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Making Plaintiffs Pay for Evasive Discovery Tactics

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As young lawyers, most of us are quite familiar with the process of drafting discovery requests. We draft requests that target information and documents that will help us determine, among other things, what additional discovery we may need, from whom we should seek that discovery, and the strengths and weaknesses of the case. Unless you are unusually fortunate, however, you have probably received responses to your carefully crafted requests that are woefully deficient and incomplete, full of numerous improper objections and refusals to answer legitimate requests. Such evasive responses violate the rules of discovery and hinder your ability to evaluate and further litigate your case.

In that situation, you of course must insist that the plaintiff respond fully and properly to your discovery requests. If opposing counsel persists in ignoring or fighting your efforts to obtain legitimate discovery, he or his client may ultimately pay a high price for such conduct by being required to pay the costs and attorney's fees that your client incurred to obtain the discovery at issue. Significantly, you may be entitled to recover those costs and fees even if your opponent relents and properly responds to your requests before being ordered to do so by the court.

Ideally, you will be able to convince the plaintiff's counsel to properly supplement his incomplete responses without court intervention. If, however, you are forced to file a motion to compel, you should be aware that the mere filing of the motion likely entitles you to the fees and costs associated with that motion and any litigation thereof. You should also be aware of the conditions that must be met before such expense-shifting is triggered. Typically, the most significant requirement will be that you sufficiently attempted to resolve the matter with opposing counsel before filing your motion to compel. Contrary to often-standard practice, a mere letter to the other side may not be enough to qualify as a good-faith attempt at resolution that will obligate your opponent to pay for its evasive tactics. The discussion below addresses what you may be required to do to establish good-faith efforts at a resolution before a motion to compel and what standards will govern whether you and your client can recover the costs of attempting to obtain discovery to which you are entitled.

In federal court, the Rule that primarily governs this situation is Fed. R. Civ. P. 37(a)(5), which provides, in part, that:

If the motion [to compel] is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.

Fed. R. Civ. P. 37(a)(5)(A). That Rule also sets out three express exceptions to the general presumption in favor of expense-shifting, which when applicable leave the court with no discretion to award your fees and costs. Those exceptions apply if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

Id. While this article focuses on federal law, a number of states have similar rules creating a presumption in favor of expense-shifting when a motion to compel discovery responses is filed. *See, e.g.*, Ala. R. Civ. P. 37(a)(4); Cal. Civ. P. Code §§ 2030.300, 2016.040; Fla. R. Civ. P. 1.380(a); Ill. S. Ct. R. 219(a); Tex. R. Civ. P. 215.1(d).

The requirement that you must attempt in good-faith to resolve the dispute before filing a motion to compel is vague and frequently given short shrift by counsel forced to file such a motion, but compliance with that requirement is mandatory, particularly if you intend to seek the fees associated with your efforts to obtain discovery. With regard to the second requirement, "substantial justification" for opposing a motion to compel has been found to be present "if there is a genuine dispute, or if reasonable people could differ as to [the appropriateness of the contested action.]" *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quotation marks and internal citations omitted) (alteration in original). While that requirement is extremely important, this article presumes that your opposing party's conduct is not substantially justified.

Detailed and Documented Communication with Opposing Counsel Will Establish Good Faith

There is no generally accepted standard for what type or quantity of communication or other action constitutes a good-faith attempt to resolve a discovery dispute before filing a motion to compel. While the Advisory Committee's Notes regarding identical language creating a duty to confer in Fed. R. Civ. P. 26(c)(1) state that that duty requires communication "either in person or by telephone" with opposing counsel, the case law considering motions to compel under Rule 37 suggests that more detailed evidence of an attempt to resolve the dispute is required than a bare assertion that counsel discussed the matter in person or on the phone. As an initial matter, it should be noted that some courts have a standing order or local rule that clarifies what efforts counsel must make to resolve a discovery dispute before filing a motion to compel. When faced with a discovery dispute, you should first determine whether such an order or rule exists in the court in which your case is pending.

In the absence of express guidance from the court in your jurisdiction, you should not assume that merely sending an opposing counsel a letter detailing why his responses are incomplete, and setting a deadline for a response to your letter, is all you need to do before filing a motion to compel. Consistent with the Advisory Committee's Notes on Rule 26(c)(1), a number of courts have held that merely exchanging correspondence, even on multiple occasions, is insufficient to constitute a good-faith attempt to resolve the dispute. *See, e.g.*, *Naviant Mktg. Solutions, Inc. v. Larry Tucker, Inc.*, 339 F.3d 180, 186-87 (3d Cir. 2003); *Hays v. Adam*, 512 F. Supp. 2d 1330, 1334 (N.D. Ga. 2007).

