You've Got It Coming – Winning Discovery through Effective Motions Practice

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1993 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PART II
by Paul DeMuro

In last month’s discussion of the 1993 amendments to the Federal Rules of Civil Procedure David J. Stout addressed those amendments that affect the discovery process. This month’s article explores the remaining amendments, emphasizing those changes that will have the greatest impact on practice in federal district court. A few comments on the retroactivity of the amendments, however, precede the discussion of the latest batch of federal rules.

The Supreme Court’s order promulgating the 1993 amendments, dated April 22, 1993, provided the amendments would take effect on December 1, 1993 “and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.” The general proposition, therefore, is that the new rules apply in pending proceedings if the court finds their application in a particular case “just and practicable.”

The Supreme Court’s pronouncement concerning how the amendments are to be applied is consistent with 28 U.S.C. § 2047(a), the statute governing the general law of retroactivity of rule changes. Section 2074(a) leaves the ultimate decision concerning the application of new rules to the presiding judge who is authorized not to apply a new rule or amendment if its application would not be feasible or would work injustice.” 28 U.S.C. §

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II. Overview: Substantive Law of Discovery

There is an enormous body of relevant law relating to discovery. The main parameters of this body of law, however, are fairly uniform and unexceptional. These materials will focus on New Mexico law and, where pertinent, law from the Tenth Circuit Court of Appeals. Counsel are directed to the Butterworth publication Hall, B. and Adams, C., New Mexico Discovery Manual (1992) for a comprehensive treatment of the subject.

A. Scope of Discovery

SCRA 1-026(B) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” In addition, “it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” The rule has three essential components that require independent evaluation. First, the information must be relevant. Second, it must not be subject to some privilege. Third, the information is discoverable even if inadmissible, so long as it is reasonably calculated to lead to the discovery of admissible evidence.


The general scope of discovery is the same in federal court. The federal courts have consistently affirmed the proposition that the discovery rules should be broadly and liberally construed. Schlagenhaus v. Holder, 379 U.S. 104, 114-115 (1964). The Tenth Circuit adheres to a philosophy of liberal discovery. See In Re Westinghouse Electric Corp., 570 F. 2d 899, 902 (10th Cir. 1978).

A discovery request should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the litigation. See Sherman Park Community Association v. Wauwatosa Realty Co., 486 F. Supp. 838 (E.D. Wis. 1980); In Re Folding Carton Antitrust Litigation, 83 F.R.D. 251 (N.D. Ill. 1978).

The right to discovery information is not, however, unlimited. “[T]he right to discovery is a qualified right…” particularly when it involves inspection pursuant to Rule 34(a) wherein courts have “uniformly scrutinized the problems to insure that the anticipated benefits are real and necessary, and that the burdens will not be intolerable.” Belcherv. Bassett Furniture Industries, Inc., 588 F.2d 904, 908, n. 12 (4th Cir. 1978) quoting 8 Wright & Miller, Federal Practice & Procedure § 2040 at 286-87 (1970). “Discovery has ultimate and necessary boundaries” and “discovery has limits... [that] grow more formidable as the showing of need decreases.” Eggleston v. Chicago Journeymen Plumber’s Local Union, 657 F. 2d 890, 904 (7th Cir. 1981).

The “ultimate and necessary boundaries” to discovery mean that discovery requests cannot be so burdensome as to constitute a kind of harassment, nor so vague that it is unfair to have a party respond. On the other hand, the mere assertion that a request for production is unduly burdensome is insufficient. See Panola Land Buyers Association v. Shuman, 762 F. 2d 1550, 1559 (11th Cir. 1985); Josephs v. Harris Corp., 677 F. 2d 985, 992 (3rd Cir. 1982); Resick v. American Dental Association, 90 F.R.D. 530, 542 (N.D. Ill. 1981); Goodman v. Wagner, 553 F. Supp. 255, 258 (E.D. Pa. 1982).

The objecting party must demonstrate how each discovery request is objectionable. Chubb v. Integrated Systems, Ltd. v. National Bank of Washington, 103 F.R.D. 52, 58 (D.D.C. 1984). Neither a general or conclusionary statement that a request for discovery is unduly burdensome or a general objection to discovery fulfills the responding party’s burden to object with specificity. See Lackey v. Mesa Petroleum Co., 90 N.M. 65, 559 P.2d 1192 (Ct. App. 1976). Chubb v. Integrated Systems, Ltd. v. National Bank of Washington, 103 F.R.D. 52, 58 (D.D.C. 1984). The party seeking to block discovery must show by specific statements how interrogatories are overbroad or unduly burdensome and thereby establish a basis in fact for the conclusionary statements contained in its objections. See White v. Wirtz, 402 F.2d 145, 148 (10th Cir. 1968). Courts have rejected the bold claim often made that any investigation required by discovery is burdensome. See generally 4A Moore’s Federal Practice para. 33.20 at 33-103-104 (2d ed. 1988) and the cases collected therein.


