"No Written Discovery Motions" Technique Reduces Delays, Costs, and Judges' Workloads

by Richard P. Holme, in collaboration with R. Brooke Jackson, David S. Prince, Edward D. Bronfin, Robert L. McGahey, and Natalie Knowlton

A litigator's heart may palpitate when a judge says: "In this court, you may not file a written discovery motion—(pause)—until you have discussed it with me first." However, instructions to this effect are not new. Jefferson County District Court Judge Bill DeMoulin gave similar instructions to attorneys appearing before him twenty years ago, as did El Paso County District Judge Donald Campbell. Today, the "no written discovery motions" approach is being employed with greater frequency, at least in the Denver and El Paso County district courts. The method can substantially assist in securing the "just, speedy and inexpensive" determination of cases.[1] Furthermore, this process significantly eases the judge's time and work in pretrial management of cases.

I was first exposed to this technique twenty years ago, and was immediately impressed with its efficacy. Lest the opinion of one attorney isn't enough, my co-contributors for this article were four distinguished Colorado judges experienced with using the method:

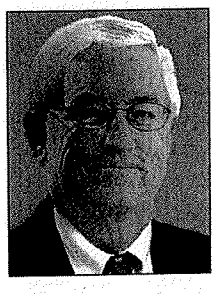
- U.S. District Court Judge R. Brooke Jackson, who routinely uses the technique with significant savings of time and effort;
- El Paso County District Court Judge David Prince, who has been using this technique for more than five years with great success;
- Denver District Court Judge Edward Bronfin, who adopted the technique in his standard pretrial order and has persuaded a number of his colleagues to use it; and
- Denver District Court Judge Robert McGahey, who has adopted it more recently but already can compare and contrast it favorably to his former method.

I also relied on the expertise of Natalie Knowlton, who is Manager of the Quality Judges Initiative for the Institute for the Advancement of the American Legal System (IAALS), a national research center led by former Colorado Supreme Court Justice Rebecca Love Kourlis.[2] Knowlton has been interviewing leading judges around the country about this technique for a larger presentation on best practices for trial courts under the auspices of the IAALS.

Traditional Discovery Motions

In most Colorado courts, as well as in most other courts around the country, when the parties are at loggerheads on discovery, the process moves roughly as follows: Party Q files an extensive discovery request for documents. Party A prepares a response that is loaded with objections to each request—"overbroad," "burdensome," and "oppressive" are just some of the adjectives thrown around—and provides little more. Party Q sends an e-mail to Party A, stating that the response is wholly unacceptable and violates all the civil rules, and declaring that it will file a motion to compel unless Party A promptly capitulates. Party A does not respond. Seven days later, Party Q files a twenty-page Motion to Compel, attaching at least twenty-five pages of discovery requests and responses. Twenty-one days (or more) pass, and Party A files a twenty-five-page opposition, including an objection that Party Q failed to confer, in violation of CRCP 121 § 1-15(8). Seven days (or more) pass. Party Q files a fifteen-page Reply. All the filings have cost the clients several thousand—often tens of thousands—of dollars.

Next, the court's tickler system flags the fact that the motion is now fully briefed. The judge looks at the eighty-five pages of material, decides it is too much to deal with in the few spare minutes the judge has available, and places the stack at the bottom of the pile of ten other discovery motions of roughly equal size. The judge is not pleased. Sixty days pass, and finally the judge reluctantly has found enough time to read the motion and rule on it. In the inter-



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vening ninety (or more) days, the parties have stopped further discovery because further discovery depends on how much of the requested discovery the judge will order. Now that the case is moving forward again, the lawyers spend and charge the clients for several hours needed to remind themselves what the case is about.

