

Some Alternative Ways to Resolve Discovery Disputes

By Pete Haskel, Executive Assistant City Attorney, Dallas, Texas

Sane lawyers hate discovery litigation. So do their clients. And without a doubt, judges and magistrates have little patience for discovery litigation.[1] Although a judge may assert that he or she only hates "unnecessary" discovery disputes, I have never met a judge who does not think that lawyers could (and therefore should) have resolved most discovery arguments that are referred for judicial resolution. For example:

> The parties' behavior explains the belief among lawyers that judges hate discovery disputes. This court finds that generalization too broad—in the court's experience, it isn't that judges hate discovery disputes. It is that judges dislike unnecessary discovery disputes that involve unprofessional (some might say puerile) behavior by the lawyers or the parties. When the parties fail to courteously and cooperatively work through a good-faith scheduling error, this judge (and probably other judges) considers the need to resolve such a dispute somewhat embarrassing.[2]

As a very recent comment from the bench illustrates, judges see acrimonious discovery issues as impeding the proper functioning of their courts:

> Currently before the Court are a ridiculous number of discovery disputes, perfectly capturing the rationale for recent reforms to the Federal Rules of Civil Procedure to address concerns that civil litigation has become too expensive, time-consuming and contentious, thereby inhibiting effective access to the courts by parties seeking a just resolution to their dispute.[3]

All can agree that discovery litigation usually is time-consuming and inordinately expensive, and often distracting from what will be the dispositive issues.

So what are some alternatives?[4]

Meet and Confer

The pretrial conference among counsel is the Federal Rules' default method for resolving discovery disputes.[5] Many local rules or orders require in-person attendance by counsel, apparently in the belief (which I share) that in-person meetings are more likely than email or even telephone to foster substantive dialogue and resolution of disputes, or at least a narrowing of issues and adoption of a method for resolution that includes the court only as a last resort. For the same reasons, local rules also now often require good faith negotiations before the filing of pretrial discovery motions or even the service of discovery objections.[6] I cannot sufficiently emphasize how important the fullest use of these conferences has become; how appreciative judges are when the parties provide them with practical approaches to discovery based on those conferences; and how unpleasant litigators' lives quickly become in so many ways if we are dilatory in fulfilling our pretrial conference obligations.

The pretrial conference is both a pretrial discovery ADR method and a vehicle for counsel to consider and adopt (usually subject to judicial approval) various alternative procedures for resolving existing and potential discovery disputes. I suggest some of those alternatives here, but am sure to a moral certainty that there are others that I fail to mention.

Among the many discovery issues that a pretrial conference and the resulting proposed pretrial order might resolve are: the scope of document and electronically stored information (ESI) preservation, the order and scope of discovery, number of different types of discovery requests, duration and number of depositions; types of metadata to be included with produced ESI, and possible segmented discovery (*e.g.*, first round of discovery limited to jurisdictional issues).

The Value of Stipulations

Starting at the pretrial conference and continuing as additional facts emerge through discovery, counsel should consider and discuss possible fact stipulations, and (subject to stricter judicial constraints), stipulations of law. I like to think of stipulations being both offensive and defensive. Obtaining material stipulations from the opposing party can be an important offensive tool of course – achieving quick and inexpensive fact resolutions without having to do discovery. But I also find it useful to consider the defensive value of granting stipulations: they can be used to limit burdensome and even potentially embarrassing discovery against our clients.

For example, if we do not want to subject our mayor to substantial deposition questioning, consider offering to stipulate to those few facts that the opposing party asserts only the mayor knows. Alternatively, consider stipulations that narrow areas for such deposition questions. In either of such instances, the fact stipulations should be accompanied by corresponding agreed or court-ordered limits on discovery to ensure we get the bargained-for advantage of the fact stipulation. If we make such offers and the other side rejects them, we have created strong ammunition for our motion for a protective order.

Obtain an Order That Production Does Not Waive Privileges

It has been frequently observed,[7] and I agree, that failure to obtain an order under Fed. R. Evid. 502(d) can almost be *per se* malpractice except perhaps in small cases:

> **(d) Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by

> disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

Unfortunately, not many states have adopted an equivalent rule. Perhaps this is at least in part because of doubts that federal courts or courts of other states would abide by a state court's non-waiver orders – even though Fed. R. Evid. 502(c) implicitly recognizes the validity of such state court orders.[8] Such an order, which can be by agreement or over objection, serves an important role in situations wherein one party's resistance to certain discovery requests is motivated primarily by concern about possible future use of disclosures in other litigation. However, a Rule 502(d) protects only against waiver of attorney-client and work-product privileges by disclosure – it does of itself not render any information privileged or confidential. While Rule 502(d) is limited to protecting against waiver of attorney-client and work-product privileges, I have successfully argued that federal courts have inherent authority under the common law to enter orders to protect against waiver of other privileges as to future state and federal proceedings:

> The motion is GRANTED, and it is hereby ORDERED that pursuant to Federal Rule of Evidence 502(d) and the Court's inherent powers, no privilege or protection for communications or other information claimed as privileged by the City of Dallas, Texas, is waived by disclosure connected with the litigation pending in this case, and that any such disclosure is also not a waiver in any other Federal or State proceeding.[9]

Requests for Admission

It may seem strange to consider using a classic discovery method as an alternative way to dispose of discovery disputes. But I am thinking of the provision in Fed. R. Civ. P. 36(b) barring use in other litigation of any admission made in response to an admission request:

> An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding."

