Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# To Move Or Not To Move: Compel Vs. Protective Order

*Law360, New York (November 17, 2011, 2:24 PM ET)* -- As counsel for a Fortune 500 company, you are faced with a decision as a part of a major litigation in federal court. Your corporate designee was deposed under Rule 30(b)(6) of the Federal Rules of Civil Procedure and, thanks to your tireless preparation, your client escaped relatively unharmed.

Shortly thereafter, the plaintiff again notes the deposition of your corporate designee for topics that were already explored in the prior deposition. You are aware that, according to Federal Rule of Civil Procedure 26(b), the plaintiff only gets one bite at the apple.[1]

After all, it's not your fault that the plaintiff's counsel forgot to ask certain questions! But what do you do? Must you incur the cost to file a motion for protective order and ask the court to prevent this egregious discovery violation, or can you simply refuse the plaintiff's demand informally and put the burden on opposing counsel to file a motion to compel?

At first glance, this problem may seem like a distinction without a difference, but a closer inspection reveals important differences between the motion for protective order and the motion to compel that weigh heavily on counsel's decision in any litigation.

This article discusses such a discovery issue, using the Federal Rules of Civil Procedure[2] and accompanying case law as a guide.

By way of background, the method to limit the frequency or use of a discovery request is detailed in Federal Rule of Civil Procedure 26(c), which states that a party "from whom discovery is sought may move for a protective order [and] must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."

However, Rule 26(c) places the burden on the moving party to show "good cause" to be protected from "annoyance, embarrassment, oppression, or undue burden or expense," and Rule 26(b)(2)(C) requires a showing that "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit."

This is a weighty burden for the corporation in the factual scenario discussed above, in which counsel will no doubt expend many hours completing the meet-and-confer requirement, as well as researching and drafting the motion for protective order.

The alternative tactic of refusing the plaintiff's demand and forcing a motion to compel brings Federal Rule of Civil Procedure 37(a) into play.

That rule provides that "a party may move for an order compelling disclosure or discovery" but also requires that the movant provide "notice to other parties and all affected persons" and "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1).

The latter tactic may be affected by subsection (d)(2) of Rule 37, which states that the imposition of sanctions for failing to appear at a properly noted deposition or for failing to respond to properly served interrogatories or requests for production of documents "is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)." Fed. R. Civ. P. 37(d)(2).

The comments to Rule 37(d) explain that this provision was added to make clear that a party may not remain completely silent even when the party believes that a deposition notice or written discovery request is objectionable and, therefore, establishes the need to seek a protective order as provided in Rule 26(c).

On the surface, Rule 37(d)(2) appears to answer the question posed at the beginning of this article by stating that a party is not excused from responding to discovery requests simply by objecting to or ignoring the discovery.

Myriad federal cases make clear that the underlying reason for the creation of sanctions was that total noncompliance in discovery may impose inconvenience or hardship on the party requesting discovery and may substantially delay the discovery process. See, e.g., Collins v. Wayland, 139 F.2d 677 (9th Cir. 1944).

Courts, therefore, will not allow a party to simply ignore a notice of deposition or request for written discovery.

For example, in Collins, the plaintiff, who failed to appear for a deposition noted outside the forum state, was precluded from contesting service or the sufficiency of the out-of-state deposition notice because he failed to file a motion for protective order.

Some courts have stricken portions of a party's pleading, dismissed actions or even entered summary judgment against a party for the complete failure to appear at a properly noted deposition or for long-standing failure to respond to written discovery. See Bourgeois v. El Paso Natural Gas Co., 20 F.R.D. 358 (S.D.N.Y. 1957); Loosley v. Stone, 15 F.R.D. 373 (S.D.Ill. 1954).

The potential for discovery sanctions, including the preclusive sanctions discussed above and non-preclusive sanctions such as monetary fines or disciplinary measures against the attorney cannot be ignored in any litigation, as the court's discretion in matters of discovery will rarely, if ever, be disturbed.

A closer inspection of Rule 37(d)(2), however, reveals that it might not establish a bright-line requirement to file a motion for protective order, and that, in certain scenarios, it may be permissible for the party opposing discovery to simply refuse to produce the witness for deposition or to answer the written discovery and force the other party to file a motion to compel.

