Discovery and Ethics

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The person who has nothing for which he is willing to fight, nothing which is more important than his own personal safety, is a miserable creature and has no chance of being free unless made and kept so by the exertions of better men than himself. John Stuart Mill **(1806 - 1873)**

I. Our Ethical Obligation – Fight Fairly, Honorably, With Everything We've Got

The Rules of Professional Conduct state plainly that as lawyers, we have a "special responsibility for the quality of justice". We have a duty to represent our clients honestly, fairly and zealously.

Litigation is long and arduous. Under the best of circumstances. Even when all parties and their attorneys are reasonable and cooperative. The slopes we must climb are far steeper than those opposing counsel face, because we are carrying the burden of proof on our backs. Our opponents have facts we need that we *must* get in discovery. If we don't get them, our clients, many of whom are out of work and need medical treatment they can't pay for, are likely to lose.

So when I read Rules of Prof'l Conduct R. 1.3 ("Diligence"), which says "A lawyer shall act with reasonable diligence and promptness in representing a client", it profoundly understates our responsibility. We cannot get the facts we need in discovery to properly represent our clients and truly do justice by merely being diligent. We must be honorably relentless.

II. Delay = Confusion = State Farm Victory Dance

Trials produce winners and losers. Your opponent is likely doing all that he can to make sure that his client wins. He is obligated to represent his client zealously, but he must do so ethically. The Rules of Professional Conduct require all attorneys to diligently comply with proper discovery requests, disclose information they reasonably should know is subject to disclosure under the law, refrain from frivolous discovery requests, and expedite litigation. Rules of Prof'l Conduct R. 3.4 (d) ("Fairness to Opposing Party and Counsel"); Rules of Prof'l Conduct R. 3.2 ("Expediting Litigation"). If you permit your opponent to ignore his ethical obligations and delay discovery until the eleventh hour, you will end up with a confused morass of facts. A confused jury is a defense jury.

Consider a typical discovery timeline in a moderately complex case, and you'll see that it can take 8-10 months to get adequate responses to first and second discovery requests:

- Sept 1 – File complaint and discovery
- Nov. 15 – Discovery responses (45 days + 30 day extension)
- Dec. 1 – Complete review, begin good faith efforts to resolve issues (Confirm every effort in writing), take depositions that don't require additional discovery
- Jan. 1 – Request hearing date
- Feb. 1 – Hearing, ruling, order requiring supp. responses within 15 days
- Feb. 15 – Receive supplemental responses to discovery served four and a half months ago
- March 1 – Complete review, draft and serve follow-up discovery
- May 1 – Receive responses; if inadequate, begin process over again

The timeline may be longer if you are dealing with multiple parties or difficult attorneys. To provide justice for our clients, we must effectively counter evasive discovery tactics.

III. Combating Evasive Discovery Attacks

A. Require opposing counsel to justify his objections early

To get the information you need well before trial, you have to make it harder for your opponent to evade than to comply. North Carolina Civil Procedure Rule 26, as amended effective October 1, 2011, will help you do this. Paragraph (b)(7)(a) was added to Rule 26, and states:

> (7) Claiming privilege or protecting trial preparation materials.
> (a) Information withheld – when a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial – preparation material, the party must (i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to access the claim.

As amended, Rule 26 now requires the party who withholds information based on a claim of privilege or work product protection to explicitly make the claim, and describe the material sufficiently so that the requesting party can assess that claim.

You still may want to include an interrogatory that requires opposing counsel to flesh out the basis for his objection. Here is an example:

> For each item withheld based upon a claim of privilege or trial-preparation material, state:
> The item's creation date, author (name, employer, job title), the nature of the writing or information (e.g. diary, correspondence, memo, report etc.), the name, employer and job title of each person who received or reviewed the item, and all facts you contend support your claim.

At a minimum, the interrogatory should require opposing counsel to tell you who has seen the material he is withholding. If a document has been distributed to other people, it may be that the attorney-client privilege has been waived. See Marina Food Associates, Inc. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990) (communication from defendant's attorney to his accountant

was intended to be disclosed to a third party and was not within the privilege, because it was not intended to be a confidential communication).

