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DISCOVERY AND SANCTIONS UNDER THE NEW FEDERAL RULES OF CIVIL PROCEDURE

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I. INTRODUCTION

The 1993 amendments to the Federal Rules of Civil Procedure took effect on December 1, 1993. The amendments included major changes to the discovery provisions of the Federal Rules of Civil Procedure. Also, the amendments allowed district courts the option of requiring the mandatory disclosure of certain information before the commencement of formal discovery. The Supreme court transmitted the amendments to Congress without an endorsement. Despite overwhelming opposition from the legal field, the amended rules subsequently went into effect on December 1, 1993, when Congress failed to act on them.[1] Thus, in a sense, the amendments passed by default.

A. Mandatory Turnover

The amendments to Rule 26 have what is generally referred to as mandatory turnover of discovery shortly after issue is joined. The mandatory disclosure must be made without having received a discovery request. Fed. R. Civ. P. 26(a)(1). All that is required under the mandatory disclosure is that the opposing party allege the disputed facts with particularity in the pleadings.

As of March 24, 1995, the Federal Judicial Center found that, of the 94 United States District Courts, 49 courts opted-out of Rule 26(a)(1) while 45 courts opted-in. six of the district courts that opted-in Rule 26(a)(1) do so with significant revisions to the rule. Of the 49 district courts that opted-out of Rule 26(a)(1), many still use mandatory disclosure by order of the judge or through local rules. Thus, a significant number of district courts are either entirely opting-out of the federal rule or are operating under their own mandatory disclosure rules.[2]

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[1]Eric F. Spade, *Mandatory Disclosure and Civil Justice Reform Proposal Based on the Civil Justice Reform Act Experiments*, 43 Clev. St. L. Rev. 147, 150-151 (1995).

[2]*Id.* at 161.

Although commentators still do not agree whether the mandatory turnover provisions effectively achieve the goal of reduction of cost and delay, they do agree that the opt-in/opt-out provision has created national dis-uniformity and confusion in the legal field, thereby creating an inefficient legal system.[3] One commentator has gone as far as suggesting the elimination of the opt-out/opt-in provisions.[4] However, others suggest that the Rules should not mandate discovery rules at all. Instead, it should be left to the judges to decide how discovery should be conducted in accordance to the customs of each court.[5]

Although one reason for the enactment of the new amendments is to eliminate discovery abuse, such a result has not been achieved. The ability to opt-in and opt-out of the discovery rules has created litigation power imbalances in district courts which opted out of some but not all of the discovery changes. Such selective opting-in and opting-out sometimes creates an overall narrowing of discovery. Where one party controls most of the relevant information (usually the defendant), this narrowing of discovery will likely work to that party's benefit and to the other party's detriment.[6] Thus, far from eliminating gamesmanship during discovery, the amendments can create more opportunities for discovery abuse.

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[3]Eric K. Yamamoto and Joseph L. Dwight IV, *Procedural Politics and Federal Rule 26: Opting-out of "Mandatory" Disclosure*, 16 Hawaii L. Rev. 167, 201-202 (1994).

[4]Angela R. Lang, *Mandatory Disclosure Can Improve the Discovery System*, 70 Ind. L.J. 657,676 (1995).

[5]Griffin Terry, *A Critical Analysis of the Formulation and Content of the 1993 Amendments to the Federal Rules of Civil Procedure*, 63 U. Cin. L. Rev. 869, 871 (1995).

[6]Eric F. Spade, *Mandatory Disclosure and civil Justice Reform Proposal Based on the Civil Justice Reform Act Experiments*, 43 Clev. St. L. Rev. 147, 178 (1995).

B. Opting Out of Mandatory Discovery

The District Judges of the United States District Court of the Western District of Texas voted unanimously to "opt out" of the mandatory discovery Rules and presumptive discovery limits as set out in new Rules 26, 30, 31, and 33 of the new Federal Rules of Civil Procedure. Therefore, concerning discovery, Local Rules CV-16, CV-26, CV-30, CV-33, and CV-36 must be consulted, and when there is a conflict, the Local Rules override the new Rules 26, 30, 31, and 33 of the Federal Rules of Civil Procedure. While the Local Rules do not have the mandatory disclosure as set out in the new Federal Rules, the Local Rules do provide an alternative from of early disclosure. This will be discussed in detail in the subsequent sections.

