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Disclosure and Discovery in the Southern District, What You Need to Know

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The Federal Bar Association, in co-sponsorship with the Association of Business Trial Lawyers and the State Bar Litigation Section, presented a series of lectures titled "Disclosure and Discovery in the Southern District." Originally scheduled for three days, an overwhelmingly positive response resulted in adding a fourth session held on May 4, 2011. This article discusses sessions one through three.

The sessions were organized around District Judge Anthony J. Battaglia's guide to discovery, "Disclosure and Discovery Under the Federal Rules of Civil Procedure." Known to many local practitioners as the Discovery Bible, it contains detailed and useful guidance on everything from initial deadlines to resources for forming a joint discovery plan. Judge Battaglia kindly allowed the ABTL and the FBA to distribute the guide to attendees.

Panel One: (L-R) Cindy Cipriani, Judge Anthony Battaglia, and Callie Bjurstrom

This article aims to capture many of the key points set forth at these lectures.

A. Session One: Getting Your Case Started: Rules 16 and 26.

On January 18, 2011, panelists Judge Battaglia, Callie Bjurstrom (Partner, Luce Forward), and Cindy Cipriani (Deputy Chief, Civil Division, U.S. Attorney's Office) discussed issues and offered advice concerning early proceedings in civil cases.

1. Early Neutral Evaluation.

Under the Local Rules, even before the Rule 26(f) conference the parties must attend an ENE—a useful tool that prompts many settlements. Be prepared to discuss compromise.

The realities of some cases, however, mean that compromise is unlikely until after some discovery—and in almost all cases, discovery cannot begin until after the parties have held the Rule 26(f) conference. For that reason, most Magistrate Judges merge the ENE with the case management conference to allow the parties to exchange initial disclosures and engage in preliminary discovery. Make sure to read the ENE notice carefully to see how the ENE has been scheduled.

2. Rule 26(f) Meet and Confer.

Twenty-one days before the Rule 16(b) initial scheduling conference, you must have your Rule 26(f) meet and confer; after the meet and confer, discovery can begin. You must be prepared to address a number of issues during the meet and confer, including discovery and—critically—ESI. That means you should meet with your client and advisably its IT department to get a good understanding of its computer systems, backup data, legacy data, and other relevant issues. Effort on the front end will put you in the driver's seat as the case progresses.

During the meet and confer, try to come to an agreement on potential custodians, search terms, forms of production, cost shifting, and other relevant ESI issues. Do not "agree to agree" later about ESI—get this beast out of the way early because it only becomes more problematic down the road. Judges are becoming less tolerant of discovery disputes that could have been avoided by an agreement on ESI at the early meet and confer. Other potential topics: rolling productions, clawback agreements, and Rule 30(b)(6) deposition witnesses to avoid unnecessary re-depositions and oppositions.

Preservation. Before the Rule 26(f) conference—and as soon as possible after your notice of the case—you must make sure the client is taking appropriate actions to preserve data and suspend any programs that would result in automated data destruction. Either you or management should send a preservation letter to all relevant employees so everyone who reasonably might possess relevant data is aware of the obligation to preserve it. Remember to send periodic reminders to the relevant custodians. At the Rule 26(f) conference, discuss preservation of ESI relevant to the case. If there is a dispute

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over what must be preserved, it is better to get it before the court at an early stage, rather than have to raise it after data has been destroyed.

3. Initial Disclosures and Joint Discovery Plan.

Fourteen days after the Rule 26(f) conference or seven days before the Rule 16(b) conference, initial disclosures are due. You have a duty of reasonable inquiry: it may be difficult to evaluate at such an early stage, but you must investigate which witnesses may be relevant and what damages may be assessed. The duty to supplement applies to initial disclosures, so calendar a tickler to update your disclosures. The supplement must be timely, which under the case law means "seasonal." In more useful terms, thirty days is a good rule of thumb.

Contemporaneously with your initial disclosures, the joint discovery plan is due. If possible, the parties should come to an agreement regarding ESI issues, custodians, and search terms. Rolling productions are becoming the rule rather than the exception; this should also be addressed in the joint discovery plan.

4. The Rule 16 CMC.

Bring any lingering issues to the court's attention at the CMC. Again, it is better for the court to referee an issue at that point—before any party has spent tens or hundreds of thousands of dollars on discovery that the court may order redone.

