Case Law and Rule Citations for Addressing Tactics by Opposing Counsel
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As a young attorney who opened up his own law firm, I found myself repeatedly encountering opposing counsel who wanted to test the young lawyer.

I knew that some of the things these attorneys were telling me about my cases, or my work generally, were an attempt to take advantage of the rookie; things they would **never** say or even attempt to argue to an attorney who had been practicing for 20 years.

I also knew that some of these statements were just part of the litigation process. To make a fuss or call these statements gamesmanship would expose my inexperience in another way. I believed that Honest Abe Lincoln had it right: sometimes it is "better to remain silent and be thought a fool than to speak out and remove all doubt."

Frankly, it can be intimidating for the young lawyer when opposing counsel's suit is nicer than yours, their offices are nicer than yours (if you even have an office), and their client's company-wide legal bills in a day may be more money than you make all year. There's also nothing about their actions which informs you that they are overstepping their bounds. No one tells you, "hey, just so you know I'm kind of taking advantage of you on this one. Hopefully you'll learn for next time"

Some of the solutions to this problem involve getting burned a time or two and conceding things that you now know not to concede. But some of them come with simply being aware of the case law. That is the easy part. My hope is that these tips can be examples to help you in passing these first tests that opposing counsel provide you with. When the other side begins to think "this guy MAY not be a fool," you are on your way!

A. Discovery Tactic: General Objections and Broad Assertions of Privilege

You've served discovery requests with the goal of putting the other side to work and forcing them to either spend money litigating the case or engage in reasonable settlement discussions. After the party has taken a 30 day extension – objecting to this would be a sign of inexperience – you receive their response. You receive a laundry list of general objections noting that all documents subject to attorney-client privilege or attorney work product are being withheld. Opposing counsel has not provided you with a privilege log that would allow you to identify what specifically is being withheld.

The response to your first document request reads as follows:

RESPONSE:

> Defendant objects that this request is overly broad, unduly burdensome, not reasonably calculated to lead to admissible evidence, and requests information which is proprietary and confidential.

The response to your second document request reads as follows:

RESPONSE:

Defendant objects that this request is overly broad, unduly burdensome, not reasonably calculated to lead to admissible evidence, and requests information which is proprietary and confidential.

The response to your third document request is a little different:

RESPONSE:

Defendant objects that this request is vague, ambiguous, overly broad, unduly burdensome, not reasonably calculated to lead to admissible evidence, and requests information which is proprietary and confidential. Specifically, Defendant objects to any documents responsive to this request which are protected by the attorney-client privilege and all documents prepared in anticipation of litigation and thus protected by the work-product doctrine.

What to do?

While judges, particularly state court judges, are not always fans of discovery disputes, there are case law and rules that you can utilize to push back. Additionally, appropriate meet and confer letters citing relevant case law and rules are necessary in order to convince the judge that you are entering court on your motion to compel with good motives and clean hands.

The recent modifications to the Federal Rules of Civil Procedure ban the use of boilerplate objections in making discovery responses. Rule 34(b)(2)(B) requires Defendant to state with specificity the grounds for objecting to a request, including the reasons. Rule 34(b)(2)(C) requires for each objection to state "whether any responsive materials are being withheld on the basis of that objection."

The North Carolina Business Court can be an effective means of citing case law in state court discovery disputes that have not made their way into appellate opinions. They issue written opinions available on-line that relate to rudimentary discovery disputes that would be difficult to find in a county's superior court's orders and which would rarely make their way into a Court of Appeals opinion. For example a good citation for a meet and confer letter in a Superior Court case is to note that, vague, general objections stated out the outset of discovery "are ineffective and are an abuse of the discovery process because such objections block discovery without explaining why and to what extent." *Hilb Rogal & Hobbs Co. v. Sellars*, 2008 NCBC 12 (N.C. Super. Ct. 2008).

Another problem with these boilerplate objections are the consistent stances taken by parties that "proprietary" or "private" information is an objection that allows documents to be withheld without court intervention. Pursuant to F.R.C.P. Rule 26(c)(1)(A) and N.C.R.C.P. Rule 26(c), the burden of obtaining a protective order is on the party seeking protection and will not be granted absent a showing of "clearly defined and serious injury." Information that is "private" is not a basis for blanket withholding of documents either. For example, requests to obtain personnel files of relevant parties have been granted by courts on motions to compel. *See Darwin John v. City of Fayetteville,* 5:12-CV-456-F (E.D.N.C. May 29, 2013).