A party seeking a protective order has the burden to establish good cause why the discovery should be denied or limited. The courts have insisted on a particular and specific demonstration of facts, as distinguished from stereotyped and conclusionary statements, in order to establish good cause. 8 Wright & Miller, Federal Practice and Procedure, Section 2035 at 265. Accordingly, federal courts have repeatedly denied general and conclusionary objections to discovery on the grounds of “undue burden.” See e.g., White v. Wirtz, 402 F. 2d 145 (10th Cir. 1968); Anderson v. Cryovac, Inc., 805 F. 2d 1, 7 (1st Cir. 1986); Cippolone v. Liggett Group, Inc., 785 F. 2d 1108, 1121 (3d Cir. 1986); Wyatt v. Kaplan, 686 F. 2d 276, 283 (5th Cir. 1982). Reference to numerous other documents in avoidance of a direct answer to the interrogato-


1. Attorney Client Privilege

SCRA 11-503 sets out the attorney client privilege. It is beyond the scope of these materials to address, more than superficially the contours of this complex privilege. Basically the privilege protects (1) confidential communications; (2) between a lawyer (or lawyer's agent) and a client; (3) for the purposes of rendering legal services. The way to attack or establish the privilege is to break down and focus upon each element. There is very little New Mexico law that addresses the privilege. Therefore, these materials will provide some simple observations.

a. The person advocating the privilege has the burden of establishing the existence of the privilege. State v. Gallegos, 92 N.M. 370, 588 P. 2d 1045 (Ct. App. 1978).

b. The communication must have been intended to be confidential. State v. Deutsch, 103 N.M. 752, 713 P.2d 1008 (Ct. App. 1986).

c. Presence of another lawyer does not destroy the confidential nature of the communication. State v. Valdez, 95 N.M. 70, 618 P. 2d 1234 (1980).


e. The attorney client privilege protects the communication, but not the facts underlying the communication. See State v. Steinkraus, 76 N.M. 617, 417 P. 2d 431 (1966).


2. Attorney Work Product

The universally accepted definition of attorney work product is derived from the text of Rule 26(b)(3). Attorney work product requires that the material be “(1) a document or other tangible thing, (2) prepared in anticipation of litigation or for trial, and (3) prepared by or for the opposing party’s attorney or representative.” Langdon v. Champion, 752 P. 2d 999, 1005 (Alaska 1988) and the extensive authorities cited there. The doctrine of attorney work product as explicated by the United States Supreme Court in Hickman v. Taylor, reflects a policy decision to protect the professional efforts of an attorney or the attorney’s representative. See Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F. 2d 480, 483 (4th Cir. 1973); Carter v. Burn Construction Co., Inc., 85 N.M. 27, 31, 508 P. 2d 1324 (Ct. App. 1973) (pre-rule case requiring a showing of good cause for production of attorney work product).

The work product doctrine protects an attorney’s thoughts and mental impressions, but does not protect relevant facts, otherwise nonprivileged, in an attorney’s file. Hickman v. Taylor, 329 U.S. 495, 511 (1947). The work product doctrine as explicated in Hickman, is “expressly limited to those matters relating to the lawyer’s mental process developed explicitly for litigation.” Vargas v. United States, 727 F. 2d 941, 945 (10th Cir. 1984) (emphasis added).

Both state and federal rules governing attorney work product recognize a distinction between what might be called ordinary work product and that type of work product which discloses the lawyers “mental impressions, conclusions, opinions, or legal theories.” See Fed. R. Civ. P. 26(b)(3); SCRA 1-026(B)(4). Ordinary work product may be discovered upon a particularized showing of need, but the mental impressions, opinions and legal theories of counsel may not be discovered, period. Ordinary work product, however, may be discovered “only upon a showing that the party seeking the discovery has substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substan-
tial equivalent of the materials by other means.” Fed. R. Civ. P. 26(b)(3); SCRA 1-026(B)(4).

a. Prepared in Anticipation of Litigation


The mere anticipation of the contingency of litigation does not automatically transform an investigative report or other communication into work product. See Soeder v. General Dynamics Corp., 90 F.R.D. 253, 255 (D. Nev. 1980); Janicker v. George Washington University, 94 F.R.D. at 650. An undifferentiated objection that information sought by a party was prepared in anticipation of litigation has been generally rejected by the courts. Most courts require some “objective facts establishing an identifiable resolve to litigate prior to the investigative efforts resulting in the report before the work product doctrine becomes applicable. See, e.g., Fine v. Bellefonte Underwriters Insurance Co., 91 F.R.D. 115 (S.D.N.Y. 1981); Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co., 61 F.R.D. 115 (N.D. Ga. 1972); Janiker v. George Washington University, 94 F.R.D. at 650.