Panel Two: (L-R) Mag. Judge William Gallo, Tim Blood, Meryl Maneker, Mag. Judge Bernard Skomal

B. Session Two: Written Discovery.

On February 17, 2011, panelists Magistrate Judge William Gallo, Magistrate Judge Bernard Skomal, Tim Blood (Partner, Blood, Hurst & O'Reardon), and Meryl Maneker (Partner, Wilson Turner Kosmo) discussed and offered pointers concerning written discovery.

1. Think about Discovery Early in the Case.

Start on discovery planning early. Plaintiffs—get the ball rolling on ESI and the discovery plan right out of the gate. Discuss the form of ESI and possible search terms. Defendants—prepare the client: discovery is coming; preparation now will save time later. Locate information on who has relevant information, what it is, where it is and how to get it. Learn the client's information systems, including file types, email, and legacy systems. Be wary of just delegating this down to someone who does not appreciate the issues of the case.

For large amounts of data, agree to rolling productions. But, don't let it lull you into forgetting ultimate deadlines, including discovery and motion cutoff dates. With massive volumes of data, talk to the other side about sampling the data to get at what they're really after. In the end, each will get its discovery faster. If necessary, request more time to respond.

2. Requests for Extension: Be Diligent.

Judge Skomal noted that if you ask for a schedule extension due to discovery issues, you must show diligence and that, in spite of it, you need more time. Ask earlier rather than later. Don't put ESI off until the last minute.

Judge Gallo concurs. Prevent problems, don't cure them—discuss discovery scheduling at the ENE and CMC if it will be an issue. Once dates are set, dates will be kept. Get a handle on potential problems early so the court can take them into account in scheduling. And don't wait until the deadline to ask for an extension; ask as soon as the problem crops up.

3. Discovery Disputes: More Facts, Please.

Judges Gallo and Skomal both have criminal law backgrounds, so both see discovery issues through that lens: Why not just turn it all over to the other side? Boilerplate objections won't cut it them. If you object that discovery is burdensome, oppressive, or too costly, give details on what you've done, where the evidence is, and why it would be burdensome or costly in terms of days, hours, and dollars. Influencing this perspective, Judge Skomal noted that criminal discovery is narrow, tailored, and well thought out. To him, most civil requests look overbroad—draft narrower, targeted requests.

4. Cost Shifting for ESI.

Cost shifting is rare, but the judges will shift costs in the right case. Judge Gallo looks at the issue proportionally: Who is asking; how important is the discovery; how difficult is it to obtain; what are the costs; and what is the relative ability of the parties to pay? If the discovery **may** be relevant, but it's expensive, Judge Gallo may have plaintiff pay. If the cost is high but it's crucial for the case, he may not shift costs at all.

Judge Skomal agrees and wants to know if there is a less expensive means—for example, sampling. Parties should agree on an alternative.

5. The 25-Question Limit.

If you can't agree to expand the presumptive limit for interrogatories and RFAs, you may ask the court. According to Judge Gallo, however, the CMC is usually too early. If you do ask for more, articulate why you need more, and why those sent were insufficient. He'll push back to see if any were wasted.

Judge Skomal agrees: There must be an exceptional reason for more discovery; you won't get two bites at the apple.

6. Duty to Supplement: 30-Day Rule of Thumb.

Parties must timely update responses until trial. Supplementation must be "seasonal" after the party or counsel acquires information—a good rule of thumb is 30 days. Err on the side of supplementing; otherwise evidence could be precluded. Judge Skomal might also inform the jury of the failure to supplement and impose attorneys' fees.

7. Privilege Logs.

For a privilege log, include enough information about the nature of the document withheld to support application of the privilege. Available software can fill in much of this information. For large

numbers of documents, use categories to describe groups of similar documents.

Provide the privilege log "promptly" or risk waiver—probably not "within 30 days," but don't wait months.

8. Objections: More Facts, Please.

In a dispute over withheld information, cut down to the real objections at issue, then confer. If you're asking and they're objecting, nail them down to the facts supporting the objection. If you're objecting, Judge Skomal wants facts to support your objection; otherwise, you risk waiver.

9. Sanctions.

Both judges want to see good faith efforts to meet and confer—more than once. Only if the other side continues to refuse should you even consider sanctions. Judge Gallo may be receptive. While preclusion is available, in most cases monetary sanctions are sufficient. Judge Skomal agrees: Conduct must be egregious to warrant sanctions. A good rule of thumb is to avoid asking for discovery sanctions unless you're dealing with spoliation. If you ask for sanctions with little basis, he may sanction you.