If you practice before other district courts, you need to know if the district court has opted in or out of the new discovery rules. Needless to say, knowing the local rules and having a good local counsel becomes more important than has previously been the case.

II. EFFECT OF LOCAL RULE CV-16 ON DISCOVERY

As recognized in Fed. R. Civ. P. 26(A)(1), a district may, by "local rule" opt out of the mandatory discovery provisions. The Western District of Texas, while it has opted out of the mandatory discovery rules, has set up a discovery time table under Local Rule CV-16 that runs from defendant's answer/appearance.

SCHEDULING ORDER
DISCOVERY TIME TABLE UNDER RULE 16

- Complaint
- 20 days — First Defendant's Answer/Appearance (Generally, 20 days after service; 60 days for United States. F.R. Civ. Pro. 12(a)).
  - 30 days — Plaintiff must submit scheduling Order. CV-16(c). Parties may elect expedited docket with Magistrate Judge.
  - 40 days — Plaintiff must file list of proposed witnesses with written summaries of testimony and exhibit list. CV-16(c).
    - 30 days — Defendant must file list of proposed witnesses with written summaries of testimony and exhibit list. CV-16(c).
      - 20 days — Parties designate rebuttal witnesses (Standard - Order for Scheduling Recommendations).
  - 3 months — Report on ADR due (Standard - Order for Scheduling Recommendations).
  - 90 days — Party claiming relief designate expert witnesses with written summary (Standard - Order for Scheduling Recommendations).
    - 45 days — Designate rebuttal experts with written summary (Standard - Order for Scheduling Recommendations).
  - 3 months — Plaintiff to submit offer of settlement (Standard - Order for Scheduling Recommendations).
    - 2 weeks — Response to offer of settlement due (Standard - Order for Scheduling Recommendations).
  - 45 days — Supplemental fact witnesses designated (Standard - Order for Scheduling Recommendations).
  - 4 months — Amend and/or supplement pleadings, join additional parties (Standard - Order for Scheduling Recommendations).
  - 2 weeks — All dispositive motions to be filed (Standard - Order for Scheduling Recommendations).
  - 6 months — Discovery Deadline. CV-16(d).
    - 14 days prior — Pretrial order due (Scheduling Recommendations)
  - 9 months — Trial Date (Standard - Order for Scheduling Recommendations).

Note that everything starts from defendant's answer or appearance. Within 40 days, Plaintiff must prepare and file with the court the following:

1. List of proposed witnesses
2. Written summaries of experts' testimony
3. Exhibit list

These are the main ingredients for a pre-trial order. At that point in time, normally no discovery will have been taken.

An additional 30 days (70 days from answer), defendant must do likewise. At that point, in most cases, discovery is just beginning. Therefore, anything that is prepared will be very preliminary.

A real problem exists concerning expert testimony. Many experts are not even selected, much less retained, until after initial discovery. For example, an expert on damages may not be able to formulate an opinion until seeing records obtained from opposing party through discovery. Normally, this is during advanced discovery in the case. Therefore, it is going to be difficult to submit an expert witness report as called for under the scheduling order.

A. Recommendation Concerning Expert Witnesses

If you have an expert witness already selected and the expert witness can formulate his opinion within the time deadlines contained in Rule 16, by all means, submit the expert's name and a written summary of the expert's testimony. However, more likely, either (a) the expert witness has not been selected, (b) the party is still "consulting" with prospective experts, or (c) evidence has not been discovered from which an expert can formulate an opinion. In either of these events, the court must be informed of the problem and an extension of time obtained to designate experts. The prudent course of action would be to file a motion with the court for additional time to designate an expert

giving the reasons for the additional time. If the reasons are logical, the court, in all probability, will grant the additional time for designating the expert. However, do not lollygag around or you may find yourself on the short end of a court order cutting off testimony by your expert witness.