Some courts have required that there be a substantial probability of litigation before a party can claim that work was fairly done in anticipation of litigation. See APL Corp v. Aetna Casualty & Surety Co., 91 F.R.D. 10 (D. Md. 1980) (Substantial probability litigation would occur did not arise until final determination to deny plaintiff’s claim was made); Miles v. Bell Helicopter Co., 19 Fed. R. Serv. 2d 712 (N.D. Ga. 1974) (The probability of a specific litigation must be substantial and the commencement of the suit must be imminent before the privilege may be invoked). See also Langon v. Champion, 752 P. 2d 999, 1005 (Alaska 1988) (“The majority of courts dealing with the problem have taken the position that litigation is not ‘anticipated’ until the expectation of litigation is such that an attorney has become involved in the dispute and has prepared the documents himself or has requested their preparation.”). Other courts have required that the “primary motivating purpose behind the document or investigative report must be to aid in possible future litigation.” Janiker v. George Washington University, 94 F.R.D. at 650.

Written material will not be protected by the work product doctrine if there is only a contingency that prospec-

The mere anticipation of the contingency of litigation does not automatically transform an investigative report into work product.

b. Work Product Doctrine does not Insulate the Underlying Facts from Discovery.


c. Work Product can be Waived


C. A Potpourri of Issues

There are a number of issues which recur with sufficient regularity to warrant some discussion. This list is by no means comprehensive and obviously reflects the nature and experience of my practice.

1. Insurance Claims Files


The discovery of insurance claims files also cannot be avoided by using a lawyer as a claims adjustor or simply copying a lawyer with work done by an adjustor. See Western National Bank of Denver v. Employers Insurance of Wausau, 109 F.R.D. 55, 57 (D. Colo. 1985) ("[T]his rule also includes investigations by a person who is an attorney but acting in the capacity of an investigator and adjustor for the insurance company. Reiss v. British General Insurance Co., 9 F.R.D. 610, 611 (S.D.N.Y. 1949); Nesbitt v. Hauck, 15 F.R.D. 254, 256 (N.D.S.D. 1954)."").

Investigation and claims files created in the ordinary course of the insurer’s business are properly discoverable. See Western National Bank of Denver 109 F.R.D. 55 (D. Colo. 1985); Fine v. Bellefonte Underwriters Insurance Co., 91 F.R.D. 420 (1981); APL Corporation v. Aetna Casualty and Surety Co., 91 F.R.D. 10 (D. Md. 1980); Mission National Insurance Company v. Lilly, 112 F.R.D. 160 (D. Minn. 1986) ("[I]t would not be fair to allow the insurer’s decision in this regard to create a blanket obstruction to discovery of its claims investigation. To the extent that Cozen & O’Connor lawyers acted as claims adjusters, then, their work-product, communications to client, and impressions about the facts will be treated herein as the ordinary business of plaintiff [insurer], outside the scope of the asserted privileges. This approach results in the majority of the file being discoverable."). Western National Bank of Denver v. Employers Insurance of Wausau, 109 F.R.D. 55 (D. Colo. 1985) (Rejecting claims of attorney-client and work-product privileges over insurance files).


2. Discovery for Punitive Damages

A succinct statement of the rule is “[w]here punitive damages are sought, defendant’s current financial condition is discoverable.” 4 J. Moore, J. Lucas, & G. Grotheer, Moore’s Federal Practice para. 26.56[5] at 26-154 (2d ed. 1987). On this particular point the cases are in almost universal agree-
Evidence of a defendant’s financial condition is admissible for the purpose of establishing an appropriate amount of punitive damages. See Ramsey v. Culpepper, 738 F. 2d 1092, 1099 (10th Cir. 1984); Ruiz, 97 N.M. at 202. “The fact that the information sought will be admissible is a strong argument in favor of discovery.” American Benefit Life Ins. Co. v. Ille, 87 F.R.D. 540, 542 (W.D. Okla. 1978) (Permitting pretrial discovery of defendant’s financial condition for claim of punitive damages.)

Defendants often do not dispute the relevance of the financial information to a claim for punitive damages. Rather, defendants frequently assert that the relevant financial information will not be produced prior to a prima facie showing of liability for punitive damages. This is simply an attempt to superimpose an additional requirement on the clear language of Fed. R. Civ. P. 26(b)(1). My experience has been that this novel claim is usually rejected by the courts.

The argument is that if plaintiff cannot make a prima facie showing of liability to sustain an award of punitive damages, then evidence of defendant’s financial condition will be inadmissible at trial. While that is true, the argument moves one step further by suggesting that plaintiff cannot discover the information until there is a threshold showing of admissibility. This claim is defeated by the plain language of Rule 26(b)(1). The Rule provides that “[i]t is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” The current financial condition of defendants may very well be admissible at trial and thus plaintiff’s discovery request is certainly reasonably calculated to lead to the discovery of admissible evidence. Indeed, the information itself is potentially admissible. The fact that this information may not be admissible is simply an irrelevant consideration under the unequivocal language of the rule. It is discoverable regardless of its admissibility.

