The Federal Bar Association
Northern Virginia Chapter

Presents:

A BENCH-BAR DIALOGUE:

More

TEN ^ TIMELY TOPICS …

That the Magistrate Judges Think You Should Know!

Panel Discussion With The

United States Magistrate Judges
of the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Moderator:
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INTRODUCTION

Although entitled *Ten **More** Timely Topics That the Magistrate Judges Think You Should Know*, the title could have been "*Ten Issues on Which I Have Recently Lost Motions*," or "*Ten Things I Wish I Had Known Before Filing a Motion (or Opposition).*" We all make mistakes or every now and then take a "bad" position. And, we usually learn from our mistakes. Well, here is your chance to learn from ***my*** mistakes, instead.

1. "APEX" DEPOSITIONS

In civil litigation, one party often notices the deposition of the other party's CEO. If a big corporation, the other party may object that the deposition is abusive, assert the "apex doctrine," and cite the line of cases that have adopted the presumption that the deposition of the CEO may be precluded ***unless*** "good cause" is shown, such as that the CEO possesses "unique" information. Neither the Fourth Circuit nor this Court has adopted a presumption that depositions of so-called "apex" witnesses are disfavored or may be precluded absent a special showing of good cause. Yet other courts have adopted the so-called "apex doctrine" to limit depositions of high-ranking corporate officers … so watch out for it.

There is, in fact, no universally recognized and applied "apex doctrine." The sporadic use of this terminology in district court cases appears to be driven by lawyers and litigants who are urging adoption of this so-called "apex doctrine," not judges who have recognized it. Indeed, it appears that high-flying corporations are among the most vocal advocates for such a rule. *See, e.g., In re Google Litigation*, Case No. C 08-03172 RMW (PSG), 2011 U.S. Dist. LEXIS 120905 (N.D. Cal. Oct. 19, 2011) (ordering deposition of Google's CEO despite Google's objection to a "so-called 'apex' deposition"). When faced with the objection to a so-called "apex" deposition, you need to know the ground rules, because barring a deposition is the exception, not the rule.

Under the Rules, parties may initiate discovery depositions upon notice to the other party. FED.R.CIV.P. 30(a)(1) & (b). Generally, corporate officers and directors are party-witnesses, and may be deposed as individuals on notice, rather than by subpoena or only through the Rule 30(b)(6) process. *See* 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2103 at 477-82 (2010); *see also E. I. du Pont de Nemours & Co. v. Kolon Indus., Inc*., 268 F.R.D. 45, 48 (E.D. Va. 2010) (*DuPont I*) (examining party "may select a particular officer,

director or managing agent for deposition and order the organization to produce the person," and "the organization, upon notice of the deposition, must produce the specified individual").[1] Generally, the deposition of a party may be freely taken, subject only to the numerical limit of set forth in Rule 30(a)(2)(A)(i) and the rules against over-discovery set forth in Rule 26(b). Thus, the default-setting is that even high-ranking corporate officers may be deposed.

So, what has to be shown to obtain a ruling that an "apex" deposition not be taken? A lot. First, all matters concerning discovery are committed to the district court's discretion, *e.g.*, *Erdmann v. Preferred Research, Inc.*, 852 F.2d 788, 792 (4th Cir. 1988), and so too is the issue of whether to permit, limit, or preclude an apex deposition. Second, party-initiated discovery generally is permissive, and "the burden is on the objecting to discovery … to show that discovery should not be allowed." *Castle v. Jallah*, 142 F.R.D. 618, 620 (E.D.Va. 1992). When it comes to barring a deposition, the burden on the objecting party is a heavy one: "it is ***exceedingly difficult*** to demonstrate an appropriate basis for an order barring the taking of a deposition." *Naftchi v. New York Univ. Med. Cntr.*, 172 F.R.D. 130, 132 (S.D.N.Y. 1997) (emphasis added). In fact, "most requests" for a protective order precluding a discovery deposition are denied. 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2037 at 169 (2010). Thus, the objector is swimming upstream against a strong current of case law, not the party seeking to depose the CEO.

During litigation, the litigants must have the means to compel "'every man's evidence,' except for those persons protected by constitutional, common-law, or statutory privilege." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). The discovery rules provide that means:

[1] The more difficult distinction to draw is between "employees" and "managing agents" of a corporate party, which is addressed in Section 2.

> [T]he testimony of ***any person***, whether a party or not, ***may be taken by any party by deposition upon oral examination*** … for the purpose of discovery or for use as evidence; and that ***the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action***. … No longer can the time honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts … .

Hickman v. Taylor, 329 U.S. 495, 501-02, 503, 507 (1947) (emphasis added). Those rulings, made over 50 years ago, are still the bedrock principles of contemporary discovery practice.

Under the discovery rules, so-called "apex" depositions of purportedly "busy" executives are not disfavored. There is a long line of cases reaching back several decades holding that "the fact that the witness has a busy schedule is simply not a basis for foreclosing otherwise proper discovery." *CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984); *accord, e.g., Less v. Faber Instr. Corp.*, 53 F.R.D. 645, 647 (W.D.N.Y. 1971); *Frasier v. Twentieth Century-Fox Film Corp.*, 22 F.R.D. 194, 195-96 (D.Neb. 1958); *Bowles v. Ackerman*, 4 F.R.D. 260, 262 (S.D.N.Y. 1945). These cases, in fact, represent the ***actual general rule*** in federal courts. *See* 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2037 at 172-73 & n. 13 (2010) (motions to preclude deposition because deponent is "too busy" are "usually denied"). Even if the a corporate executive succeeds in proving that his schedule is full, the proper accommodation is a protective order setting a convenient date and place for the deposition, *see, e.g., Less*, 53 F.R.D. at 647; or limiting the time allowed for the deposition, *see, e.g., Rolscreen Co. v. Pella Products, etc.*, 145 F.R.D. 92, 98 (S.D. Iowa 1992) (limiting number of hours), not an order precluding the deposition altogether.

