Best & Worst Discovery Practices

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A. Utah Standards of Professionalism and Civility:

Preamble:

"A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms."

"Conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice."

Standard No. 1:

"Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner."

Standard No. 3:

"Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any adversary unless such matters are directly relevant under controlling substantive law."

Standard No. 4:

"Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a 'record' that has not occurred."

Standard No. 5:

"Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose."

Standard No. 6:

"Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom."

Standard No. 7:

"When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts."

Standard No. 12:

"Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court."

Standard No. 13:

"Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability."

Standard No. 14:

"Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extension of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extensions of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage."

Standard No. 15:

"Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments."

Standard No. 17:

"Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information."

Standard No. 18:

"During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge."

Standard No. 19:

"In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents."

B. A New Standard For The Sanction of Dismissal in the 10th Circuit: Markyl Lee v. Max International, LLC (10th Cir. May 3, 2011)

Redefines Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992), which previously required a district court to examine and apply each of these factors before imposing dismissal as a discovery sanction: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for non-compliance; and (5) the efficacy of lesser sanctions";

"The *Ehrenhaus* factors are simply a non-exclusive list of sometimes helpful 'criteria' or guide posts the district court may wish to 'consider' in the exercise of what must always remain a discretionary function."

"The dispositive question on appeal thus isn't whether the district court's order could or did touch every *Ehrenhaus* based. Instead, it is and always remains whether we can independently discern an abuse of discretion in the district court's sanctions order based on the record before us. The *Ehrenhaus* factors may sometimes help illuminate that question, just as they sometimes may assist a district court in exercising its discretion. But a district court's failure to mention or afford them extended discussion does not guarantee an automatic reversal."

C. **Philips Electronics North America Corp v. BC Technical** (U.S. Dist. Utah 7/28/10)

Spoliation of electronic data on 5 lap top computers in violation of court orders;

No prior warning under Ehrenhaus.

Answer and counterclaims stricken, and default entered, and matter referred to U.S. Attorneys' office.

Malpractice complaint filed by BC Technical, Inc. v. Jones, Waldo, et al.

D. **Daynight, LLC v. Mobilight, Inc.** (Utah Ct. App. January 27, 2011).

Affirming entry of default judgment for spoliation of evidence.

E. Proposed Amendments To Utah Rules of Civil Procedure: (published May 3, 2011)

1. The Concept of Proportionality:

The cost of discovery should be proportional to what is at stake in the litigation.

Under the new proposed rules, proportionality will become the controlling factor for all discovery.

Proportionality will exist if the following standards are met:

a. The likely benefits of the proposed discovery outweigh the burden or expense;
b. The discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;
c. The discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;
d. The discovery is not unreasonably cumulative or duplicative;
e. The information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and
f. The party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

In other words, must demonstrate (a) likely to lead to discovery of admissible evidence; and (b) proportional to the amount at issue.

2. Three Tier System:

Tier 1: Under $50,000

- 3 hours of fact witness depositions;
- No interrogatories;
- 5 Requests for admissions
- 120 days to complete discovery

Tier 2: $50,000 to $299,000 and actions for non-monetary relief:

- 15 hours of fact witness depositions
- 10 interrogatories;
- 10 requests for production;
- 10 requests for admission
- 180 days to complete discovery

Tier 3: $300,000 and above:

- 30 hours of fact depositions;
- 20 interrogatories;
- 20 requests for production
- 20 requests for admission;
- 210 days to complete standard discovery

3. Extraordinary Discovery:

   a. Stipulate to additional discovery with appropriate certification;
   b. Motion to demonstrate need and proportionality.

4. Cost Shifting:

   Under the proposed rules, a court may require the requesting party to pay some or all of the costs to achieve proportionality.

5. Early Disclosure:

   a. Plaintiff must disclose all documents, and a witness list with a summary of testimony, within 14 days after service of the first answer. '
   b. Defendants must make a similar disclosure within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later.
   c. The purpose is to put everything on the table early or risk exclusion.

6. Expert Discovery:

    a. "Mini" Initial Disclosure: Without waiting for a discovery request, a party shall provide: (i) expert's name, qualifications, list of publications, and list of cases in which the expert testified; (ii) a brief summary of expected opinions; (3) all data and other information relied upon; and (4) compensation to be paid.
    b. Opposing party must chose a written report or a deposition.
        a. Written report: offering party pays. Must contain all opinions. Testimony limited to opinions fairly disclosed in report.
        b. Depositions: Deposing party pays for the deposition. 4 hour limit.
    c. If election is not timely made, there is no expert discovery.