B. Amending or Supplementing Pleadings

Within four months of defendant's answer, any amended or supplemental pleadings and the joining of any additional parties must have occurred. You should seriously consider filing a "story book" complaint based on the information discovered. By "story book" I mean alleging the facts in detail, telling a story as to why your client has been wronged and the opposing party is liable.

The reason I recommend a story book complaint is very simple. New Federal Rule 26(a)(1) repeatedly required disclosure of "discoverable information relevant to disputed facts alleged with particularity in the pleadings." While the mandatory provisions of Rule 26 have not been adopted by the Western District of Texas, it is not known what affect this particular language will have on future discovery disputes.

In the early part of this century, the trend was fact specific pleadings. In the '50s, '60s, and '70s, the trend was toward generalized pleadings. The generalized pleadings, however, have resulted in broad discovery requests, which in turn has caused an outcry concerning the cost of litigation, particularly discovery. As a counter to the public outcry, particularly the cost of discovery, the trend now appears to be back to pleadings "alleged with particularity," i.e., "story book" type of pleadings. My recommendation is to allege your facts in detail in a story book fashion, but request your relief in a broader, more general, and alternative manner. That way the opposing party cannot effectively argue they do not know the facts sufficiently to prepare the list of witnesses or exhibits as called for

under the scheduling order, CV-16. Also, you will be able to get the broadest type of relief for your client.

C. Discovery Deadline

The most important thing to remember is that all discovery must be complete within six months! If you have a good reason, you may obtain an extension of time for discovery. However, my personal experience is that after one or two extensions of time on discovery, even if you have the parties stipulating to further extensions of time on discovery, the court may not grant additional time. The moral of the story is to take your discovery early so you will not have to explain to your client why the case was lost due to a lack of discovery to prove the case.

III. NEW RULE 26 AND LOCAL RULE CV-26: GENERAL PROVISIONS GOVERNING DISCOVERY

A. Expert Testimony

Local Rule CV-26 does not deal with expert testimony, but new Rule 26 does. However, there is a conflict between Local Rule CV-16 and new Rule 26. Local Rule CV-16 defines what is to be in a written summary of any expert witness's expected testimony. However, new Rule 26 requires in addition the following:

1. Written report prepared and signed by the witness.
2. Data or other information considered by the witness in forming the opinion.
3. Qualifications of the witness.
4. List of publications authored by the witness within the preceding 10 years.
5. Listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding 10 years.

As can be seen from the above listed items that are included in new Rule 26, but are not included in Local Rule CV-16, new Rule 26 is much more extensive and comprehensive than Local Rule CV-16. The part that is unclear is when the Western District opted out of the mandatory discovery, did the Western District also opt out of these additional requirements concerning expert witnesses. Even under new Rule 26, while the sequence of the disclosure is controlled by the court, new rule 26 states "the disclosures [concerning experts] shall be made at least 90 days before the trial date." While it appears Local Rule CV-16 intended to amend new Rule 26 concerning expert witnesses, since the Western District only opted out of the "mandatory disclosure" portion of new Rule 26, it can be argued these additional disclosures concerning expert witnesses need to be made.

When deciding whether to depose the opposing side's expert, remember your client will have to pay the expert witness a reasonable fee for time spent responding to discovery. new Rule 26(b)(4)(C). Also, your client may end up having to pay for time spent in preparing for the deposition, as well as the deposition itself. S.A. Healy Co. v. Milwaukee Metro Sewerage Dist., 154 F.R.D. 212 (E.D. Wis. 1994); Magee v. The Paul Revere Life Insurance Company, No. CV 95-4574(ADS), 1997 WL 199071, **16 (E.D.N.Y. March 21, 1997).

B. Labeling Exhibits

Local rule CV-26(b) provides in detail how exhibits should be numbered with plaintiff's exhibits being identified with a "P" and defendant's exhibits being identified with a "D." Government exhibits are identified with a "G." All of the exhibits are to be numbered sequentially, such as P-1, P-2, P-3, etc.