Similarly, as a general rule, a witness's claim of "lack of knowledge" is not a reason to enter a protective order that a deposition not be taken. *See* 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2037 at 176-77 & n.19 (2010). Instead, the district court should allow the interrogating party to test that claim or to attempt to refresh the

witness's recollection. *Id.; see, e.g, Travelers Rental Co., Inc. v. Ford Motor Co.,* 116 F.R.D. 140 (D. Mass. 1987); *Less,* 53 F.R.D. at 647. Therefore, conclusory claims of ignorance, or knee-jerk protests that someone else has "more information," need not be credited.

Furthermore, senior corporate executives seeking to avoid having their depositions taken often couple the claim of a "busy schedule" with the conclusory claim of "lack of personal knowledge." By this tactic, a corporate executive seeks to invoke a thin line of cases in which federal courts have "sometimes" precluded the depositions of senior executives when the record suggests "a clear risk of abuse" and the executive is "unlikely to have personal familiarity with the facts of the case." *See* 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2037 at 176-82 & n.21 (2010). The objector must make a compelling factual showing to invoke that rule—conclusory assertions of "fishing expedition" are not enough.

Nonetheless, there are exceptions to the general rule that "busy" senior executives who claim "lack of knowledge" may be deposed. For example, in *Liberty Mutual Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 1287 (Cal. App. 1st Dist. 1992), the court held that it may be proper to preclude an "apex" deposition "when there is no showing [that the corporate executive] had any involvement in a lawsuit against the corporation," and the other party has not exhausted "less intrusive means of discovery." Similarly, it was held in *Harris v. Computer Assocs. Int'l, Inc*., 204 F.R.D. 44, 46 (E.D.N.Y. 2001) (emphasis added), that, "When a vice president ***can contribute nothing more*** than a lower level employee, good cause is shown to not take the deposition." Finally, in *Baine v. General Motors Corp*., 141 F.R.D. 332, 334-35 (M.D. Ala. 1991), the court found that the deposition of a vice president, who had no unique personal knowledge, was oppressive, inconvenient, and burdensome. ***NB:*** These are the oft-cited cases are ***mere exceptions*** to general rule permitting "apex" depositions of corporate officers.

2. "OFFICER," "DIRECTOR," AND "MANAGING AGENT" vs. "EMPLOYEE"

When a corporation is a party to civil litigation, the status of its officers and employees is significant during discovery. The Federal Rules and Local Civil Rules use the terms "officer," "director," and "managing agent" when stating the parties' rights and obligations regarding depositions, and the case law also distinguishes those categories from ordinary "employees." Yet, the rules themselves do not define these categories. The federal courts, however, have fashioned tests for making these distinctions.

The need for these distinctions is real. For example, the Federal Rules require that an entity-party identify "one or more officers, directors, or managing agents" to appear as designees in response to a Rule 30(b)(6) deposition notice. And Rule 32(a)(3) states that "An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)." Furthermore, as shown above, officers, directors, and managing agents may be compelled to appear for deposition on notice rather than by subpoena. Finally, Rule 37(b)(2)(A) and (d)(1)(A)(i) both provide that an entity-party may be sanctioned if an individual who is its "officer, director, or managing agent—or [Rule 30(b)(6)] designee" fails to obey an order or fails to appear for a properly noticed deposition. Thus, figuring out who-is-what is important.

Similarly, Local Civil Rule 30(A) provides that "a representative of [the plaintiff or a counterclaimant] (e.g., officer, director, or managing agent) … must ordinarily be required, upon request, to submit to a deposition" in the Division in which the action is pending. The initial order also states that "A party may not take more than five (5) non-party, non-expert depositions … without leave of court." Does this mean that the deposition of an officer or director ***does not*** count against the five-non-party deposition rule, but the deposition of an employee ***does***? Once

again, figuring out who-is-what is important. While these categories often defy generalized definitions, here are some guidelines that will help you analyze the facts of your case:

Officers and Directors: The Rule's adoption of these long-recognized terms-of-art under corporation law has lead to little dispute about who fits in these categories. *See* 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2103 at 480 (2010). These individuals may be deposed on notice (without a subpoena), *In re Outsidewall Tire Litig.*, 1:09cv1217, 2010 U.S. Dist. LEXIS 44019, *7 (E.D. Va. May 4, 2010), and their testimony is binding on the corporation. *DuPont*, 268 F.R.D. at 48. They are then ***party*** depositions.

But what about business entities that have "partners" or "members"—what category to they fit in? Arguably, managing partners of a partnership and managing members of a limited liability company should be categorized as officers or directors, but at the very least, they are "managing agents" of the entity they operate. Moreover, the categorization problem can be ameliorated (if not eliminated) by resort to Rule 30(b)(6), which applies to any "partnership" or "other entity"—particularly business entities. Rule 30(b)(6) also applies to "associations," such as unions, clubs, and other unincorporated organizations.

