EXISTING EASTERN DISTRICT STANDING ORDERS ON EFFECTIVE DISCOVERY IN CIVIL CASES AND NOTES ON COMMITTEE RECOMMENDATIONS

Subject to the power of any judge or magistrate to rule otherwise for good cause shown, the following are adopted as standing Orders of this Court:

I. GENERAL PROVISIONS

1. Cooperation Among Counsel.

Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures.

COMMITTEE NOTE

The Committee recommends that Standing Order 1 be retained, and that it be renumbered as Local Civil Rule 26.5 (Eastern District Only).

2. Stipulations.

Unless contrary to a prior order of the court entered specifically in the action, the parties and when appropriate a non-party witness may stipulate in any suitable writing to alter, amend or modify any practice with respect to discovery.

COMMITTEE NOTE

The Committee recommends that Standing Order 2 be eliminated, because it is duplicative of Federal Rule of Civil Procedure 29, as amended in 1993.

II. JUDICIAL INTERVENTION

3. (a) Scheduling Conference.

Promptly after joinder of issue, but in any event as soon as practicable and reasonably before the expiration of the 120 day period provided by Fed. R. Civ. P. 16(b),

the judge shall determine whether the judge or the magistrate shall deal with the scheduling order, and if the magistrate, the judge shall make a suitable reference.

COMMITTEE NOTE

The Committee recommends that Standing Order 3(a) be deleted, on the ground that it has been rendered unnecessary by Standing order 4(a), which now provides that a Magistrate Judge will be assigned in every case and is empowered to act on all non-dispositive pretrial matters unless the Judge orders otherwise.

(b) Scheduling Order. Prior to any scheduling conference, the attorneys for the parties shall attempt to agree to a scheduling order and if agreed to, shall submit it to the court. If such scheduling order is reasonable, the court will approve it and advise counsel. The court may for any reason convene a conference with counsel by telephone or otherwise to clarify or modify the scheduling order agreed to by counsel. If the attorneys for the parties cannot agree on a scheduling order, they shall Promptly advise the court.

COMMITTEE NOTE

The Committee recommends that Standing Order 3(b) be deleted, on the ground that it is now duplicative of Federal Rule of Civil Procedure 26(f), as amended in 1993.

4. Reference to Magistrate Judge.

(a) Selection of Magistrate Judge. A magistrate judge shall be assigned to each case upon the commencement of the action, except in those categories of actions set forth in Civil Rule 45 of this Court. In any courthouse in this District in which there is more than one magistrate judge such assignment shall be at random on a rotating basis. Except in multi-district cases and antitrust cases, a magistrate judge so assigned is hereby empowered to act with respect to all non-dispositive pretrial matters unless the assigned district judge court orders otherwise.

COMMITTEE NOTE

The Committee recommends that Standing Order 4(a) be retained, and that it be renumbered as Local Civil Rule 72.1(a) (Eastern District Only). The reference in the first sentence to Local Civil Rule 45 will become a reference to Local Civil Rule 16.1, and the word "court" in the last sentence should be removed as redundant.

(b) Limitation on Scope of Reference. The district judge may at any time enlarge or diminish the scope of any reference to the magistrate judge.

COMMITTEE NOTE

The Committee recommends that Standing Order 4(b) be stricken, on the ground that its subject matter is already covered by the last sentence of Standing Order 4(a).

(c) Orders of Limitation on Reference. The attorneys for the Parties shall be provided with copies of all orders of enlargement or limitation on the scope of reference to the magistrate judge.

COMMITTEE NOTE

The Committee recommends that Standing Order 4(c) be retained, and that it be renumbered as Local Civil Rule 72.1(b) (Eastern District Only). The Committee recommends that the rule and its title be changed to refer to all orders affecting the scope of the reference, rather than merely orders of enlargement or limitation, so as to make clear that the parties should receive copies of all orders that affect the scope of the reference.

5. Review of Magistrate's Rulings.

(a) Procedure. A party may make application to the judge to review a ruling of the magistrate on a discovery matter pursuant to Fed. R. Civ. P. 72(a). Such application shall be made by short-form notice of motion as appears in Form A, delineating the scope of the issues to be reviewed by the judge.