The case of Hughes v. Grove, 47 F.R.D. 52 (W.D. Mo. 1969) is helpful for the party seeking the discovery. In Hughes, the defendant objected to an interrogatory which sought information pertaining to defendant’s assets, liabilities, and earnings. Defendant argued to the district court, as do Defendants here, that the interrogatory was “premature” and that more than a simple allegation and claim for punitive damages was required to permit the discovery sought by plaintiff. The district court rejected defendant’s argument and held that “[n]o prima facie showing in punitive damages is required to justify discovery.” Id. at 55. The Hughes case is entirely within the mainstream of judicial opinion on this issue. See also Vollert v. Summa Corp., 389 F. Supp. 1348 (D. Haw. 1975); Coy v. Superior Court, 58 Cal.2d 210, 23 Cal. Rptr. 393 (1962).

3. Production of Witness Lists

As the Supreme Court has noted “civil trials in the federal courts no longer need be carried on in the dark. The way is not clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.” Hickman v. Taylor, 329 U.S. 495, 501 (1947).

Not surprisingly courts have required parties to answer interrogatories seeking the identification of potential trial witnesses. See, e.g., Lewis v. J.P. Stevens & Co., Inc., 20 Fed. R. Serv. 2d 1091, 1092 (D. S.C. 1975)(Requiring identification of trial witnesses three years after complaint filed since “plaintiffs should know by now who will be called as a witness, and if they do not know, the answer to this interrogatory will assist them in the preparation of their case.”); United States v. 216 Bottles, More or Less, 36 F.R.D. 695, 701 (E.D.N.Y. 1965)(Purpose of interrogatory seeking names of witnesses is to discover facts and narrow issues. “Disclosure of the names of witnesses with knowledge of the facts would accomplish this purpose.”); United States v. Northside Realty Associates, Inc., 15 Fed. R. Serv. 2d 17, 27, 324 F. Supp. 287 (N.D. Ga. 1971).

The Tenth Circuit has also held that the district court has the discretion to order the production of a witness list during discovery. See Brock v. R.J. Auto Parts and Service, Inc., 864 F. 2d 677, 679 (10th Cir. 1988). The court in Brock indicated that a party must show a particular need for the production of a witness list prior to the pretrial conference, at least in the context of a Fair Labor Standards Act case.

4. Appeal from Magistrate

In New Mexico federal district court and in many jurisdictions virtually all of the discovery matters are heard in the first instance by the magistrates. It is sometimes necessary to take an appeal from the Magistrate’s ruling. The issue then becomes whether the Magistrate’s ruling, considered in light of the record, is clearly erroneous, contrary to law, or an abuse of discretion.

Magistrates are empowered to preside over pretrial matters. 28 U.S.C. sec. 636(b)(1)(A); Fed. R. Civ. P. 72(a). A ruling entered by a magistrate upon non-dispositive motions such as a motion to compel or a motion for protective order may be set aside only if clearly erroneous or contrary to law. Magistrates have been extended broad discretion over discovery matters and as a matter of law, their decisions on such disputes are entitled to substantial deference. Aries Ventures Ltd. v. Axa Finance S.A., 12 Fed. R. Serv. 3d 1038 (S.D.N.Y. 1988).

In view of the above, the rulings of a magistrate on discovery matters, insofar as they concern issues of relevancy that are traditionally left to the discretion of the trial court, are
5. In Camera Inspection

Frequently discovery disputes revolve around very specific characterizations of documents. The discovering party is at a distinct disadvantage in responding to the characterization since the document is not in his or her possession. On such occasions it is wise to request an in camera inspection of the documents to prove up the nature of the document and to test the claims or characterizations of party opposing the discovery. See International Telephone & Telegraph Co. v. United Telephone Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (in camera inspection necessary to test assertion of work product). The discovering party should be ready to make this request particularly where the opposing party has not laid an adequate basis for the assertion of the privilege. See Nutmeg Insurance Co. v. Atwell & Sterling, 120 F.R.D. 504 (W.D. La. 1988) (proponent of privilege must provide enough information to determine the privilege and must provide detailed affidavits that precise facts exist to support the claim of privilege).

6. Witness Statements

The rule in New Mexico is that a witness statement prepared in anticipation of litigation can be discovered only upon a showing of “substantial need and undue hardship.” Knight v. Presbyterian Hospital Center, 98 N.M. 523, 526, 650 P.2d 45 (Ct. App. 1982); cf Bloom v. Lewis, 97 N.M. 435, 640 P.2d 935 (Ct. App. 1980) rev’d on other grounds 96 N.M. 63, 628 P.2d 308 (1981) (pre-rule case holding that a tape recorded statement was work product and discoverable only upon showing of good cause).

