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Discovery in Federal Court

PITFALLS FOR THE WINNERS



DISCOVERY IN FEDERAL DISTRICT COURT

PITFALLS FOR THE UNWARY

BY MARLON A. PRIMES

Practitioners in federal district court are well aware of the old adage that federal practice has numerous pitfalls for the unwary. One of the many relatively unknown and little-discussed pitfalls is the procedure for obtaining crucial discovery and responding appropriately to common discovery disputes. However, unlike state court, federal practice has an intricate series of guidelines and rules that govern the breadth and scope of discovery.

Because discovery is so important in civil cases, successfully charting a course through these applicable rules often means the difference between success and failure. One of the many rules of thumb in safely charting these waters is to prevent disputes by engaging in careful pre-discovery planning with opposing counsel in accordance with the applicable rules. Fed. R. Civ. P. 26(f); *See also* Local Rules 8:4.2 (b) and 8:7.2. However, if this careful planning still leads to a dispute, one should examine whether the discovery exceeds the applicable scope, whether the discovery objections are timely, and whether the

request for relief satisfies the procedural requirements. *Id.*

Pre-discovery Planning

Unless exempted by the particular federal district judge, rule 26(f) of the Federal Rules of Civil Procedure requires counsel for the plaintiff and the defendant to meet at least 14 days prior to the Case Management Conference (CMC). *Id.* While part of the focus of the meeting is designed to encourage settlement, the meeting is also designed to develop a proposed discovery plan. Fed. R. Civ. P. 26(f), (committee notes). This plan should set forth proposed limitations on the discovery requirements and discuss any anticipated discovery problems. Fed. R. Civ. P. 26(f) (1) (2) and (3). More importantly, proposed dates for the completion of discovery and the scope of discovery also should be discussed at the meeting. *Id.*

At the conclusion of the 26(f) meeting, parties are required to submit a report to the federal district judge, who assigns the case to either the expedited, standard, complex or administrative track. Local Rule

8:2.1(b). These tracks determine the length of discovery and the number of depositions and discovery requests that can occur. *Id.* For instance, under the expedited track, the following discovery is permitted and must be completed within 100 days after filing the complaint:

- 15 single-part interrogatories;
- 10 requests for production of documents;
- 10 requests for admissions; and
- 3 non-party depositions of fact witnesses. Local Rule 8:2.1 (b) (1).

If a case is assigned to the standard track, the following discovery is permissible and must be completed within 200 days after filing the complaint:

- 35 single-part interrogatories;
- 20 requests for productions of documents;
- 20 requests for admissions; and
- 3 non-party depositions of fact witnesses. Local Rule 8:2.1 (b) (2).

However, discovery in cases assigned to the complex track is entirely determined by the court and the parties,

with a goal of completion within 24 months. Local Rule 8:2.1 (b) (3).

Nevertheless, despite these strict guidelines, the Local Rules suggest that the district court can modify the discovery plan at the CMC, if "good cause" is shown. Local Rule 8:1.2 (e) and (h). Accordingly, properly notifying opposing counsel at the planning meeting and notifying the court at the CMC of the proposed scope of discovery can potentially expand discovery and alleviate discovery problems that might manifest themselves during later stages in the case. *Id.*

Scope of Discovery

However, despite the best intentions, discovery disputes can arise, especially between busy attorneys that are typically involved in numerous other legal matters. Once a dispute arises or a motion to compel is filed, one should determine whether the dispute exceeds the scope of the discovery plan set forth at the CMC, *before* addressing the merits of the motion. For instance, a motion to compel that is filed in a standard track case is procedurally flawed, if it concerns the failure to answer more than the requisite 35 single-part interrogatories. Local Rule 8:7.3 (a), (b) and (c).

