# The Five Most Common Mistakes Made During Discovery

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# The Five Most Common Mistakes Made During Discovery

1. Failure to Include Damages Calculations in the Initial 16.1 Disclosures

NRCP 16.1 (a)(1)(C) specifically requires the following: "A computation of any category of damages claimed by the disclosing party, making available for inspection and copying under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered. . ."

The Commissioner expects that the following information will be provided at or within 14 days of the 16.1 Conference:

a. relevant medical records and bills;

b. economic reports, if initially available;

c. verification of wage loss; tax returns if appropriate;

d. a general description of the damages being sought; and

e. special damages information.

Failure to provide this information, and upon appropriate motion, may result in sanctions be awarded against the non-complying party.

In addition to the foregoing, the Discovery Commissioner continues to observe the following problems:

a. Failure to ensure that the case is exempted from arbitration prior to filing the Case Conference Report.

b. Failure to file a Case Conference Report after requesting a *trial de novo*.

c. Failure to incorporate all of the discovery deadlines into the Case Conference Report.

d. Failure to serve the Discovery Commissioner with a courtesy copy of the Case Conference Report.

e. Improperly attaching documents to the Case Conference Report.

2. Improperly Objecting to or Failing to Object to Written Discovery

By now, most attorneys are aware that form objections are highly disfavored. NRCP 33(b)(4) provides as follows: "All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown."

The general rule is that a general objection that an interrogatory is "overly broad, burdensome, oppressive and irrelevant" is not a proper objection. See e.g., Wagner v. St. Paul Fire & Marine Ins. Co., 238 F.R.D. 418 (N.D.W. VA 2006). Although interrogatories may indeed be objectionable, the objecting party must explain the basis for the objection. Referencing applicable case law is another way in which to support an appropriate objection.

Importantly, if written discovery is objectionable – **timely** object, either within the thirty days plus mailing permitted by NRCP 33 or within the time frame agreed to by the parties. Unless an agreement is in place, failure to respond to written discovery within 60 days may result in sanctions, and objections will be deemed waived.

3. Failure to Conduct a Meaningful EDCR 2.34 Conference Prior to Filing a Discovery Motion.

One of the most significant problems noted by the Discovery Commissioner is the lack of communication between or among counsel to attempt to resolve the dispute at issue. Discovery Commissioner Opinion No. 10 discusses the parameters for a meaningful EDCR 2.34 conference. In this opinion, the following guidance is given:

> "In order to satisfy the requirements of E.D.C.R. 2.34 the movant must detail in an affidavit the essential facts sufficiently to enable the Commissioner to pass preliminary judgment on the adequacy and sincerity of the good faith discussion between the parties. It must include the name of the parties who conferred or attempted to confer, [the conference should be between the attorneys/parties – not delegated to secretaries or paralegals] the manner in which they communicated, the dispute at issue, as well as the dates, times and results of the discussions, if any, and why negotiations proved fruitless."

A reoccurring problem is that discussions are held with paraprofessionals and not with attorneys involved in the litigation who are knowledgeable about the facts and circumstances of the dispute. Further, an attorney may attempt one telephone call to opposing counsel, and after receiving no response, makes no further efforts to contact counsel before filing a motion. As a general rule, the Discovery Commissioner would like to see two telephone conference attempts and two letter attempts before counsel files a motion without holding the "meet and confer" conference as required. The Discovery Department will not set a motion for hearing unless a meaningful EDCR 2.34 conference has been held or meaningful efforts to hold one have been made.

4. Failure to Timely Apply for Extensions of Discovery Pursuant to EDCR 2.35.

EDCR 2.35(a) specifically requires the following: "Stipulations or **motions** to extend **any** date set by the Discovery Scheduling Order must be in writing and supported by a showing of good cause for the extension and be received by the Discovery Commissioner within **20 days before the discovery cut-off date or any extension** thereof." (Emphasis added.)

This means a request to extend **any discovery deadline** must be made at least 20 days before the deadline expires. For example, if the expert disclosure deadline needs to be extended the request must be made 20 days before the deadline for expert disclosures as set forth in the scheduling order.

Further, stipulations and motions tend not to be submitted in accordance with EDCR 2.35. Please review the attachment regarding Extension of Discovery Deadlines and incorporate the information into your practice.

5. Improper Objections During Depositions.

Setting forth appropriate objections during the deposition process continues to be problematic for counsel. As a preliminary matter, NRCP 30(d)(1) states the following: "**Any objection** during a deposition **shall be stated concisely** and in a **non-argumentative** and **non-suggestive manner**. A party may instruct a deponent not to answer and only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under paragraph 3." (Emphasis added.)

The problem arises when an objection is made to a question that does not provide sufficient information so that attorney asking the question may correct it. In other words, "object to the form of the question" is not very helpful. As the U.S. District Court of Nevada explained in *In Re Stratosphere Corp. Securites Litigation*, 182 F.R.D. 614 (D. Nev. 1998): "It is only necessary to object at a deposition where the "form" of the question (not the nature of the question) is objectionable and a "seasonable" objection would provide an opportunity to correct the form." Lengthy speaking depositions will not be tolerated. Likewise, improperly instructing a witness not to answer a question is sanctionable conduct. A party may bring a motion for sanctions pursuant to NRCP 37 after the completion of the deposition for improper deposition conduct.

**Rule 2.35. Extension of discovery deadlines.**

(a) Stipulations or motions to extend any date set by the discovery scheduling order must be in writing and supported by a showing of good cause for the extension and be received by the discovery commissioner within 20 days before the discovery cut-off date or any extension thereof. A request made beyond the period specified above shall not be granted unless the moving party, attorney or other person demonstrates that the failure to act was the result of excusable neglect.

(1) All stipulations to extend any discovery scheduling order deadline shall be lodged with the discovery commissioner and shall include on the last page thereof the words "IT IS SO ORDERED" with a date and signature block for the commissioner or judge's signature.

(2) A motion to extend any discovery scheduling order deadline shall be set in accordance with Rule 2.34(c).

(b) Every motion or stipulation to extend or reopen discovery shall include:

(1) A statement specifying the discovery completed;

(2) A specific description of the discovery that remains to be completed;

(3) The reasons why the discovery remaining was not completed within the time limits set by the discovery order;

(4) A proposed schedule for completing all remaining discovery;

(5) The current trial date; and

(6) Immediately below the tile of such motion or stipulation a statement indicating whether it is the first, second, third, etc., requested extension, e.g.:

STIPULATION FOR EXTENSION OF TIME TO
COMPLETE DISCOVERY
(FIRST REQUEST)

(c) The court may set aside any extension obtained in contravention of this rule.