If your jurisdiction has not defined the extent of your duty to confer with opposing counsel, it may be helpful to consult the definitions in place in other jurisdictions to determine the extent of that duty. For example, the District of Kansas has a local rule for discovery disputes that provides that "[a] 'reasonable effort to confer' means more than mailing or faxing a letter to the opposing party. It requires that the parties in good faith converse, confer, compare views, consult, and deliberate, or in good faith attempt to do so." D. Kan. Rule 37.2. Kansas federal courts have often been called upon to construe this rule, and in doing so they have held it to mean that parties must "determin[e] precisely what the requesting party is actually seeking; what responsive documents or information the discovering party is reasonably capable of producing; and what specific, genuine objections or other issues, if any, cannot be resolved without judicial intervention." *Manning v. Gen. Motors*, 247 F.R.D. 646, 650 (D. Kan. 2007) (quoting *Contracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D. Kan. 1999)) (alteration in *Manning*). The Southern District of New York has employed a standing order that contains virtually identical language to Kansas's local rule. *See, e.g.*, *Duran v. J.C. Refinishing Contracting Corp.*, No. 07 Civ. 11584(CM)(DFE), 2008 WL 2073363, at *2 (S.D.N.Y. May 12, 2008).

Notably, in another Kansas case, the court found that the parties had sufficiently conferred regarding a discovery dispute despite the fact that the only communications between the parties' counsel had been via e-mail correspondence that was largely unproductive in addressing the substance of the dispute. *See U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-cv-2192-JWL-DJW2008, WL 2548129, at *2-3 (D. Kan. June 23, 2008). In that case, the court found that the e-mail exchange "demonstrate[d] that the specific discovery disputes were raised and counsel for [the defendant movant] made reasonable attempts to meet and confer with [plaintiff's] counsel." *Id.* at *3. Accordingly, even Kansas federal courts, which must consider a local rule that requires counsel to be unusually proactive in attempting to resolve discovery disputes, will grant a motion to compel and order sanctions if the movant has at least attempted to specifically address the substance of the dispute with opposing counsel.

Courts outside of Kansas have reached similar conclusions. In a federal case in New Hampshire, the party opposing a motion to compel argued that the plaintiff movant had failed to adequately confer before it filed that motion. *See In re Tyco Int'l, Ltd. Multidistrict Litig.*, No. MD-02-1335-B, 03-1339-B, 2004 DNH 091, 2004 WL 1179450, at *1 (D.N.H. May 25, 2004). The court disagreed, noting that the movant "support[ed] its assertion of a good faith attempt to confer . . . by detailing the communications between the parties and the reasons advanced by [defendants] for not complying with the discovery requests." *Id.* Based on this explanation by the movant, the court found that it had "'detail[ed] the efforts to confer and explain[ed] why they proved fruitless,' complying with Rule 37." *Id.* (quoting *Messier v. Southbury Training Sch.*, No. 3:94-CV-1706 (EBB), 1998 WL 841641, at *3 (D. Conn. Dec. 2, 1998)).

The lesson of these and other similar cases is that if you discuss the dispute with the plaintiff's counsel enough to be able to explain both parties' positions and show why they are irreconcilable, you have likely made a good-faith effort to resolve the matter sufficient to justify the filing of a motion to compel. To create a helpful record that you can rely on if forced to seek court intervention, you should take these steps after receiving incomplete discovery responses:

- As soon as possible after receiving the responses, send a letter to the plaintiff's counsel explaining, with as much detail as possible, why each deficient response should be supplemented. Give the plaintiff's counsel a deadline in the letter by which he is to either supplement those responses or call you to discuss them.

- If you have not heard from the plaintiff's counsel by that deadline, call him the next day to discuss the responses. After discussing the responses with him, send another letter setting out the substance of your discussion, noting which responses he has agreed or refused to supplement and your understanding of his basis for any remaining objections, and provide him with a final deadline to respond.

- If you are unable to reach the plaintiff's counsel to discuss the responses, send a letter noting the necessity of a conference regarding his incomplete responses, and give him a final deadline to respond to you, noting that you may have to seek court intervention if he again fails to do so.

