Honorable Rosalyn M. Chapman, United States Magistrate Judge, Central District of California

Planning and Cooperation are Essential for Successful Discovery

Discovery is indispensable to an attorney's adequate representation of a party in civil litigation in the federal courts, regardless of whether the party is a plaintiff or a defendant or the litigation is simple or complex. Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain the evidence necessary to evaluate and resolve their action by settlement, dispositive motion or trial. Yet, sometimes discovery does not fulfill its vital purpose. Often this is the result of inadequate discovery planning or the lack of cooperation among counsel, especially when one side needs more discovery than the other side. Either of these shortcomings can drastically disrupt the discovery process, increase the cost of litigation, and cause substantial delay in resolving the case.

The Federal Rules of Civil Procedure encourage cooperation among counsel during discovery planning, see Fed. R. Civ. P. 37(f) (authorizing court to award attorney's fees against party or attorney who "fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f)"), as well as during the discovery process. See, e.g., Fed. R. Civ. P. 37(a)(5)(A)(i) (court must deny prevailing party's application for attorney's fees when "movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action"). Counsel must, therefore, take specific steps to assure discovery planning occurs and there is cooperation among counsel. This brief introduction proposes several means to assure adequate discovery planning and cooperation among counsel during the discovery process.

The Rule 26(f) conference usually affords counsel the first real opportunity to talk extensively with opposing counsel, and to create a good working relationship for the duration of the litigation, especially when counsel have had no previous contact with each other. To facilitate the development of a good working relationship, counsel should meet personally, face-to-face, rather than confer telephonically or, worse, by corresponding with each other. Counsel should spend considerable time at the Rule 26(f) conference discussing their parties' discovery needs, as well as the details of the discovery plan they will jointly submit to the district court for approval. However, when the district court's local rules substantially broaden the scope of the Rule 26(f) report, see, e.g., Local Rule 26-1 of the Central District of California (requiring Rule 26(f) report address whether action is complex, likely mo-

tions and motion cut-off dates, settlement procedures, trial estimate, additional parties and timing of expert witness disclosures), it is preferable for counsel to prepare a joint discovery plan separate from the rest of the Rule 26(f) report. The more detailed the discovery plan, the more likely it is to be useful to the parties, and the less likely the parties will need the assistance of the court during the discovery process.

Preparing a joint discovery plan is fairly easy and straightforward in cases with only one counsel on each side. However, in cases with multiple counsel representing multiple parties on one side or another, or on both sides, discovery planning is considerably more complicated, and cooperation of counsel is even more important. Discovery usually proceeds more smoothly in multi-counsel cases when each party (or group of parties) designates a discovery counsel, who is primarily responsible for: coordinating that party's (or group's) discovery with both in-house counsel and other discovery counsel on the same side, and creating the side's common discovery proposal; meeting with opposing counsel to develop a discovery plan for joint submission to the court; sharing common discovery, and his or her party's (or group's) discovery, with other counsel on the same side; and responding to discovery requests from opposing parties. Often it makes the most sense for a party's trial counsel to be its discovery counsel, since the trial counsel best understands what discovery is necessary to evaluate the merits of the action, and, if the case goes to trial, he or she is already familiar with the evidence. Sometimes that is just not possible, however. Yet, discovery counsel must be sufficiently senior in the law firm to assure others do not reverse his or her decisions.

Before meeting with opposing counsel to draft the joint discovery plan, discovery counsel on each side in multi-counsel cases should, as an initial matter, confer with their client, and the client's in-house counsel (if any), about the client's discovery needs, learn about the client's computer file system and e-mail delivery system, advise the client about its discovery obligations, discuss how the client can obtain information to produce to the opposing party and the various methods the client can use to preserve information to be produced, identify the key witnesses for the client's case, and determine the witnesses' locations. Next, discovery counsel should confer with other discovery counsel on their side to discuss the plaintiffs' or defendants' common discovery needs, to create a common discovery proposal, and to reach an agreement on the additional discovery each individual plaintiff or defendant may pursue. Agreements among plaintiffs' or defendants' discovery counsel often assign responsibilities for common discovery among counsel by topic or subject matter, if the nature of the litigation is conducive to that approach;

otherwise, responsibilities for common discovery may be assigned by any other rationale counsel find helpful, such as the parties' wherewithal or counsel's experience. Such agreements usually include assigning responsibilities for common written discovery, i.e., interrogatories, document requests, and admissions (especially regarding the authenticity of documents), as well as the noticing of, and taking the lead examining role in, the depositions of specific individual witnesses and persons most knowledgeable ("PMK") under Rule 30(b)(6), subjects or topics for the examination of PMK witnesses, and the length of time each party will have to examine the individual and PMK witnesses. Moreover, such agreements should assure counsel share common discovery with other counsel on their side, and that any non-common or additional discovery by an individual plaintiff or defendant does not duplicate discovery taken by any other plaintiff or defendant. The agreements should also discuss whether an individual party's discovery should also be shared with other parties on the same side (which may be problematic with cross-parties). Each side's common discovery proposal should be flexible enough to allow for changes to be made when the details of the joint discovery plan are negotiated with opposing counsel.