III. The Discovery Plan

At the outset of every case it is desirable to sit down and evaluate the precise information you need to prove your case. What are the elements of proof that will establish liability or conversely what information is necessary to defeat a claim or limit damages. Once those are identified, you can proceed to chart out precisely what discovery is necessary to obtain that information. Discovery can then be drafted with those specific objective in mind.

Now, how does this relate to discovery motions practice? There are three important points flowing from a carefully calculated discovery plan which are important for discovery motions. First, by identifying just the information you need, you can draft discovery requests which can’t be objected to on the basis of relevance, that is you can always demonstrate the relevance of the request because it is specifically related to proof of an essential element. Second, this process forces you to examine and understand your case. This will necessarily result in better drafted discovery. Most meritorious discovery objections are the result of sloppy or careless drafting. Third, you can analyze your discovery needs to plan out a sequence of written discovery which allows you to maximize the efficacy of your discovery requests.

IV. Timing of Discovery Motions

A. Confer in Good Faith

Once discovery requests have been answered when is it time to file a motion to compel? In federal court there is a requirement that you confer in good faith with opposing counsel in an effort to resolve the discovery dispute. D.N.M. LR-37.1. The local rule further requires that you “certify” what efforts have been made to resolve the dispute. There is no analogous rule on a state wide basis in New Mexico although there is a general requirement that counsel seek concurrence for a motion prior to filing the motion. See SCRA 1-007.1. Some of the New Mexico districts have a local rule imposing the confer in good faith requirement, see, e.g., 1st Judicial Dist. LR 303(d), others do not. When you are in state court, you always need to check the local rules of the district in which the case is filed. Regardless of the requirements of any rule, it is simply the better practice to seek to resolve the dispute before filing a motion to compel. It is recommended that in most cases you send a letter clearly and succinctly setting forth the reasons why you are entitled to the discovery. There are several benefits to this approach. First, it allows you to organize your own thoughts and arguments concerning the disputed to discovery. This gives you a leg up in the event a motion does have to be filed. Second, it allows you to document the good faith effort to confer and to propose reasonable alternatives. This last point bears further discussion. Discovery is often a series of compromises. There is a distinct advantage when filing a motion to compel or a motion for a protective order to be able to demonstrate what efforts you have made to be reasonable and to offer fair alternatives which, if accepted, would have resulted in an informal resolution. Courts tend to take a dim view of absolutist positions in discovery.

The propounding party is probably in the best position to offer the compromise and, where possible, should make the offer at the outset of the dispute. The party resisting discovery can often “steal the march” by sending a letter accompanying discovery responses which offers to resolve certain of the disputes via some alternative channel. E.g. Produce five years of tax returns instead of ten.

The good faith conference letter should always request a “Vaughn Index” for any documents where the responding party has claimed one of the privileges. The “Vaughn Index” is no more than a listing of the documents claimed to be privileged with sufficient information about the document to permit the party to test the privilege. The instructions to a Rule 34 request for production of documents should always include a request to the responding party to identify documents withheld on the basis of a privilege with sufficient specificity to allow the privilege to be tested.

B. Motion to Compel

The timing for a motion to compel is determined by the rules. In federal court there are twenty (20) days from the “receipt” of an objection to file the motion. See D.N.M. LR-33.2. The twenty days includes whatever time is required to seek an informal resolution of the dispute, though the federal
court here has been generous in extending that time where there is a possibility that the parties can resolve the problem.

There is no consistent rule in the state courts of New Mexico. The First Judicial District has a twenty day limitation in which to file a motion to compel, see 1st Judicial Dist. LR 303(c), and the Second Judicial District has no such limitation.

C. Motion for Protective Order

There is no established rule for seeking a motion for a protective order pursuant to Rule 26(c) or SCRA 1-026(C) directed to written discovery other than prior to the date the response is due. In the case of depositions the requirements are somewhat different. In federal court reasonable notice for a deposition is ten (10) days. D.N.M. LR-30.1. If a party wishes to avoid appearing for the deposition then the motion for a protective order must be filed at least three (3) days prior to the scheduled deposition. If this requirement is met then the failure to appear is not considered willful under Rule 37(d) or contumacious under Rule 45(f) unless the motion was frivolous or dilatory. 16 See D.N.M. LR-30.1 Notice of non-appearance must be provided to all parties. D.N.M. LR-30.1.

The rules are somewhat different in New Mexico state court. Reasonable notice for a deposition is five (5) days. SCRA 1-030(H). The deponent must appear unless there is a court order obtained prohibiting the discovery. See Wiennek v. Chalmers, 73 N.M. 8, 14, 385 P.2d 65 (1963) (motion for protective order or motion to quash deposition notice are not self-executing and until an order is made in connection with the motion there is “nothing to delay the taking of deposition”).

