Chancery Forum – April 13, 2012

Discovery Discussion

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I. Interrogatories & Document Requests

A. Use of Discovery Requests: Depending on the case, some information can best be obtained through interrogatories, while other information can be best obtained through document requests, requests for admission, or depositions. In some cases, the same information can be obtained most readily (and easily) by taking one or more depositions. The value of efficiency runs through Tennessee's discovery rules. Tenn. R. Civ. P. 1 requires that the judge construe discovery obligations so as to secure the just, speedy, and inexpensive determination of every action.

B. Scope of Discovery Requests: Interrogatories and Document Requests should be concise, focused, objective, and unambiguous. Some "ask for the world" type of questions may be customary or common, and lawyers may negotiate acceptable answers between them, but answers are difficult (or impossible) for the Court to compel because the questions are broad and unfocused. Rule 33.02 itself uses the term "relate to." Yet, if this or similar terms are used in an interrogatory, the question becomes ineffective. The request is either too broad and open-ended or it asks for a subjective response. Discovery can be an extremely difficult process Lawyers sometimes feel that they need to cover their bases by asking these broad questions.

C. Examples of Actual Unfocused/Broad Requests:

1. Identify every document which relates to your employment and your employment agreement.
2. Identify every communication that you have had with your partner Mr. Y since January 2010.
3. Identify all communications, whether written or oral, that refer or relate to X party or any of its agents, employees, officers, or directors, specifically including, but not limited to, Mr. Y, and describe in detail the substance of the communication and who was present.
4. Produce all documents relevant to this litigation of which you are aware.

D. Drafting Focused Requests: You can avoid objections and avoid handing the opposing party great discretion in answering the request by limiting the question by time, place, issue or person. Ask yourself whether a judge

can compel a useful answer to your question and how would you respond on behalf of your client to the same question?

E. Incomplete Responses: Attorneys are often concerned when a party has provided too little in response to a particular discovery request. Lawyers should recall that the Rules of Civil Procedure require that the responding lawyer sign the requests, responses or objections in the lawyer's individual name, whose address shall be stated. The signature "constitutes a certification that the attorney has read the request, response or objection, and to the best of that person's knowledge, information and belief formed ***after a reasonable inquiry*** it is…" consistent with the rules, not posed for an improper purpose, for delay, or to increase costs, and not unreasonable or unduly burdensome. Tenn. R. Civ. P. 26.07. Lawyers should insist that discovery responses meet the formal requirements of the Rules of Civil Procedure and that the responses are signed. During motions to compel, the judge will need to know why a particular question is unduly burdensome. Sometimes lawyers will respond by saying that they are not aware of the details, but that the client said it would be burdensome to respond. Such a response is not satisfactory because the rules require that the lawyer make "reasonable inquiry" before posing an objection. Thus, lawyers should be prepared to describe the inquiry they have made into, and detailed support for, the objections they sign.

II. Common Discovery Requests

A. Witness Identity: The identity and location of persons having knowledge of any discoverable matter are specifically included in the allowable scope of discovery. Tenn. R. Civ. P. 26.02 (1). The rules do not require disclosure of which persons, other than trial preparation experts, a party intends to use at trial since witness decisions are made in preparation for trial. Witness disclosure is covered by the local rules. Dav. Co. Local Rule 29.01. Thus, it is often better to pose discovery questions about knowledge of persons, rather than of witnesses. *Strickland v. Strickland*, 618 S.W.2d 496, 499 (Tenn. App. 1981). Witness statements prepared in anticipation of litigation by the defendant's attorneys were held not to be discoverable after a witness was deposed in *Kirksey v. Overton Pub. Inc.*, 804 S.W.2d 68 (Tenn. Ct. App. 1990). If the party withholds such statements, claiming attorney work product, the party shall make the claim expressly and shall describe the nature of the documents not produced. . . ." Tenn. R. Civ. P. 26.02(5). An affidavit of an attorney is an appropriate and sufficient way to provide evidence needed to support the claim of work product.

Lawrence A. Pivnick, *Tennessee Circuit Court Practice*, §18:3, p. 959-62 (2010 Ed.).

B. Income Tax Returns: Whether a party should be required to produce tax returns is within the discretion of the trial judge. While the judge will exercise caution in this area, production of tax returns is not *per se* objectionable. When asking for a tax return, lawyers should remember that Rule 26 requires them to certify that their questions are not posed for harassment or abuse purposes. The judge may require that the requestor exhaust other discovery options before ordering production of tax returns. A substantive reason must be provided for objecting to production of a tax return other than the just the fact that it is a tax return. Tax returns are often relevant when: the income of a party is at issue, if business records are incomplete, to show property values, to show the existence or nonexistence of a partnership, agency or employment, and many other reasons. The entire return, including all schedules that were filed with the return, should be provided in response, unless otherwise requested or narrowed by the trial judge. The judge may order a party to request a copy of his tax return from the government.