With this correspondence in hand, if the plaintiff continues to refuse to respond to legitimate discovery requests, you should file your motion confident that you have a good chance at recovering the costs and fees associated with forcing your opponent to respond to those requests. The motion should include evidence of your good-faith efforts to resolve the dispute with the plaintiff's counsel, such as the correspondence exchanged by the parties and an affidavit from you detailing those efforts, and should note your intention to seek the costs and fees of the motion after the court rules on it.

Your Entitlement to Fees Is Triggered with the Filing of the Motion

When you are satisfied that you have attempted to resolve the discovery dispute in an amount of good faith commensurate with the applicable standard in your jurisdiction, it is time to file the motion to compel. Continuing with our presumption that your opponent's conduct is not substantially justified, the filing of the motion should alone be sufficient to require that the court award you with your expenses associated with that motion.

As noted above, Fed. R. Civ. P. 37(a)(5) provides that a court "must" require a party whose conduct necessitated the motion to compel to pay the expenses incurred in making the motion. The exceptions to the generally mandatory nature of this Rule are meant to be sparingly applied. In amending Rule 37 in 1970, the Advisory Committee criticized the infrequency of an award of fees to the prevailing party and noted that, under the new rule, "expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably." Advisory Comm.'s Notes to 1970 Amendment to former Fed. R. Civ. P. 37(a)(4); *see also Devaney v. Cont'l Am. Ins. Co.*, 989 F.2d 1154, 1161 (11th Cir. 1993) ("The Rules Committee drafted the 1970 amendments to encourage the use of sanctions . . . .").

Significantly, after filing a valid motion to compel, you are entitled under the express language of Rule 37(a)(5) to the costs of the motion even if the plaintiff immediately provides full and complete discovery responses after you file. In fact, such an action by the plaintiff can constitute a de facto admission that the initial responses were inadequate. *See E.E.O.C. v. E.J. Sacco, Inc.*, 102 F. Supp. 2d 413, 416 (E.D. Mich. 2000). In one case, the nonmovant provided discovery responses after its opponent filed a motion to compel and on that basis argued that the motion was moot. *See Thompson v. Assurant Employee Benefits*, No. 07-1062-MLB, 2008 WL 80181, at *2 (D. Kan. Jan. 4,

2008). The court found that the motion was not moot, despite the production of the requested discovery, "because the issue of fees and costs under [Rule 37] remains." *Id.*; *see also Rhein Med., Inc. v. Koehler*, 889 F. Supp. 1511, 1518 (M.D. Fla. 1995) (although motion to compel had been mooted by subsequent production of missing document, movant was still entitled to attorney's fees); *AFCO Credit Corp. v. United States Fid. & Guar.*, No. 89 C 4874, 1990 WL 114577, at *1 (N.D. Ill. July 20, 1990). Accordingly, unless the amount of costs and fees at issue does not justify pressing the issue, you may insist on recovering those expenses even when your motion to compel prompts your opponent to properly respond to your discovery before the court orders it to do so.

What Expenses Can You Recover?

To determine whether it may be worthwhile to pursue those expenses, you should be aware of what fees are recoverable. Rule 37(a)(5) expressly provides for the recovery of "reasonable expenses incurred in making the motion," but you are also entitled to the costs and fees you incur after the motion is filed in preparing your request for your expenses. *See, e.g.*, *Sure Safe Indus. Inc. v. C & R Pier Mfg.*, 152 F.R.D. 625, 627 (S.D. Cal. 1993) (citing *Booker v. Stauffer Seeds, Inc.*, 817 F.2d 47, 50 (8th Cir. 1987)). In addition, if your opponent appeals the court's expense-shifting decision, you may recover the costs and fees associated with the appeal if you prevail. *See Rickels v. City of S. Bend*, 33 F.3d 785, 787 (7th Cir. 1994) (citing *Comm'r of INS v. Jean*, 496 U.S. 154 (1990)).

Assuming your opponent is unjustified in failing to properly respond to your discovery requests and that you sufficiently attempted to reach a good-faith resolution before filing a motion to compel, Rule 37(a)(5) creates a fairly clear-cut entitlement to recover your fees and costs associated with that motion. If the amount of expenses at issue justify it, your motion should note that you intend to seeks those expenses and you should follow up with the court after it grants your motion or after your opponent provides the discovery at issue and promptly request your fees in a separate motion.

Conclusion

It can be extremely aggravating to have to deal with evasive or incomplete responses to thoughtfully drafted discovery requests. In cases where a discovery dispute cannot be informally resolved, however, if you follow the steps outlined above and carefully document your fruitless efforts to obtain a resolution, it will be your opponent who has to bear the cost of the aggravation he has caused you and your client.