COMMITTEE NOTE

The Committee recommends that Standing Order 5(a) be eliminated as unnecessary. Except for the requirement of use of the Form A notice of motion, Standing

Order 5(a) is duplicative of Federal Rule of Civil Procedure 72(a). The Committee understands that Form A is relatively seldom used, and does not believe that it is useful to require that all applications for review of rulings of Magistrate Judges be made on a standard form.

(b) Timing. An application for review of a magistrate's order shall be made to the judge within ten days after the entry of such order.

COMMITTEE NOTE

The Committee recommends that Standing Order 5(b) be deleted on the ground that it is inconsistent with Federal Rule of Civil Procedure 72(a). Standing Order 5(b) requires that an application for review of a Magistrate Judge's order be made within ten days of the entry of the order, while Federal Rule 72(a) allows the application to be made at any time within ten days after the party applying for review is served with a copy of the order.

(c) Written Exposition of Magistrate's Rulings. The magistrate shall enter into the record a written order setting forth the disposition of the matter within such ten-day period if requested to do so by the judge or a party considering review. Such written order may take the form of an oral order read into the record of a deposition or other proceeding.

COMMITTEE NOTE

The Committee recommends that Standing Order 5(c) be omitted, on the ground that it is duplicative of Standing Order 6(c).

6. Mode of Raising Discovery and Other Procedural Disputes with the Court.

(a) Premotion Conference. Prior to seeking judicial resolution of a discovery or procedural dispute, the attorneys for the affected parties or non-party witness shall attempt to confer in good faith in person or by telephone in an effort to resolve the dispute.

(b) Resort to the Court

(i) Depositions. Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of a discovery dispute that arises during the taking of a deposition, they shall notify the court by telephone and request a telephone conference with the court to resolve such dispute. If such dispute is not resolved during the course of the telephone conference, the court shall take other appropriate action, including scheduling a further conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except where a ruling which was made exclusively as a result of a telephone conference is the subject of *de novo* review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

(ii) Other Discovery. Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of any other discovery dispute, they shall notify the court, at the option of the attorney for any affected party or non-party witness, either by telephone or by a letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials. Any opposing affected party or non-party witness may submit a responsive letter not exceeding three pages in length attaching relevant materials. Any affected party or non-party witness may request a hearing or the opportunity to submit additional written materials, or to make any other appropriate presentation to the court. If the dispute is not resolved during the course of the telephone conference or if the letter option is exercised, the court shall take appropriate action to resolve the dispute, including scheduling a telephone or other conference without the

submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except for the letters and attachments authorized herein or where a ruling which was made exclusively as a result of a telephone conference is the subject of *de novo* review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

(iii) Where a ruling is made exclusively as a result of a telephone conference it may be the subject of *de novo* reconsideration by a letter not exceeding five pages in length attaching relevant materials submitted by any affected party or non-party witness. Any other affected party or non-party witness may submit a responsive letter not exceeding five pages in length attaching relevant materials.

(iv) Where papers are filed or a letter submitted, the attorneys shall set forth in appropriate detail the efforts they have made to resolve the dispute prior to raising it with the court.

(c) Decision of the Court. The court shall record or arrange for the recording of the court's decision in writing. Such written order may take the form of an oral order read into the record of a deposition or other proceeding, a hand-written memorandum, a hand-written marginal notation on a letter or other document, or any other form the court deems appropriate.

(d) Timing. The court shall deal with all applications for rulings respecting discovery disputes as promptly and expeditiously as the business of the court permits.

(e) Procedural Disputes. The letter motion provisions of subparagraph (b)(ii) and (b)(iv) shall also be used to resolve other disputes that are procedural in

character. In those circumstances, the court shall follow the provisions of subparagraphs (c) and (d) in recording and rendering its decision on such letter motions.

