Jeff Westerman
WESTERMAN LAW CORP

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2020

Using the Rule 26 conference to start your discovery

HOW TO START YOUR FEDERAL CASE DISCOVERY AS QUICKLY AS POSSIBLE BY COUNTERING THE DEFENSE ATTEMPT TO DELAY IT

In the normal California state court action, plaintiffs are permitted to begin written discovery, "without leave of the court at any time … 10 days after the service of summons." (See Code Civ. Proc., § 2031.020(b).) Once the time passes, plaintiff is entitled to serve discovery without any procedural hurdles.

However, in a federal court action, a party may not serve discovery until after the meeting of counsel under Federal Rule of Civil Procedure 26. This meeting is typically initiated by plaintiff's counsel. It is designed to discuss and exchange preliminary case information such as witnesses, the types of documents involved, case organization and settlement prospects. But defense counsel often try to delay the meeting to also delay the start of discovery.

The most common defense delay arguments are that: (1) the Rule 26 meeting and discovery should await until any motions to dismiss are resolved so that the pleadings are settled; (2) the Rule 26 conference is not needed until the Court sets the scheduling conference and the joint scheduling conference statement is due. The problem with both of these positions is that they can delay the start of discovery for many months. Some judges do not issue the scheduling conference order until after the pleadings are resolved. This defense tactic also prevents discovery that may aid in amending the complaint and allow you to get a start on case preparation in the event the judge ultimately sets a schedule with a short time until the discovery cut-off. In fact, many judges assume you are already proceeding and keep their discovery cut-offs tight.

Both defense arguments are wrong.

The purpose of this article is to give you the ready-made tools, born from experience, to overcome this hurdle and set your Rule 26 conference so you can start your discovery, as early as possible, with minimal effort and delay.

How to initiate a Rule 26 conference

After the complaint is filed and served, defense counsel often seek an initial extension to respond and ask for

See Westerman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2020

a meet and confer under Central District Local Rule 7-3 as a predicate to a motion to dismiss. Once you know the identity of defense counsel, you should ask them for a date and time for the Rule 26 meeting and give them some date options. If they are asking for a pre motion-to-dismiss conference, insist on conducting the Rule 26 meeting at the same time. This way they cannot feign unavailability. You should request the Rule 26 conference, and at the same time, in the alternative, request a Local Rule 7-3 meet and confer as a precursor to filing a motion to compel the Rule 26 conference. This gets their attention and will often accomplish your goal.

Good defense lawyers should not want to go to the first motion hearing in the case to explain why they refused to meet and confer under Rule 26. In fact, if you look at the standing orders of your judge on their court webpage, you will find that some of them provide language that directs, some might say warns, the attorneys to move the case forward.

Here is an actual email exchange that was effective to set the Rule 26 meeting in a recent case:

Plaintiff's counsel wrote:

"Hi [defense counsel],

We would like to schedule a Rule 26(f) conference. We are available on Wednesday (1/29) any time before 5 p.m. We could also be available February 6th or 7th. We're flexible on the date as long as you agree to a date certain.

Seeing as you will need to have the L.R. 7-3 conference for your anticipated motion to dismiss, we propose to have the L.R. 7-3 conference and the Rule 26 conference on the same call. I'm not available next Thursday or Friday, so Wednesday would be ideal. In the event Defendant does not wish to hold the Rule 26 conference, this is our attempt to schedule a meet and confer conference pursuant to L.R. 7-3 with regards to a motion to compel a Rule 26 conference. We propose that both L.R. 7-3 conferences (your MTD, and our Rule 26 motion) occur on the same call next week.

Let me know your availability. Thanks."

Defense counsel wrote back in less than an hour:

"[Dear plaintiffs' counsel]

Thanks for reaching out. We would be happy to combine the Rule 26(f) conference with the meet and confer on our motion to dismiss. Let's plan on a call at 1:00 pm on January 29th. Would you mind sending us a dial-in when convenient?

Thanks,"

That Rule 26 conference went off without a hitch. The drafting of the opening discovery was started before the meeting and served just a few days after.