The "No Written Discovery Motions" Technique

There is a better way. Judges can give lawyers some iteration of this instruction: "You may not file a written discovery motion until you have discussed it with me first." Some judges include provisions in their initial Pretrial Order, such as:

No written discovery motions will be accepted. The Court will address all discovery disputes with an in-person [or telephonic] discovery hearing instead of by written motions.

a. If there is a discovery dispute, counsel are expected to confer in a meaningful way by telephone or in person to try to resolve it. An exchange of e-mails doesn't quality.

b. If counsel cannot resolve the dispute, please call my clerk at [phone number] and set it for a hearing. The court will hold discovery hearings on [*e.g.*, Tuesday (noon–1:30 p.m.) and Friday (8:00–9:30 a.m.)]. If counsel cannot agree on a date, please let my clerk know and I will set the hearing date.

c. The dispute will be argued and usually will be resolved at the hearing. Occasionally, I will take it under advisement and issue a prompt ruling. If I need more information or a written submission, I'll ask for it.[3]

[Optional additional provision: The day before the hearing, counsel may provide the court and all other counsel with a letter of no more than one [or two] page[s] containing an advisory listing the issues that are contested without elaboration or argument and citations of any critical cases on which counsel rely.]

Advantages to No Written Motions

Judges who use this approach find that it has a number of significant advantages over wading through written motions. Start from the proposition that very few lawyers want to antagonize the judge handling their case, especially in person. When lawyers know they will have to speak directly to the judge, the incentive to resolve as many of the disputes as possible is much greater.

Lawyers do not want to embarrass themselves by going before the judge and arguing for something the other side can validly contend was unclear and state that if it had been clear, there would have been no objection. They do not want to try to convince the judge that they should be entitled to large numbers of documents or depositions when they know a few will suffice. They do not want to have to look the judge in the eyes and contend that requests that appear to be more than they need or more than the case justifies must be granted. Conversely, they do not want to assert that something that is clearly important need not be produced.

In short, the mere fact that counsel will need to talk directly to the judge will improve the chances for meaningful conferral and resolution of some if not most of the disputes early on. Frequently, that realization is sufficiently powerful that the parties will not want to bring any of the disputes before the judge. The require-

ment for a personal appearance or direct phone call, of course, has the salutary effect of diminishing the number or complexity of discovery motions all by itself.

Minimizing Combative Behavior

This technique also has the benefit of reducing "distant courage," which is the practice of saying something to a person from a physical (or virtual) distance that would not be said face-to-face. Too frequently, lawyers who believe they will never have to discuss discovery directly with the judge will resort to characterizations of opposing parties and counsel that they would never consider saying aloud to the court. Accusations and counteraccusations of "blatant dissembling," "outrageous prevarication," "ludicrous and ridiculous demands," and still more creative, outlandish, and unprincipled allegations tend to be sprinkled liberally through discovery motions and oppositions. It is no wonder that judges do not want to navigate such putrid waters.

Because this chest thumping is almost always distant courage, when the initial discussion of a discovery dispute must be made directly to the judge, the tone of the presentation is remarkably less bombastic and much more likely to be reasonable, civil, and tempered. The judge is then able to appreciate and recognize that the parties are not just being childish and actually do have an intelligent dispute on which even rational parties can legitimately disagree, and that the dispute simply needs a decision. Further, when the dispute is receiving more light than heat, the court is likely to make a rational decision and give the parties the direction they need to move the case forward.

The Road to a More Speedy Resolution

Judges who employ the "no written discovery motions" technique report that the disputes that are brought before them tend to be mostly capable of resolution during a hearing lasting from five to thirty minutes. Compare this to the prospect of plowing through dozens of pages of motions and briefs and then preparing a written decision, and it is readily apparent why this technique saves judges substantial time and heartburn.

Of course, there are occasions when discovery disputes cannot be understood and resolved on the spot. When it becomes apparent to the judge that additional legal authority or briefing would be helpful, the judge can request exactly what he or she wants. Having heard the initial oral presentation, the judge can identify the specific issues for which he or she needs additional help, can set intelligent page limits on briefing, request specific additional factual information to help decide what discovery is appropriate, and set tight time limits. At this point, the judge is more likely to get ten or fifteen pages of focused (and non-combative) material, presented in a short time frame. Because the judge does not have to place this new briefing under a stack of ten other discovery motions, the judge can more easily and quickly digest the matter and rule on the unresolved issues.

