Civil Practice Guidelines - Magistrate Judge Michael B. North

United States District Court for the Eastern District of Louisiana

(Updated – February 2022)

This document is intended to help guide the parties and their counsel in litigating their matters in my court.[1] It is intended to lay the groundwork for professional, efficient and collegial conduct by counsel, especially, but not exclusively, during pre-trial discovery. I hope and expect that these observations will assist counsel in effectively representing their clients' interests while simultaneously conducting themselves in a professional manner best calculated to "secure the just, speedy, and inexpensive determination of every action and proceeding." FRCP 1.

An initial, overall observation: Professionalism, courtesy, civility, candor, and pragmatism are not signs of weakness in a lawyer – they are attributes toward which all attorneys should strive. Lawyers who are described by peers and judges as possessing these traits are invariably the most respected and effective advocates for their clients. Litigation can create great pressure that tempts lawyers to lose sight of these important ideals while engaging in an overly aggressive, no-holds-barred, or even unethical approach. That attorneys sometimes give in to that pressure is a leading cause of many unnecessary litigation disputes.

[1] These guidelines are not intended to be wielded as a sword against one's adversaries. To the contrary, they are intended to reduce conflicts among counsel and parties over non-merits issues and allow them to more efficiently and less contentiously handle their disputes in this Court. Accordingly, this document is not to be cited or quoted in briefs submitted to this Court, nor is it to be attached as an exhibit to any brief submitted to the Court. For future reference, these guidelines may be found at the Eastern District of Louisiana Court website.

For instance, experience teaches that far too many discovery "disputes" arise when one or both sides exhibit (1) a failure to grasp the law, the rules, or the facts of their particular case; (2) a lack of professionalism or civility; (3) a refusal to extend common courtesies to a fellow professional (and, by extension, to the Court); (4) bad faith; or (5) some combination of all of the above. These problems generally manifest themselves in the all-too-common – but nonetheless intolerable – take-no-prisoners, scorched-earth tactics employed by many present-day litigators.

Unfortunately, it is becoming increasingly rare for courts, including this one, to be presented a truly justiciable discovery dispute (*i.e.*, requiring thoughtful consideration and resolution by the Court) that all the interested parties have meaningfully tried to resolve in good faith before resorting to often-unnecessary motion practice. To assist counsel in avoiding some common pitfalls, I offer the following practical guidance.

Lawyers who practice the art of making life difficult—who shade the truth, are deliberately uncooperative in the discovery or trial-preparation process, take extreme or marginally defensible legal positions, or deliberately make litigation more expensive or time consuming—bring disrepute on the legal profession and harm the reputation of this Court's bar in the community. Lawyers engaging in such conduct and litigants who encourage it immeasurably undermine their own standing with the Court – a fact that will quickly become evident to anyone who persists in engaging in such conduct here.

You may reasonably expect the Court to be unconvinced by half-baked arguments or excuses, delays purportedly caused by the client, mud-slinging and overheated rhetoric, passing the buck, finger-pointing, blaming support staff (especially mine), or improper

planning, which is often the cause of a professed lack of time to accomplish a task within the deadlines set by the Court. Likewise, if civility and common courtesy are not in your make-up, or if you think bullying tactics are a necessary tool of our profession, rest assured you will not enjoy the consequences of your lack of manners.

I do not take claims of ethical violations by opposing counsel lightly and if you have made such an accusation against your opponent, you have done so at your peril if you are not prepared to prove it.

Courts and lawyers know all too well that abuse of the legal process most often occurs during discovery and that lawyers do things during discovery that they would not dream of doing if a judge were present. In depositions, you should always keep in mind that conduct that is not permissible in the courtroom during the questioning of a witness is ordinarily not permissible at a deposition and that depositions are not to be used as a device to intimidate a witness or opposing counsel. The Federal Rules of Civil Procedure (and this Court) do not tolerate speaking objections of any sort (including the dreaded "you can answer if you know" instruction), interruptions, or instructions not to answer for any reason not expressly stated in Rule 30(c)(2). Similarly, making serial "form" objections when there is nothing wrong with the form of the question is obstructive and improper conduct.

If an unresolvable dispute arises during a deposition, counsel should pick up a phone and call my chambers for direction rather than engaging in wasteful colloquy or, worse, threatening to call me and not doing so.

Regarding written discovery, and consistent with the Federal Rules, when propounding written discovery, you should make every attempt to intelligently target your requests to the claims and/or defenses in the case and properly limit them temporally. I do not favor fishing expeditions or questions and requests unlimited in time or place, *i.e.*, requests for "any and all" of a thing "pertaining or relating" to another thing. These so-called "bombshell" requests are wholly inappropriate and represent an abdication of the requesting party's responsibilities under Rule 26(b) to seek discovery that is relevant to any party's claim or defense and proportional to the needs of the case.