The potential for a such an interpretation of Rule 37(d)(2) arises from the fact that it is a subsection of the discovery sanction rules and arguably seems to be stating simply that the objectionable quality of a discovery request is not a shield against the imposition of sanctions unless the party has filed a motion for protective order.

Under this narrow application, it would appear that neither Rule 37(d)(2) nor accompanying case law requires that a motion to compel, as distinguished from a sanctions motion, must be granted simply because a motion for protective order was not filed.

Furthermore, the phrase in Rule 37(d)(1) that provides the basis for sanctions, and is relied upon in Rule 37(d)(2), requires that the party be "served with proper notice" for a deposition and "properly served with interrogatories." Neither the comments to Rule 37 nor the accompanying case law defines the modifier "proper" or makes clear whether the rule requires the service to be proper or whether the notice of deposition, interrogatory or request for inspection must, itself, be proper.

The latter interpretation would provide the basis for an argument that, in certain cases, the interrogatories or the deposition notices were so egregiously improper that they need not be answered.

For instance, in the factual scenario discussed at the beginning of this article, it would undoubtedly be cumulative and duplicative, and thus contrary to Rule 26(b), for the plaintiff to take the second bite at the corporate designee apple when there was ample opportunity for discovery of such matters in the prior deposition.

Similarly, it would be improper for a party who has already propounded the maximum number of interrogatories under the Federal Rules of Civil Procedure to later propound a second set of interrogatories or for a corporate designee to be asked about matters unrelated to the geographic, temporal or factual allegations of the complaint. See, e.g., Young v. United Parcel Service of America Inc., Civil Action No. DKC-08-2586 (D. Md. March 30, 2010).

When such egregious and obvious discovery violations occur, the opposing party's argument that a motion to compel must be granted because the responding party failed to file a motion for protective order could be opposed by arguing that the responding party was exempted from the requirement to file a motion for protective order as a result of the improper notice of deposition or improper interrogatories.

For counsel involved in contentious litigation, the discovery-motions practice is a minefield of potential attacks from opposing counsel. In the case of egregious discovery violations, as discussed above, the question of whether to file a motion for protective order or to reject the discovery and force the opposing party to file a motion to compel requires thoughtful analysis of the competing risks with the following points to keep in mind.

First, the cost and time needed to fully research and prepare the motion for protective order, to respond to the opposing party's opposition, and to file the reply brief is not minimal. Indeed, it seems inequitable for a party to be forced into such costly exertions when, for example, the opposing party simply served a short-form notice to take the second deposition of a corporate designee.

Second, the burden on the moving party to show good cause as to the reason why discovery should be denied is not one to be taken lightly. The filing of discovery motions is usually not viewed favorably in the busy federal court dockets and it is always better to be a party opposing a motion to compel, instead of the party attempting to convince a court that a protective order is needed.

In some cases, therefore, it may make more sense to reject the discovery informally in writing and place the burden on one's opponent to file the affirmative motion with the court. After all, opposing counsel may receive your letter with its detailed explanation of why the discovery is improper and decide not to file the motion to compel at all! Alternatively, the required discussions among counsel might produce a compromise that all parties could live with.

Although the authors cannot take a stance on the preferable strategy for any individual case, it is certainly important to consider the personality and probable response of opposing counsel, the inclinations of the court, and the potential cost of motions for protective orders, and to weigh the possibility of dangerous motions for sanctions when deciding on a potential strategy for dealing with egregious violations of the discovery rules by opposing counsel.

--By Matthew T. Wagman and Christopher J. Madaio, Miles & Stockbridge PC

*Matthew Wagman is a partner, and Christopher Madaio is an associate, with Miles & Stockbridge in the firm's Baltimore office.*

*The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] See Nicholas v. Wyndham Int'l Inc., 373 F.3d 537, 543 (4th Cir.2004) (affirming entry of protective order for a corporate party when its only two shareholders were already deposed, explaining that to allow the 30(b)(6) deposition would be cumulative and duplicative, contrary to Fed. R. Civ. P. 26(b)).

[2] State procedural discovery rules are often modeled after or substantively similar to the Federal Rules of Civil Procedure. The arguments and strategies discussed in this article have general application to discovery motion practice in state courts across the country.