C. Session Three: Deposition Practice.

On March 30, 2011, panelists Magistrate Judge Cathy Bencivengo, Karen Hewitt (Partner, Jones Day), and Jill Sullivan (Partner, Chapin Fitzgerald Sullivan) discussed issues involved in deposition practice.

1. Ground Rules.

By the numbers: If you want documents, you must give the witness 30-days notice; you cannot circumvent this by attaching a document demand to the deposition notice.

Rule 30(b)(6) witnesses: Federal rules do not require the person most knowledgeable; as Judge Bencivengo mentioned, PMK is a state court concept. Judge Bencivengo also noted that if you want to depose a person as both a corporate designee and as an individual, you should work that out ahead of time with opposing counsel.

Objections and protective orders: Objections must be short and non-argumentative; instructions not to answer are limited to privilege. If you do not want to produce a witness, move for a protective order.

2. Preparing for a Deposition.

Don't wing it: Better to over-prepare, whether taking or defending. Know your case and the documents.

Timing: Take a deposition before document discovery? It depends. An early deposition can obtain candid testimony without extensive analysis of your (and the other side's) legal position. But, you're going in without the benefit of extensive analysis.

Judge Bencivengo stated that, for an early deposition, Rule 26 disclosures should alert you to the claims, defenses and key documents, even without document discovery. If you're not getting what you need from the disclosures, come to the court and ask. During the ENE, let the court know if you need specific documents or depositions to move the case forward. The process can be tailored to target that discovery, holding back on other, less critical, discovery.

Research: One suggestion: jury instructions will help frame your questions and may supply the theme for your case. Use critical words from the jury instructions in your questions or, in defending, to educate your client.

Organization and transcripts: When both sides plan on taking several depositions, agree in advance to use common exhibits and use the same numbering system. Judge Bencivengo suggested giving a glossary to the court reporter with names of the players, technical terms, and product names.

Video depositions: If a witness is important enough to depose, video the deposition. Judge Bencivengo said it would be foolish not to video if you anticipate using the testimony; video is more effective for both impeachment and as direct evidence. She is willing to look at the video to resolve a dispute.

Outlines and authentication: Whether or not you choose to prepare a detailed outline, Judge Bencivengo suggested preparing, at a minimum, a checklist of admissions necessary to authenticate exhibits, establish hearsay exceptions, and deal with other basic evidentiary issues. She noted that too often counsel will forget to authenticate each exhibit used.

3. Taking a Deposition.

Handling exhibits. Judge Bencivengo reinforced that, in each question that follows identification of an exhibit, you identify the document you're talking about so that you don't need to split testimony identifying, for instance, the smoking gun "exhibit 63," and the witness's admission that he authored exhibit 63. If you always identify exhibits during depositions, you are also more likely to do so at trial and thus create a clear record—a critical issue on appeal.

Broad Q, then Short Q/Short A: Purposes of a deposition: (1) information; (2) impeachment; and (3) admissions. Use the funnel technique: go from broad narrative questions to a cross exam on the answers. Even if you get an objection for overbreadth, Judge Bencivengo noted that the witness still has to answer unless he or she doesn't understand. Once the witness answers, explore specific issues. Finally, follow up with yes/no questions asking the witness to admit the things just said—essentially, a cross examination. LiveNote can help with instant quotations.

4. Defending a Deposition.

Defending a deposition takes fierce concentration and keen preparation. Prepare your witness: go over key documents and themes. Tell the witness: take your time; don't fill the void of silence. Judge Bencivengo noted that engineers in particular can be overcome with the urge to be helpful, and if using a video, counsel your client on appropriate dress. Pay attention to the question; make your objection; stop. Speaking objections are state court practice.

Call the Court for disputes: Judge Bencivengo said that the court will take calls about disputes while the deposition is ongoing. If the judge is not available, leave a message and move to another topic until the judge calls back.

5. Ethical Issues.

Witness Preparation Versus Coaching. You have to help your client understand the case and the potential pitfalls; to see the events and the documents through the lens of the law and the theme of the case. But, there is a line. If you supply the answers, you may be coaching the witness. The witness already knows all the answers. Remind him (and yourself) of that.