AVOIDING COMMON MISTAKES DURING DISCOVERY

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I am consistently impressed by the professionalism and collegiality of attorneys in connection with discovery motions, hearings and conferences. Most attorneys properly use the discovery process to obtain needed information about their own claims, and to learn more about the claims of opposing parties. Nevertheless, anyone associated with the litigation process will quickly see examples of frustrating or improper (or even abusive) discovery practices. For attorneys who see the discovery process as merely a weapon to be employed in breaking an opponent or waging a war of attrition, discussions about the purposes of discovery and the desirability of avoiding discovery disputes are unwanted and pointless. But for those who must confront discovery abuses, or who simply want to conduct discovery more efficiently and successfully, a little advice might be appreciated. Here, then, are a few suggestions that, if followed, should minimize the number (if not the intensity) of discovery disputes, and improve your odds of success when those disputes prove unavoidable.

Deadlines Aren't Guidelines

Deadlines affecting the discovery process are found primarily in the court's scheduling orders, the Nevada Rules of Civil Procedure and our local rules of practice, and they cannot be ignored. Apart from the erosive effect perpetual tardiness will have on an attorney's good reputation, the failure to comply with these deadlines may (and routinely does) result in an inability to obtain important information, the waiver of objections to written discovery requests, the imposition of monetary or evidentiary sanctions, and even dismissal of the lawsuit. Courts understand that extensions of time will be necessary on occasion, but they expect attorneys to be proactive in seeking a stipulation or order in that regard. If an extension of time is needed, you should act before the deadline passes.

Preparation is the Key to Success

Thorough preparation is necessary to so many of the services provided by attorneys, and it is no less necessary in discovery proceedings. For example, the participants at an early case conference are required to make or arrange for the disclosures required by NRCP 16.1(a)(1), and to develop a discovery plan pursuant to NRCP 16.1(b)(2). How can an attorney responsibly discuss or negotiate a discovery plan – including the establishment of discovery deadlines and the use of phased or staggered discovery – without thoroughly understanding his or her client's situation? The growing realization that relevant (indeed, crucial) information is often stored in computers and similar devices underscores the need for preparation prior to the early case conference. The discovery plan must account for electronically stored information (ESI), and the attorney must therefore understand whether and how the client maintains potentially relevant ESI. In addition, responses to written discovery requests might require an affidavit from the client or preparation of a privilege log, both of which are due when the responses are served. A potential need for supporting evidence or authorities should also be considered before a formal discovery hearing.

The Court Helps Those Who Help Themselves

From time to time, I encounter disputes in which the attorneys are arguing over whether they previously reached an agreement with respect to discovery. Fortunately for the court, these disputes are easily resolved by referring to DCR 16 – the court will not consider any purported agreement between the parties or their counsel unless it is in the court minutes, or it is in writing and signed by the party or attorney denying its existence. The lesson: If the agreement is important, put it in writing and have the other side sign it. Similarly, the court sometimes receives motions in which the movant indignantly complains that it has been asking for certain discovery for some lengthy period of time. Do not expect the court to share your outrage. A party's failure to serve a required discovery response, or to otherwise provide requested discovery, can be remedied through an appropriate discovery motion. While our rules require parties to make a good faith effort to resolve their discovery dispute without court action, an endless exchange of letters, faxes or e-mails is not required, or even contemplated. Once a good faith effort to avoid court involvement has been made, a party is free to file an appropriate discovery motion. An unreasonable delay in bringing that motion may result in an order denying the entire motion as untimely, despite the fact that your original request was meritorious.

Avoid the WMDs and UFOs

Some cases legitimately require substantial discovery, and an assessment of whether a given request is "too much" may depend upon the circumstances of a given case. But far too often, I encounter requests that could be viewed as "weapons of mass discovery," or WMDs – requests that are so improperly extensive or imprecise that compliance would be unduly expensive and burdensome. Just as frequent (if not more so) is the use of "unexplained frivolous objections," or UFOs – typically, a boilerplate litany of objections without any explanation or support. In many cases, these improprieties are unintended (e.g., a request for "all documents pertaining to the incident"); the attorney simply failed to take sufficient care in drafting the request or objection. In other cases, the drafter's error appears less innocent. Whatever the intention, they are improper. WMDs are not enforced and UFOs are disregarded, so attorneys are well advised to avoid motions or oppositions in which they find themselves attempting to argue in favor of either these improprieties.

Do Unto Others

Our entire discovery process is subject to a rule of reasonableness. That concept is expressly incorporated into NRCP 26(b)(2) and NRCP 26(g), but the words "reasonable" or "unreasonable," or variants thereof, appear dozens of times in our discovery rules. The discovery system depends absolutely on good faith and common sense from counsel. So it is disheartening, and a bit puzzling, to read or listen to arguments in support of a strained interpretation or application of our discovery rules. With due regard for the fact that attorneys are hired to zealously represent the interests of their respective clients, judges

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have little regard for arguments or tactics that the proponent would almost certainly disapprove if the positions of the parties were reversed. The situation is more than ironic. When an attorney refuses to acknowledge the reasonableness of an opponent's position, even in part, the persuasiveness of that attorney is undermined to some degree. Reasonable conduct enhances an attorney's effectiveness, his or her reputation in the legal community and the standing of our profession generally. But if that sounds too high-minded, just remember the other incentive for acting reasonably in discovery – it's the law. NL

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