Opposing counsel will also occasionally try to take advantage of the situation through liberal usage in asserting privilege. It is certainly appropriate and acceptable to demand that parties produce documentation identifying what documents are being withheld on the basis of privilege. In an effort to be reasonable, we will occasionally agree to limit the privilege log by not requiring that counsel of record-client email correspondence or inter-firm email correspondence be provided. We do insist that work product that is "in anticipation of litigation" when prepared by non-lawyers or in-house lawyers be identified.

It is also important to note that work-product privilege is a limited privilege; it is not an absolute basis to withhold documents. Additionally, some categories of documents are not work product even if they are utilized in the litigation. This makes it even more important to secure identification of what documents are being withheld and the basis for the withholding.

For example, documents prepared in the ordinary course of business, even if they relate to the investigation of an incident that might lead to litigation are not work product. The seminal case explaining that documents generated in the "ordinary course of business" are not work product is *Cook v. Wake County Hosp. System, Inc.*, 125 N.C. App. 618, 482 S.E.2d 546 (1997). There, the Court held that "even though litigation is already in prospect, **there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation**." Id. at 624, 482 S.E.2d at 551 (emphasis added). In fact, even if the documents are helpful in a "litigation context," they remain excluded from work product protection if they would have been created for a nonlitigation purpose whether or not litigation was anticipated. Id. In *Cook*, for example, the Court observed that:

> [D]efendant's accident reporting policy exists to serve a number of nonlitigation, business purposes. These business purposes impose a continuing duty on hospital employees to report any extraordinary occurrences within the hospital to risk management. These duties exist whether or not the hospital chooses to consult its attorney in anticipation of litigation. Here, absent any other salient facts, it cannot be fairly said that the employee prepared the accident report because of the prospect of litigation. In short, the accident report would have been compiled, pursuant to the hospital's policy, regardless of whether Cook intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital.

Id. at 625, 482 S.E.2d at 551-552. A similar analysis was performed more recently in *Fulmore v. Howell*, 189 N.C.App. 93, 657 S.E.2d 437 (2008). In *Fulmore*, the Court of Appeals found that:

> [T]he facts tend to show that the attorney, Ullrich, did not contact Lawrimore and Howell until they had already begun the accident report, and the procedural manual directs that the preparation of the accident report was for safety purposes, not for the purpose of seeking legal advice, as required for the attachment of attorney-client privilege. Moreover, the accident report was created in the ordinary course of the business of Pilgrim's Pride, pursuant to their safety manual, which negates the possibility of the protection of the report under the doctrine of work product.

Id. at 102, 657 S.E.2d at 443.

Additionally, "because insurance companies regularly investigate claims, such investigations would normally seem to be in the ordinary course of business rather than in anticipation of litigation." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 29 (N.C. Ct. App. 2001). It is well-settled that "document prepared before an insurance company denies a claim . . . will not be afforded work product protection." Id., at 31. Insurance companies investigate claims, whether litigation is contemplated or not.

You are also entitled to obtain documents that were not prepared in the ordinary course of business if you can show a substantial need for them. There is an exception to the qualified immunity of the work product doctrine when the party seeking discovery "has a substantial need for those materials and cannot 'without undue hardship . . . obtain the substantial equivalent of the materials by other means.'" *Fulmore*, at 189 N.C. App. at 163 (quoting *Long v. Joyner*, 155 N.C. App. 129, 136 (2002)). "Balanced against the importance of protecting work product is the fundamental consideration that procedural rules should be construed to allow discovery of all relevant information in order to facilitate a trial based on the true and complete issues." *Evans*, 142 N.C. App. at 29. For example, in consumer litigation cases, the individual consumer has no access to information that may be work product and maintained by large defendant corporation. We have also successfully utilized the "substantial need" exception in wrongful death personal injury cases where the decedent might have been able to identify information.

Work product can also be waived where it is disclosed to a non-party or provided to a separate adversary, such as in a government investigation. *See e.g. State v. Holston*, 134 N.C. App. 599 (N.C. Ct. App. 1999); *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993).

The liberal usage of privilege is not limited to a blanket assertion of work-product or attorney-client privilege. Occasionally, opposing counsel have sought to test the young attorney by withholding documents on the basis of the "Critical Self Review" and "Peer Review" privileges. If you're not a medical malpractice attorney, you may not have even heard of those privileges. Don't assume that privileges exist just because they are included in responses to discovery. If a party relies upon "Critical Self Review" or "Peer Review" privileges, you can note that they are neither recognized privileges by the Eastern District of North Carolina, nor the 4th Circuit. *See Warren v. Legg Mason Wood Walker, Inc.*, 896 F. Supp. 540 (E.D.N.C. February 2, 1995).