Review responses to your discovery as soon as possible (our office has a hard target deadline to complete an initial review within 48 hours.) Begin good faith efforts to resolve opposing counsel's objections and document all of it. Do it professionally, politely, thoroughly and quickly. If you're not able to resolve important issues, file your motion to compel sooner rather than later. This will require your opponent to justify his objections to the court.

The party asserting that material is work product bears the burden of proving (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent. Evans v. United Services Auto. Ass'n, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (2001). "Because work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose, which is to 'safeguard the lawyer's work in developing his client's case.'" Id.

The burden of establishing the attorney-client privilege also rests upon the claimant of the privilege. He must prove (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated, and (5) the client has not waived the privilege. Evans, 142 N.C. App. at 32, 541 S.E.2d at 790-91. "Like the work-product exception, the attorney-client privilege may result in the exclusion of evidence which is otherwise relevant and material. Thus, courts are obligated to strictly construe the privilege and limit it to the purpose for which it exists." Id.

B. Don’t permit your opponent to bury you under a mountain of business records in lieu of answering interrogatories

You have served interrogatories about the defendant’s construction of a defective roadway. The defendant responds to several of them by stating “the information sought by this interrogatory may be ascertained by a review of the construction diaries and other records. These documents are available for review, inspection and copying.” You arrive at defense counsel’s office to inspect the documents, and you’re directed to a storage room that contains 200 unlabeled boxes. “Good luck!” says his secretary, as she closes the storage room door. Is this proper?

A party may make business records available for inspection and copying in lieu of answering interrogatories where the answer may be ascertained from the records only under specific circumstances. N.C. R. Civ. P. 33(c). First, the option of producing business records in lieu of answering interrogatories is available only if “the burden of deriving or asserting the answer is substantially the same for the party serving the interrogatory as for the parties served.” Id. Second, the party offering the documents must “specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.” Id. Third, Civil Procedure Rule 33(c) was amended in 2011 to require that a “specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.” Id.

Rule 33(c), as amended, now substantially mirrors its Federal Civil Procedure Rule 33 counterpart. Several federal cases interpret the obligations this language imposes. In Taube Corp. v. Marine Midland Mortgage Corp., 136 F.R.D. 449, 454, 19 Fed.R.Serv. 3rd 698 (W.D.N.C.) (1991), the defendant referenced business records which it offered to make available for inspection in

lieu of interrogatory answers. The defendant did not specify which of the several thousand records were likely to contain answers to plaintiff's interrogatories.

The plaintiff filed a motion to compel. The court found that the defendant improperly invoked the use of Fed. R. Civ. Pro. 33(c). It first determined that the burden would not be substantially the same for plaintiff to ascertain interrogatory answers from the defendant's documents, because the defendant was familiar with its own records and methods of organization and the plaintiff was not: "A respondent may not impose on an interrogating party a mass of records as to which research is *feasible* only for one familiar with the records." Taube Corp., 136 F.R.D. at 455. The court also admonished the defendant for its failure to meet Rule 33(c)'s requirement of specificity:

> The final sentence of Rule 33(c) is meant to "make it clear that a responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived." American Rockwool v. Owens–Corning Fiberglas Corp., 109 F.R.D. 263, 266 (E.D.N.C.1985) (quoting Fed.R.Civ.P. 33(c) advisory committee's note). As such, "directing the opposing party to an undifferentiated mass of records is not a suitable response to a legitimate request for discovery." Id.; see also Blake Associates, Inc. v. Omni Spectra, Inc., 118 F.R.D. 283, 289 (D.Mass.1988) (reply that party will make available "documents responsive to this interrogatory" is "patently insufficient" under Rule 33(c)).

Although the court declined to impose sanctions, it warned that if the defendant continued to thwart plaintiff's legitimate discovery attempts, "the Court will not hesitate to award Plaintiff expenses and award appropriate sanctions." Taube Corp., 136 F.R.D. at 457.

Capacchione v. Charlotte-Mecklenburg Schools, 182 F.R.D. 486 (W.D.N.C.) (1998), involved a desegregation lawsuit in which plaintiff sought through discovery information about the school system's racial composition, student assignment, testing and achievement. In response to interrogatories, the defendant referenced business files which it made available for inspection and

copying. The files were contained scattershot among approximately 200 unlabeled boxes.

