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DISCOVERY AND SANCTIONS UNDER THE NEW FEDERAL RULES OF CIVIL PROCEDURE

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I. INTRODUCTION

The new Federal Rules of Civil Procedure (hereinafter "new Rules") were effective December 1, 1993. The new Rules did not receive much publicity though they had been proposed by the United States Supreme Court months before because everyone expected Congress would override the mandatory disclosure portion of these new Rules. However, Congress was tied up in debates over NAFTA and other emergency matters until the close of the Session. Congress simply recessed and never took any action on the new Rules proposed by the United States Supreme Court. When that occurs, whatever has been proposed by the United States Supreme Court becomes the new Rules.

A. Mandatory Turnover

The new Rules have what is generally referred to as mandatory turnover of discovery shortly after issue is joined. The mandatory disclosure is 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.

Even among the Supreme Court that promulgated the new Rules, there is considerable dissent over the new Rules as was stated by Justice Scalia (joined by Justices Thomas and Souter) in dissent that the new Rules are

> promoted as a means for reducing the unnecessary expense and delay that occurred in the present regime. But that duty-to-disclose regime does not replace the current, much-

> criticized discovery process; rather, it adds a further layer of discovery. It will likely increase the discovery burdens on District Judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure."

Ivan H. Donner, Rule 26 and Discovery: A Mandatory "Optional" Rule, Side Bar, Summer 1994, at 10.

It is certainly the belief of this attorney that Justice Scalia is right. The new mandatory discovery Rules add another layer of discovery and increase discovery costs. The new Rules do not decrease discovery costs!

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 form 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. There are 94 federal District Courts. Just on new Rule 26, the various District Courts have opted in or out as follows:

-- Rule 26(a)(1) (Initial Disclosures): Thirty-seven (37) districts have opted in, wholly or partially. Twenty-six (26) districts have opted-out but have some disclosure requirements by local rule. Thirty-one (31) districts have opted-out with no local rule disclosure requirements.

-- Rule 26(a)(2) (Disclosure of Expert Testimony): Fifty-eight districts have opted in, wholly or partially. Thirty (30) districts do not have the rule in effect, although some of them have some form of expert discovery by local rule. Six (6) districts have the matter under advisement or have delegated it to individual judges.

-- Rule 26(a)(3) (Pre-Trial Disclosures): Fifty-nine districts have opted in. Twenty-four (24) districts do not have the rule in effect, although some have a local rule with somewhat similar requirements. Eleven districts have the rule under advisement or leave the application to individual judges.