COMMITTEE NOTE

The Committee recommends that the substance of Standing Order 6 be retained, and that it be renumbered as Local Civil Rule 37.3 (Eastern District Only). The Committee believes that the rule can be substantially shortened without losing anything of substance, and has suggested a shorter version as recommended Local Civil Rule 37.3 (Eastern District Only). For the sake of clarity, the committee recommends that the term "non-dispositive pretrial matter" be used instead of "procedural matter" throughout this rule.

III. DEPOSITIONS

7. Non-Stenographic Recording of Depositions.

Motions in accordance with Fed. R. Civ. P. 30(b)(4) for leave to record the deposition of an adverse party or of a non-party witness by means other than stenographic recording, including tape recording or videotaping, shall presumptively be granted. If requested by one of the parties, the recording or videotaping shall be transcribed.

COMMITTEE NOTE

The Committee recommends that Standing Order 7 be eliminated, on the ground that non-stenographic recording of depositions is now dealt with by Federal Rule of Civil Procedure 30(b)(2), as amended in 1993.

8. Telephonic Depositions.

The motion of a party to take the deposition of an adverse Party by telephone will presumptively be granted. Where the opposing party is a corporation, the term "adverse party" means an officer, director, managing agent or corporate designee pursuant to Fed. R. Civ. P. 30(b)(6).

COMMITTEE NOTE

The Committee recommends that Standing Order 8 be retained, and renumbered as Local Civil Rule 30.3 (Eastern District Only). While the subject of telephonic

depositions is dealt with by Federal Rule of Civil Procedure 30(b)(7), the Committee concluded that Standing Order 8 is not duplicative of that rule.

9. Persons Attending Depositions.

A person who is a party, witness or potential witness in the action may attend the deposition of a party or witness.

COMMITTEE NOTE

The Committee recommends that Standing Order 9 be retained, and renumbered as Local Civil Rule 30.4 (Eastern District Only). The Committee recommends that, as to witnesses and potential witnesses, the rule be made subject to a contrary order of the Court.

10. Depositions of Witnesses Who Have No Knowledge of the Facts.

(a) Where an officer, director or managing agent of a corporation or a government official is served with a notice of deposition or subpoena regarding a matter about which he or she has no knowledge, he or she may submit reasonably before the date noticed for the deposition an affidavit to the noticing party so stating and identifying a person within the corporation or government entity having knowledge of the subject matter involved in the pending action.

(b) The noticing party may, notwithstanding such affidavit of the noticed witness, proceed with the deposition, subject to the witness' right to seek a protective order.

COMMITTEE NOTE

The Committee recommends that Standing Order 10 be retained, and renumbered as Local Civil Rule 30.5 (Eastern District Only).

11. Directions Not to Answer.

(a) Repeated directions to a witness not to answer questions calling for non-privileged answers are symptomatic that the deposition is not proceeding as it should.

COMMITTEE NOTE

The Committee recommends that Standing Order 11(a) be deleted, on the ground that the subject of directions not to answer is now regulated by Federal Rule of Civil Procedure 30(d)(1), as amended in 1993.

(b) Where a direction not to answer such a question is given and honored by the witness, either party may seek a ruling as to the validity of such direction.

COMMITTEE NOTE

The Committee recommends that Standing Order 11(b) be omitted, on the ground that it is duplicative of the provisions of Standing Order 6, which the Committee has recommended be carried forward in substance as Local Civil Rule 37.3 (Eastern District Only).

(c) If a prompt ruling cannot be obtained, the direction not to answer may stand and the deposition should continue until (1) a ruling is obtained or (2) the problem resolves itself.

COMMITTEE NOTE

The Committee recommends that Standing Order 11(c) be deleted, on the ground that it is duplicative of the provisions of Standing order 6, which the Committee has recommended be carried forward in substance as Local Civil Rule 37.3 (Eastern District Only).

12. Suggestive Objections.

If the objection to a question is one that can be obviated or removed if presented at the time, the proper objection is "objection to the form of the question." If the objection is on the ground of privilege, the privilege shall be stated and established as provided in Standing Order 21. If the objection is on another ground, the objection is "objection." Objections in the presence of the witness which are used to suggest an answer to the witness are presumptively improper.