Managing Agents: Although the rule drafters used terms of art to categorize corporate "officers" and "directors," they appear to have coined the term "managing agents" as a catch-all. Thus, "the framework for determining whether a particular person qualifies as a managing agent is primarily a construction of decisional law concerned with ensuring that an organization is deposed through its proper representatives concerning matters at issue in the litigation." *DuPont*, 268 F.R.D. at 48. This analysis is conducted "pragmatically on an ad hoc basis." *See* 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2103 at 480 (2010). The concept of "managing agent" is "a functional one to be determined largely on a case-by-case

basis." *DuPont*, 268 F.R.D. at 48. Usually, four factors are analyzed: (1) the nature and extent of "discretionary authority" invested in the individual by the organization; (2) the individual's "dependability in following" the organization's directions; (3) "whether the individual is more likely to identify with the [organization] or the adverse party in the litigation"; and (4) the nature and extent of the individual's "supervisory authority in areas pertinent to the litigation." *See id*.; *accord* 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2103 at 480-81 (2010). And as explained in both *DuPont* and Wright & Miller, this test may be applied more permissively at the time the deposition is noticed, but more carefully if the examining party seeks to introduce the deposition at trial as binding testimony.

Employees: If an individual employee or agent "is not an officer, director, or managing agent, then the examining party must resort to [Rule 45] for subpoenas on non-party witnesses." *DuPont*, 268 F.R.D. at 48; 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2103 at 478-79 & nn.41 & 42 (2010). The distinction between an employee and managing agent may be in their authority in the matter at issue—a senior airplane mechanic may be an employee in race discrimination case, but a managing agent in an aviation crash case. Moreover, the testimony of an "employee" would not be binding on the corporation, and depositions of "employees" generally should be counted as non-party depositions for purposes of the local five non-party deposition rule.

3. EDITING DEPOSITION TESTIMONY

You have just finished a long, carefully planned, and (in your humble opinion) masterful deposition of the opposing side's key witness. At the conclusion of the deposition, you had insisted that the deponent read and sign—just so he would have to re-read the answers he gave to your incisive questions which skewered his case. You can finally relax—or can you? Over the

next few weeks, you repeatedly contact the court reporter for the final transcript, but are told that the witness has not signed and returned it, and so it is not final. On the thirtieth day after the deposition, you receive an errata sheet from the deponent and find that he has substantively changed all of the "great" answers you wrung out of him. Can he do that?

Under the deposition rule, either the deponent or a party may request that the deposition be read and signed; during the ensuing 30-day period, the deponent may make "changes in form ***or substance***:"

> (e) Review by the Witness; Changes.
>
> > (1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
> >
> > > (A) to review the transcript or recording; and
> > >
> > > (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.
> >
> > (2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

FED.R.CIV.P. 30(e). Just how far can the deponent go to note changes in form or substance? Can he only change "The light was ***read***" to "The light was ***red***", or can he change "The light was ***red***" to "The light was ***green***"? Despite there being only one rule, there are many interpretations of it, so the answer may depend on which judge you get.

Under one line of cases (which appears to be the majority rule), a witness is permitted to freely make substantive—even self-contradictory—changes to his deposition testimony through an errata sheet; however, the original answers remain part of the record and may be used to cross-examine the witness at trial, ***and*** the deposition may be re-opened for further examination of the changed testimony. 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2118 at 598-600 & nn.3 & 4 (2010). The justification for this permissive rule is that

the accuracy of testimony is essential to the truth-finding process at trial. *See, e.g.*, *SEC v. Parkersburg Wireless, LLC*, 156 F.R.D. 529, 535-36 (D.D.C. 1994) (declaring that the plain language of Rule 30(e) permits changes in form or substance "to provide an accurate record for trial that will reduce inconsistencies"). Critics of this line of cases question whether substantive edits promote truth-finding and accuracy. Indeed, one can persuasively argue that the exact opposite result is promoted: allowing retraction of truthful but harmful deposition testimony, for which is substituted lawyer-coached answers, obscures the truth.

While not purporting to be a uniformly applied rule in this District, several judges have recently taken stands on this issue. Here are some of their pithy rulings:

- "[T]he errata sheet clearly makes substantive changes, not technical or typographical changes, to plaintiff's deposition testimony. Altering deposition testimony in this manner is not a permissible use of errata sheets." *Lee v. ZOM Clarendon*, L.P., 689 F. Supp. 2d 814, 816 n.3 (E.D. Va. 2010) (citations omitted) (Ellis, J.).

- "[A] deposition is not a take home exam. The errata sheet 'clarifications' in this case are akin to a student who takes her in-class examination home, but submits new answers only after realizing a month later that the import of her original answers could possibly result in a failing grade." *Id*. (citation omitted)

- "[The deponent's] errata entries and declaration statement moreover strike this Court as a bit too convenient. '[T]he purpose of an errata sheet is to *correct alleged inaccuracies* in what the deponent *said* at his deposition, not to modify what the deponent said for tactical reasons or to reflect what he wishes that he had said.' Rule 30(e) (allowing the submission of errata sheets), 'cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination." *Touchcom, Inc. v. Bereskin & Parr*, 790 F. Supp. 2d 435, 465 (E.D. Va. 2011) (Cacheris, J.) (citations omitted).

- "It makes no sense to allow a deponent to change sworn testimony merely because after the deposition he wishes that he had said something other than what was said. Indeed, to adopt such an approach would be to set at naught the efficacy of the deposition process." *E. I. du Pont de Nemours & Co. v. Kolon Indus., Inc*., 277 F.R.D. 286, 297 (E.D. Va. 2011) (Payne, J.) (*DuPont II*)

- "Nor can the errata process permitted by Rule 30(e) be used to allow post-deposition revision of testimony to conform a witness' testimony to enhance a party's case. That too

would undermine the purpose for which depositions are allowed under the federal rule." *Id*.