V. The Form and Content of the Motion

So, now you have a discovery plan. You have carefully and thoughtfully drafted your discovery requests. You have followed the local rules and have just the right number of interrogatories and subparts. 17 The responses have been returned and they are full of objections. You have sent a letter discussing the objections and even proposing some alternatives forms of production. There has been no response. You have researched the substantive law governing the discovery issues and are thoroughly familiar with the arguments. The time has come to draft the motion. 18 If you have done these things, the motions and accompanying memoranda will write themselves.

A. Keep it short, simple and sweet

The first step is to familiarize yourself with the extended provisions of Rule 37 or SCRA 1-037 which control the formal process of compelling discovery. The case load of the state and federal courts continues to far outpace the number of judges available to do the work. 19 As a result, the most effective discovery motions will be short, pointed, and clear. 20 I would suggest making the motion very short and conclusory and reserving the complete discussion for the memorandum that accompanies the motion. The discussion should be organized around the specific discovery request in dispute and the body of the brief should set out both the request and the response. 21 For example:

Request for Production No. 1:
All individual or business tax returns for the past 10 years.
Response:
Objection, this request constitutes an unreasonable invasion of privacy, it is premature in that there is not even been a prima facie showing of any actions on the part of these Defendants which would give rise to a punitive damage claim.

There are several benefits which follow from this simple organizational format. First, it provides a built-in outline for your legal discussion. Second, it allows the court to review the specific discovery dispute directly in the context of your argument. Third, it saves the court from having to flip back and forth from the brief to the exhibits.

The final ingredient to top off your brief and argument is what I call “keeping it sweet.” Avoid the sometimes irresistible temptation to refer to opposing counsel in somewhat less than gracious terms, you misbegotten son-of-a-ape. Ad personam attacks always, repeat always, detract from the presentation and provide the reader with little more than an unwanted distraction. Don’t squander you own credibility with the Court by making like a pit bull. Save your fulminations and the odd bon mot for those incredibly rare occasions when they might constitute effective advocacy.

B. Explain the Specific Relationship between the Discovery Sought and the Rest of Your Case

After you have briefly set out the contours of the dispute, you need to proceed with the argument. The single most important point to convey is why the specific discovery is important to the case. Although this simple point seems self-evident, the greatest shortcoming in discovery motions is the failure to clearly describe for the court the relationship between the information sought and the rest of the case. A discovery motion should always begin with a brief description of the case. Those specific facts which bear upon the discovery issue should be highlighted and developed. You can’t expect a court unfamiliar with the case to decide a motion in a vacuum. You will win 90% of the motions in which you establish the relationship between the discovery sought and some important part of the case.

C. Keep the Citations to a Minimum

Like the “Naked City” there are thousands of cases relating to discovery. Avoid simply stringing together a group of citations, particularly for the basic standards. The court is familiar with the essential body of law governing discovery. Look and cite those cases which are factually apposite and therefore directly relevant to the issues. If you have a case or two which are particularly compelling, then attach them to the brief. You want to be sure that the court or the law clerk reads your best authority.
VI. Enforcement of Discovery Orders and Sanctions

What follows is a brief description of the general process for both obtaining sanctions for failure to provide discovery and enforcing discovery orders. There are a variety of grounds available for the imposition of discovery sanctions. The choice of the sanction lies within the discretion of the court. See United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980). The trial court's decision on the appropriate sanction is therefore reviewable only for abuse of discretion. See Pittard v. Four Seasons Motor Inn, Inc., 101 N.M. 723, 688 P.2d 333 (Ct. App. 1984). Where, however, the "ultimate" sanction of default is imposed, which requires a finding of willfulness, the court's determination that the failure to comply with a discovery order was willful must be supported by substantial evidence. Lopez v. Walmart Stores, Inc., 108 N.M. 259, 771 P.2d 192 (Ct. App. 1989).

"Set the stage" for your motion by explaining a little bit about the lawsuit and show just how the discovery issues relate to the case as a whole.

A. Grounds for Sanctions

Failure or refusal to provide discovery may give rise to sanctions. It applies to all forms of discovery directed to a party including interrogatories, requests for production, and depositions. It may also apply to non-parties. It may apply to failures to follow or obey orders under SCRA 1-026 such as protective orders. See SCRA 1-037(B).

B. Procedure for Sanctions

In order to proceed for sanctions against the non­responding party, the propounding party must first move for an order to compel. Once you have obtained the order to compel then you can enforce the order. If the non-responding party fails to obey the order to compel, then you can move for sanctions. State ex rel. New Mexico State Police v. One 1978 Buick Lesabre, 108 N.M. 612, 775 P. 2d 1329 (Ct. App. 1989). The court can, however, enter a dismissal without a prior order for untruthful answers in discovery. See Sandoval v. Martinez, 109 N.M. 5, 780 P.2d 1152 (Ct. App. 1989).