It is essential for the parties to present a joint discovery plan to the district court for approval; separate plans from the parties will merely result in the district court drafting the discovery plan, which may not meet the parties' needs. Moreover, the parties can use the discovery plan as the vehicle for proposing special procedures to, or making special requests of, the district court to ensure discovery proceeds smoothly. These special procedures may include requiring a prefiling conference and the joint submission of a discovery motion, if the district court does not require these procedures, see, e.g., Local Rule 37 of the Central District of California (requiring mandatory prefiling conference between counsel to try in good faith to resolve discovery dispute and submission of discovery dispute by joint stipulation signed by both counsel), or requiring counsel to meet monthly or periodically to discuss the discovery conducted vis-a-vis the discovery plan, any discovery problems that have arisen, and counsel's efforts to resolve such problems. Special requests of the district court may include asking the court to be available by telephone during depositions that are expected to raise complicated privilege claims or be contentious, to inspect a tangible thing, such as a product, or view a location and, especially in multi-district litigation or class actions, to resolve discovery disputes in an expedited manner. (For example, in exchange for the speedy resolution of discovery disputes, the parties can propose a streamlined hearing procedure, which provides for less than 21 days no-

tice, presents the discovery dispute solely as a joint submission, forgoes oral argument and makes the magistrate judge's decision final, without an appeal to the district judge.) The preceding special procedures and requests have proven especially helpful in ensuring the discovery process does not bog down when a short discovery period is set.

The discovery plan the parties submit to the district court for approval should address the following topics, where applicable:

- The discovery plan should briefly address the need for a protective order under Rule 26(c), and, if a protective order is needed, state when a proposed order will be lodged. However, a stipulated protective order should be prepared separately from the discovery plan, and should be presented separately to the district court for its approval. Counsel should assure that all provisions in the stipulated protective order refer to, and comply with, the local rules of the district court.
- The date for Rule 26(a) disclosures, if not yet made.
- A month-by-month outline of factual discovery and expert discovery, as it relates to the topics and issues to be covered by the discovery, as well as the timing of written discovery, depositions and anticipated third-party discovery.
- A schedule for the supplementation of discovery under Rule 26(e).
- Modifications to the limitations on the number of interrogatories (Rule 33(a)(1)), the number of depositions (Rule 30(a)(2)(A)(i)) and the length of depositions (Rule 30(d)(1)), as well as the application of these modifications to common discovery and an individual party's discovery.
- Agreements about the locations of depositions under Rule 30(a) and 30(b)(6), the methods for taking and preserving deposition testimony, deposition travel costs, foreign discovery through letters rogatory or other means, written depositions under Rule 31, and the like.
- The subjects or topics of Rule 30(b)(6) PMK depositions, including the deposition of a party's systems manager regarding the party's computer file system and e-mail delivery system, policies for the routine destruction of files and e-mails, and available means to implement preservation orders.
- Agreements on how the parties will respond to document requests under Rule 34, the form in which electronically stored information will be produced, obtaining releases for information, the advance production of documents by deposition witnesses under Rules 30(b)(2), 30(b)(6) and 45(a)(1), inspections of tangible things or entry onto land, and, in particularly document-intensive litigation, the costs of

duplication or production, how documents will be preserved for trial, e.g., CD- ROM, and whether parties must provide indexes with document productions.

- Whether the parties claim privilege and other protections, and, if so, agreements regarding the screening of documents for privilege claims, the information on privilege logs, see Model Form 11:A, Rutter Group Practice Guide, Federal Civil Procedure Before Trial, and when the privilege logs will be produced in relation to the document productions.
- Whether a neutral depository is required to preserve physical evidence or particularly sensitive documents, and, if so, agreements regarding the identity of the depository, access to the depository, reports from the depository and the costs of maintaining the depository.
- Whether the parties will conduct any examinations of persons under Rule 35, and, if so, agreements regarding the qualifications of the examiners, who may be present during the examinations, whether the examinations will be recorded, and the like.

When a discovery plan addresses most of these topics, the parties should be able to obtain sufficient information to evaluate and resolve their action by the end of the discovery process. Nevertheless, when counsel simply refuse to cooperate with each other, even the best discovery plan cannot assure discovery fulfills its vital purpose. Sometimes this happens when counsel become sidetracked with narrow discovery issues and do not focus on the merits of the case. The types of special procedures and requests discussed above are designed to help counsel avoid becoming sidetracked during the discovery process. In the end, however, it is imperative counsel act reasonably and in good faith for the discovery process to be successful. The parties and the federal courts deserve no less.