My recommendation is, starting with the first deposition, that exhibits be labeled consecutively with your client's designation such as P-1, P-2, P-3, etc. In that manner, once discovery is complete,

the same numbers can be used at trial. If there are additional exhibits that should be designated (such as items produced by opposing party or opposing party exhibits), the additional exhibits can be designated with subsequent numbers. In that manner, there is not a conflicting numbering system between discovery and trial. In the courts that I have been in, the courts have appreciated the numbering system remaining the same, especially if excerpts are being offered from deposition testimony. Local Rule CV-26(b)(2)(f) seems to encourage use of the same numbering sequence during discovery and at trial.

C. Definitions

Local Rule CV-26(c) provides definitions for discovery requests. By simply using the definitions as provided in the Local Rules, long introductory definitions in discovery requests are no longer necessary. For the sake of convenience, it is suggested that the definitions contained in Local Rule CV-26 be adopted as part of your standard form for requesting production of documents. When the opposing side objects to the definition (that is proposed in the Local Rules), whose favor do you believe the court will rule in when you file a motion to compel?

D. Protective Orders for Confidential Information

Many times in federal court, confidential and/or trade secret information may be involved. Therefore, on party or the other may seek a protective order to protect the confidential and/or trade secret nature of the information requested to be produced. Rather than going through a continual hassle on the form of the protective order, the Western District has now adopted as Appendix H of the Local Rules a proposed protective order to protect confidential and/or trade secret information. The proposed standard protective order by the court has two classes of confidential information. One

class is designated as "confidential" and the other class has a higher classification of "attorneys eyes only." One of the disputes that commonly arose in the past was whether to have multiple levels of confidential information. The court has opted for the use of multiple levels.

One question that I had that was raised in a prior suit was if a party cannot see information designated "for attorneys eyes only," then how can the party participate in the trial or defense of its case? This is especially true when the opposing party has designated a large amount of material as "for attorneys' eyes only." Under such a designation, the attorney representing the party cannot even tell the party what the evidence is that is being used against his client. There are some serious Constitutional questions of the party not having the right to have at least one designated individual to see information alleged to be "attorneys eyes only."

E. Claims of Privilege

Local Rule CV-26(e) is much more detailed than new Rule 26(b)(5) for claims of privilege. Specifically, the party claiming the privilege must

1. State the particular rule of privilege upon which the claim is based;

2. Give any information including that in an alleged document itself necessary to establish the factual elements required by the privilege. The information must be sufficiently detailed to permit a decision on the claim of privilege.

3. Be verified by affidavit by a person having knowledge of the facts asserted.

Once the privilege has been asserted and the burden of demonstrating that the material falls within the privilege has been met, then the burden shifts to the party opposing the privilege to establish reasons the material must be disclosed.

If only part of the document is privileged, it must be clearly indicated which parts are claimed to be privileged, and why, and which parts are not claimed to be privileged.

F. Requests for Relief in Discovery

When a request for relief in discovery is filed with the court, the discovery request and reply (if any) should be attached thereto. Local Rule CV-26(a). Before a motion for a protective order from discovery can be filed, the parties must confer in good faith in an attempt to resolve their discovery dispute. New rule 26(c); Frupac Int'l Corp v. M/V "Chucabuco", 1994 U.S. Dist. LEXIS 8176, Civ. 92-2617 (E.D. Pa. June 14, 1994). The purpose of the change in new Rule 26 was to hopefully eliminate or reduce the need for court intervention in discovery disputes. Musicom Int'l, Inc. v. Serubo, 1944 U.S. Dist. LEXIS 10826, Civ. 94-1920 (E.D. Pa. Aug. 5, 1994).

G. Supplementation of Discovery

Do not forget there is a requirement under Rule 26(e) to supplement any disclosure or discovery request to include additional information or correct a prior disclosure. Such duty of supplementation occurs:

1. When a party learns the prior requested information is incomplete or incorrect.

2. If the additional or corrected information has not otherwise been made known to the opposing party during the discovery process or in writing.