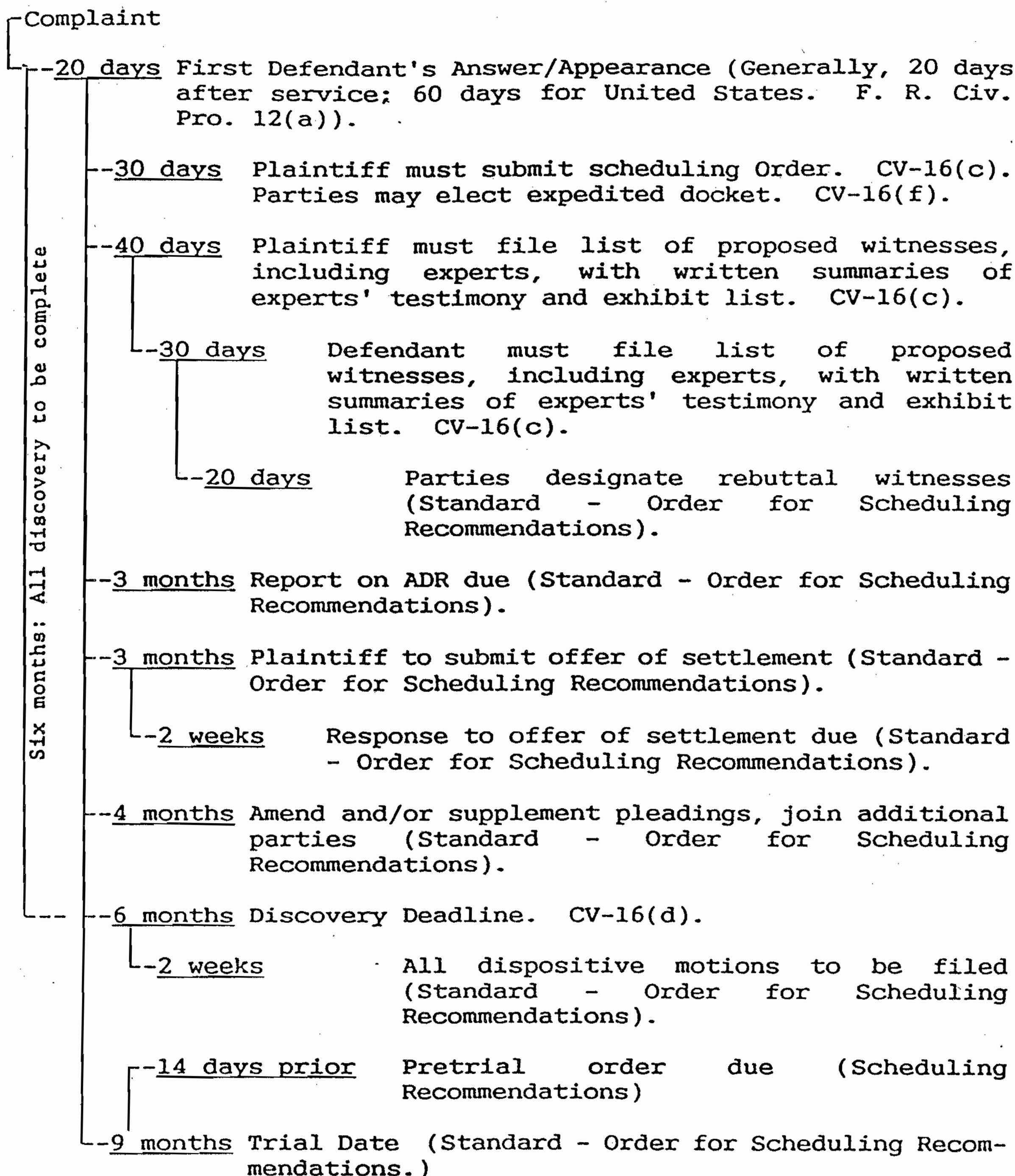
-- Rules 26(F) (Meeting of Parties): Fifty-one districts have opted in. Twenty-six (26) districts do not have the rule in effect. Eight (8) districts have the matter under advisement or have delegated the matter to individual judges. In nine (9) districts, the actions taken by the court have been ambiguous, and it is not certain the extent to which a meeting of the parties is required.

Federal Litigation Guide Reporter, Vol. 5, Issue 9, p. 259-60 (Sept. 1994). 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[1]
DISCOVERY TIME TABLE UNDER RULE 16



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[1]Prepared by Annalyn G. Smith with Matthews & Branscomb for "Federal Rules of Civil Practice Seminar," March 25, 1994.

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 four 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 "mandatary 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).

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 in 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, one 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 <u>verified by affidavit</u> 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 why 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. <u>Requests for Relief in Discovery</u>

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); <u>Frupac Int'l Corp. v. M/V "Chucabuco"</u> 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. <u>Musicom Int'l, Inc. v. Serubo</u>, 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 latter 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). 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).

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).

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). 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 should essentially "sit down and shut up." Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Penn. 1993). 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 Depositions

To take a video taped or audio taped deposition, all the 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 the 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 or "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 it pertains 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.

Depositions on written questions are normally best utilized where the information is very precise or in written form and the witness is disinterested. For example, a custodian of records for a disinterested third party may be a logical witness on which to use deposition on written interrogatories.

VI. NEW RULE 32 AND LOCAL RULE CV-32: USE OF DEPOSITIONS IN COURT PROCEEDINGS

Local Rule CV-32 provides that all portions of depositions to be offered at trial shall be designated prior to jury selection. However, every pre-trial order that this attorney has ever filled out has required the listing of excerpts from depositions that are intended to be used at trial. More specifically, Appendix B-2 of the Local Rules entitled "Pretrial Order" requires in paragraph 17 that each party advise the other party of the deposition questions and answers to be offered into evidence. This is long prior to jury selection.

The most important aspect of Rule 32 is that it provides that a deposition cannot be used against a party who receives less than 11 days notice. Therefore, in a de facto manner, new Rule 32 establishes 11 days as the minimum reasonable notice. However, before the deposition cannot be used, the party receiving less than 11 days notice must have filed a motion for a protective order.

If a deposition is offered in non-stenographic form, the party offering the deposition testimony must provide a transcript of the portions offered.

VII. NEW RULE 33 AND LOCAL RULE CV-33: INTERROGATORIES TO PARTIES

The Local Rule CV-33 establishes the limit on the number of interrogatories to each adverse party to 20. The biggest point of contention normally is what constitutes 20 interrogatories. This is especially true when "each separate paragraph within a question and each sub-part contained within a question which calls for a response shall be counted as a separate question." Local Rule CV-33(a). However the sample interrogatories at the end of Local Rule CV-33 certainly are an indication of how an interrogatory can be framed to extract the maximum amount of possible information without being considered multiple interrogatories.