Plaintiff filed a motion to compel discovery. The defendant contended the burden of ascertaining the interrogatory answers from a review of the documents was substantially the same for both parties. It also contended that it had satisfied the requirement of specifically identifying the documents as required by Rule 33(d). The court disagreed: "A party that responds to an interrogatory under the provisions of 33(d) abuses this option when the responding party simply directs the interrogating party to a mass of business records or offers to make all of their records generally available." Capacchione, 182 F.R.D. at 490. The court also dismissed the defendant's contention that it specifically identified the documents that contained the requested information and directed that "at a minimum, responses shall identify the particular box containing such documents. Responses also shall identify, to the extent possible, the particular file(s) in which the information is found, for example, by date, file number, folder number, and so on." Capacchione, 182 F.R.D. at 491. The defendant was also required to instruct the plaintiff about how to efficiently retrieve the requested information in the most efficient manner, and to provide all abstracts, indexes or summaries that would aid plaintiff in the process.

In Herdlein Technologies, Inc. v. Century Contractors, Inc., et al., 147 F.R.D 103, 25 Fed.R.Serv. 3rd 1370 (W.D.N.C.) (1993), the plaintiff, in lieu of answering defendant's interrogatories, responded by stating that the information sought was available from the approximately 800 documents the defendant had already produced. The plaintiff did not specify which of the 800 documents contained the information requested by the interrogatories.

The defendant filed a motion to compel discovery. The court found that the plaintiff did not respond the defendant's interrogatories "with the candor and specificity that the rules of discovery require," Herdlein, 147 F.R.D. at 105. The court also observed "that discovery should not merely result in a transfer of

information among the parties, but should also serve to organize the information and bind the responding party to its responses so that the interrogating party may use the response in a trial setting." Id.

Never let your opponent unfairly disadvantage your client and prejudice your ability to find the facts through a misapplication of Rule 33(c). I've made that mistake, and although our clients ultimately prevailed, I will never make it again.

C. Don't permit your opponent to make meaningless objections to requests for admission (documents do not "speak for themselves")

You served the following request for admission and got this response:

Admit that the second paragraph of the contract attached as Exhibit A states: "… (verbatim quote) …".
Answer: The document speaks for itself.

Is this an appropriate objection? Asserting that a document "speaks for itself" is not a proper objection to a request to admit that a document contains quoted language. Miller v. Holzmann, 240 F.R.D. 1, 66 Fed.R.Serv. 3rd 977 (2006). In Miller, plaintiff served a request for admission that a document contained language quoted in the request. The defendant objected on the grounds that the document "speaks for itself." The court held that the objection was improper:

> It is astonishing that the objection that a document speaks for itself, repeated every day in courtrooms across America, has no support whatsoever in the law of evidence…. The tautological 'objection' that the finder of fact can read the document for itself to see if the quote is accurate is not a legitimate objection but an evasion of the responsibility to either admit or deny a request for admission, unless a legitimate objection can be made or the responding party explains in detail why it can neither admit nor deny the request…. It is also a waste of time, since the 'objection' that the document speaks for itself does not move the ball an inch down the field and defeats the narrowing of issues in dispute that is the purpose of the rule permitting requests for admission.

Miller, 240 F.R.D. at 4; accord Diederich v. Dept. of the Army, 132 F.R.D. 614 (1990).

In Booth Oil Site Administrative Group v. Safety-Kleen Corp., 194 F.R.D. 76 (2000), the court also found that it is permissible to request that a party admit or deny a Rule 36 request as to the accuracy of quoted textual material from a document relevant to the case:

> As a statement of a document's text is a matter of fact, a request calling upon a party to admit or deny that such quoted material is the actual text of an identified document, relevant to the case, may not be ignored on the ground that the request seeks an interpretation of the text or that the document in question 'speaks for itself' documents do not speak, rather, they represent factual information from which legal consequences may follow. It is therefore permissible to request that a party admit or deny a Rule 36 request as to the accuracy of quoted textual material from a particular document relevant to case.