The duty to supplement also applies to expert's reports and opinions. The duty to supplement applies to all forms of discovery.

A party may answer an interrogatory, which answer should later be supplemented. Courts have held it sufficient supplementation if somewhere buried in a deposition answer to a question, the party answers in a way to provide the supplemental information. Boynton v. Monarch, 1994 U.S. Dist. LEXIS 11967, 92-C-140 (N.D. Ill. Aug. 24, 1994); In re Norplant Contraceptive Products

Liability Litigation, 170 F.R.D. 427 (E.D. Tex. 1997). The moral is you may have been supplemented in an interrogatory and not even know it. Supplementation may take any form.

H. Certification of discovery Response by Attorney

Anything is discoverable that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). It does not matter if the item requested is not admissible at trial. The signature of an attorney in a response to a discovery request constitutes certification that to the best of the attorney's knowledge, information, and belief, "formed after a reasonable inquiry" the disclosure is complete and correct as of the time it is made.

Also concerning objections to discovery, a signature by the attorney constitutes a certification that:

> (A) The objection is consistent with these Rules . . .
>
> (B) Not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in litigation costs; and
>
> (C) Not unreasonable or unduly burdensome or expensive . . . .

Sanctions can be imposed on the party certifying (i.e. attorney) if the certification was made without justification in violation of Rule 26.

You should remember that the main purpose of most of the new amendments to the Federal Rules of Civil Procedure was to reduce costs of litigation, especially discovery. If you indulge in gamemanship in discovery, you or your client may end up with sanctions. Marchand v. Mercy Med. Ctr., 22 F.3d 933 (9th Cir.) 1994); see Harolds Stores, Inc. v. Dillard Dept. Stores, Inc., 82 F.3d 1533, 1555 (10th Cir. 1996).

IV. LOCAL RULE CV-30 AND NEW RULE 30: DEPOSITIONS UPON ORAL EXAMINATION

The part of new Rule 30 that has been opted out of by the Western District of Texas is the limitation of 10 depositions per side. The custodian of records counts as one deposition regardless of how many different people testify. New Rule 30(a)(2)(A) Advisory Committee Notes. All other portions of New Rule 30 have been adopted in the Western District of Texas other than the 10 deposition limit.

A. Deposing a Witness Twice

Under new Rule 30(a)(2)(B), a witness can only be deposed a second time with court approval. You should get and review the documents before deposing the witness because the court might not give approval for a second deposition. Jack Frost Labs, Inc. v. Physicians & Nurses Mfg. Corp., 1994 U.S. Dist. LEXIS 261, 92-CIV-9264 (S.D.N.Y. Jan. 13, 1994); Tri-Star Pictures, Inc. v. Unger, F.R.D. 94 at 101, (S.D.N.Y. 1997).

B. Objections

New Rule 30(d) is an attempt to diminish improper obstructive tactics in depositions. Excessive objections during depositions can result in sanctions. Phillips v. Manufacturers Hanover Trust Co., 1944 U.S. Dist. LEXIS 3748, 92-CIV-8527 (S.D.N.Y. Mar. 29, 1994); O'Brien v. Amtrak, 163 F.R.D. 232 at 236, (E.D. Pa. 1995). Specifically, objections must be concise, non-argumentative, and non-suggestive. Lengthy and deponent-leading objections are subject to sanctions by the court. An attorney can only instruct an opponent not to answer when necessary to protect a privilege, to enforce a court imposed limit on discovery or evidence, or to present a "bad faith"

motion. New Rule 30(d)(3). New Rule 30 specifically allows for suspension of the deposition until a court ruling can be obtained if the deposition is being conducted in bad faith or in such a manner as to annoy, embarrass, or press the deponent.

Some courts have gone so far as to basically state that once the deposition begins, the non-deposing counsel may not instruct witnesses not to answer questions unless to assert a privilege. Boyd v. University of Maryland Medical System, No. CIV. A. WMN-96-3105, 1997 WL 249233 at **1-2 (D. Md. May 2, 1997). Local Rule CV-30(d) specifically adopts new Rule 30 for "procedural rules, examination of the witness, objections, recesses, and termination of any deposition."

