

Magistrate Judge North’s Guidelines for Conducting Discovery and Motion Practice
United States District Court for the Eastern District of Louisiana

This document is intended to help guide the parties and their counsel in the conduct of their litigation, particularly with respect to matters that will come before me.¹ It is intended to lay the groundwork for professional, efficient and, yes, even collegial conduct by counsel in their discovery efforts in this case. I hope and expect that these observations will assist counsel in effectively representing their clients’ interests while simultaneously conducting discovery in a 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 we all should strive. Attorneys who are described by peers and judges with these adjectives are invariably the most respected and effective advocates for their clients. There is often great pressure in litigation to brush aside these important ideals in favor of an overly aggressive, “dog-eat-dog” approach. That lawyers sometimes give into that pressure is a leading cause of many unnecessary litigation disputes.

Experience teaches that far too many discovery “disputes” arise when one or both sides exhibit (1) a failure to grasp (or an actual disdain for) the law, the rules, or the facts of their particular case; (2) a lack of professionalism or civility; (3) a refusal to extend common courtesy to a fellow professional (and therefore to the Court); (4) bad faith; or (5)

¹ 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.

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. 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. For instance, if it is your habit or practice to make speaking or suggestive objections during a deposition or to instruct witnesses not to answer when you have no right under the Rules to do so, be forewarned that such behavior will not be viewed kindly here. If you persist in such conduct after it has been brought to your attention, you should be prepared for unhappy results.

If you do not return telephone calls, are always “unavailable,” screen every communication through staff and then dash off e-mails “confirming” something that was not agreed to when you were finally reached, rest assured you are not fooling anyone. If civility and common courtesy are not in your make-up, or if you think bullying tactics are a necessary tool of our profession, you undoubtedly will not enjoy the consequences of your lack of manners.

You may reasonably expect the Court to be unconvinced by half-baked arguments, lame excuses, delays caused by the client, mud-slinging, passing the buck, pointing fingers, blaming support staff (especially mine), or a professed lack of time, which is almost always the result of improper planning.

Claims of ethical violations are not taken lightly here and if you have made such an accusation against opposing counsel, you have done so at your peril if you are not prepared to prove it.

I believe that the attorney-client privilege is very nearly sacred, and I am not inclined to find that such a critically important privilege has been waived accidentally, by implication, or by oversight, except in the most unusual and compelling circumstances. Do not, however, take this statement to mean that you can safely ignore the requirements of Rule 26(b)(5).

I do not favor fishing expeditions; questions and requests unlimited in time or place; or unsupported objections to discovery based on the usual boilerplate, including assertions that the request is overly broad or unduly burdensome, or that the information sought is irrelevant, privileged, or is “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 recently been amended in many important respects. “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 not be employed.

When you propound written discovery, you should make every attempt to intelligently target your requests and avoid broad requests for “any and all” information of a certain category. Such catchall requests are 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, 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 (1) rethink that response² or, failing that, (2) disclose that you are actually withholding responses pursuant to that objection.³

You should not assume that I will buy your argument that a common English word is “vague” or “ambiguous.” If you think something is burdensome, accompany your objection with facts to show it. In short, 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 are on shaky ground indeed.

Here is the bottom line: 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

² You may be about to waive your objection. See Wright, Miller & Marcus, Federal Practice and Procedure: Civil § 2173: “A voluntary answer to an interrogatory is also a waiver of the objection.”

³ Newly amended Rule 34(b)(2) now expressly requires that a responding party state objections with specificity and indicate whether documents or information is being withheld on the basis of such objection(s).

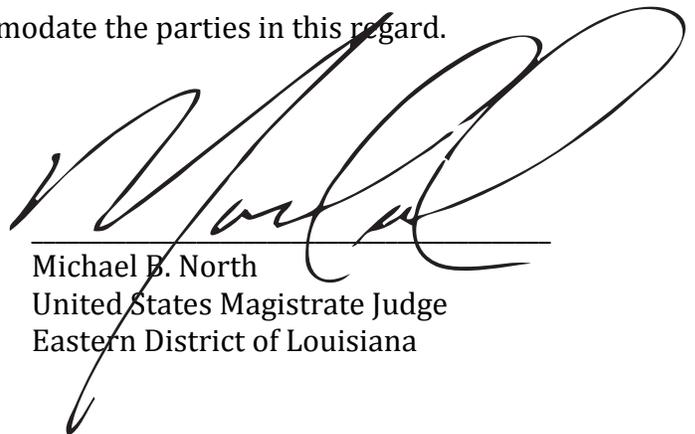
avoid unnecessary disputes. When disputes do arise, before resorting to motion practice, you should convene an actual “meet and confer” session in person or by telephone, *i.e.*, simultaneous communication with your opponent. E-mail exchanges attached as exhibits to your motion are generally insufficient 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 likely be denied or stricken and costs may be awarded against you. Counsel are reminded that FRCP 37 imposes a presumptive “loser pays” rule, subject to certain limited exceptions, and that where appropriate I will not hesitate to enforce this 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 via 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 a motion is filed, I may *sua sponte* set it for hearing and if either party requests such a hearing I will almost always grant that request. If your motion is set for hearing, it is almost certainly because I have a question or questions about one or both parties’ arguments or contentions and/or their citations to authority; it will not be because I wish to hear counsel simply repeat or re-argue the points they have already made in brief. My best advice to counsel is to be prepared to engage in such a “question-and-answer” format – the most effective advocates always are.

A final observation: 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 play.”⁴ 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.

If, at any time during the litigation, the parties wish to seek guidance from me on a discovery dispute – whether 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. 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 during the litigation and I will make every effort to accommodate the parties in this regard.



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

⁴ Available on the web at: <http://www.laed.uscourts.gov>.