting requirements vary by local rule and jurisdiction, including whether or not objections themselves or notice of objection must be filed with the court. But, in essence, for interrogatories, "[t]he grounds for objecting . . . must be stated with specificity. Any ground not stated in a timely objection is waived unless the court for good cause, excuses the failure."[235] "An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact," but the court may postpone required compliance until after certain discovery has taken place or some other appropriate time.[236] For document production requests, "[a]n objection to part of a request must specify the part and permit inspection of the rest."[237]

C. Depositions

A party may object to the noting of a deposition if it would result in more than ten depositions being conducted in the lawsuit, because the FRCPs limitthe number of depositions without

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[231] *See Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249 (D.D.C. 1970); *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992).

[232] *See Slaughter v. Nat'l R.R. Passenger Corp.,* No. 10-4203, 2011 WL 780754 (E.D. Pa. Mar. 4, 2011)*; Louisiana Envtl. Action Network, Inc. v. Evans Cooperage Co.*, No. 95-3002, 1997 WL 824310 (E.D. La. Sept. 30, 1997).

[233] 45 C.F.R. §§ 160, 162, & 164 (2012).

[234] *See* 42 U.S.C. § 290dd-2 (2012); 42 C.F.R. Part 2 (2012).

[235] FED. R. CIV. P. 33(b)(4).

[236] FED. R. CIV. P. 33(a)(2).

[237] FED. R. CIV. P. 34(b)(2)(C).

leave of court to ten for each side,[238] There may also be limitations on who may be deposed in a particular case.

During the deposition, objections are more limited than those generally asserted in response to document requests or interrogatories. FRCP 30 provides, among other things, that objections "must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner."[239] Certain objections must be made at the time of the deposition or they will be deemed waived.[240] These objections generally pertain to errors and irregularities that occur throughout the course of the oral examination—those made on grounds "that might be immediately obviated, removed or cured."[241] These include objections to the form of questions or answers, to the manner of the taking of deposition, and to the administration of the oath or affirmation.[242] The parties might also agree to the "usual stipulations," under which all objections, except those as to form, need not be timely made during the deposition and are instead reserved for trial.[243] This would encompass evidentiary objections, such as hearsay and relevance.[244] These stipulations might also include a waiver of the right to read and sign the deposition transcript, as pursuant to FRCP 30(e), the onus is on the deponent to affirmatively request to check the testimony for errors.[245]

It is proper for a defending attorney to instruct a witness not to answer "only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion to limit or terminate the deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party."[246] As a practical matter, however, counsel unfamiliar with the FRCPs, and with the obligation to seek affirmative protection on matters believed to be protected from disclosure, often attempt to instruct their clients not to answer on matters outside the limited protections of the rule. In the event opposing counsel interposes an inappropriate instruction not to answer during the course of a deposition, the deposing party should note the inappropriate instruction on the record, continue with the remainder of the deposition, and seek relief from the court after the deposition is concluded.

Further, counsel defending the deposition should be strategic in making objections. For example, although some questions may be clearly objectionable, if they relate to an unimportant or trivial detail, an objection can fluster the witness, or make the witness believe that the question is actually important. Using objections sparingly will add emphasis to the objections

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[238] FED. R. CIV. P. 30(a)(2). The ten deposition limit may be further limited in number or time by local rule.

[239] FED. R. CIV. P. 30(c)(2).

[240] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 32.45 (3d ed. 1999).

[241] FED. R. CIV. P. 30(d) (1993 advisory committee's note).

[242] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 32.45 (3d ed. 1999).

[243] Toomey & Pressman, *supra* note 4.

[244] *Id.*

[245] *Id.*; FED. R. CIV. P. 30(e).

[246] FED. R. CIV. P. 30(c)(2), 30(d)(3).

that are made, and will put the witness on notice that particular questions are important or should be carefully considered. Sparing use of objections will also give deposing counsel less of an opportunity to correct deficiencies in his or her questioning, and make it more likely that the objection will be sustained at the time of trial when counsel seeks to have the deposition testimony admitted.

If a deposition is noticed for the primary purpose of harassment, a protective order (discussed below) may issue. For example, under the "apex rule," the court may bar a deposition of a high level executive who lacks unique or personal knowledge related to the case.[247] The "apex rule," often relevant in franchise cases, has evolved out of the notion that depositions are a powerful tool that should not be used simply to harass or burden the opposing party. Franchisors can use the "apex rule" to seek to prevent the depositions of their senior officers, at least when those individuals were not directly involved in decisions or communications at issue in the dispute. That is because courts, upon motion, generally refuse to allow a deposition of an opposing party's senior executive unless he or she has unique, personal knowledge that is relevant to the case and not available from other sources.[248] With respect to "apex" depositions, "the courts have agreed that if a party seeks to depose a very senior official of an adversary entity, the adversary may obtain an order vacating the deposition notice if it can demonstrate that the proposed deponent has no personal knowledge of the relevant facts and no unique knowledge of those facts."[249]

Lawyers also sometimes try to circumvent the thirty-day period to respond to document production requests[250] by serving parties with deposition notices accompanied by a requirement that documents be brought to the depositions. This is improper and may give rise to a well-founded protective order, discussed below.[251]

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[247] *In re Mentor Corp.*, No. 4:08-MD-2004(CDL), 2009 WL 4730321, at *1 (M.D. Ga. Dec. 1, 2009).