The Federal Rules and many local court rules have been modified to keep the discovery process from being a series of "hide the ball" opportunities for opposing parties. Case law exists that allow you to secure documents that are routinely withheld under some vague semblance of "privilege." Require that any documents that are being withheld be identified specifically and don't be afraid to go to the Court for assistance. You may not receive attorney fees absent egregious withholding of documents, but if you have sufficiently papered your file, judges will not hesitate to order that documents be produced.

Bottom line, you need to see what is being withheld to determine if you have a basis to secure it. Even if you secure a single document that opposing counsel would prefer to be withheld, it will go a long way towards convincing opposing counsel that you know what you are doing. While opposing counsel, particularly in cases that they have deemed unilaterally to be "small," may not want to expend the time and resources to comply with the rules regarding requests for

production, they will typically get in line if you can identify the appropriate case law that ensures a loss in a motion to compel.

B. Deposition Tactic: Overt Coaching of Witnesses

Smart attorneys prepare their witnesses for depositions. Often, their witnesses are prepared to deal with certain lines of questions and know the best means of avoiding such traps. However, as a younger attorney, efforts by opposing counsel to impact the course of the deposition were more overt than an extensive prep session:

> Q: "How fast were you going?"
>
> Opposing Counsel: "don't guess!"
>
> A: "I don't know."

Or sometimes we've seen:

> Q: "How fast were you going?"
>
> Opposing Counsel: "Objection, calls for speculation. You can answer if you have any earthly idea of the exact miles per hour your vehicle was traveling at the exact time."
>
> A: "I don't know."

Or even:

> Q: "How fast were you going?
>
> Opposing Counsel: "Hold on, when you say 'how fast,' do you mean in the car, on the date of the accident, at the specific time before impact? Because that would be impossible to know assuming my client's eyes were on the road. Can you clarify the question? But you can answer if you understood."
>
> A: "I don't know."

Taking the deposition of opposing counsel is much more difficult than taking the deposition of their client. The Federal Rules of Civil Procedure have been modified to address such coaching. Speaking and coaching objections are simply prohibited in federal cases. An objection must be stated concisely in a non-argumentative and nonsuggestive manner. F.R.C.P. 30(c)(2). In amending F.R.C.P. 30, the 1993 Advisory Committee Notes to the Rule provided that:

> "the first sentence of new paragraph (1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called 'usual stipulation' preserving objections, be

raised for the first time at trial and therefore should be kept to a minimum during a deposition."

North Carolina's Rules of Civil Procedure do not contain guidelines for the form of objections in a deposition. However, many District's local rules contain guidelines similar to the Federal Rules. If litigating in an unfamiliar district, certainly review the local rules to see if provisions similar to the Federal Rule on objections exist. Additionally, Rule 30(c) notes that examination and cross-examination of witnesses may proceed "as permitted at trial" under the provisions of Rule 43(b). If opposing counsel's objections do not mirror the manner in which they would object at trial, you are within your rights to insist that they do so.

For cases in the North Carolina Business Court, there is also an explicit rule limiting coaching objections. "Counsel shall not make objections or statements which might suggest an answer to a witness." "Objections are to be succinct, stating briefly the basis of the objection and nothing more." Business Court Rule 18.3(b).

Additionally, we have found that video-taping depositions will limit the incidents of extreme coaching. Videographers are expensive, but a video camera is not. Videotape all depositions and save items to a flash drive even in cases where the cost of utilizing a videographer may not be feasible.

It is not unreasonable to expect that overt coaching of the witness be limited at depositions as it could never happen at trial. Do not be afraid to note your objection to such behavior and to explicitly ask that opposing counsel limit any statements to objections to the form of the question. This doesn't mean you have to "call the judge" or walk out of the deposition. Along with videotaping the deposition, simply noting your explicit request to limit objections to the form is almost always enough to get them to be quiet and to allow you to conduct your examination.

C. 30(b)(6) Depositions Tactic: Unprepared Witnesses.

In civil matters – particularly consumer litigation cases – the defendant is often a large corporation that disagrees with your position regarding the appropriate significance of the litigation as well as how much time and resources should be allocated to the case. Discovery requests which address policies and procedures of the defendant in how they deal with consumers are met with objections stating that it would simply be unduly burdensome for the corporation to print out its own materials on file *and* give them to you.

