

RULE 16 HEARING AGENDA*

(Revised 3/00)

1. Rule 26(a)(1) Disclosures:

The parties and their attorneys have an obligation to make a reasonable inquiry into the facts of the case. The Rule does not demand an exhaustive investigation but one that is reasonable under the circumstances focusing on the facts that are alleged with particularity in the pleadings. See Dickson v. Certainteed Corp., 164 F.R.D. 685, 691-92 (D. Kan. 1996); Taydus v. Cisneros, 902 F. Supp. 288, 296-97 (D. Mass. 1995); In re Lotus Development Corp. Securities Litigation, 875 F. Supp. 48, 51 (D. Mass. 1995).

2. Rule 26(a)(3) Impeachment:

Impeachment material must be disclosed during discovery in response to an appropriate request. Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 586 (S.D. Tex. 1996); Martino v. Baker, 179 F.R.D. 588 (E.D.N.C., 1998); Ward v. CSX Transportation, 161 F.R.D. 38, 39 (E.D.N.C. 1995).

3. Rule 26(a)(2) Expert Testimony:

(a) The Expert Report A detailed complete written report setting forth the testimony the witness is expected to present during direct examination together with the reasons therefor must be disclosed on the date designated in the Rule 16 Order. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Surprise disclosure of experts and/or their opinions will not be allowed.

(b) Rule 702/Daubert Hearings Admissibility of expert testimony pursuant to Federal Rule of Evidence 702 is now governed by Kuhmo Tire Co. v. Carmichael, U.S. 119 S. Ct. 1167, 1171 (1999), in which the Supreme Court held that a district court's gate-keeping function applies both to scientific knowledge and technical and specialized knowledge. Consequently, Daubert and/or Rule 702 gate-keeping motions and hearings may be required to determine the admissibility of all expert testimony. In General Electric Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512 (1997), the Supreme Court held that deference is accorded the district court's decision on these issues.

- (c) Communications with counsel There is tension between the work product privilege codified in Federal Rule of Civil Procedure 26(b)(3) and expert witness disclosure required by Federal Rule of Civil Procedure 26(a)(2)(B). Compare Intermedics Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991) with Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 642 (E.D.N.Y. 1997). This Court requires disclosure of "all data or other information [including communications with counsel] considered by the witness in forming" all opinions. Rule 26(a)(2)(B) (emphasis added).

4. Deposition Protocol

- (a) Scheduling All counsel will confer at the beginning of discovery and establish a reasonable schedule for taking depositions of all parties and witnesses. Scheduling conflicts of parties, witnesses, and counsel will be taken into consideration.
- (b) Objections The examination and cross-examination of witnesses will proceed "as permitted at trial" and objections are to be stated "concisely and in a non-argumentative and non-suggestive manner." Fed.R.Civ.P. 30(c); 30(d)(1). Because objections to "competency, relevancy, or materiality" are not waived, only objections to form and foundation are permitted, that is, an objection is appropriate when the question is leading, compound, assumes facts not in evidence, calls for narration, speculation or conjecture, or is argumentative. Fed.R.Civ.P. 32(d)(3)(A). Counsel are to make an objection by stating only "objection - form" "objection - foundation." Counsel shall not make objections or statements which might suggest an answer to a witness.
- (c) Interruptions When a question is pending, neither the deponent nor his/her counsel may initiate an interruption of the deposition to confer about the question, the answer, or any document that is being examined, except to assert a claim of privilege, to conform to a court order or to present a motion pursuant to Rule 30(d)(3).
- (d) Exhibits Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the exhibiting of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.

- (e) Breaks Counsel are to establish a schedule for breaks before the deposition begins and abide by that schedule except when an emergency occurs.

5. Rule 26(b)(5) Privileged Material:

No privileged material may be withheld without notice or the party withholding the evidence will be subject to sanctions pursuant to Rule 37(b)(2). Sufficient information must be provided to evaluate the applicability of the privilege. The Court will ultimately decide the issue if there is a dispute.

6. Rule 26(e) Supplementation:

The Rule 16 Order must provide a final date for supplementation of all disclosures and answers to discovery requests including material changes in opinions of the expert testimony as set forth in depositions or reports and for disclosure of all witnesses to be called and exhibits to be used at trial. A party is not relieved from the obligation of disclosure merely because another party has not made a disclosure or has made an inadequate disclosure. The Rule applies to all corrective information which is learned by the client or the attorney. The Court will allow the parties to agree to a final supplementation date after the close of discovery date, which must occur before the time for filing dispositive motions.

7. Discovery Disputes:

- (a) The Rule 16 Order at Paragraph J and Local Rule 1.10(j) provide that no discovery motion will be considered unless the moving counsel has certified sincere efforts to resolve the matter.
- (b) The parties are to contact the Court if any dispute exists before filing any discovery pleadings to obtain a hearing for presentation and resolution of the dispute orally in court. Counsel will inform the Court's staff by telephone that a dispute exists. The Court's staff will set a date and time for the dispute to be resolved in court. Counsel will confirm by faxing a letter to the Court, that the parties have complied with Local Rule 1.10(j) and paragraph J of the Rule 16 order and set forth briefly, in no more than two sentences, what the dispute entails.

8. Motions for Summary Judgment:

- (a) After all required pleadings the Court may order the parties to jointly file a succinct stipulated

statement of undisputed facts five (5) working days before the hearing on the motion for summary judgment.

(b) If oral argument is held, the Court will fax questions that the parties should be prepared to answer at the hearing.

(c) If inadmissible facts are offered by either party in propounding or opposing the motion for summary judgment, a motion to strike must be filed or the Court will deem the inadmissibility of the evidence waived when resolving the motion. See Allen v. Scribner, 812 F.2d 426, 435 n.18 (9th Cir. 1987).

9. Settlement:

(a) Do the parties request a settlement conference?

(b) The Court will provide a settlement judge for the parties when a settlement conference is advisable.

10. Magistrate Referral:

Have the parties thoroughly considered this alternative?

11. Pretrial Order:

This Court's form of Pretrial Order may be altered or limited to suit each case. The parties are to contact the Court and propose a Final Pretrial Order "Lite".

12. Pretrial Conference:

This proceeding is ordinarily extensive and lasts approximately one-half day. The Court decides all motions in limine and resolves disputes regarding instructions, voir dire, and anticipated evidentiary issues.

13. Trial:

(a) Voir dire. The Court's standard questionnaire given to the jury may be supplemented by counsel. The Court generally allows counsel to conduct a limited amount of individual voir dire.

(b) Juror Participation. If all counsel agree, the Court will permit the jurors to ask questions

of the witnesses and, with appropriate instruction, to discuss the case before deliberations.

* If a Rule 16 hearing has been delayed, the parties are to pay particular attention to what is set forth in this document during the litigation.