[248] *See Rodriguez v. SLM Corp.*, 2010 U.S. Dist. LEXIS 29344, at *5 (D. Conn. Mar. 26, 2010) ("[C]ourts frequently restrict efforts to depose senior executives where the party seeking the deposition can obtain the same information through a less intrusive means, or where the party has not established that the executive has some unique knowledge pertinent to the issues in the case.") (internal quotations omitted); *Mehmet v. Paypal, Inc.*, 2009 U.S. Dist. LEXIS 131011, at *4-5 (N.D. Cal. Apr. 4, 2009) (noting that courts appropriately "protect high-level corporate officers from depositions when the officer has no first-hand knowledge of the facts of the case or where the officer's testimony would be repetitive"); *Chick-Fil-A, Inc. v. CFT Dev., LLC*, 2009 U.S. Dist. LEXIS 34496, at *4 (M.D. Fla. Apr. 3, 2009) (party seeking deposition must "show that the executive has unique or superior knowledge of discoverable information"); *Cardenas v. The Prudential Ins. Co. of Am.*, 2003 U.S. Dist. LEXIS 9510, at *2-3 (D. Minn. May 16, 2003) (same).

[249] *See Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 2006 U.S. Dist. LEXIS 87096, at *39 (S.D.N.Y. Nov. 30, 2006); *Simon v. Pronational Ins. Co.*, 2007 U.S. Dist. LEXIS 96320, at *4 (S.D. Fla. Dec. 13, 2007) ("Courts have generally restricted parties from deposing high-ranking officials because (by virtue of their position) they are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection") (internal quotations omitted).

[250] FED. R. CIV. P. 34(b)(2).

[251] *See Joiner v. Choicepoint Servs., Inc.,* Civ. No. 1:05CV321, 2006 WL 2669370, at * 5 (W.D.N.C. Sept. 15, 2006) (finding that the "use of a subpoena duces tecum under Rule 45 to bypass the requirements of Rule 34's guidelines on document disclosure is 'unthinkable.'") (internal citations omitted).

D. Opposing Subpoenas

Subpoenas are rarely, if ever, required for obtaining information from parties. Subpoenaing out-of-state witnesses or documents in state court proceedings can be complicated and require ancillary court proceedings to obtain or a "commission" to do so.[252] If a subpoenaing party does not properly follow the necessary steps, the subpoena may be unenforceable. To determine the rights and responsibility of an out-of-state subpoena recipient in a state court matter, the state court statutes and rules in both jurisdictions should be consulted.

A party issuing a subpoena in a federal court matter:

> must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply.[253]

FRCP 45 permits a document-only subpoena recipient to object by sending a timely letter on any valid ground rather than requiring a motion to quash (discussed below) or other court filing.[254] Letters of objection must be served on the subpoenaing party "before the earlier of the time specified for compliance or 14 days after the subpoena is served."[255] A letter of objection pursuant to FRCP 45 essentially puts the ball in the subpoenaing party's court to compel compliance.[256]

In cases where a letter of objection is insufficient, for example, when a deposition is also required, the subpoena recipient may move the issuing court[257] to quash or modify the subpoena.[258] The grounds for moving to quash are quite broad and include: (i) failure "to allow a reasonable time to comply:" (ii) that the subpoena requires excessive travel; (iii) that the subpoena "requires disclosure of privileged or other protected matter"; (iv) that the subpoena "subjects a person to undue burden"; (v) that the subpoena requires disclosure of "a trade secret or other confidential research, development, or commercial information"; or (vi) that the subpoena essentially requires an (uncompensated) expert opinion.[259] Some of these grounds allow for court discretion, and others do not.[260]

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[252] *See, e.g.,* CONN. GEN. STAT. § 52-148c; Connecticut Practice Book § 13-28; N.J. CT. R. 4:11 (requiring court order to approve deposition subpoena for use of testimony out-of-state).

[253] FED. R. CIV. P. 45(c)(1).

[254] FED. R. CIV. P. 45(c)(2)(B).

[255] *Id.*

[256] FED. R. CIV. P. 45(c)(2)(B)(i).

[257] FED. R. CIV. P. 45(a)(2)(A)-(B). *But see* FED. R. CIV. P. 45(f), *amended effective December 1, 2013 by* 2013 US ORDER 0022 (C.O. 0022).