- "The purpose of a deposition is to memorialize testimony or to obtain information that can be used at trial or that eliminates the pursuit of issues or that inform decisions as to the future course of the litigation. One of the main purposes of the discovery rules, and the deposition rules in particular, is to elicit the facts before the trial and to memorialize witness testimony before the recollection of events fade or 'it has been altered by … helpful suggestions of lawyers.' Those purposes are disserved by allowing deponents to 'answer questions [at a deposition] with no thought at all' and later to craft answers that better serve the deponent's cause. Indeed, to allow such conduct makes a mockery of the serious and important role that depositions play in the litigation process." *Id*. (citations omitted).

Suffice it to say that deposition editing (and lawyer editors) would be skeptically viewed in this District. Indeed, if you want to read a *tour de force* against deposition editing, read *DuPont II*. If, after all this, you are still tempted edit, follow the procedural rules, explain the changes, and act in a timely manner. As Judge Payne explains in *DuPont II*, these rules are strictly enforced even when the edits are permissible.

4. FIVE-DAY MOTIONS

Those of us who remember "the good old days" fondly recall the Court's three-day motions practice for non-dispositive motions: file by close of business on Wednesday; file the brief in opposition by close of business on Thursday; and appear for oral argument (and a ruling from the bench) on Friday. As motion issues regularly became more complex, the motion schedule was enlarged: First (*ca*. 1995), it became Monday-Wednesday-Friday, and then (*ca*. 2000) Friday-Wednesday-Friday.

The five-business-day motions cycle, in fact, was the shortest period ordinarily allowed by the Federal Rules (*see* former Civil Rule 5(c)). Then, in 2009, the notice period for a motion was lengthened to "at least 14 days before the time specified for the hearing," except if "a court order … sets a different time." *See* FED.R.CIV.P. 6(c)(1)(C). But this did not end the five-business-day motions practice in the Alexandria Division.

A standard provision in the Rule 16(b) Scheduling Order set the non-dispositive motions cycle as five-business-days. But that is changing, too, it seems. In the recently amended standard Rule 16(b) Scheduling Order provision now makes a five-business-day motion optional at the election of the movant. No doubt this change will be mourned by the old-timers as was the removal of the spittoons from federal courtrooms.

For purposes of the five-business-day cycle, however, there was a gap-period between the filing of the action and the entry of the Rule 16(b) Scheduling Order. Can five-business-day motions be filed during the gap period? Generally, yes, but expect your opponent (particularly if from out of state) to point to Local Civil Rule 7(E) and argue that you short-noticed the motion. Requests for extensions of the briefing schedule and hearing date may be granted (or denied) as warranted under Local Civil Rule 7(G).

5. PRIVILEGE LOG CHALLENGES

When determining whether matter is privileged or not, the rules state that the law of privileges "applies at all stages of all actions ... ." FED.R.EVID. 1101(c). Thus, the substantive law of privileges applies during discovery, just as at trial, to determine whether otherwise "relevant" matter is "privileged" and not discoverable. *See United States v. Reynolds*, 345 U.S. 1, 6 (1953) (military secrets privilege applied during discovery). As a general rule in federal question cases, privileges "shall be governed by the principles of the common law as they may be developed by the courts of the United States in the light of reason and experience." FED.R.EVID. 501. Likewise, in diversity cases, the law of privileges governed by the applicable state law. *Id.* And in cases involving claims under both state and federal law, federal law governs privileges. *E.g.*, *Hancock v. Hobbs*, 967 F.2d 462, 466-67 (11th Cir. 1992). These

choice of law considerations may be pivotal—federal law and state law of privileges differ, often dramatically, and the law of privileges also varies from state to state.

The assertion of privilege objections generally is made in two steps. For example, in response to a request for documents, you will object to production of privileged or work product materials. In addition, you must serve a proper and timely privilege log. FED.R.CIV.P 26(b)(5). That rule provides as follows:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and *shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.*

FED. R. CIV. P. 26(b)(5)(A) (emphasis added). Although the rule requires "sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection," the rule "does not define for each case what information must be provided when a party asserts a claim of privilege or work product protection." ADV. COM. NOTES, 146 F.R.D. 501, 639 (1993). This Court has held, however, that "an adequate 'privilege log'" should contain the following information for each item:

> (1) a brief description or summary of the contents of the document, (2) the date the document was prepared, (3) the person or persons who prepared the document, (4) the person to whom the document was directed, or for whom the document was prepared, (5) the purpose in preparing the document, (6) the privilege or privileges asserted with respect to the document, and (7) how each element of the privilege is met as to that document.

Cappetta v. GC Services LP, No. 3:08CV288, 2008 U.S. Dist. LEXIS 103902, *12 (E.D. Va. Dec. 24, 2008) (citation omitted). The Committee also has stated that detailed information generally would be required, but recognized that this requirement might be "unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items

can be described by categories." ADV. COM. NOTES, 146 F.R.D. at 639. The party seeking to avoid the requirement of detailed itemization, however, must "seek relief under [Rule 26(c)]," showing that "compliance with the requirement for providing this information would be an unreasonable burden." *Id*. If you believe this issue is present in your case, you should raise it when the *Joint Discovery Plan* is drafted.