Unfortunately, it is not always so easy. The rest of this article is devoted to giving you ready-made motion and reply briefs to compel the setting of a Rule 26 conference if opposing counsel does not readily agree. Armed with this material, you are ready to advance your case in the time it takes for a motion, rather than after the many months of delay attempted by the defense.

Sample opening brief to set Rule 26 conference

I. INTRODUCTION

In this motion, ("Plaintiffs"), ask the Court to issue an order to compel Defendants to hold a conference pursuant to Federal Rule of Civil Procedure ("Rule(s)" or "Federal Rule(s)") 26(f), and to comply promptly with all aspects of Rule 26 including, but not limited to, scheduling and participating in the discovery conference required by the Rules.

Plaintiffs filed a class action complaint, alleging on behalf of themselves and all others similarly situated, that they purchased defendants' product based on misrepresentations about the product's performance. Plaintiffs allege [the facts and claims asserted in the Complaint.] Plaintiffs seek damages, injunctive and equitable relief, attorneys' fees, costs and other appropriate relief.

Plaintiffs requested a Rule 26 conference and defendants would not agree to set the conference. Defendants' refusal to set the conference is contrary to their Rule 26 obligations. It has the effect of stalling and delaying prosecution of this case and, in effect, imposing a unilateral stay on all discovery, without making the showing that would be required by a motion for a stay. Defendants would not provide a date for a Rule 26(f) conference despite requests for a proposed date. Plaintiffs seek to enforce the clear mandate of Rule 26(f) requiring that the conference take place "as soon as practicable."

II. RELEVANT PROCEDURAL HISTORY

[Provide your case status.]

ARGUMENT

III. DEFENDANTS ARE IN VIOLATION OF THE EXPRESS TERMS OF RULE 26

On [Date], Plaintiffs' counsel informed Defense counsel that Plaintiffs were seeking dates to schedule the required Rule 26(f) discovery conference. Declaration of [Plaintiffs' counsel] in Support of Plaintiffs' Motion to Compel Compliance with Fed. Rules Civ. Proc., rule 26 ("Counsel's Decl.").

Plaintiffs informed Defendants' counsel that if they were unwilling to provide a date for the Rule 26 conference, Plaintiffs would file a motion seeking to compel compliance with Rule 26. (*Ibid.*) On [date], Plaintiffs' counsel wrote to Defendants' counsel requesting confirmation of a date for a Rule 26 conference within two to three weeks. Counsel's Decl. ¶ _. Counsel also informed Defendants that if they were unwilling to provide a date for the discovery conference, Plaintiffs would file a motion seeking to compel Defendants to comply with the requirements of Rule 26. (*Ibid.*)

On [Date], counsel for the parties participated in a telephonic meet and confer conference to discuss Defendants' planned motion to dismiss and setting a Rule 26 conference. Counsel's Decl. ¶ __.

See Westerman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2020

Counsel explained that the text of Rule 26(f) required setting the conference "as soon as practicable" and that Defendants' intention to file a motion to dismiss did not change the requirements of the Rule. (*Ibid.*) Counsel noted that the Advisory Committee Notes to Rule 26(f) indicate that a conference must be scheduled even if a defendant has not yet answered a complaint. (*Ibid.*) Defendants declined to propose or provide a date for a Rule 26(f) discovery conference. (*Ibid.*)

The Rule 26 provision regarding timing of the discovery conference requires that "the parties must confer as soon as practicable – and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." (Fed. Rules Civ. Proc., rule 26(f)(1).) As a scheduling conference has not yet been scheduled, under the applicable rules the discovery conference in this case must be held "as soon as practicable" but in no event later than [Date]. (Fed. Rules Civ. Proc., rule 26(f)(1), 16(b)(2).) Rule 16(b)(2) requires issuance of a scheduling order as "soon as practicable" and unless there is good cause for delay, "the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." As service was made on [Date], a scheduling order is due within 90 days or [Date]. (*Ibid.*) Rule 26(f)(1) requires that the discovery conference be held "at least 21 days earlier" which would be no later than [Date]. (Fed. Rules Civ. Proc., rule 26(f)(1).) Defendants have refused to provide a date for the discovery conference in the time frame required by the applicable Federal Rules or any proposed date whatsoever.