C. Sanctions Available

There are a variety of sanctions available for the failure to obey a discovery order.

1. Failure of a deponent to be sworn or to answer may be considered a contempt of court. SCRA 1-037(B)(1).

2. Failure to obey discovery order may result in the designation of facts as established, striking pleading or claims, dismissal of the action, or judgment by default.

3. In addition or instead of other sanctions the court shall require the party or the attorney or both to pay reasonable expenses including attorney's fees, unless the failure to comply was substantially justified or it would be otherwise unjust. SCRA 1-037(B)(2).

4. Default or dismissal may not be imposed unless the nonresponding party's conduct is willful or in bad faith.


VII. Postscript

After I finished drafting these materials I contacted a very experienced staff attorney with the United States District Court here and inquired about two points. First, what things make for an effective presentation of a discovery issue; Second, what were the major shortcomings of motions she reviewed. Here, in summary form are her very worthwhile observations:

1. Remember that the person reading the motion and brief may only have read the complaint (and maybe not) and knows nothing else about the case. "Set the stage" for your motion by explaining a little bit about the lawsuit and show just how the discovery issues relate to the case as a whole. Don't just jump into the discussion assuming the reader is familiar with the intricacies of the case.

2. Remember that the Court has a large caseload. Carefully organize your discovery motion. She suggested two possible organizational possibilities. You could do it discovery request by discovery request. She referred to this method as kind of a "mini-motion" for each request. This is probably the preferred method, unless you are dealing with a large number of disputed requests. If that is the case then you should try to address categories of requests by subject matter. E.g. "This part of the motion relates to requests 1, 5, 8, and 9 which concern the claim of trade secrets."

3. When you are raising a claim of privilege, make sure you have established the case for the privilege. Show how each necessary element of the privilege is factually established element by element. She pointed out that this showing ought to be made in the discovery response itself and that if you have waited for the motion and/or response you may run the risk of having waived the privilege; that is, courts increasingly are requiring more than a categorical assertion of privilege in the discovery response itself.

4. Whenever possible use indices or charts that list and identify the documents for which there is a claim of privilege. The index or chart should show how each document fits the claim of privilege.

5. Don't forget to attach a copy of discovery of the disputed discovery request together with the disputed response.

6. If you need an expedited hearing on the motion don't bury the request on the last page of the motion or brief. Either file a separate request for expedited hearing or identify right up front in the motion that this motion requests expedited review. I might suggest the use of a title such as "Motion to Compel and Request for Expedited Hearing on Motion to Compel."

7. Avoid joining a motion to compel with other motions. This is particularly true of such substantive motions as a motion for summary judgment. Remember that the magistrate will address discovery matters and the district judge the substantive motions. By joining the two you are making matters more difficult to obtain an expedient review.
1. The state and federal discovery rules are virtually identical. This discussion will note any differences where relevant.

2. The test for relevancy is broader than for the admission of evidence. As one court has noted: "The test for relevancy for purposes of discovery under Fed. R. Civ. P. 26(b)(1) is broader than the test for admissibility at trial as the Rule specifically provides. Hence, a party may discover information which is not admissible at trial if such information will have some probably effect on the organization and presentation of the moving party's case." Smith v. Schlesinger, 513 F. 2d 462, 472 (D.C. Cir. 1975).

3. The United States Supreme Court has clearly laid down the broad rule for the proper scope of discovery:

   We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.

Hickman v. Taylor, 329 U.S. 495, 507 (1947); Salitan v. Carillo, 69 N.M. 476, 480, 368 P. 2d 149 (1961) ("No longer is the time-honored cry of 'fishing expedition' available to block this discovery.").

4. The rules provide certain specific limitations. The discovery sought cannot be "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." SCRA 1-026B(2)(a); Fed. R. Civ. P. 26(b)(1)(i). Nor can the discovery be "unduly burdensome or expensive, taking into account the needs of the case, the amount in the controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." SCRA 1-026B(2)(c); Fed. R. Civ. P. 26(b)(1)(ii).

5. Board of Education v. Admiral Heating and Ventilating, Inc., 104 F.R.D. 23 (N.D. 111. 1984) provides a good example of where the balance tips in favor of the discovering party. Admiral Heating was a complex antitrust case and the issue was the form in which certain voluminous documents were to be produced. Id. at 36. The court simply ordered that under the particular facts of the case Rule 34(b) permitted plaintiffs to require the producing defendant to segregate the documents according to plaintiffs' discovery request. The bases for the decision were that (1) Rule 34 was specifically directed to documents; (2) the requests sought documents which would be show payoffs and the court was concerned that such documents could be buried in the mass of documents involved in the production.