In that respect, Fed. R. Civ. P. Rule 36(b) has an effect similar to that of an order under Fed. R. Evid. 502(d) – it protects a party from use of the matter disclosed or admitted in future litigation. An advantage of the protection for matters admitted under procedural Rule 36 over the protection of an order under evidence Rule 502(d) is that the evidence rule only protects privileged information against later assertions of waiver, whereas the procedural rule can limit future use of any information communicated through admissions. As noted in the above discussion about Rule 502(d), a party's principal concern about providing discovery may be feared collateral consequences. Treating the matter under Rule 36 rather than in depositions, interrogatories, or even requests for production, can help protect a party from future adverse use of the matter admitted at minimal expense.[10]

Sealing and Confidentiality Orders

When properly used, sealing and confidentiality orders can protect against further disclosure of trade secrets or other sensitive competitive information, thereby reducing legitimate hesitance to provide such information in discovery. As with Rule 502(d) orders and admissions under Rule 36, confidentiality orders can protect parties from adverse use of disclosed information in future proceedings. However, courts are legitimately starting to push back against abuses, such as when parties seek to protect information that is not worthy of judicial protection, try to protect information for too long a period, or try to protect information on which court orders approving settlements are based. Also, confidentiality orders are interlocutory, and therefore a court can reconsider them at any time (of course Rule 502(d) orders are interlocutory too).

Motion for Partial Summary Judgment or Dismissal

Early partial summary judgment and dismissal motions can be used to test whether disputed discovery is really material. Staying discovery except as to matters directly relevant to jurisdiction while such motions are pending has great potential for mooting discovery requests and associated disputes.[11] However, courts retain broad discretion to stay or not to stay discovery – and many decline to do so:

> While a party's filing of a motion to dismiss may be an appropriate circumstance in which to limit discovery, the filing of a motion to dismiss by itself does not mandate a stay of discovery pending resolution of that motion, nor does the right to discovery continue in light of a pending dispositive motion. Rather, whether a stay of discovery is warranted depends on the individual case. A stay is appropriate where the motion to dismiss can resolve the case, where ongoing discovery is unlikely to produce facts necessary to defeat the motion, or where the motion raises a potentially dispositive threshold issue, such as a challenge to plaintiff's standing.[12]

Perhaps because I am usually on the defense, I see stays or limits on discovery pending resolution of non-frivolous dispositive motions as conserving judicial and party resources. Of course discovery should be permitted to proceed to prevent loss of testimony or other evidence, or to prevent other demonstrable prejudice. Courts also grapple with the harder question of whether to stay discovery entirely, not at all, or only as to the defendants whose dispositive motions have been dismissed where such motions from other defendants remain pending.[13]

Shifting Preservation, Collection, Review, and/or Production Costs

I mention these possibilities here but the mechanics are beyond the scope of this piece. Cost shifting does not directly resolve discovery disputes but a requesting party who is required to pay discovery expenses before the discovery is had might understandably decide that the requested discovery just might not be that crucial after all.

Discovery Master or Mediator (or Referral to Magistrate Judge)

Retaining neutral non-judicial referees can help resolve discovery disputes if the case warrants the expense. Some federal districts use magistrate judges as discovery mediators too, with impressive success at less out-of-pocket cost to the parties. Federal judges often refer discovery disputes to magistrate judges, either to issue dispositive orders or to recommend orders to

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the district judge. A mediator can either recommend settlement terms on scope of disputed discovery to the parties or recommend procedure for resolving such dispute. Using mediation can allow the parties to keep information confidential – sometimes even from the judge – while referral to magistrates or masters require confidentiality orders for such protection.