C. Video Taped and Audio Taped Deposition

To take a video taped or audio taped deposition, all this e noticing party needs to do is to properly notice the deposition to be taken by the appropriate non-stenographic means and follow Appendix I of the Local Rules. The party taking this deposition is responsible for the non-stenographic recording. New Rule 30(b)(2).

Also, there are provisions in New Rule 30 to allow the taking of depositions by telephone of "other remote electronic means." This would include satellite or other advanced technologies. All that the requesting party has to do is to provide a transcript if the deposition is later used at trial. New Rule 30(b)(2); Gillen v. Nissan Motor Corp., 1994 U.S. Dist. LEXIS 9699, 94-CIV-0354 (E.D. Pa. July 13, 1994).

D. Attendance of Others

Rule 30(c) indicates that other deponents cannot be excluded from the deposition without filing a motion for a protective order under Rule 26(c)(5) and obtaining an order of exclusion. To

counter this, Local Rule CV-30(c) requires in the notice to state that if anyone in addition to "the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition" will be in attendance. In other words, if someone else plans to attend the deposition, notice must be given to the opposing party.

E. Exhibits

Local Rule CV-30(e) provides for the numbering of exhibits sequentially regardless of the deposition in which they are used. This ties back to Local Rule CV-26(b)(2) dealing with the identification of exhibits. The court is encouraging the use of the same sequential numbers during depositions as will be used during trial.

F. Attendance by Telephone

Counsel for any party may attend a deposition by telephone even though the witness, stenographer, and opposing counsel are present in person. Local Rule CV-30(f). This Local Rule attempts to keep up with the technology of our time.

V. NEW RULE 31: DEPOSITIONS UPON WRITTEN QUESTIONS

Just as new Rule 30 posed limits on the number of depositions, new Rule 31 posed limits on the taking of depositions upon written questions. The Western District has opted out of both of these Rules as they pertain to limits. However, the time for serving cross, redirect, and re-cross questions as contained in new Rule 31 do apply. There are 30 days response time for the individual served, 14 days for cross questions, and 7 days for re-direct questions.

motion. Otherwise, the court will not have a full record as to what is being requested and the response or the objection that was given.

C. Compelling Disclosure or Discovery

Every litigator is familiar with the old provisions of Rule 37 for a motion to compel. If the response to requested discovery is evasive, incomplete, or non-existent, an appropriate motion to compel can be taken. If the motion is granted, the court shall require the party or deponent whose conduct necessitated the motion (or the attorney) to pay the moving party's reasonable expenses and attorneys fees. There is an exception when the opposing party's actions were "substantially justified" or other circumstances to make the award of expenses and attorneys fees unjust.

In keeping with the saying "what's good for the goose is good for the gander," if the motion is denied, the court shall award attorneys fees against the moving party, again, unless "substantially justified."

D. Failure to Comply With Court Order

Again, every litigator is familiar with Rule 37(b) as to what occurs when a party fails to comply with a court order concerning discovery. The sanctions can be so drastic as to cause any litigator to shake in his boots if his client refuses to comply with court ordered discovery. Sanctions can go all the way to the extent of granting judgment in one party's favor and striking eh opposing party's pleadings.

E. Failure to Disclose, False or Misleading Disclosure, or Refusal to Admit

If a party fails to disclose information, they should not be permitted at trial to use evidence they refused to produce. In addition, the court may use any of the sanctions that it deems appropriate, such as striking pleadings, refusing to allow the disobedient party to support certain claims, or to designate certain facts as established.

If a party refuses to admit the genuineness of a document or to admit the truth of a matter that is thereafter proved to be genuine and true, the party refusing to admit may be ordered to pay reasonable expenses including attorneys fees unless the court finds a substantial justification for the refusal to admit.

F. Failure of a Party to Attend on Depositions or Serve Answer to Interrogatories or to Respond to a Request for Inspection

One of the most significant changes in new Rule 37 is that a party cannot refuse to act simply because the requested discovery is objectionable unless the party has filed a motion for a protective order as provided under Rule 26(c). Therefore, you must file a motion for a protective order or respond to the discovery request even though it is objectionable.