[258] FED. R. CIV. P. 45(c)(3).

[259] *Id.*

[260] *Id.*

"The issuing court may hold in contempt" a validly served subpoena recipient who "fails without adequate excuse to obey the subpoena."[261] However, "[a] nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place" outside specified geographical limits.[262]

E. Protective Orders and Confidentiality Agreements

FRCP 26(c) provides, among other things, that:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending – or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken.[263]

The movant must present with the motion a certificate of good faith establishing that the parties conferred or attempted to confer but were unable "to resolve the dispute without court action."[264] In ruling on a protective order motion, "[t]he Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[265]

Protective orders can take many forms and may range from an outright order preventing certain discovery, such as an "apex" deposition or responses to requests for admission, to: (i) specifying terms, including time and place, for the disclosure or discovery; (ii) prescribing a discovery method other than the one selected: (iii) "limiting the scope of disclosure;" (iv) requiring deposition sealing; and (v) otherwise modifying or directing the substance or manner of disclosure.[266] Protective orders can also be governed by local rule or a particular court or judge's standing order.

A party may also request that the Court enter a confidentiality order, by agreement or otherwise, that, among other things, may allow parties to designate certain information disclosed in discovery as "confidential" and limit disclosure of those designated documents to particular individuals. The form of such orders may be limited by local rule or standing order.[267] Some courts are reluctant to enter some confidentiality stipulations as orders and prefer parties to simply enter private agreements relating to the use and disclosure of confidential information. If a party objects to discovery of particular information but would be willing to produce it with confidentiality protection, that party may assert an objection based on confidentiality unless a mutually agreeable confidentiality order or agreement is in place. The court would then have to

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[261] FED. R. CIV. P. 45(e).

[262] *Id.*

[263] FED. R. CIV. P. 26(c)(1).

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *See, e.g.,* United States District Court for the Northern District of Illinois Model Confidentiality Order, Local Rule 26-2, *available at* http://www.ilnd.uscourts.gov/home/_assets/_news/General%20Order%2012-0018%20-%20Form%20LR26.2%20Model%20Confidentiality%20Order.pdf

decide the issue (see Motions to Compel, discussed below) if the parties could not reach agreement.

Franchisors may be reluctant to share their confidential business documents with a former or disgruntled franchisee and may seek to limit disclosure to "attorney's eyes only" in a confidentiality order or agreement. This is particularly true where the franchisee has been terminated, and is now operating a business that competes with the franchisor's other franchisees. The franchisee may object because the franchisee's lawyer believes that he would need to consult with his client to fully understand and analyze the impact of the information disclosed on the franchisee's case.

F. Motions to Compel

While parties seeking to prevent disclosure file motions for protective order, parties seeking to force the opposing party to respond to discovery or asking a court to overrule discovery objections generally file motions to compel and, sometimes, motions for sanctions.

FRCP 37 governs motions to compel, which may be further refined by local rule. The movant must provide a good faith certificate certifying that efforts were made to obtain the information without court intervention.[268] As a practical matter, counsel should take great care to ensure that every effort has been made to reach an agreement with the opposing side before bringing a motion to compel. Most judges dislike such motions and may deal harshly with attorneys who have improvidently or prematurely moved to compel disclosure. However, if counsel has ample documentation demonstrating the opposing party's intransigence in resolving the discovery dispute, the court will likely have no mercy for the noncompliant party.

Motions under FRCP 37 may be made, among other things, to compel a discovery response to which no response has been made or to address "an evasive or incomplete disclosure, answer or response."[269] Motions to compel may also be made to force a deponent to answer questions that he or she evades or refuses to answer, and "the party asking a question may complete or adjourn the examination before moving for an order."[270] If the court grants the motion to compel, it "must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitating the motion, the party or attorney advising that conduct, or both to pay the movant's reasonably expenses incurred in making the motion, including attorney's fees" unless, among other reasons, the nondisclosure "or objection was substantially justified."[271] FRCP 37 also allows parties to seek sanctions for the failure to disclose or supplement discovery responses, failure to properly respond to requests for admission, failing to attend deposition or respond to other discovery requests.[272]

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[268] FED. R. CIV. P. 37(a).

[269] FED. R. CIV. P. 37(a)(3).

[270] FED. R. CIV. P. 37(a)(3)(C).

[271] FED. R. CIV. P. 37(a)(5).

[272] *See generally* FED. R. CIV. P. 37.

IX. CONCLUSION

A franchise case, like any substantial commercial case, requires effective discovery and a solid working knowledge of the procedural vehicles to obtain and properly prevent discovery. A lawyer who properly conducts discovery is better prepared to proceed to trial and is also better able to evaluate the likelihood of success at trial, thereby facilitating settlement.