See M. L. Cross, Annotation, *Discovery and Inspection of Income Tax Returns in Actions Between Private Individuals*, 70 A.L.R.2d 240 (1960).

III. Requests for Admission

Tenn. R. Civ. P. 36 is a useful tool for trial preparation. "Unlike other forms of discovery, requests to admit under Rule 36 primarily involve the elimination of undisputed matters, rather than the ascertainment of facts. Admissions should facilitate the proof at trial by weeding out the facts and items of proof over which there is no dispute. Thus, all issues as to which they can be no controversy in good faith should be eliminated. Admissions were designed to reduce trial time by limiting and narrowing the issues. . . . The admission is comparable to . . . a stipulation." *Tennessee Department of Human Services v. Barbee*, 714 S.W.2d 263, 266 (Tenn. 1986). Lawyers often request that a party admit liability and other disputed significant legal or factual matters in hopes that opposing counsel will fail to respond timely or make some other mistake in the response. This approach to requests to admit is rarely effective, however, since a judge can relieve a lawyer from admissions made in error. Lawyers should instead use Rule 36 to its best advantage and force the opposing lawyer to aid in the efficiency of the case.

IV. Common Deposition Issues

A. Deposition Location

1. Location for a non-party witness deposition: A foreign witness is a witness who resides in another state. A foreign witness is not subject to a Tennessee subpoena. "A subpoena for taking depositions may be

served at any place within the state." Tenn. R. Civ. P. 45.04(1). The foreign witness may be subpoenaed to appear in his home state for a deposition, depending upon whether his home state has, like Tennessee, adopted the Uniform Interstate Deposition and Discovery Act. *See* Tenn. Code Ann. §§ 24-9-201 – 24-9-207 (Supp. 2011). A Tennessee resident who is a non-party witness, may be required to appear for a deposition only in the county where he resides, is employed, or transacts his business or at such convenient place as may be fixed by court order. Tenn. R. Civ. P. 45.04(2).

2. Location for the plaintiff's deposition: The general rule is that, absent exceptional circumstances, the plaintiff must attend a deposition in the location of the forum that he chose. *Marlowe v. First State Bank of Jacksboro*, 371 S.W.2d 826 (Tenn. Ct. App. 1962). The plaintiff may seek a different location through a motion for protective order. *See* Tenn. R. Civ. P. 26.03.

3. Location for the defendant's deposition: This deposition is usually taken at the defendant's place of residence or principal place of business. *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)*; Dunn v. Standard Fire Ins. Co.*, 92 F.R.D. 31, 32 (E.D. Tenn. 1981).

B. Directing the Deponent Not to Answer: "A deponent may be instructed not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion to terminate or limit examination." Tenn. R. Civ. P. 30.03.

C. Improper Use of Objections: Objections to the form of the question and other common objections are sometimes used (albeit rarely) to alert the witness that a critical question has just been asked. Repetitive use of objections in this manner may cause the reader to give less weight to the answers of the deponent.

V. Motions to Compel

A. Burdens: The party submitting the interrogatories has the burden of moving for an order by the Court on the objections or failure to answer. Tenn. R. Civ. P. 33.01. "Failure to seek such a ruling has the effect of allowing the objection to stand. Once the propounding party has sought a ruling, however, the burden of sustaining the objection is on the party making it." Lawrence A. Pivnik, *Tennessee Circuit Court Practice*, §18:8, p. 995-96 (2010 Ed.). *See also, In re*: *Shopping Carts Antitrust Litigation*, 95 F.R.D. 299, 305 (S.D. N.Y. 1982).

B. Purpose and Liberal Construction: The purpose of discovery rules is to "do away with trial by ambush… and to rid trials of the element of

surprise that often leads to results based not on the merits but upon unexpected legal maneuvering." Pettus v. Hurst, 882 S.W.2d 783, 786 (Tenn. Ct. App. 1993). Discovery procedures are remedial in nature and are to be liberally construed in favor of disclosure of non-privileged material. Southeastern Fleet Leasing, Inc. v. Gentry, 416 S.W.2d 773, 777 (Tenn. Ct. App. 1966); Wright v. United Services Auto Assoc., 789 S.W.2d 911, 915 (Tenn. Ct. App. 1990).

C. Production on Eve of Motion: Unfortunately, some parties feel that discovery is not due until a motion to compel is filed. It is common for parties to produce discovery on the eve of a motion to compel. This places the movant in a difficult position. The movant does not want to waste time by appearing for the motion when the discovery response has been provided. Yet, the movant has not had time to review the responses to determine if they are adequate. Each judge handles these situations differently. The movant may decide to appear at the motion docket to explain that the motion will be reset given the late response. Or, the movant may simply reset the motion without an appearance, assuming notice is given to the other side.