This Court also has ruled that "[i]mproper assertion of a privilege may result in a waiver of that privilege," and where a party "has allowed time to pass without clarifying the basis of its assertion of privilege, waiver of the privilege may be the appropriate sanction." *Cappetta*, 2008 U.S. Dist. LEXIS 103902 at *12-13 (citations omitted). Thus, the failure to serve a log, or to list a document on the log, or to identify the requisite information, may constitute a waiver of any otherwise applicable privilege or protection.

But Rule 26(b)(5) does not state when a privilege log is due. Should it be served together with the document production? Should the parties agree upon a due date in their discovery plan? Similarly, the Rule does not specify when the receiving party must make a motion challenging the producing party's privilege log. Generally, in the Alexandria Division, all discovery motions need to be filed and heard before the cut-off. Is there an exception of privilege log challenges?

6. FOREIGN DISCOVERY: PART I (Party-to-Party)

In contemporary civil litigation, it is no longer unusual when the case involves foreign parties. This presents several problems during discovery, which are then exacerbated by the Court's efficient schedule. This problem is not new, however, but it is growing. The "solution" to this problem, the HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, March 18, 1970, U.S.T. 2555, reprinted at 28 U.S.C. § 1781 ("Hague Convention")—to which the United States and many other industrialized countries are

signatories—was formulated and adopted over a generation ago. Does it still work? That is debatable, but it still applies. The first question, answered in this section, is ***when*** does it apply?

As litigation between parties from different nations increased, the need for an effective international agreement on pretrial disclosure procedures intensified—particularly in light of the differences between the common law and civil law approaches to the taking of evidence for use abroad. *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. D. Iowa*, 482 U.S. 522, 530-33 (1987) (discussing history of this treaty). The purpose of the Hague Convention was "to establish a system for obtaining evidence located abroad that would be 'tolerable' to the state executing the request and would produce evidence 'utilizable' in the requesting state." *Id. at* 530-31. Thus, the Hague Convention procedures are "the law of the United States" as much as are the Federal Rules. *Id*. at 533. And where a foreign litigant is involved, the district court must decide which procedure to use.

In fact, as the Hague Convention was being adopted by the United States in the early 1970s, federal litigation was undergoing the transition to modern discovery practices. Under the Hague Convention, by contrast, "letters rogatory" are issued by the Court to foreign judicial tribunals seeking their assistance in obtaining evidence—testimony or documents, or both. That ancient common law discovery procedure contrasts sharply with the various and specialized party-initiated discovery procedures that have burgeoned since the 1970 discovery revolution under the Federal Rules.

Use of the Hague procedures is not mandatory, even when a foreign litigant objects to discovery under the Federal Rules. *Id*. at 534-40. In fact, the convention was not universally adopted by foreign nations, and only foreign litigants from signatory-countries can raise this issue. However, it would be "erroneous" to conclude that the Hague procedures "do not apply"

where jurisdiction over a foreign litigant has been asserted by an American court. *Id*. at 540-41. While not preferred over the Federal Rules, use of Hague procedures nonetheless must be considered when a foreign litigant objects. *Id*. at 542-44. Whether to require compliance with the Hague Convention instead of the Federal Rules is to be determined by a trial court on a case-by-case basis. *See id.* at 546. The Supreme Court has held that a trial court must consider the following factors to make this determination: (1) "the particular facts" of the case, (2) the "comity interests" of the sovereigns at issue, and (3) the likelihood that resort to Hague Convention procedures "will prove effective." *Id*. at 544. Where those factors weigh in favor of the foreign party, the Supreme Court has held that comity requires use of the Hague Convention procedures. *Id.* The party seeking the application of the Hague Convention procedures, rather than the Federal Rules, bears the burden of persuading the trial court that these factors support that result. *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 354 (D. Conn. 1991); *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 257-58 & n.3 (M.D.N.C. 1988); *but see Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 38 (N.D.N.Y. 1987)(burden is on party opposing use of Hague Convention). Here is what needs be shown.

The Particular Facts: The first factor—the "particular facts" of the case—focuses primarily on the nature and extent of discovery sought. Even with the Rule's emphasis on relevance and proportionality, American-style discovery is much broader than the disclosure requirements of virtually every other country's judicial system. A litigant seeking to use American-style discovery against a foreign litigant, therefore, may need to scale-back its discovery requests to minimize the conflict with comity interests of the other nation involved.

District courts have found that if the requesting party is willing to narrow its discovery requests, then this factor will favor using the Federal Rules. *E.g., Valois of America, Inc. v.*

Risdon Corp., 183 F.R.D. 344, 347-48 (D. Conn. 1997) (citing cases). For example, American-style discovery might be ordered if only a handful of discovery requests are involved, which are "routine" and "not overly burdensome." *Doster v. Schenk*, 141 F.R.D. 50, 51-53 (M.D.N.C. 1991); *accord Haynes v. Kleinwefers*, 119 F.R.D. 335, 338 (E.D.N.Y. 1988) (discovery sought from foreign litigant was not "extensive"). If the requesting party will not voluntarily reduce its requests, the Court may narrow them as the basis for deciding whether to proceed under the Federal Rules or the Hague Convention. *See Valois*, 183 F.R.D. at 349; *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 388-89 & n.2 (D.N.J. 1987). Each case must be decided on its own facts, not generalities, and typically an off-shore "fishing expedition" will not be authorized.

These cases, however, do not purport to state a general rule that simply having a meet-and-confer process before the order is entered will obviate the need to consider the first factor. Rather, the Supreme Court has made clear that this first factor must be considered as an integral part of the "***prior scrutiny***" of factors in the case-by-case analysis. *Societe Nationale*, 482 U.S. at 544 (emphasis added). Therefore, even if the discovery requests have been narrowed through a meet-and-confer, the Court still must find that proceeding with American-style discovery is fair.