Rule 26 and the accompanying Advisory Committee Notes make clear that 26(f) conferences should happen sooner rather than later, regardless of the preliminary nature of the proceedings. (Fed. Rules Civ. Proc., rule 26, 1993 Advisory Comm. Notes ["It will often be desirable . . . for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint . . . "].) Rule 26(f)(1) expressly states that "the parties must confer as soon as practicable." Defendants are in violation of the Rules and their clear directives.

> The obligation to participate in the planning process is imposed on all parties that have appeared in the case, *including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case.*

(Fed. Rules Civ. Proc., rule 26, 1993 Advisory Comm. Notes (emphasis added), see also, *Melaleuca, Inc. v. Hansen*, 1:10-CV-00553-EJL, 2014 WL 1343452, at *8 (D. Idaho Apr. 3, 2014) [compelling defendant to participate in Rule 26(f) conference while granting plaintiff leave to amend the complaint], *ATEN Int'l Co. Ltd. v. Emine Tech. Co., Ltd.*, 261 F.R.D. 112, 122 (E.D.Tex. 2009) [party not excused from making initial disclosures simply because of pending motions to dismiss, remand, or change venue].)

Defendants' refusal to participate in a Rule 26(f) discovery conference, or even provide a proposed date for such a conference, is in clear violation of the express requirements of the Federal Rules. Defendants' actions, or perhaps more accurately refusal to act, have improperly imposed a stay on this litigation and precluded Plaintiffs from moving forward with discovery and the prosecution of this matter, including possible injunctive relief. Defendants' refusal to comply with the Rules, thereby requiring Plaintiffs to file a noticed motion and seek an order from this Court, has foreclosed any possibility that the parties will be able to hold the discovery conference on or before [Date], as required by applicable Federal Rules. Consequently, Defendants' actions have already resulted in what appears to now be an inevitable violation of the Federal Rules and significant delay to the Plaintiffs and their ability to prosecute this action.

Thus, Plaintiffs request that the Court order a Rule 26(f) conference to occur within 4 business days and that Defendants fulfill all their obligations pursuant to Rule 26.

IV. CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request that the Court adopt the Proposed Order requiring Defendants to conduct the Rule 26(f) conference within 4 business days of the Court's order.

Sample reply brief

The following is a sample reply brief that addresses likely defense positions, if they oppose the motion;

INTRODUCTION

Defendants in their Opposition have not shown any valid reason for delaying the Rule 26 conference beyond the requirements of the Federal Rules of Civil Procedure or the Local Rules of this Court. The Federal Rule of Civil Procedure ("Rule(s)" or "Federal Rule(s)") Rule 26 process, including the exchange of witnesses, documents or categories of documents and setting a proposed pre-trial schedule in this case, is not complex and will mirror the many cases experienced counsel on both sides of this case have handled. The basic factual storyline is the same whether one, or all, of the alleged causes of action survive the motion to dismiss. Defendants do not assert otherwise.

Instead, Defendants erroneously refuse to schedule and participate in a discovery conference pursuant to Rule 26(f) by claiming it is not "practicable" to hold the required discovery conference without providing a compelling explanation. While Rule 26(f) requires that the discovery conference between parties should have already taken place, Defendants continue to misconstrue or completely ignore portions of the applicable Rules and applicable case law to create an argument that the discovery conference should not take place until long after the time proscribed by the applicable Rules. In doing so they ignore the clear intent of Rule 26(f), which is to actively manage actions based on the date of filing and service, not on when the pleadings are at issue. This of course makes sense, since if Defendants'

See Westerman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2020

claims were accepted, every Defendant would likely file a motion, no matter how unmeritorious, just to delay the prosecution of the litigation. They also ignore the express language of Rule 1, which states these Rules are to be construed and employed "by the court and by the parties to secure the just, speedy and inexpensive determination of every action and proceeding." Defendants' refusal to engage in such a conference results in precisely the opposite result.

Defendants dismiss the Advisory Committee's notes to Rule 26 as "not binding." Defendants do so without any substantive basis to disregard the Rule's interpretation contained in the Advisory Committee's notes. That is not the point of referencing these Notes, which are intended to provide official guidance in interpreting and applying these Rules. In fact, a discovery conference is now long overdue, and the Defendants are in violation of the Federal Rules.

