

Resolving Discovery Disputes - Using discovery to reach evaluation, mediation and trial goals

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My Experts Go Last!

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You are within fifty days of trial and you are in receipt of defendant's expert witness disclosure. She has three experts and you have three experts. All six of them need to be deposed in less than 35 days and you haven't yet sent out a deposition notice. You pick up the phone and meet and confer with opposing counsel to select dates. During the conversation the attorney for the defendant states very adamantly

***My expert will not be ready to testify until your expert testifies.
Besides you are the plaintiff and you have to go first!***

Heard this before? I have and there are some really big problems with defense counsel's position.

First, without a protective order in place, there is no priority in discovery and this includes experts. C.C.P. §2019.020 (pdf)

Second, C.C.P. §2034.260.pdf(c)(4) requires that the Expert Disclosure state under penalty of perjury by the attorney for the party designating the expert "that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial." In other words, counsel is

swearing under penalty of perjury that the expert is ready to testify with his trial testimony.

Third, there isn't enough time to play games. Pursuant to C.C.P. §2034.230 (pdf) (expert disclosure 50 days before trial), C.C.P. §2024.030 (pdf) (expert discovery closes 15 days before trial) and C.C.P. §2025.270 (pdf) (10 day deposition notice) you only have a 25 day window period in which to take all expert depositions and that includes Saturdays and Sundays. If you exclude the weekends, you have less than 15 days. This is assuming that you start noticing expert depositions on Day 50.

And, finally, even if you notice the expert depositions on the last days when experts can be deposed you may have wasted your time if you haven't checked whether or not the expert is available. You could argue that they have been noticed for deposition and they must appear. However, that makes for one hostile deposition. More likely you are going to agree to reschedule past the close of expert discovery which will then interfere with your preparation for trial.

Disclosing experts 50 days before trial and having only 25 days in which to take the depositions means you are going to have to work with counsel to get things done. There are a few things that you can do prior to the expert disclosure that will make the last 50 days before trial a tad less stressful:

1. If the case is expert driven or more than five experts are going to be taken, consider moving the expert disclosure from 50 days before trial to 75, 90 or even 150 days before trial.
2. Agree with opposing counsel to provide dates for each expert's availability for deposition at the time of the expert disclosure. This will give everyone the opportunity to set the expert deposition schedule as soon as possible, thus leaving time for trial preparation.
3. Agree to shorten time on service of the Notice of Deposition so you can use the dates between Day 50 and Day 40 and, if necessary agree to schedule
4. Agree to allow a second deposition of your expert if your expert provides an updated report after hearing the opposing side's expert's testimony.
5. Agree to a discovery referee to schedule the depositions of the experts.

If you are unable to work with opposing counsel in the scheduling of the expert's deposition, get the court involved immediately as time is limited. Do not be surprised if you are confronted with an angry judge as you should have worked this out. So don't be surprised with the court's creative solutions such as:

Experts shall be deposed simultaneously;

Experts shall appear at ordered times by the court and will be disqualified if they don't appear;

Experts depositions shall be scheduled according to experts availability and that includes nights and weekends; or

Experts shall be taken on nights and weekends during trial.

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