Comity Interests: Many foreign nations are affronted by American-style discovery, and, having already signed the Hague Convention, generally believe that its procedures should be followed, not the Federal Rules. Thus, in every case involving a litigant from a nation that has signed the Hague Convention, there is a baseline comity interest to be considered. Some of the signatory nations have gone even farther, though, and have enacted "blocking statutes" that purport to prohibit their citizens from participating in American-style discovery. That is what occurred in the *Societe Nationale* case.

In *Societe Nationale*, the Supreme Court held that the French blocking statute, while not dispositive, was a "relevant" factor that must be considered in the district court's "particularized comity analysis":

> The lesson of comity is that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign. The blocking statute thus is relevant to the court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material.

Societe Nationale, 482 U.S. at 544 n.29. A blocking statute cannot be disregarded, but neither must it be given dispositive weight.

United States law respects international law and foreign sovereignty, and holds that the cardinal rule in approaching an international conflict of law is to avoid a conflict where possible. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *accord* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987). The Court's interest in allowing an American litigant to obtain adequate discovery, and a foreign country's interest in having its citizens obey its blocking-statute must be harmonized (if possible) before the Court orders that discovery against the foreign party proceed under the Federal Rules. If harmony cannot be attained, then a fair choice must be made.

Efficacy and Feasibility: In light of the nature and extent of discovery needed in the case, the Court must analyze whether proceeding under the Hague Convention will be feasible and effective. As is shown in the next topic discussion, the Hague Convention procedures are cumbersome, time-consuming, and imprecise. It is the rare case in which use of the Hague Convention procedures will appear feasible and effective on this Court's schedule.

Monitoring the Process: As the Supreme Court explained, if after consideration of all three factors, the district court decides to proceed under the Federal Rules, it still must take extraordinary care to protect the foreign party from discovery abuse:

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses. … Objections to "abusive" discovery that foreign litigants advance should therefore receive the most careful consideration. … American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.

Societe Nationale, 482 U.S. at 546. Simply put, even after having considered the "particular facts" of the case ***before*** ordering American-style discovery, the district court must still closely supervise discovery involving a foreign party ***after*** that order and throughout the discovery period.

7. FOREIGN DISCOVERY: PART II (Hague Convention Procedures, etc.)

If the district court rules that the Hague Convention applies, or if discovery is sought from foreign non-parties who are not subject to Rule 45, then under Rule 28(b) (depositions in a foreign country) and 28 U.S.C. § 1781 you must proceed under the Hague Convention (if the person is located in a signatory country) or by letters rogatory, letters of request, commissions, or under any other treaties.[2]

Assuming that the Hague Convention applies, here are some key features: The party seeking foreign discovery must apply to the district court (*qua* "requesting authority") for

[2] There also is an INTER-AMERICAN CONVENTION ON LETTERS ROGATORY, reprinted at 28 U.S.C. § 1781.

issuance of a "letter of request" (Art. 1) to be forwarded to the "Central Authority" of the receiving nation (Art. 2) being asked to execute the request. There are many formal requirements to the request (Art. 3), and translations may be (and usually are) required (Art. 4). The "judicial personnel" of the requesting authority may seek to be present for the execution of the letter of request—for example, lawyers for the parties may allowed to appear for the formal interview of a witness (Art. 8). Generally, the "judicial authority" which executes the letter request "shall apply its own law as to the methods and procedures to be followed," but may use "a special method or procedure," and shall execute the letter of request "expeditiously" (Art. 9). Compulsory process under "internal law" of the nation executing the request may be employed (Art. 10). Applicable privileges may be asserted by the "person concerned" (Art. 11). Once the letter of request has been executed, the documents and evidence are sent through diplomatic channels to the requesting authority (Art 13). Plainly, this is not like party-initiated discovery under the Federal Rules.

Even if the foreign country is not a signatory to the Hague Convention, the federal courts have "inherent authority" to issue letters rogatory or letters of request to seek judicial assistance from other countries. 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D, § 2083 at 412 & n.8 (2010). This inherent authority predates the Hague convention, and reaches countries that are not signatories.

If the foreign country permits depositions, the procedures for initiating them is set forth in Rule 28(b). Many countries do not allow evidence to be taken of their citizens by depositions, and some do not permit depositions at all.

Finally, the State Department webpage for judicial assistance is a ***necessary resource*** for any foreign discovery (http://travel.state.gov/law/judicial). There is a separate webpage for most

countries, which states whether the country is a signatory of the Hague Convention, what discovery may be pursued, and how it may be obtained. The State Department website also provides forms, guidelines, and other resources that will be invaluable in this process. Finally, there are service providers for foreign discovery and translation that can provide turn-key assistance for the issuance and execution of letters rogatory or letters of request.

8. FOREIGN DISCOVERY: PART III (for use abroad under 28 U.S.C. § 1782)

Even while foreign countries have set up barriers and byzantine procedures for American litigants to obtain discovery overseas, the United States has done the reverse. Under Title 28, Chapter 117, upon the request of a foreign "tribunal" or "interested party," a federal court may order a "person who resides or is found" in that judicial district "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal … ." 28 U.S.C. § 1782(a). There are several statutory elements that must be satisfied to obtain this relief, ***and*** the statute is discretionary, not mandatory.

