

SURVEY OF FEDERAL DISTRICT & MAGISTRATE JUDGES

In anticipation of the Seminar, an informal survey was submitted to all of the District and Magistrate Judges in the District of New Mexico.

The following judges responded:

District Judges:

Judge Martha Vazquez (MV)
Judge Robert C. Brack (RB)
Judge James O. Browning (JB)

Magistrate Judges:

Chief Judge Karen B. Molzen (KBM)
Judge William P. Lynch (WPL)
Judge Stephan M. Vidmar (SMV)
Judge Steven C. Yarbrough (SCY)

Non-Dispositive/Discovery Motions

1. Are you willing to have lawyers call your chambers to seek a resolution of their dispute without full briefing on the issues?

Yes: JB, KBM, WPL (few have taken him up on the offer), SMV, SCY.

2. Which do you prefer:

A. To have lawyers call your chambers?

Yes: JB, KBM, SCY, SMV, WPL (if straightforward, discrete issues and parties have engaged in good faith discussions to resolve or narrow the issues)

B. Or to submit full briefing on pre-trial non-dispositive motions?

None.

3. In discovery disputes, what are the most effective kinds of arguments that lawyers can make to prevail on their position?

JB, KBM: Narrow issues through discussion with opposing counsel as much as possible.

WPL: Focus on the issues at hand and not bring up extraneous matters.

SMV: They need to explain why the information sought is or is not relevant to a claim or defense in their particular case, not merely hypothetically. Legal arguments are less effective because there is always case law going both ways. Simply citing cases that say the information is typically discoverable (or worse, that discovery is "broad") is rarely helpful or effective. I need to know why the requested discovery is relevant *in this particular case*.

SCY: Arguments supported by controlling precedent or the strong weight of authority are the most effective. If a dearth of legal authority exists with regard to a particular issue, I will most likely be persuaded by practical concerns. In most instances, these practical concerns will turn on a balance between the need for the discovery and the burden of disclosing it. If I get the sense that a party is engaged in gamesmanship, that party is likely to lose the argument.

4. What suggestions do you have for ways that lawyers can reduce the number of issues on which they need to secure a ruling from the court?

JB: Talk, not write letters or e-mail.

WPL, KBM: I'm not sure why lawyers can't talk to each other about the issues in a case. It seems that attorneys sometimes hide behind emails that grow increasingly terse and testy over time. There is often a middle ground that could be reached without court intervention.

SMV: That's easy: Talk with each other. Too often, attorneys deal with each other solely by letter or email. That seldom works. If they'd just pick up the phone and talk, I think they'd resolve most issues.

SCY: Have a direct conversation. Also, step back and ask if a particular battle is really worth fighting. A great deal of time and money are often expended on issues unlikely to affect the ultimate outcome of a case.

5. What are the most common mistakes lawyers make when filing or responding to discovery and other non-dispositive motions?

JB: Talking at length about failure to confer.

KBM: Failing to pick up the phone or meet in person to resolve disputes.

WPL: Failing to respond timely or at all, failing to address the issues raised in the motion, failing to present all the facts on an issue or misciting the facts, and failing to cite to the governing rules or case law. Also attacking opposing counsel or whining.

SMV: Not following the letter or the spirit of LR 7.1(a) regarding determining whether a motion is opposed. The litigants seem to look at the rule as sort of a "ticket-punching" step; you send an email requesting concurrence and then file your motion the next day. The rule is there to encourage a dialogue between the attorneys about each discovery request at issue. If they'd have that dialogue (in good faith), they'd resolve 90% of their disputes without a motion. Also, I dislike it when attorneys lump 15 or 20 requests together and argue about them as a group, e.g., "Interrogatories 3 through 15 seek information about the Plaintiff's background. This information is discoverable because...." I am going to rule on each interrogatory individually, so they should address each one individually.

SCY: An organized, rationale response that addresses the points raised in the motion, and supports those points with legal authority, is much more effective than a response that is emotional, sarcastic, or personal.

6. What did you learn about discovery practice as a judge deciding such disputes that you did not know as a practitioner and wish you would have known?

JB: How badly discovery disputes make the lawyers look - nasty communications, etc. - they often times look unreasonable.

