Setting Discovery Ground Rules in a Complex Civil Case

Jared R. Green & Elie A. Maalouf

I. Introduction

We recently obtained a favorable order in a complex wrongful death case that we feel should set the standard for a corporate defendant's discovery obligations in personal injury and medical negligence cases. What was unique about this case is that the Court accepted our invitation to impose a set of general discovery ground rules at the outset of the case to govern the corporate defendant's production obligations. We now provide this order to opposing counsel in new complicated cases and encourage them to abide by the same rules without the necessity of litigation.

II. Background

In the *Estate of April S. Courtney v. Osterman Propane, et al.*[1], we represent the estate of a woman who died from carbon monoxide poisoning because, we allege, a heating system was improperly installed at her home. We sued three technicians and their employer in Grafton County Superior Court. In response to our initial discovery requests, the corporate defendant asserted boilerplate objections and declined to provide substantive answers. For example, the corporate defendant referred us to batches of documents instead of answering the discovery requests; failed to provide narrative responses when indicated; failed to produce information within the knowledge of its employees and agents; and refused to answer basic discovery requests such as identifying each person that was consulted in answering the plaintiff's interrogatories or disclosing the applicable limits of insurance coverage. The defendant also asserted a number of privileges in an attempt to withhold responsive information, but failed to provide a privilege log describing the materials that were withheld as required by Superior Court Rule 21(c).

As required by Superior Court Rules 23(k) and 29(e), we attempted to resolve these discovery disputes informally by sending a detailed, eight-page letter to defense counsel explaining that the defendant had failed to fully answer a large number of discovery requests. In the letter, we identified each answer that was deficient and the reasons why they were inadequate; requested supplementation; and, reminded the defendant of its obligation to provide a privilege log for all the materials and information that were withheld on the basis of the asserted privileges. The defendant, however, failed to engage in good faith efforts to resolve the discovery disputes and, ultimately, after several months, chose to stand by its deficient discovery responses. Accordingly, we filed a motion compelling interrogatory answers and document production.

The day before filing its objection and two and a half months after providing its initial discovery responses, the defendant produced a rudimentary "privilege log" that merely advised the plaintiff that it was withholding an

undisclosed number of emails and letters authored by undisclosed individuals described as "investigation." The defendant also supplemented its discovery responses with some additional documents and asked that we withdraw our motion. Given the defendant's continued obfuscation and woefully inadequate supplementation, we refused the request.

III. Judge Bornstein's Order

A. Ground Rules

It was clear to us that the corporate defendant did not fully appreciate its discovery obligations in New Hampshire. We felt the best course of action was to ask the court to articulate the general ground rules that governed the defendant's duties so we could obtain all of the information we were entitled to. Judge Bornstein agreed with our position and imposed the following rules, which we had proposed:

1. The defendant must answer discovery requests based on both information contained in is records and information obtained from the knowledge of its employees.
2. The defendant must obtain information within the personal knowledge of its employees and must furnish, in response to interrogatories, whatever information is available to the corporation through reasonable efforts.
3. The defendant may not answer interrogatories by directing the plaintiff to a batch of documents, rather, the defendant must provide narrative answers signed under oath by an authorized corporate representative.
4. Where the defendant had failed to establish any applicable objections, the defendant must provide the plaintiff with unqualified, narrative responses to his interrogatories that are signed under oath by an authorized representative of the defendant.

In imposing these rules, the court noted that "[a]lthough the duty to investigate is not unlimited, a party must find out what is in his own records and what is within the knowledge of [its] agents and employees concerning the occurrence or transaction" and "fully disclose" the requested information."[2] Moreover, in order for the defendant's narrative answers to be "sufficiently complete," the court explained, the responses must "summarize[], to a reasonable degree and with a reasonable degree of specificity, the facts that the answering party considers responsive to the interrogatory."[3] The court also clarified that "[a] 'sufficiently complete' answer also means that the party responding to the discovery request does not generally cite to a batch of documents and direct the requesting party to search for the answer."[4]

We also asked the court to expressly overrule all of the defendants' baseless, boilerplate objections so they could not be used later to justify a failure to provide discovery. Although the court declined to issue such "a

widespread rule" at that time, it left the door open for the plaintiff to raise this rule again if the defendant continued to avoid producing the requested discovery.[5]

B. Privilege Log

In addition to ordering the defendant to answer all of the discovery requests cited in our motion in accordance with the rules we recommended, the court also held that the defendant had waived all of its privilege arguments by failing to provide a timely privilege log that complied with Superior Court Rule 21(c). First, the court noted that the privilege log that the defendant eventually provided "was not promptly provided to the plaintiff" because the defendant did not produce it until two and a half months after it had first responded to the plaintiff's discovery requests. Next, the court found the privilege log did not, as required by Superior Court Rule 21(c), "describe [the documents'] general character with sufficient specificity as to enable other parties to assess the applicability of the privilege claim" because "there [was] no description of the documents claimed to be privileged…." Rather, it "categoriz[ed] groups off emails and letters as having the subject matter 'investigation,'" and "[was] so broad as to appear 'vague and uninformative.'"[6] The court subsequently denied the defendant's motion to reconsider and its motion for interlocutory appeal on this issue.

IV. Conclusion

In our opinion, a corporate defendant in a case like *Courtney* has a strong incentive to limit its discovery responses as much as possible. While there may seem to be little the plaintiff can do on a prospective basis to force the defendant to voluntarily produce harmful information, we believe it is useful to attempt to establish ground rules early on when discovery requests are first propounded. We hope that by doing so the opponent is more likely to provide harmful information in the first instance, and, in any event, the opponent cannot claim a good faith misunderstanding when we later discover that relevant information was improperly withheld. As a declaration of New Hampshire law, Judge Bornstein's order is a powerful tool in this respect.

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[1] No. 215-2021-CV-00159, Grafton Super. Ct. (April 12, 2022) (Order, Bornstein, J.).
[2] *Id.* (citing *Kearsarge Comput., Inc. v. Acme Staple co*, 116 N.H. 705, 707 (1976)).
[3] *Id.* at *22 (citing G. Macdonald, 4 New Hampshire Practice, *Wiebusch on New Hampshire Civil Practice and Procedure*, § 22.25 (3d ed. 2010) (clarifying that a "party need not volunteer information which has not been requested, but neither should a party be evasive and rely upon technicalities of semantics or defects in the request to avoid producing information which the party knows that the opponent is seeking and is entitled to receive")).
[4] *Id.* at *22 (citing *DL v. DC*, 251 F.R.D. 38, 48-49 (D.D.C. 2008) (explaining that "it is technically improper and unresponsive for an answer to an interrogatory to refer to outside material…unless such reference clearly indicates how the documents in question are responsive to the interrogatory.")).

[5] *Estate of April S. Courtney v. Osterman Propane, et al.*, No. 215-2021-CV-00159, Grafton Super. Ct. (April 12, 2022) (Order, Bornstein, J.) at *19.

[6] *Id.* at *20. In reaching its conclusion, the court noted that "the sufficiency of a privilege log's document description may be context driven; nevertheless, 'vague and uninformative document descriptions do not satisfy' the standard for privilege log adequacy." *Id.* (citing Johnson v. Ford Motor Co., 309 F.R.D. 226, 233 (S.D.W. Va. 2015) (quoting In re McDonald, No. 13–10661, 2014 WL 4365362, at *4 (Bankr. M.D.N.C. Sept. 3, 2014) (citing other cases concluding the same)).