A. Filing Answers to Interrogatories

If the answers to the interrogatories are to be used at trial, the portions to be used shall be filed with the clerk at the beginning of trial. In the answers, each answer should be preceded by the interrogatory itself.

B. Objections

An objecting party shall answer the interrogatory to the extent it is not objectionable. All grounds for objections shall be specifically stated. If any ground is not stated, it is waived.

C. Recommendation

The Local Rules go to great extent of giving proposed "instructions" and "interrogatories." My recommendation is that every party should utilize to the extent possible the court's proposed instructions and interrogatories in every case they have in the Western District of Texas. The court is naturally going to believe its "instructions" and "interrogatories" are clear and understandable. Therefore, the opposing party is going to be hard-pressed to object to the court's own instructions and interrogatories.

VIII. NEW RULE 34: PRODUCTION OF DOCUMENTS AND THINGS

The only significant change in Rule 34 is that if an objection is made to part of a request, inspection must be made or permitted on the remaining parts of the request. Simply because one part is objectionable is not grounds for refusing production on the non-objectionable parts.

IX. LOCAL RULE CV-36: REQUEST FOR ADMISSIONS

The request for admissions is limited to 30 responses. In the same manner as interrogatories are treated, each paragraph and sub-paragraph that requires a separate response is considered as a separate request for admission for the purposes of 30 requests contained in Local Rule CV-36. Also, responses to requests for admissions, if they are to be used in trial, have to be filed with the clerk of the court.

X. NEW RULE 37 AND LOCAL RULE CV-37: FAILURE TO MAKE DISCLOSURE OR INCORPORATE IN DISCOVERY: SANCTIONS

Requests for discovery should be taken very seriously! A discovery sanction can be imposed even without an order compelling discovery. McLeod, Alexander, Powell & Apffel v. Quarles, 894 F.2d 1482 (5th Cir. 1990). The District Court will only be reversed for abuse of discretion. Batson v. Neale, Specle Assoc., Inc., 765 F.2d 511, 514 (5th Cir. 1985). The District Court can even dismiss the complaint for failing to comply with a discovery order, Truck Trends, Inc. v. Armstrong Rubber Co., 818 F.2d 427 (5th Cir. 1987), or enter a default judgment for numerous discovery abuses. Sciambra v. Graham News Co., 841 F.2d 651, rehearing denied 847 F.2d 840 (5th Cir. 1988). Sometimes an evidentiary hearing on damages may be required when the District Court awards sanctions and renders judgment based on those sanctions for discovery abuses, but an evidentiary hearing is not required if the damages are for a liquidated amount. Frame v. S.H., Inc., 967 F.2d 194 (5th Cir. 1992). Under the new Rules 26 and 37, discovery sanctions can be imposed, not under the general provisions of Rule 11 as was possible in the past. Tec-Air, Inc. v. Nippondenso Mfg. USA, 1994 U.S. Dist. LEXIS 2026, 91-C-4488 (N.D. Ill. Feb. 23, 1994).

THE MORAL OF THESE CASES IS TO TAKE DISCOVERY REQUESTS SERIOUSLY.

A. Conference With Opposing Counsel

Before any motion to compel based upon a discovery dispute can be brought before the court, the moving party must have conferred

with opposing counsel and made a reasonable effort to resolve the dispute prior to filing the motion. Local Rule CV-37(b). A certificate of conference with opposing counsel must be contained within the motion itself. The reason an agreement was not reached should also be given in the motion. This is a prerequisite for bringing any motion to compel.

My recommendation is that if the discovery dispute occurs during a deposition, you confer with opposing counsel on the record to attempt to resolve the discovery dispute. Then you have a written record as to when you conferred and exactly what was stated. Remember, when you try to resolve your discovery dispute on the record, that record may later be reviewed by the court. Be careful what you say.

B. Attachment of Copies to Motions to Compel

Because discovery requests are normally not filed with the court, Local Rule CV-37(a) requires that any motion to compel include the discovery request and response be attached to the 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 <u>shall</u> 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 <u>shall</u> award attorneys fees against the moving party, again, unless "substantially justified."

D. <u>Failure to Comply With Court Order</u>

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 the opposing party's pleadings.

E. <u>Failure to Disclose, False or Misleading Disclosure, or Refusal to Admit</u>

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 the 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 question. 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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