ARGUMENT

The timing of the required discovery conference between the parties is expressly set forth in the Federal Rules:

> Conference Timing. Except in a proceeding exempted from initial disclosure under 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable – and in any event *at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)*.
>
> (Fed. Rules Civ. Proc., rule 26(f)(1) (emphasis added).)

In turn, a scheduling order is directed under Rule 16(b)(2) to be issued absent good cause for delay within 60 days after any defendant has appeared or 90 days after the defendant has been served, *whichever is earlier*. This means that under the Rules, the parties should plan to participate in this discovery conference within six weeks of initially appearing in the action – in this case, by [Date]. The clear intent of the timing requirements of Rules 16 and 26 is for the parties to participate in an early discovery conference "as soon as practicable" in order to facilitate discovery and the eventual resolution of the dispute, and clearly before the pleadings are at issue even if any Rule 12 motion practice is anticipated. (*Ibid*.)

Despite this clear directive, Defendants are unilaterally delaying participating in the required discovery conference well beyond what is allowed by the Rule. As there is no Order finding good cause for delay, and Defendants in their Opposition admit they are not seeking any order for a stay or continuance of such dates, Defendants are acting in violation of Rule 26 in refusing to participate in this conference past the deadline for doing so. Defendants argue that since the Court has not yet set a scheduling conference there is no deadline for the conference, and they are under no obligation to participate in a discovery conference. Initially, the Defendants ignore the Rule's requirement that "the parties must confer as soon as practicable" and not unnecessarily delay the conference. (Rule 26(f)(1).) Further, the Defendants also ignore the alternative portion of the Rule that provides that the discovery conference must take place "at least 21 days before . . . a scheduling order is due under Rule 16(b)." (*Ibid*.) Thus, this timing is not derived from when the Rule 16 conference actually takes place or the scheduling order is issued, as Defendants claim. Rather, the Rule requires the discovery conference take place 21 days before the scheduling order is due, even if no order is issued and no scheduling conference is set. (*Ibid*.) As discussed in Plaintiffs' Memorandum in support of this motion, pursuant to the applicable Rules "a scheduling order is due" in this case by [Date], thereby requiring that the discovery conference be held no later than [Date], 21 days before that date.

While Defendants have been refusing to schedule the required discovery conference since [Date], in an attempt to justify their failure to comply with the Rules, they now rely on a Notice to Counsel from the Court as purported justification for refusing to participate in that conference a month and a half before that Notice even issued. It is either clairvoyant or disingenuous for Defendants to argue that the Notice, issued a month and a half after they first began refusing to provide a date for the discovery conference, justified their conduct for refusing to ignore the timing set forth in Rule 16. It is an after-the-fact construct to justify their violation of the Rules. Further, it does not appear, as Defendants now claim, that the Court intended to modify the requirements of Rule 26 when it noted that parties are required to "disclose information and confer on a discovery plan not later than 21 days prior to the date" of the scheduling conference. Rather, the Notice expressly advised counsel that the "Court expects strict compliance with the Local Rules and the Federal Rules of Civil Procedure." Strict compliance with Rule 26(f)(1) requires the discovery conference to have taken place no later than [Date], and there is nothing in the Court's Notice as having found good cause for delay or having ordered otherwise as required by Rule 16(b)(2).

Defendants make a half-hearted argument that it is not "practicable" to hold the discovery conference now because they do not understand the theory of Plaintiffs' claims and have moved to dismiss the complaint. First, the very first pages of the Complaint explain how Defendants made a representation to consumers which turned out to be false, and how they omitted material facts to the contrary, resulting in damages to Plaintiffs and other consumers. That is the theory that is clearly articulated in the Complaint and that is borne out by specific factual allegations.

Second, as summarized above, the Rules clearly contemplate that the Rule 26 conference will be held before the pleadings are at issue. Thus, the fact that Defendants filed a motion is not an excuse to violate the timing requirements of Rule 16.