D. Certificate of Good Faith: Davidson County Local Rules 22.08 through 22.11 provide special requirements for motions to compel. Rule 22.08 requires the movant to file "a statement which certifies that the lawyer has conferred with opposing counsel in a good faith effort to resolve the discovery dispute and that the effort has not been successful." To satisfy this requirement, Part I is seeking a statement that the movant's attorney has not just sent a letter, but has talked to opposing counsel "voice to voice" whenever possible in an attempt to resolve the dispute.

E. Other Practical Considerations: In theory, parties have the obligation to fully answer the discovery questions posed in accordance with the rules the first time around. The process of providing wholly inadequate responses, effectively placing the burden on the other side to complain about the responses, is not an acceptable practice. In practice, however, a party should file a timely motion to compel in order to preserve its concerns about the discovery responses or obtain additional information. An objection at trial to exclude information that was not produced in discovery may be successful, but one cannot count on such a ruling. Thus, try not to litigate your discovery issues in motions in limine. File any necessary motions to compel as far in advance as possible.

VI. Principles of Law in Discovery Objections

A. General Objections / Matching Objections With Questions:

> In objecting to interrogatories, the practice of making boilerplate objections at the outset of the response and incorporating them *in toto* into the specific numbered responses generally is not acceptable. *Cf.* Tex. R. Civ. P. 193.2(e)(an objection that is "obscured by numerous unfounded objections" will be deemed waived unless the court excuses it for good cause). The responding party should make plain exactly which objections apply to exactly which interrogatories. The response to each interrogatory should identify the particular language or characteristics of the interrogatory that is being objected to. . . . s*ee also Obiajulu v. City of Rochester*, Dep't of Law, 166 F.R.D. 293, 295 (W.D.N.Y. 1996)("pat, generic, non-specific objections, intoning the same boilerplate language, are inconsistent with both the letter and the spirit of the [discovery rules]").

Civil Discovery Standards of the American Bar Association (2004), Subsection (c)(i), Comments to Standard III.7.c.i., Matching Objections to Interrogatories.

> i. Matching Objections to Interrogatories. Specific objections should be matched to specific interrogatories. General or blanket objections should be used only when they apply to every interrogatory.
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> ii. Narrowing the Scope of a Response. When an answer is narrowed by one or more objections, this fact and the nature of the information withheld should be made clear in the response itself.

Id. at Standard III.7.c.

B. "Subject to, and Without Waiving These Objections…"

Tenn. R. Civ. P. 33 .01 states that "Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated *in lieu of an answer."* (emphasis added). The answers are signed by the person who makes them and the lawyer signs the objections. "Discovery by interrogatory requires

candor in responding . . . . The candor required is a candid statement of the information sought or of the fact that an objection is made to furnishing the information. A partial answer reserving an undisclosed objection to answering fully is not candid. It is evasive." *Dollar v. Long Mfg., v. Nichols Tractor Co., Inc.*, 561 F. 2d. 613, 616 (5th Cir. 1977).

> The practice of answering an interrogatory "subject to these objections" or "without waiving these objections" often leaves the requesting party unsure as to whether the full answer is being provided or only a portion of it. To prevent this uncertainty, the responding party should expressly state either that (i) the information being provided is the entire answer or (ii) the information being provided is responsive only to that portion of the interrogatory to which no objection is asserted.

Civil Discovery Standards of the American Bar Association (2004), Subsection (c)(ii), Comments to Standard III.7.c.i., Matching Objections to Interrogatories.

> [t]here is no authority in the Federal Rules of Civil Procedure for reserving objections. Unlike deposition questions, which are intended to be answered "subject to" objections, the same exception does not apply to interrogatories or production requests. Parties have a duty either to answer discovery or object to it. This is not to say that a party may not object to a portion of discovery and also provide an answer to the non-objectionable portion. It simply means that an objecting party cannot have it both ways.

R. Jason Richards, *Answering Discovery "Subject to" Objections: Lessons from Florida's District Courts,* 35 S. Ill. U.L. J. 127, 130 (Fall 2010).

Some lawyers respond overall, with boilerplate introductory, general objections. Then, they may respond to individual interrogatories by announcing the objections a second time, such as "this request is overly broad, unduly burdensome, and not reasonably calculated to lead to admissible evidence" and then add "without waiving these objections, and in a spirit of cooperation, we provide the following answer." In Part I of Chancery, when such a combined answer and objections are heard in the context of a motion to compel, Part I will grant the motion to compel finding that the answers are not responsive. Partial answers intertwined with objections, as just described, are evasive in result and are contrary to the letter and spirit of the discovery rules.