Although this numerical limit may seem simple enough, this limit can easily be exceeded by practitioners that rely on form discovery requests that have questions with numerous subparts, as each impermissible subpart counts as a separate interrogatory. *Id.* Therefore, 20 interrogatories with numerous subparts can potentially exceed the permissible limit, and unwary practitioners can be consequently precluded from obtaining answers to crucial questions. *Id.*

Practitioners can also preserve their interrogatories and avoid exceeding the limit by not asking questions covered by the initial disclosures. Fed R. Civ. P. 26(a) (1). For instance, unless exempted by the particular federal district judge, Rule 26(a) (1) essentially requires parties to disclose relevant witnesses, relevant documents, damage calculations and relevant insurance policies. Fed R. Civ. P. 26(a) (1) (A), (B), (C) and (D).

Moreover, as a result of the information obtained from these initial disclosures, practitioners can narrowly tailor deposition proceedings and, more importantly, preserve the ability to depose all desired witnesses. *Id.*; Local Rule 8:2.1 (b) (2). For example, unwary practitioners may first decide to take the depositions of minor players as a prelude to taking the depositions of more important witnesses. However, in a standard track case, only three non-party depositions are permitted without a special order from the court. *Id.*

Therefore, if these three non-party depositions are taken up by unessential witnesses, unwary practitioners may be precluded from taking the depositions of witnesses that are more central to the case. *Id.* Not only could this result in being disadvantaged at trial, but it also gives the practitioners less information that could have provided sufficient leverage to work out an amicable settlement. *Id.*

Timeliness of Discovery Requests and Objections

Timeliness can also serve as a pitfall for unwary practitioners. As set forth above, the track assignment made at the CMC designates the amount of time that the parties have to complete the discovery process. *Id.* This assignment further demonstrates the importance of making sure a realistic assessment has been made about how long discovery will take to complete.

Accordingly, failure to notify the court of the complexity of a case could result in a complex matter being assigned to the standard track, making discovery fairly difficult to complete within

the allotted time frame. *Id.* The disastrous impact could result in a failure to obtain all the crucial discovery during the applicable discovery period. *Id.*

In addition, objections to alleged discovery abuses are also governed by time limits. Local Rule 8:7.4. For instance, these objections must be presented to the judicial officer within 10 days after the discovery cut-off date. *Id.* Failure to abide by this time limit can serve as a procedural defense to discovery abuse claims and, once again, disadvantage the unwary practitioner at trial and/or during settlement negotiations. *Id.*

Proper Procedure for Discovery Objections

Not only must objections to discovery be timely, but they must also comply with the procedural guidelines set forth in the Local Rules. Otherwise, the objections are



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procedurally flawed and cannot be entertained by the court. *Id.* Local Rule 2:4.6 and 4:0.9. These rules prohibit practitioners from simply filing a motion to compel as the first step in resolving a discovery dispute. *Id.* Instead, the moving party must make a good faith attempt to cooperate and work out the dispute with opposing counsel. *Id.* If the dispute still cannot be resolved, the moving party must

telephone conference to attempt to resolve the dispute. *Id.*; Local Rule 8:7.4. If this conference still does not resolve the matter, the parties can be asked to outline their respective positions by letter. *Id.* After receiving these letters, the judicial officer can attempt to resolve the dispute without any legal memorandum in opposition. *Id.* Finally, within three days after receiving these motions, the judicial officer can schedule a hearing on the disputed discovery. *Id.*

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Conclusion

Idealistically, the Local Rules envision a spirit of cooperation between opposing parties to smoothly complete discovery and adjust to the nuances that each particular case may bring. *Id.*; Local Rule 8:4.2(b) and 8:7.1. Although careful planning can often help eliminate disputes,

sometimes disagreements in contentious cases are unavoidable. *Id.* However, strictly following the foregoing rules and understanding the scope, timeliness and procedural requirements can make discovery a much easier process and make the frequently described pitfalls of federal practice less of a reality. *Id.*

About the Author

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certify to the judicial officer (usually the judge or his or her designee) that this good faith attempt has been made. Moreover, as part of this certification, the moving party must provide the following written material to the judicial officer:

- state the matters in dispute;
- state the date, time and place of the conference where the attempt to resolve the dispute was made; and
- state the names of all parties participating in the foregoing conference. Local Rule 4:0.9.

Again, before any motions are filed, the judicial officer then can schedule a

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