Sneak peeks and other methods of testing disputed data sets for responsiveness

Discovery disputes often center on whether a set of data contains enough relevant information to justify the expense and time to review that data. Courts have started to approve proposed testing methods – often using sophisticated statistical tools for selecting representative test sets. For example, the parties might be ordered to use agreed key words to search a randomly-selected statistically valid sample from a disputed data set based on an agreed or court-determined level of reliability. The results of such tests can inform future settlement of discovery disputes and/or court discovery rulings.[14]

Notes

1. By "discovery litigation" I mean the usual objections, motions to quash, motions for protective order, motions to compel, and motions for sanctions. Some jurisdictions have different names for these procedures or vary discovery litigation from the federal model, which I treat as a benchmark here.
2. SV Gopalratnam v. Hewlett-Packard Co., 13-CV-618-PP, 2015 WL 5772864, at *7 (E.D. Wisc. Sept. 30, 2015).
3. Spin Master Ltd. v. Bureau Veritas Consumer Products Serv., Inc., 08-CV-923A (SR), 2016 WL 690819, at *1 (W.D.N.Y. Feb. 22, 2016).
4. *See generally,* Federal Judicial Center, Manual for Complex Litigation, §§ 11.4.423-.424 at 56-62 (4th ed. 2004), https://public.resource.org/scribd/8763868.pdf (last accessed Feb. 28, 2016).
5. *See* Fed. R. Civ. P. 26(f).
6. *See generally* Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery)* Road, 19 Rich. J.L. & Tech. 8 (2013) (now outdated because of rapid developments, but a useful discussion).
7. *See, e.g.*, Pearl Zuchlewski, The Uses and Abuses of Electronic Discovery, 57 Wayne L. Rev. 1391, 1409 (2011) (attributing statement to U.S. Magistrate Judge Andrew Peck, S.D.N.Y.).
8. Fed. R. Evid. 502(c) provides in pertinent part: "When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver . . .." The drafters' note on Rule 502 relies on full faith and credit principles to take the position that ". . . a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings." Explanatory Note on Evidence Rule 502. I suppose the drafters would have taken the same position as to such state court orders being enforced by courts in other states.
9. *See* Order Granting Motion for Entry of a Protective Order as to City of Dallas, ECF No. 934, United States v. Don Hill, Crim. Action No. 3:07-CR-289-M (N.D. Tex. Aug. 14, 2009). My concern was to preserve the legislative deliberation privilege for city council communications, but the order also would have protected other privileges too.
10. However, assuming the admission is not sealed, a future litigant in a later law suit could ask the same question as the request for admission, or seek the information using another discovery method. Nothing in Rule 36(b) would prevent that, nor in my view should it. Rule 36 cannot and should not immunize a party from the adverse consequences of unfavorable facts – it merely limits the adverse use of the admission of such fact in a law suit. The 1970 drafters' notes to Rule 36 contain some interesting passages: "The provisions of Rule 36 make it clear that admissions function very much as pleadings do. Thus, when a party admits in part and denies in part, his admission is for purposes of the pending action only and may not be used against him in any other proceeding. . . . In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party." Notes to 1970 Amendments, Fed. R. Civ. P. 36 (citations omitted). These excerpts imply that admissions or denials in pleadings in one case cannot be used against the pleader in a later case. However, I think that implication is incorrect. *See* New Hampshire v. Maine, 532 U.S. 742, 749-51 (2001) (court discretion to invoke judicial estoppel to prevent litigant from taking position contrary to the party's pleadings in a prior case); In re Zonagen, Inc. Sec. Litig., 322 F. Supp. 2d 764, 783 (S.D. Tex. 2003) ("Statements a party makes in pleadings in one case that are inconsistent with the positions a party takes in another case may be admissible as admissions against interest and for impeachment"). I could not find any federal cases on whether Rule 36(b) would bar the use of an admission in impeachment as a prior inconsistent statement, but the plain language of the rule does suggest that the impeachment use of the admission would be prohibited. Interestingly (at least to me) is another implication from a literal reading of Rule 36(b): It bars future use of admissions but not of denials or refusals to admit. A carefully phrased request for admission could draw a denial that might haunt the denying party in future litigation if the rule is to be literally applied. And what about deemed admissions arising from failure to respond to admission requests? Does the dilatory party get to use the Rule 36 shield for deemed admissions in future litigation? I would think not but have not tried to research the question.
11. "The Court retains ample discretion to tailor discovery to minimize incidental costs incurred by defendants with pending motions to dismiss." In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d 100, 106 (D. Mass. 2002) (citations omitted because post-2002 Fed. R. Civ. P. amendments have redistributed courts' authority – but preserved it).
12. Nexstar Broad., Inc. v. Granite Broad. Corp., 1:11-CV-249, 2011 WL 4345432, at *2 (N.D. Ind. Sept. 15, 2011) (internal quotation, typographic changes and citations omitted).
13. *See* In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d 100 (D. Mass. 2002).
14. *See generally* Ruling Regarding Electronically Stored Information ("ESI"), Strauch v. Computer Sciences Corp., Civ. Action No. 3:14-cv-00956, 2015 WL 7458506, *3 (D. Conn. Nov. 24, 2015), for a good discussion of some of these approaches. Additional insight appears in the lawyers submissions on the discovery issue, available from PACER. ML