The "no written discovery motions" technique also substantially speeds the process of getting the case ready for trial or, as normally occurs, settlement. Resolving discovery disputes in two or three weeks is clearly faster than the months it usually takes under traditional case management procedures. The clients' attorney fees are significantly reduced with fewer and much shorter motions and

briefs, and without having to pay for the retooling expense created when there are long delays waiting for rulings on discovery motions.

Lawyers Like It, Too

Almost without exception, lawyers like the technique. It saves clients time and money (which, contrary to popular thinking, many lawyers really desire for their clients). It also clears the court's docket more quickly. More significant is the fact that when the lawyer or the client wants to have an important matter heard and determined by the judge, it provides the ability to gain such an audience on short notice. In many discovery disputes, the lawyers simply find themselves at a fork in the road. For example, are they going to be able to depose witnesses and obtain documents on a particular topic? Although each party wants the judge to adopt its position, it often is as important (if not more important) to the progress of the case simply to have the judge tell them which fork they should take. Once they know that, they can proceed apace with appropriate discovery and trial preparation or analysis of settlement positions. If the decision is important and the judge was wrong—well, that is why the appellate process was created. Many lawyers have found that a judge who gets dozens of pages of briefs and materials and takes months to decide which fork should be taken is no more likely to make the "correct" decision than a judge who rules promptly on an earlier oral presentation.

On a more psychological level, prompt access to and a ruling by a judge can be a major step toward creating what sociologists and legal scholars praise and advocate as "procedural fairness."[4] Though beyond the scope of this article, procedural fairness fundamentally boils down to recognizing the litigants' right "to be listened to; to be treated with respect; and to understand why a decision was made."[5]

Conclusion

The "no written discovery motions" technique was developed so that when parties do contact the judge with a discovery dispute, they actually receive a prompt hearing and ruling. Using this approach inevitably will save the clients significant expense and time; alleviate judges' burdens and time constraints; increase the likelihood of professional behavior among counsel; and advance the just speedy and inexpensive disposition of civil cases. Indeed, it is enough to cause one to wonder whether the same technique also can be applied to other pretrial motions.[6]

Notes

1. CRCP 1(a). *See* Carr, "Fixing Discovery: The Judge's Job," 38 *ABA Litigation J.* 6, 7-8 (Summer/Fall 2012), available at www.americanbar.org/publications/litigation_journal/2011_12/summerfall/from_bench_fixing_discovery.html.

2. The Institute for the Advancement of the American Legal System (IAALS) was created in 2006 to foster a more accessible, efficient, and accountable civil justice system. To learn more about the IAALS, visit iaals.du.edu.

3. Adapted from 2012 Pre-Trial Order of Denver District Court Judge Edward D. Bronfin.

4. *See, e.g.*, www.proceduralfairness.org/Resources/Tips-for-Judges.aspx; www.courtinnovation.org/topic/procedural-justice ("Research has shown that when defendants and litigants perceive the court process to be fair, they are more likely to comply with court orders and follow the law in the future—regardless of whether they 'win' or 'lose' their case."); www.proceduralfairness.org/Procedural-Fairness-Theory.aspx:

> Psychology professor Tom Tyler, a leading researcher in this area, suggests that there are four basic expectations that encompass procedural fairness:
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> - **Voice**: the ability to participate in the case by expressing their viewpoint;
> - **Neutrality**: consistently applied legal principles, unbiased decision makers, and a "transparency" about how decisions are made;
> - **Respectful treatment**: individuals are treated with dignity and their rights are obviously protected;
> - **Trustworthy authorities**: authorities are benevolent, caring, and sincerely trying to help the litigants—this trust is garnered by listening to individuals and by explaining or justifying decisions that address the litigants' needs.

5. *See* www.proceduralfairness.org/Procedural-Fairness-Theory.aspx. A 2005 California survey concerning significant factors in overall court approval showed that the public values the existence of fair procedures in court as being substantially more important than fair outcomes.

6. For example, Denver District Court Judge Robert L. McGahey's standard Pretrial Order already applies the technique to "Pretrial Motions and Motions *in Limine*." ■