COMMITTEE NOTE

The Committee recommends that Standing Order 12 be omitted as unnecessary, since Federal Rule of Civil Procedure 30(d)(1), as amended in 1993, now requires that objections be made in a non-suggestive manner.

13. Conferences Between Deponent and Defending. Attorney.

An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a Privilege should be asserted.

COMMITTEE NOTE

The Committee recommends that Standing Order 13 be retained, and renumbered as Local Civil Rule 30.6 (Eastern District Only). Some members of the Committee favored expanding Standing Order 13 by changing the word "initiate" to "carry on" and by adding language that would expressly bar conferences during recesses, lunch breaks, and overnight breaks. Other members of the Committee did not favor such changes, and some members would have added language limiting the rule to instances where a deposition question is pending. The Committee could not reach a consensus supporting any of these changes. On balance, the majority of the Committee recommends the retention of Standing Order 13 in its existing form.

14. Document Production At Depositions.

Consistent with the requirements of Fed. R. Civ. P. 30 and 34, a party seeking production of documents of another party in connection with a deposition should schedule the deposition to allow for the production of the documents in advance of the deposition. If requested documents which are discoverable are not produced prior to the deposition, the party noticing the deposition may either adjourn the deposition until after such documents are produced or, without waiving the right to have access to the documents, may proceed with the deposition.

COMMITTEE NOTE

The Committee recommends that Standing Order 14 be retained, and renumbered as Local Civil Rule 30.7 (Eastern District Only). The Committee recommends that the

last sentence of the rule be reworded to make clear that this sentence applies only if documents have been requested to be produced in advance of the deposition.

IV. INTERROGATORIES

15. Form of Interrogatories.

Attorneys serving interrogatories shall have reviewed them to ascertain that they are applicable to the facts and contentions of the particular case. Interrogatories which are not directed to the facts and contentions of the particular case shall not be used.

COMMITTEE NOTE

The Committee recommends that the substance of Standing Order 15 should be retained, and transferred to a new Local Civil Rule 26.6 (Eastern District Only) which would be applicable to all discovery requests, not just the particular discovery requests enumerated in Standing Orders 15 and 18. The Committee recommends that the rule be reworded to make clear that what is prohibited is not the use of form discovery requests *per se*, but their use without ascertaining that they are relevant to the subject matter involved in the particular case. In order to avoid a misunderstanding which the Committee understands has arisen in practice, the Committee recommends that the words "relevant to the subject matter involved in" be substituted for the words "applicable to the facts and contentions of" in the existing standing Order, so as to make clear that there is no intent to change the permissible scope of discovery as defined by Federal Rule of Civil Procedure 26(b)(1).

16. Interrogatories Shall Be Drafted and Read Reasonably.

(a) Interrogatories shall be drafted reasonably, clearly and concisely, be limited to matters discoverable pursuant to Fed. R. Civ. P. 26(b), and shall not be duplicative or repetitious.

COMMITTEE NOTE

The Committee recommends that Standing Order 16(a) be eliminated on the ground that it is now duplicative of Federal Rule of Civil Procedure 26(g)(2), as amended in 1993.

(b) Interrogatories shall be read reasonably in the recognition that the attorney serving them generally does not have the information being sought and the attorney receiving them generally does have such information or can obtain it from the Client.

COMMITTEE NOTE

The Committee recommends that Standing Order 16(b) be retained, and generalized into a new Local Civil Rule 26.7 (Eastern District Only) which would be applicable to all discovery requests, not merely those enumerated in Standing Orders 16(b) and 19(b).

17. Responses to Interrogatories.

Each interrogatory and each part thereof shall be answered separately and fully to the extent no objection is made. No part of an interrogatory shall be left unanswered merely because an objection is interposed to another part of that interrogatory.

COMMITTEE NOTE

The Committee recommends that Standing Order 17 be deleted on the ground that it is now duplicative of Federal Rule of Civil Procedure 33(b)(1), as amended in 1993.

V. REQUESTS FOR DOCUMENTS

18. Form Requests For Documents.

Attorneys requesting documents pursuant to Fed R. Civ. P. 34 and 45 shall have reviewed the request or subpoena to ascertain that it is applicable to the facts and contentions of the particular case. A request or subpoena which is not directed to the facts and contentions of the particular case shall not be used.