This lack of interest in utilizing sufficient resources is also evident when you have issued a valid notice for a Rule 30(b)(6) deposition. Your topics are broad – but not overly broad – and require a corporate witness to testify regarding how the corporation goes about its business in dealing with consumers. When the deposition begins, the witness is simply unprepared to answer questions regarding the entirety of your validly noticed topics. Opposing counsel puffs their chest and haughtily states that your notice was "too broad" and "unreasonable" and suggests that it would be "impossible" for a single witness to answer some of these questions. What to do and what to say?

Rule 30(b)(6) requires corporate parties to prepare their designee to testify with "reasonable particularity" as to areas of which it has knowledge, and as to those areas as to which it does not have knowledge, it must be prepared to introduce evidence explaining why it lacks such

knowledge. *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996). Producing an unprepared witness for a Rule 30(b)(6) deposition is tantamount to failure to appear. *Remediation Products, Inc. v. Adventus Americas, Inc.* Case No. 3:07-cv-153 (W.D.N.C. September 30, 2010) *citing Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000). The fact that such preparation may be burdensome or expensive will not suffice; instead, the burden is on the corporation to show that it is *unduly* burdensome or *unduly* expensive to so prepare. *Grevera v. Microsoft Corp.*, No 3:12-cv-261 (W.D.N.C. October 11, 2013).

If a single person does not have knowledge of the matters set forth in the notice, the corporation has to prepare that person (or persons) so that they can give appropriate answers.

> If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation. *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D.Neb.1995) (citing *Marker* [*v. Union Fid. Life Ins. Co.*], 125 F.R.D. [121,] 126 [(M.D.N.C.1989)])… Rule 30(b)(6) explicitly requires [an organization] to have persons testify on its behalf as to all matters known or reasonably available to it and, therefore, implicitly requires such persons to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the "sandbagging" of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. This would totally defeat the purpose of the discovery process. The Court understands that preparing for a Rule 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business. *United States v. Taylor,* 166 F.R.D. 356, 361-362 (M.D.N.C.1996).

Opposing counsel may not like it, but you are entitled to investigate your case and to illicit sworn testimony from the defendant corporation regarding the claims alleged. While this does not mean that a single “I don’t know at a deposition” warrants sanctions, Rule 37 of both the North Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure provide you with the ability to complete the deposition and move to compel an additional Rule 30(b)(6) deposition where the witness is appropriately prepared. It would also be appropriate, if the failure to prepare was egregious, to move the court for an appropriate award of attorney fees as a sanction. If this is your goal, illicit as many “I don’t knows” or other indicia of the lack of preparedness as possible.

Another option associated with this is to move for summary judgment on any defenses that the 30(b)(6) witness is unable to provide supporting facts for or to move to exclude evidence contrary to that knowledge at trial. "If a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, it cannot argue for a contrary position at trial without introducing evidence explaining the reasons for the change." *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996).

When you encounter an unprepared 30(b)(6) witness, it does not mean that you should walk out of the deposition once it becomes apparent that the witness is unprepared. The practical maneuver may be to note on the record that the witness is unprepared by securing testimony that they lack knowledge regarding certain topics or subject matters, request that a witness be prepared

to testify at a later date and move to compel if necessary. Alternatively, if their failure to provide adequate testimony at the deposition helps your case, take advantage of that down the line! For example, if the corporate witness states that they cannot identify facts or documents that might support their defenses, they ought to be stuck with that answer.

D. Settlement Negotiation Tactic: Alteration of Material Terms After Mediation

You have completed a successful mediated settlement conference and secured an excellent result for your client. The mediator's one page form outlining the material terms has been executed but contemplates a more formal settlement agreement and release to be papered by the lawyers in the coming weeks. When you receive the draft settlement agreement, some additional terms have been added. The defendant now wants you to release additional parties, has added a confidentiality provision, or even wants to make payments over time. Opposing counsel informs you that this stuff is "standard," notes that it was *obvious* that confidentiality was going to be part of this settlement agreement, and suggests that without these alterations, there is no deal. What to do?

In North Carolina, a party may attempt to enforce a settlement agreement by filing a motion in the action purportedly settled. *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 694 (2009). In such a circumstance, the summary judgment standard of review applies, meaning that the moving party must show that there is no material issue of fact regarding whether the parties reached an agreement as to all material terms. Id. at 695. Accordingly, a party seeking relief from enforcement of a mediated settlement agreement must overcome a "strong presumption that a settlement agreement reached by the parties through court-ordered mediation . . . is a valid contract." *Chappell v. Roth*, 141 N.C. App. 502, 505 (2000). Nevertheless, the enforceability of a mediated settlement agreement is governed by general principles of contract law. *Chappell*, 353 N.C. at 692.