Third, as discussed in greater detail in connection with their Opposition

See Westerman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2020

to the pending Motion to Dismiss, Plaintiffs' theory of their case is very simple, and the Complaint complies with all applicable pleading requirements in terms of being "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2). Defendants' self-serving characterization of the gravamen of the allegations in the Complaint does not provide a basis for them to unilaterally refuse to comply with the requirements of the Federal Rules. They effectively unilaterally imposed a stay of discovery without meeting their burden for obtaining a stay, and still do not make any effort to meet that burden in their Opposition to this motion.

As Defendants cannot justify their refusal to participate in this conference based on "strict compliance" with the timing requirements of Rule 16 as directed by this Court, Defendants are left to argue the Court should disregard the 1993 Advisory Committee Notes to Rule 26(f)(1), as well as all the decisions cited in Plaintiffs' motion. While Defendants assert such Notes are not "binding," courts routinely refer to those Notes as a basis for ruling on procedural issues. (See *Summers v. Delta Air Lines, Inc.*, 508 F.3d 923, 926 (9th Cir. 2007) [indicating that the Advisory Committee's note "guides our interpretation of" Federal Rule of Civil Procedure]; *United States v. Saeturn*, 504 F.3d 1175, 1180 (9th Cir. 2007) ["We look to Advisory Committee notes when interpreting a federal rule for 'guidance and insight.'"].) While Defendants claim they are not requesting a stay or continuance, in fact they do not need to – their unilateral and continuing refusal to comply with the timing requirements of Rule 16 has stayed discovery without requiring them to demonstrate good cause for doing so or first obtaining an order finding good cause for delay. (See *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D.Cal. 2002) ["The party who resists discovery has the burden to show that discovery should not be allowed . . . "].) The Advisory Committee Notes that Defendants can only describe as not binding, are directly on point and provide that "all parties" that have appeared in the case are required to participate in the discovery planning process "*including defendants who, because of a pending Rule 12 motion, may not have filed an answer in the case*." (Fed. Rules Civ. Proc., rule 26, 1993 Advisory Comm. Notes (emphasis added).) Notably, Defendants fail to provide the Court any explanation of why their particular motion is any different than what these Notes contemplate, or raises any unique issues. In fact, Defendants' primary argument in their Motion to Dismiss is that the Complaint is not specific enough to give them notice of the claims at issue. If that is the case, discovery as to the common nature and scope of the representations they disseminated, and the information in their exclusive possession that showed they could not comply with the agreements and promises they made and were still making to consumers about being able to upgrade their computers, should start sooner, not later.

Both opinions cited by Defendants fail to support their refusal to participate in the Rule 26 discovery conference, since in both instances, the Defendants had filed a Motion for Protective Order to Stay Discovery Pending the Motion to Dismiss or a Joint Statement of Discovery Dispute. (See *Bryant v. Armstrong*, 285 F.R.D. 596, 601 (S.D.Cal. 2012); *Lauris v. Novartis AG*, No. 1:16-cv-00393, 2016 U.S. Dist. LEXIS 80707 at *1 (E.D.Cal. June 21, 2016).) Here, Defendants have filed nothing, have not made any showing of good cause for a stay of discovery, and in fact have expressly disavowed requesting a continuance or a stay of discovery in their Opposition, a critical distinction between this matter and the opinions they cite. Yet, they have effectively imposed a unilateral stay of discovery. Defendants should not be allowed to continue to ignore and violate the clear letter and intent of the Rules and thereby maintain their unilaterally imposed stay of discovery.

Plaintiffs respectfully request that the Court adopt the Plaintiffs' Proposed Order requiring Defendants to conduct the Rule 26(f) discovery conference within 4 business days of the Court's order, being that the deadline to do so has already passed.

Conclusion

The rules are followed in Federal Court and the ability to start discovery early is enshrined in the rules. Whether you only need an email to set a Rule 26 conference, or you must file a motion, you should assert your right to proceed.

Jeff Westerman is an Emeritus Board Member of CAALA and the President Elect of the Los Angeles Chapter of the Federal Bar Association. He is past Chair of the US District Court, Central District of California's Attorney Discipline Committee and served on the Court's Magistrate Judge Merit Selection Panel. He was a Co-Chair of the Central District Attorney Representatives to the Ninth Circuit Judicial Conference. Jeff's practice is plaintiff class actions for consumers and investors in state and federal court.