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Avoid unnecessary motion practice

There are inevitable motions and then there are unnecessary ones that could have been a stipulation

By Sarah Madan

It never hurts to reflect on how motion practice was intended to move litigants toward resolution by resolving disagreements between parties. This article will suggest effective methods of communication that may help you, and your client, avoid unnecessary motion practice. The last thing you want to bring before the judge in your case is a motion that could have been a stipulation.

Overbroad record subpoenas

A frequent impetus for motions to quash are overbroad record subpoenas. Commonly, defendants will issue subpoena requests for records that are not limited in time, scope, or to body parts at issue. Sending a specific meet and confer letter with the case law to support your objections either the same day or next business day upon receipt of the subpoenas and requesting counsel to respond to the letter with a simple call or email within 2-3 days encourages an immediate dialogue before the deposition officer has already obtained the records, and it does not become too much of an annoyance for defense counsel to reissue the subpoenas.

In the meet and confer letter, I have found it helpful to identify what language in the overbroad subpoena you can agree to and suggest simple modifications that you would stipulate to. Setting a self-imposed, send on receipt, deadline is key to avoiding the records already becoming available to defendant, leaving them zero motivation to reissue the subpoena and deadlines rolling toward a time consuming and expensive motion quash.

Stipulate to psych claims when possible

Another stipulation that can be agreed to proactively is one regarding plaintiff's psychological claims. There are several reasons why a plaintiff would stipulate that no claim is being made for neuropsychological cognitive injuries, including the nature of their injuries or the plaintiff makes the decision not to open the door to a mental examination due to unrelated conditions and concerns. Plaintiff can stipulate that no claim is being made for mental or emotional distress over and above what is usually associated with the physical injuries claimed and no expert testimony regarding that usual mental distress need be offered at trial. (Code Civ. Proc., §2032.320(c).) Sending this stipulation before defendant even intimates that they want a psych evaluation will avoid any contention over the issue.

Sensitive and privileged documents

Taking the time to narrow your discovery requests and setting reasonable expectations can go a long way. When sending

requests for production of documents in sensitive areas such as taxes or personnel files, take the time to make sure the scope of your questions is narrowed as much as possible. Suggest that defendant produce a privilege log, or redacted documents in the requests. Starting at a place of accommodation and reasonableness will only make it easier for you and defense counsel to reach a compromise. Make it clear that you are not interested in any documents that are subject to legitimate privacy concerns from the start. Hopefully, that should set the stage for your judge as to who the reasonable party was if the meet and confer efforts break down.

You can still be a zealous advocate

Of course, there will be inevitable motions and there is an art to when to bring them. However, I think there are more than a few members of the bench who would agree that avoiding motion practice is not inapposite to zealous advocacy. Frontloading your time and attention to anticipate conflicts and set yourself as the party with the solution will pay off for your clients in the long run.

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