6. There are other important privileges which may be pertinent. These are set forth in the New Mexico Rules of Evidence in Article 5. See, e.g., SCRA 11-504 psychotherapist-patient privilege; SCRA 11-507 political vote; SCRA 11-508 trade secrets. There are also certain other types of privilege which may attach to a particular process. For a substantive discussion of these and other evidentiary privileges see Vigil, J. Evidence Handbook New Mexico and Federal at 69-96 (1992); Hall and Adams, New Mexico Discovery Manual at 20-73 (1992).

7. It may be relevant that the materials were prepared by a non-lawyer. See Hardy v. New York News, Inc., 114 F.R.D. 633, 644-45 (S.D.N.Y. 1987). In Hardy, the court determined that handwritten reports and other documents did not fall within the protection of the work product privilege which may attach to a particular process. For a substantive discussion of these and other evidentiary privileges see Vigil, J. Evidence Handbook New Mexico and Federal at 69-96 (1992); Hall and Adams, New Mexico Discovery Manual at 20-73 (1992).


9. In APL Corp. v. Aetna Casualty & Surety Co., 91 F.R.D. 10, (D. Md. 1980), the district court took note: "[A]etna felt there was a good possibility that litigation might result. Nevertheless, Aetna had to conduct a routine investigation of Plaintiff's claim prior to determining whether or not to indemnify APL...Thus, it was not until it had conducted a thorough investigation of Plaintiff's claim that Aetna decided to deny Plaintiff's claim for indemnification. And it was not until that determination was made "that there was a substantial probability that litigation would occur and that commencement of such litigation was imminent." (Citations omitted.) Id. at 21.

10. A belated offer by the opposing party to submit documents for in camera review may be rejected because if untimely it would subvert the process of having the magistrate review discovery in the first instance. Varo, Inc. v. Litton Systems, Inc., 129 F.R.D. 139, 142 n.4 (N.D. Tex. 1989).

11. The universal rule in that you must timely file objections to the discovery requests or the objection is waived. See United Nuclear Corp. v. General Atomic Co., 96 N.M. 155 629 P.2d 231 (1980).

12. Arguably this general rule imposes a duty to attempt resolution of the dispute prior to filing a motion, since almost by definition a motion to compel will be opposed.

13. The good faith effort to resolve a discovery dispute also extends to a motion for a protective order. See D.N.M. LR 37.1; 1st Judicial Dist. LR 303(d).

14. The "Vaughn Index" is derived from the case of Vaughn v. Rosen, 484 F. 2d 820 (D.C. Cir. 1973) where the United States was resisting a Freedom of Information Act request. In the course of examining the government's claim that certain categories of documents were exempt from discovery, the court created an indexing procedure which could be used by the court in determining which documents were exempt.

15. The following is an example of such an instruction: "If any document is withheld on the basis of any privilege or 'work product' claim, please identify the document so withheld, the person or persons who created the document, the person or persons who received or viewed the document, the person or persons to whom the document was addressed, the asserted basis for withholding the document in sufficient detail to permit the applicability of the asserted privilege or work product claim to be determined and identify each person who has or ever has had possession, custody, or control of the document or any copy thereof, or otherwise became aware of the document or information in question."

16. The provisions of Rule 37(a)(4) apply to the award of expenses in relation to the motion.

17. You need to check the local rules to determine the number of interrogatories which you can propound. The number in federal court is fifty (50) including subparts. See D.N.M. LR-33.1. The number in the 1st Judicial District is also fifty including subparts. 1st Judicial Dist. LR 303(e). The rule is the same in the Second Judicial District with the qualification being that the rule provides for some basic information to be considered as a single interrogatory. See 2d Judicial Dist. LR 122(B)(1) and (2). A carefully drafted request of admissions followed by a single interrogatory asking for an explanation and basis for the denial can greatly expand the available questions.

18. Similar considerations obtain for a motion for a protective order. The form and content of a motion for a protective order should be roughly the same as a response to a motion to compel.

19. The discussion which follows is largely directed to the written presentation of motions. It is extraordinarily rare that you will have a hearing on a discovery motion in federal court. Increasingly in state court discovery motions are being determined on the basis of written submissions. Obviously when you are fortunate enough to have a hearing you have another opportunity to persuade the court concerning your position on the issue.

20. This is not the place for an extended discussion regarding effective written advocacy. Short, affirmative sentences using active voice will convey your points clearly and effectively. For those of you who desire a short and useful compendium of legal writing tips, I recommend Hollis Hud's Writing for Lawyers.

21. You should attach as exhibits to the brief copies of the actual discovery requests and responses. This is a requirement in federal court and is generally required in the 1st Judicial District. D.N.M. LR-37.1.