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IF EVERYTHING IS "OVERBROAD" AND "BURDENSOME," NOTHING IS

Overcoming obstructive discovery tactics

Stop me if this sounds familiar. You craft careful discovery requests; asking for the information you believe is relevant to proving your claims or defenses. You send them off and 30 days later, you get back pages upon pages of objections, with nothing indicating what about your requests was objectionable. More critically, the responses do not provide any information that you can use.

So you write a letter, identifying the problems with the responses and ask for those issues to be corrected. They aren't, so you schedule a meet/confer conference, at which no one agrees to anything. Eventually, you bring a motion to compel, which takes months to brief, argue, and get a decision. Maybe then you get the discovery that you wanted in the first place. Maybe.

If you read those two paragraphs and felt your blood pressure rising because it's the exact same situation you find yourself in day after day, congratulations! You're a litigator in 2022. Discovery has become less about "discovering" anything, and more an exercise in recycling objections from other cases that have little or no application to the requests at issue.

There must be a better way, and there is. They're called the "Rules of Civil Procedure" and they can be your friend, when you know what they say. Below are some practical tips for how to effectively push back against obstructive discovery tactics so that you, your clients, the courts, and even opposing counsel, can work through the litigation process in a way that is fair, reasonable, and gets cases resolved in a timely fashion.

First, whether you are in state or federal court, read the current version of Rule 26. Here is what it says in Minnesota about the appropriate scope of discovery:

Parties may obtain discovery regarding any nonprivileged matter that is:

- Relevant to any party's claim or defense and
- Proportional to the needs of the case . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit

Minn. R. Civ. P. 26.02(b). Unfortunately, words like "relevant" and "proportional" are catnip for lawyers who like nothing more than stretching the interpretation of a word to (or past) its limit. Thus, a standard litany of objections to practically any discovery request is that it is "not proportional to the needs of the case" and that the "burden" of the discovery outweighs its proposed benefit, without any explanation as to why the request is "not proportional" or creates an improper "burden."

But, recognizing the ways in which the Rules could be misused, over the years the Rules have been refined to clarify parties' obligations regarding objections. For example, Fed. R. Civ. P. 33(b)(4) requires that "[t]he grounds for objecting to an interrogatory must be stated with specificity." Id. (emphasis added). Similarly, Fed. R. Civ. P. 34 requires that in responding to a document request, any objection must "state with specificity the grounds for objecting to the request, including the reasons." Failing to provide "specificity" and the "reason" for the objection makes the responses improper. Pointing this out to an objection-happy counsel, and that courts can and will treat such responses as a failure to respond, is one of the simplest ways to move parties past "bare" objections. See Minn. R. Civ. P. 37.01(c) ("an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond."); see also Speed RMG Partners, LLC v. Artic Cat Sales Inc., 2021 WL 5087362, at *3 (D. Minn. Jan. 5, 2021) (it is "well-established that boilerplate objections, without more specific explanations for any refusal to provide information, are not consistent" with the rules of civil procedure).

Second, use the meet and confer process to try to resolve issues, rather than preview the arguments you have already prepared for the judge.

There is a reason that both state and federal courts in Minnesota require parties to meet and confer before hearing motions. See D. Minn. L.R. 7.1; Minn. Gen. R. Prac. 115.10. It's because most discovery disputes should be able to be resolved without burdening the court. Going into the meet/confer process with a clear understanding of what the problems with your opponent's positions are, or some ideas for compromises you are willing to make, can head off expensive and time-consuming motion practice.

Of course, you can only control how you approach the meet/confer process. Even if you show up ready to compromise, nothing requires the other side to do so. At that point, many judges have created a third option that is well worth utilizing (and is now required by many state and federal judges).

Third, use the informal discovery conference process to further narrow areas of disagreement and focus motion practice.

Whether before the judge that will try the case, or a magistrate or special master specially designated to address discovery disputes, an informal conference is often the last opportunity for the parties to reach a compromise before diving headlong into motions. The informal conference is not the time for lengthy opening statements and charged language.

Instead, think of the purpose of the conference from the judge's perspective: is there a way to resolve, or substantially narrow, the issues that the judge will need to spend time considering and writing an order about? Not every dispute is worth the judge spending hours delving into the parties' correspondence. Also, reaching agreements ahead of an eventual hearing will help the parties focus on issues that are significant to the case, rather than dedicating time and energy to issues that the parties disagree about, but ultimately aren't that critical. That leads to a smoother discovery process and more efficient trial, two things that everyone involved in the litigation process should be striving for.

Discovery does not need to be a zero-sum game. Attorneys, clients, and the courts, all benefit when thoughtful lawyers approach disputes in good faith, and consistent with the rules.

Norman H. Pentelovitch is a Shareholder with Anthony Ostlund Louwagie Dressen & Boylan P.A. in Minneapolis, Minnesota. Prior to joining Anthony Ostlund, Norman was an attorney in the Washington, D.C. office of Paul Weiss Rifkind Wharton & Garrison LLP, and a founding associate of preeminent national trial boutique Wilkinson Walsh + Eskovitz LLP, also in Washington D.C. For more information, visit www.anthonyostlund.com.

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