Similarly, I am severely allergic to "general" objections and those otherwise unsupported objections based on the usual boilerplate, including assertions that the request is vague, overly broad, or unduly burdensome, or conclusory statements that the information sought is irrelevant or "unlikely to lead to the discovery of admissible evidence." If you haven't done so in a while, you should re-read the Rules of Civil Procedure, which have been amended in many important respects. Both "general" and boilerplate objections have always been improper and are uniformly prohibited by courts throughout the country, including the Fifth Circuit (and this one). They are antithetical to the goals of the Federal Rules and *should never be employed, period*.

Similarly, if you object to a discovery request, give the Court something to back up your objection (or it will be overruled). If you have answered a discovery request "subject to" or after "reserving" an objection – or some such similar verbiage – you should disclose whether you are actually withholding responses pursuant to that objection. Failing to do so will result in a finding that your objection has, in fact, been waived.

You should not assume that I will buy your argument that a common English word is "vague" or "ambiguous." If you think something is unduly burdensome, you must accompany your objection with facts to show it.

In summary, if your discovery requests or responses are not well thought-out and clearly presented, or if you are the deposition-taker from another planet, you will find yourself on very shaky ground if and when forced to defend your behavior.

While I generally believe that the attorney-client privilege is very nearly sacred and am not inclined to find that such a critically important privilege has been waived accidentally, by implication, or by oversight, this does not excuse compliance with the requirements of Rule 26(b)(5). You simply cannot object to a discovery request "to the extent" it calls for the production of privileged material without actually identifying that material on a privilege log. This is a fundamental requirement when claiming a privilege and far too many lawyers seem to think they can skip this important step without consequences. Such an omission carries with it tremendous risk – you are encouraged not to gamble with your clients' privileged information by failing to provide your opponent a privilege log.

Finally, all lawyers practicing before this Court should understand that professional and meaningful communication with your opponent is of paramount importance. Before you tell me that I need to rule on your discovery dispute, you should be sure to have exhausted every *reasonable* possibility of resolving it amicably. In this vein, counsel should take heed of the emphasis placed on cooperation and dialog by the amended Rules and begin such dialog early in the case to avoid unnecessary disputes. When disputes do arise,

before resorting to motion practice, you should convene an *actual and meaningful* "meet and confer" session through *simultaneous communication* with your opponent, *i.e.*, in person or by telephone. E-mail exchanges attached as exhibits to your motion are generally insufficient to comply with this requirement and if you file a discovery motion without a proper and meaningful meet-and-confer having first taken place, that motion will be denied or stricken and costs may be awarded against you. Counsel are reminded that Rule 37 includes a presumptive "loser pays" provision, subject to certain limited exceptions, and that where appropriate I will not hesitate to enforce that provision.

I fully understand that every dispute cannot be resolved amicably and that quite often, despite counsel's best efforts, the Court will be asked to decide disputed matters through motion practice – that is, after all, what courts do. If you believe you must make a record, I will always allow you to do so. When motions are filed, I routinely set them for hearing, not because I wish to hear counsel simply repeat or re-argue the points they have already made in brief, but because I find open discussion of the issues is almost always helpful to the Court and the parties and because I often have questions about one or both parties' arguments or contentions and/or their citations to authority.[2] My best advice to counsel is to be prepared to engage in such a "question-and-answer" format – the most effective advocates always are.

On the important issue of professionalism, please note that this District has adopted by rule the Code of Professionalism of the Louisiana State Bar Association, which requires, in part, that counsel conduct themselves with "dignity, civility, courtesy and a sense of fair

[2] For this reason, I frown upon and rarely allow the filing of surreply briefs.

play."[3] I urge all counsel to fully acquaint themselves with the provisions of this Code and to conduct themselves in accordance with those provisions when dealing with opposing counsel, litigants and the Court. I hope that all counsel appearing here take for granted that this Code, along with the ethical rules that govern the practice of law, are *minimum* standards and that they strive daily to be more than minimally professional and ethical in their dealings with each other and the Court.

Finally, if at any time during the litigation, the parties wish to seek guidance from me on a discovery dispute – whether merely budding or in full bloom – you are urged to call chambers as part of your efforts to resolve that dispute before filing a motion. I will take such calls whenever possible and will otherwise do whatever I can to assist the parties in this regard. The same holds true for seeking assistance in resolving your case entirely by scheduling a settlement conference at any time during the litigation. Whether the parties are ordered to attend a settlement conference here by the District Judge or not, you may always contact chambers to arrange for such a conference at any time and I will make every effort to accommodate the parties in this regard.

New Orleans, Louisiana, this 4th day of February, 2022.

Michael B. North
Chief United States Magistrate Judge
Eastern District of Louisiana

[3] Available on the web at: http://www.laed.uscourts.gov.