First, the statutory authority is ***discretionary***. Note carefully the use of the word "may"—that is, the "district court … ***may*** order" the discovery. In other words, "§ 1782(a) ***authorizes, but does not require***, a federal district court to provide judicial assistance to foreign or international tribunals or to 'interested person[s]' in proceedings abroad." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004) (emphasis added). This statutory language has long been recognized as conferring "wide discretion" on the district court to determine (i) whether to order discovery, (ii) the nature and extent of discovery that may be allowed, and (iii) the procedures for such discovery as is allowed. *See Al-Fayed v. United States*, 210 F.3d 421, 424 (4th Cir. 2000). However, the district court's discretion is not bounded by a so-called "foreign-discoverability requirement." *Intel*, 542 U.S. at 253. In other words,

discovery under §1782 may be obtained whether or not the testimony or documents would "be discoverable" under the disclosure procedures of the foreign tribunal where the action is pending.

Second, the requests for discovery under §1782 must be made "for use in a foreign or international ***tribunal***," which may include a pre-accusation criminal investigation. The *Intel* decision expanded the reach of the statute. In *Intel*, the foreign tribunal was a commission enforcing European competition laws (equivalent to our antitrust laws), not a court or judicial tribunal. *Id*. at 254 (describing how the commission worked). Recently, and against a strong current of precedent, the Eleventh Circuit held that §1782 may be used to obtain discovery in aid of a foreign arbitral tribunal. *Application of Consorciao Exuatoriano de Telecom. S.A.*, 685 F.3d 987 (11th Cir. 2012). Neither every sort of tribunal, nor every sort of arbitral tribunal, will qualify. The Eleventh Circuit applied four criteria found in *Intel* to analyze the status of the arbitral tribunal as a "tribunal" within the meaning of §1782.

Third, the applicant for §1782 discovery must be the tribunal itself or an "interested person." But an "interested person" is not limited to only to "litigants, foreign sovereigns, and the designated agents of those sovereigns;" rather, §1782 "plainly reaches beyond the universe of persons designated 'litigant,'" and was "intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance." *Intel*, 542 U.S. at 256-57 (citations omitted). In *Intel*, for example, the "interested person" was not a litigant *per se*; rather, it was the complaining party whose complaint prompted the commission's investigation.

Fourth, the §1782 discovery order "may prescribe the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing

the document or other thing," but unless so prescribed, the discovery may be taking according to the Federal Rules of Civil Procedure. So if you are seeking (or opposing) §1782 discovery, you need to consider and request (or object to) the procedures best suited to obtain that discovery.

Fifth, discovery under §1782 is subject to "any legally applicable privilege." Legally applicable privileges may be those recognized by foreign or federal law. *See In re Veiga*, 746 F. Supp. 2d 27 (D.D.C. 2010). Expect close judicial scrutiny of any assertion of privilege and be prepared to prove (or dispute) the assertion of foreign law privileges under Rule 44.1.

Sixth, and finally, a "person" who may be subject to discovery under §1782 does not include the United States government, or its agencies or instrumentalities. This exception has been variously justified as being based a sovereign immunity, or statutory construction, or comity. *Al-Fayed v. CIA*, 229 F.3d 272 (D.C. Cir. 2000). A "person," however, does include individuals and other legal persons (like corporations). Questions about whether the person "resides or is found" in the district may give rise to an analysis of personal jurisdiction. And if a corporate person is "found" in the district, but the responsive documents are located outside the district, does the district court have authority to order production (as it would under Rule 45)? Good question—unsatisfactory answer: probably.

9. *PRO SE* LITIGANTS

Federal cases involving *pro se* litigants seem to be on the rise. *Pro se* cases pose special procedural, professional, and practical problems for the lawyers on the other side. Here are some things to consider:

Procedurally, there is only one set of rules—federal and local—that apply to all civil cases. As the Supreme Court has observed:

> It is no doubt true that there are cases in which a litigant proceeding without counsel may make a fatal procedural error, [where the risk that a lawyer will err]

> is virtually nonexistent. Our rules of procedure are based on the assumption that litigation is normally conducted by lawyers. While we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed, and have held that some procedural rules must give way because of the unique circumstance of incarceration, we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel. As we have noted before, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

McNeil v. United States, 508 U.S. 106, 113 (1993) (citations omitted). Similarly, "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). Nonetheless, there are some special considerations.

At the pleading stage, "the Court must extend leeway to the *pro se* Plaintiff;" nonetheless, "such leeway must be tempered to require the Plaintiff to comply with the Federal Rules of Civil Procedure, specifically, here, the pleading requirements of Rule 8." *Davis v. Bacigalupi*, 711 F. Supp. 2d 609, 615 (E.D. Va. 2010). If the represented defendant files a motion to dismiss of any sort—but particularly on substantive grounds (like lack of standing or statute of limitations grounds)—the pro se litigant must be given "notice and a reasonable opportunity" to respond to the motion and be heard. *See Hill v. Braxton*, 277 F.3d 701 (4th Cir. 2002); *see also* E.D.VA.CIV.R. 7(K) (specifying notice procedures when "dispositive or partially dispositive motion" is filed against a pro se litigant). Similarly, before a Rule 12(b)(6) motion can be converted to and decided as a Rule 56 motion, special notice must be given to the pro se plaintiff. *See Davis v. Zahradnick*, 600 F.2d 458 (4th Cir. 1979). Finally, at the summary judgment stage, special notice must be given to the pro se litigant, advising him "of his right to file counter-affidavits or other responsive material and alert[ing him] to the fact that his failure to so respond

might result in the entry of summary judgment against him." *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975). Thus, while the rules apply neutrally, the due process requirements of notice and opportunity to be heard must be specially protected.