If a person refuses to comply with the discovery request, the court may enter any of the sanctions given in Rule 37(b)(2)(A), (B), or (C).

G. Discovery Made After Motion to Compel

One provision of new Rule 37(a)(4) is that if disclosure is only made after a motion to compel has been filed, sanctions may still be awarded, such as attorneys fees or costs.

XI. RECOMMENDATIONS

If I am on the receiving end of discovery requests, my personal preference in documents requests is to produce everything conceivable that was requested other than attorney/client privilege or attorney work product documents. concerning privileged documents, I err on the side of non-disclosure because I do not want to inadvertently waive the privilege. However, concerning non-privileged documents, I err on the side of over-production. Personally, if I think my client is extremely clean and it will not interfere with their business operations, I like to bring opposing counsel to their place of business, point to the file cabinets, and say there they are. In that manner you do not have to segregate the documents and you produce them as they are kept in the ordinary course of business. This will reduce your cost of production with the possible problems that you may (a) produce privileged documents, (b) produce documents not requested that you later regret producing, or (c) educate your opposition as to how your client's business operates.

During depositions, I try to make sure the witness is fully aware of what the issues are in the case and what the other side is attempting to prove. I will go through mock question and answer sessions with the witness as to how they should answer critical questions while still being truthful and honest. While it is hard to get a leopard to change its spots, I try to get the witness not to volunteer information and to truthfully answer only the questions asked.

During the actual deposition itself, I like to make as few objections as possible, while at he same time making the objections you need to make to preserve the record. Again, if there is a question as to whether something is privileged, I err on the side of preserving the privilege.

In interrogatories, I normally record all of the objections I can think of to the interrogatories, but then answer the interrogatories despite those objections. The only objections that I would always

follow would be those of attorney/client privilege or attorney work product in which case I would not answer the interrogatory unless ordered to do so by the court.

When I am on the sending side of discovery, I do things somewhat differently. I normally send a request for production of documents that will have (a) some paragraphs that are very specific, (b) some paragraphs that are intermediate in scope, and (c) some paragraphs that are very broad. However, in recent years, I have cut down on the number of broad paragraphs. In that manner, if I later have to file a motion to compel, all judges would give me the specific paragraphs, most judges would give me the intermediate paragraphs, and some judges would even give me the broad paragraphs. However, I probably would not file a motion to compel on the extremely broad paragraphs because I do not want to be on the losing side of a motion to compel.

Concerning interrogatories, I normally only use interrogatories to identify witnesses, fact and expert, damages or other very specific areas. I normally do not rely that much on interrogatories other than to force the other side to identify witnesses, exhibits, contentions, and damages.

During depositions, I simply have a general outline of areas that I want to cover, but I allow the witness, to a large degree, say what the witness wants to say just directing them back to the areas I want to cover after I have exhausted the subject the witness is talking about.

If there are any questions the attorney directs the witness not to answer, I have the witness clearly state on the record that they are refusing to answer the questions. I may ask a whole series of questions the witness refuses to answer so there is no doubt the witness is not going to provide any further information in that subject matter area. In that manner I have built my record for a motion to compel.

If the witness was supposed to produce documents, I go over each requested category of documents and establish the witness has produced (or not produced) the documents requested in that

paragraph. If the requested documents have not been produced, I establish where the documents are and why they have not been produced by the witness. Again, I am laying the foundation for my motion to compel.

XII. CONCLUSION

TAKE DISCOVERY SERIOUSLY! Courts are fed up with discovery abuse. If you play games on discovery, sooner or later you are going to be hammered by a court. Don't take that chance. Don't let your clients take that chance.

Also, don't delay your attempts to obtain discovery from the opposing side. If you do, again, either your client or you personally may regret the delaying of discovery. My personal opinion is that the second most important document you will prepare beyond your complaint (or answer) is your first "Notice of Deposition Duces Tecum" that you serve on the opposing side. This will set the tone for the entire litigation.

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