See also Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co., Inc., 246 F.R.D. 522 (2007) (court awards sanctions against party that objected to request for admission about contents of a relevant document, noting that "a favorite excuse for not answering requests for admission in a contract case is that 'the document speaks for itself.'"); House v. Giant of Maryland, LLC, 232 F.R.D. 257 (2005) (court awarded sanctions against defendant for evasive response to request for admission about contents of document.); Aetna Casualty v. Souras, 78 Md. App. 71, 76, 552 A.2d 908, 910 (1989) (court deemed party's response that "The policy speaks for itself - a copy is attached" as an admission that that underinsured motorist coverage was $50,000).

Although filing a motion to compel on an issue like this is troublesome and time consuming, it is worth it. The court will not appreciate your opponent's failure to admit a relevant fact, and you will be able to simplify your proof at trial. (I haven't found any North Carolina or Fourth Circuit cases that address this issue. If anyone knows of any, please email me at ithorp@kirby-holt.com.)

IV. No Matter How Hotly Contested Things Get, Always Do the Right Thing -- Obligations Related to Inadvertent Disclosure

Civil Procedure Rule 26 and the Rules of Professional Conduct address an attorney's obligations when he has inadvertently received material related to his representation of a client. Rule 26 was amended in several respects, effective October 1, 2011. Paragraph (b)(7)b. was added to address parties' rights and responsibilities when a party inadvertently produces material in discovery that is subject to a claim of privilege or protection as trial-preparation material:

> b. Information Produced. – If information subject to a claim of privilege or protection as trial-preparation material is inadvertently produced in response to a discovery request, the party that produced the material may assert the claim by notifying any party that received the information of the claim and basis for it. After being notified, a party (i) must promptly return, sequester, or destroy the specified information and any copies it has, (ii) must not use or disclose the information until the claim is resolved, (iii) must take reasonable steps to retrieve the information if the party disclosed it before being notified, and (iv) may promptly present the information to the court under seal for determination of the claim. The producing party must preserve the information until the claim is resolved.

The producing party may assert the claim by notifying the recipient parties of the claim and the basis for it. Once notified, the recipients:

- must promptly return, sequester or destroy all copies of the material;
- must not use or disclose the information until the privilege claim is resolved;
- must take reasonable steps to retrieve the material from anyone to whom the recipients distributed it;
- may promptly present the materials to the Court under seal for determination of the producing party's claim.

Rule 26 imposes an obligation on the recipient only after he is notified by the producing party, and applies only to materials that were inadvertently produced in response to a discovery request.

The Rules of Professional Conduct impose broader obligations on an attorney who has inadvertently received material relevant to his representation of a client. Rule 4.4 (“Respect for Rights of Third Persons”) states:

> (b) A lawyer who receives a writing relating to the representation of the lawyer’s client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

An attorney is obligated by Rule 4.4 to notify the sender as soon as he knows or reasonably should have known that the material was inadvertently sent. The recipient cannot wait to act until he is notified by the sender. The duty to notify the sender is imputed to all members of the recipient’s law firm, and the material subject to this rule is not limited to information produced in discovery. However, Rule 4.4 does not require that the attorney return the material:

> Whether the lawyer who receives the writing is required to take additional steps, such as returning the original writing, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a writing has been waived. Rules of Prof’l Conduct R. 4.4 cmt.

If return of the writing is not required by law, “the decision voluntarily to return such a writing is a matter of professional judgment ordinarily reserved to the lawyer. Id. RPC 252 cmt.

Before Rule 4.4 was amended in 2003, an attorney was obligated to promptly return material he inadvertently received pursuant to Ethics Opinion RPC 252 (“Receipt of Inadvertently Disclosed Materials from Opposing Parties”) (1997). RPC 252 ruled that a lawyer who inadvertently received materials from an opposing party or opposing counsel, which appeared on their face to be subject to the attorney-client privilege or otherwise confidential, should refrain from

examining the materials and return them to the sender. However, an Editor's Note was added to RPC 252 after Rule 4.4 was amended in 2003:

> To the extent that this opinion is contrary to Rule 4.4, Respect for Rights of Third Persons, paragraph (b) and Comments [2] and [3], as revised in 2003 and thereafter, the rule and comment are controlling."

In the professional judgment of this attorney, RPC 252 established a proper course of action before its scope was limited by Rule 4.4.