Motions practice even for non-dispositive motions is difficult with *pro se* parties. You must make sure they have adequate notice of your motions, because they might call the court *ex parte* to seek a continuance or to complain that they never received proper notice. On the other hand, a pro se party may misconceive of motions practice and file numerous frivolous motions. That can be sanctionable misconduct. "*Pro se* litigants are not immune from any sanction by virtue of their status alone." *Zaczek v. Fauquier County, Va.*, 764 F. Supp. 1071, 1076 (E.D. Va. 1991) (sanctions imposed for repeated filing of vexatious motions despite court order). In other words, while the Court must allow some leeway for the pro se litigant's ignorance of the rules or lack of formality, the represented party cannot be subjected to numerous misguided motions.

Professionally, the challenge for the lawyer is punctiliously observing the rules of court and the rules of professional responsibility. Slip ups in a vigorously contested case between parties with capable lawyers might appear like overreaching and strong-arming when viewed through the lens of a pro se case.

And practically, the lawyer must ensure his own ability to advocate for his client, obtain discovery, and keep the case moving. Your discovery plan should include notice provisions for a regular mail address, email address, and overnight delivery address for the *pro se* litigant. With agreed upon service procedures in place, you should be able to prove that you gave notice of a deposition, served requests for documents, or served interrogatories when you file a motion to compel or seek discovery sanctions. Make sure you have telephone numbers, too, to keep the lines of communication open at all times.

10. RULE 37 AWARDS OF FEES AND COSTS

Under Rule 37(a)(5), the Court may award fees and costs to a party who moves to compel discovery and under Rule 37(b)(2), the Court may make such an award to enforce a prior Court order. Although both provisions are found in Rule 37, each has its own peculiarities.

Rule 37(a)(5)

Rule 37(a)(5) permits the district court to award fees and expenses incurred on a motion to compel:

> ***(5) Payment of Expenses; Protective Orders.***
>
> (A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — ***the court must***, after giving an ***opportunity to be heard***, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. ***But*** the court must not order this payment if:
>
> (i) ***the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action***;
>
> (ii) the opposing party's nondisclosure, response, or objection was ***substantially justified***; or
>
> (iii) other circumstances make an award of expenses ***unjust***.
>
> (B) *If the Motion Is Denied.* If the motion is denied, the court ***may issue any protective order*** authorized under Rule 26(c) and ***must***, after giving an ***opportunity to be heard***, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. ***But*** the court must not order this payment if the motion was ***substantially justified*** or other circumstances make an award of expenses ***unjust***.
>
> (C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and ***may***, after giving an ***opportunity to be heard***, apportion the reasonable expenses for the motion.

FED.R.CIV.P. 37(a)(5) (emphasis added). Thus, an award of fees is ***mandatory*** under subsection (A) ("***must***") – ***but*** there may be extenuating circumstances (*e.g.*, lack of a meet-and-confer, if noncompliance is "***substantially justified***," or if an award otherwise would be "***unjust***").

The burden of proof under this provision was reversed in 1970: rather than requiring the movant to prove his entitlement to fees, an award of fees is mandatory "***unless***" the resisting party proved that his noncompliance was justified. ADV. COM. NOTES, 48 F.R.D. 487, 539 (1970). This change was intended to "encourage" fee awards to curb discovery abuse. *Id*. Similarly, if a motion to compel is denied, fees "***must***" be awarded under subsection (B) unless the motion was "substantially justified."

Noncompliance with a discovery request, or an unsuccessful motion to compel, may be "***substantially justified***" if there is a "genuine dispute" or "if reasonable people could differ as to [the appropriateness of the contested action]." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Moreover, when the motion is granted or denied in part, an apportioned award of fees is discretionary under subsection (C) ("***may***"). Under all subsections, ***due process*** is required ("***opportunity to be heard***"), which may be the opportunity to make "written submissions" or have a hearing. ADV. COM. NOTES, 146 F.R.D. 501, 690 (1993). Thus, there may be fee-shifting under Rule 37(a)(5), even though it is not denominated as a sanction *per se*.

Rule 37(b)(2)

If a party fails to comply with other discovery orders, the trial court has a wide array of sanctions at its disposal to penalize, coerce compliance, or to compensate the other party.

(2) ***Sanctions in the District Where the Action Is Pending.***

> (A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an

order under Rule 26(f), 35, or 37(a), the court where the action is pending ***may issue further just orders***. They ***may*** include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence:

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court ***may*** issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it ***cannot*** produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court ***must*** order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was ***substantially justified*** or other circumstances make an award of expenses ***unjust***.

FED.R.CIV.P. 37(b)(2) (emphasis added). Each of these bears separate explication.

Under subsection C the trial court may award fees against the disobedient party or his counsel. The procedures and standards mirror those under Rule 37(a)(5): the defense of substantial justification may be asserted, and due process is due. Importantly, the award of fees to the movant under Rule 37(b)(2) must be reasonable and directly incurred as a result of the nonmovant's failure; they cannot be a fine – such as a flat fee that bears no relation to the movant's fees and expenses. *See Insurance Co. of No. Am. v. MacMillan*, 945 F.2d 729, 732 (4th Cir. 1991). Thus, as under Rule 37(a)(5), the award must be reasonable and is limited to fees and expenses that have been "caused" by the nonmovant's failure to obey the order.