COMMITTEE NOTE

For the reasons described in the Committee Note to Standing Order 15, the Committee recommends that the substance of Standing Orders 15 and 18 be retained and generalized to all discovery requests in a new Local Civil Rule 26.6 (Eastern District Only).

19. Requests for Documents and Subpoenas Duces Tecum Shall Be Drafted and Read Reasonably.

(a) Requests for documents and subpoenas *duces tecum* shall be drafted reasonably, clearly and concisely and be limited to documents discoverable pursuant to Fed. R. Civ. P. 26(b).

COMMITTEE NOTE

The Committee recommends that Standing Order 19(a) be eliminated on the ground that it is now duplicative of Federal Rule of Civil Procedure 26(g)(2), as amended in 1993.

(b) A request for documents or subpoena *duces tecum* shall be read reasonably in the recognition that the attorney serving it generally does not have knowledge of the documents being sought and the attorney receiving the request or subpoena generally does have such knowledge or can obtain it from the client.

COMMITTEE NOTE

For the reasons stated in the Committee Note to Standing Order 16(b), the Committee recommends that the substance of Standing Orders 16(b) and 19(b) be retained, and generalized to all discovery requests, in a new Local Civil Rule 26.7 (Eastern District Only).

VI. OTHER

20. Discovery of Experts.

After completion of fact discovery and within a reasonable period but in no event less than thirty days prior to the time for completion of all discovery, each party, if requested pursuant to Fed. R. Civ. P. 26(b)(4), shall identify each person the party expects to call as an expert witness at trial and shall state the subject matter and the substance of the facts and opinions on which the expert is expected to testify and a summary of the grounds for each opinion.

COMMITTEE NOTE

The Committee recommends that Standing Order 20 be deleted, on the ground that it is now duplicative of Federal Rule of Civil procedure 26(a){2), which deals with expert discovery.

21. Privilege.

(a) Where a claim of privilege is asserted during a deposition and information is not provided on the basis of such assertion,

(1) the attorney asserting the privilege shall identify during the deposition the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

(2) the following information shall be provided during the deposition at the time the privilege is asserted, if sought, unless divulgence of such information would cause disclosure of privileged information:

(i) for documents, to the extent the information is readily obtainable from the witness being deposed or otherwise: (1) the type of document, *e.g.*, letter or memorandum; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author, addressee, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(ii) for oral communications: (1) the name of the person making the communication and the names of persons present while the

communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and place of communication; (3) the general subject matter of the communication.

(iii) Objection on the ground of privilege asserted during a deposition may be amplified by the objector subsequent to the objection.

(3) After a claim of privilege has been asserted, the attorney seeking disclosure shall have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of the privilege, including (i) the applicability of the particular privilege being asserted, (ii) circumstances which may constitute an exemption to the assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and. (iv) circumstances which may overcome a claim of qualified privilege.

(b) Where a claim of privilege is asserted in responding or objecting to other discovery devices, including interrogatories, requests for documents and requests for admissions, and information is not provided on the basis of such assertion,

(1) the attorney asserting the privilege shall in the response or objection to the discovery request identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

(2) the following information shall be provided in the response or objection, unless divulgence of such information would cause disclosure of privileged information:

(i) for documents: (1) the type of document, *e.g.*, letter or memorandum; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author, addressee, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(ii) for oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and place of communication; (3) the general subject matter of the communication.

(3) The attorney seeking disclosure of the information withheld may, for the purpose of determining whether to move to compel disclosure, serve interrogatories or notice the depositions of appropriate witnesses to establish other relevant information concerning the assertion of the privilege, including (i) the applicability of the privilege being asserted, (ii) circumstances which may constitute an exception to assertion of the privilege, (iii) circumstances which may

result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege.

COMMITTEE NOTE

The Committee recommends that the substance of Standing Order 21 be combined with existing Local Civil Rule 46(e)(2) (Southern District Only) in a new Local Civil Rule 26.2 dealing generally with assertions of privilege.