In *North Carolina National Bank v. Wallens*, 26 N.C. App. 580, 217 S.E.2d 12 (1975), the parties had agreed on a letter which was "to serve as a memorandum agreement until proper complete documents can be drawn up." Id. at 582, 217 S.E.2d at 14. The Court of Appeals determined that, "it cannot be said that execution of a later agreement was a condition precedent to any contractual rights which might otherwise pertain. Furthermore, reference to a more 'complete' document does not necessarily indicate that material portions of the agreement have been left open for future negotiation." Id. at 584, 217 S.E.2d at 15. The Court of Appeals enforced the settlement, concluding that the parties intended to reach a complete settlement, and that the reference to future negotiation on other terms to be included in a more complete agreement could only concern immaterial additional terms.

The *Chappell* case referenced above is the primary case that can be used by parties seeking to wiggle out of a settlement agreement or renegotiate terms through an argument suggesting the absence of a meeting of the minds of all material terms. There, the Supreme Court held that "absent an agreement by the parties concerning the terms of the release, the settlement agreement did not constitute an enforceable contract. We recognize that settlement of claims is favored in the law (citations omitted), and that mediated settlement as a means to resolve disputes should be encouraged and afforded great deference. Nevertheless, given the consensual nature of any

settlement, a court cannot compel compliance with terms not agreed upon or expressed by the parties in the settlement agreement." 353 N.C. at 692.

The argument from opposing counsel goes something like this: "We assumed confidentiality was in play. You obviously did not. That means we did not have a mutual understanding of all material terms, and thus no agreement. Your client who had already understood that the case is settled isn't getting any money from us unless you agree to confidentiality … and that this unrelated party is also released by our agreement."

The North Carolina Business Court has pushed back on such attempts recently, particularly within the context of a mediated settlement conference and has elected to enforce *Wallens* over *Chappell* in cases where there were feasible arguments on both sides. In *McCarthy v. Hampton*, 2015 NCBC 67 (N.C. Super. Ct. 2015), the Court found that parties' mediated settlement agreement "manifests a clear intent to be bound to the terms outlined in the [agreement]" and that "no genuine issue of material facts exists as to the finality and binding nature of the [agreement]."

The Court also noted that if a right that did not appear in the mediated settlement agreement "truly was a material term, it is perplexing to the Court why such a term was not embodied in the [agreement] before that document was signed" by the parties. *McCarthy*, 2015 NCBC at 10. This common sense argument ought to cut off the addition of most material terms. Simply put, if you had wanted it, you should have asked for it. Similarly, in *DeCristoforo v. Givens*, 2015 NCBC 53 (N.C. Super. Ct. 2015), the Court granted a motion to enforce a settlement agreement, rejecting *Chappell* and citing *Wallens*.

The Court of Appeals has also held that the absence of terms regarding timing or manner of proposed settlement payments does not necessarily render an agreement ambiguous or unenforceable. *Capps v. NW Sign Indus. of N.C., Inc.*, 2007 N.C. App. LEXIS 1816, at *20 (N.C. Ct. App. Aug. 21, 2007). In such a situation, a court will presume a reasonable time and manner. Id.; see also *Sockwell & Assocs., Inc. v. Sykes Enters., Inc.*, 127 N.C. App. 139, 142 (1997). But note that, unless a payment plan has been negotiated explicitly, it is generally safe to assume that the "reasonable time and manner" will address the length of time that the party has to make a single payment, not to invent a payment plan that was not bargained for.

Courts want you to feel comfortable that the deal reached at mediation *is* the deal. Do not be afraid to put your foot down on this if necessary, particularly if it is an important term. If the term was material to you, you should have noted it before the parties signed the agreement. And if the term is immaterial, then the agreement is enforceable without it.

E. Conclusion:

These materials are designed to provide you with some information and case law regarding tactics of opposing counsel. The unwritten rules without case law are often more difficult to know and understand: are they crossing the line or am I unaware of common-place professional courtesy. Those can often be learned by seeking mentorship opportunities from more experienced lawyers. Feel free to contact me at emaginnis@maginnislaw.com if you have questions or find yourself in a tricky situation. Worst case, you sometimes learn these lessons the hard way. But, where case

law exists, don’t be afraid to step up and assert your rights. You will be better for it and opposing counsel will likely treat you as someone who understands what is acceptable and what is not. This will assist in settlement negotiations and in future dealings with these lawyers. Typically, you only have to show that you know what you are doing once. Good luck!