KBM: Given the court's great discretion when ruling on discovery motions, work to see if you can come to a compromise, especially where the opposing party has interposed an "unduly burdensome" objection. By identifying the *specific* information one party sought and the purpose for which it is needed, and giving the opposing party the opportunity to *specifically* identify what burdens the request imposes, the parties might come to an agreement as to a proportionate response under the circumstances.

WPL: Your credibility is the key to everything you do. It is difficult (perhaps impossible) to recover your credibility if the judge concludes that you do not accurately present the facts or law in a discovery dispute.

SMV: The importance of teeing up discovery disputes early in the discovery period. As you know, I'm really behind right now. It's taking me 90 - 120 days to get to a discovery motion after it's ripe, even though I try my best to give them priority over other cases. So if the motion isn't ripe until 60 days before the end of discovery, I'm probably not going to get to it before the end of the discovery period ends. If I were the movant, I'd want to get any disputes teed up and briefed in the first 60 days of the discovery period. Otherwise, if I end up losing, I'll have no time left to come up with some other way of getting the information I want. A corollary to this point is that it's easier, and usually quicker, to get the information from a third party than it is to fight with opposing counsel over it. So if the defendant needs, say, plaintiff's employment records to evaluate a lost wage claim, defense counsel should consider getting the records by way of records custodian depositions, rather than waiting for the plaintiff to produce them. The point I try to emphasize with the litigants is that it's their job to get whatever they need to support their claim or defense; it's not opposing counsel's job. So if they (or more often, their experts) need something, they need to get it as quickly and efficiently as possible, which in many case means getting the information from the source, rather than from the opposing party.

Dispositive Motions

1. Do you normally decide dispositive motions without oral argument?

Yes: MV, RB, WPL

Sometimes: KBM, SCY (parties who file substandard briefs thinking that they will save their best for oral argument often place themselves in a position where they needlessly face a tough uphill battle)

No: JB, SMV

2. If a party requests oral argument on a dispositive motion:

A. What is your normal practice

Grant it: JB, SMV

Depends: RB

Hasn't happened: WPL

B. Do you encourage or discourage such requests?

Neither: RB, JB, SCY

Encourage: KBM, WPL, (if oral argument is warranted), SMV (always holds hearing)

Discourage – MV

3. If a dispositive motion has been fully briefed and submitted to your chambers, is there any way for the parties to request an earlier resolution than might otherwise be the normal practice? That is, is there any acceptable way for the parties to signal to you that early resolution of a pending motion might materially advance resolution of the case?

MV, JB, KBM: Yes, a letter to the court or call to courtroom deputy (JB) or law clerk (MV, KBM).

RB: Does not have a mechanism to request an early disposition - strives for timely decisions.

WPL: Since we are generally pretty current with our motions, it would not be helpful to call to request an earlier resolution. Rather, I'd suggest that the party file the motion sooner rather than waiting for the dispositive motion deadline.

SMV: No. Once a Notice of Briefing Completed is filed, the motion is put into the queue. There is no way for the parties to influence when I'll get to it.

SCY: Fielding calls from all attorneys in the queue takes up resources that could otherwise be used deciding motions. Nonetheless, if resolution of a particular motion is important to settlement, the parties should make this known to the Magistrate Judge assigned to handle the settlement conference.

4. What is your response to lawyers who believe it is important to file a motion not to prevail, but to “educate the court” on the legal or factual issues involved in the case?

Unanimous response – DON'T.

RB, JB, KBM, SCY, SMV, RB, WPL: Motion practice should not be used for this purpose; not a good idea; can be educated about the facts without working through a non-meritorious motion; educate the court in the JSR, a trial brief or motions in limine; you will only delay us in getting to motions where a party believes he/she can prevail; @\$@# (expletive deleted).

5. If “electronic briefs” (those in pdf format that include hyperlinks to highlighted copies of the exhibits and authorities) have been submitted to you, have you found the investment in creating the briefs to be worthwhile?

MV, RB, KBM, SCY, WPL: Never got one; would like hyperlinks if cost-effective.

JB: Yes. It is very helpful to the process generally, but provides substantial assistance to the law clerks in drafting opinions.

SMV: No

6. Do you have recommendations for the federal bar on how to make dispositive motion practice more effective or efficient?

MV: Research the law and ensure that your arguments accurately reflect the law; if you determine that the opposing party's motion is meritorious, please advise the Court if you intend to abandon your claim or concede in the relief requested by the other party, rather than simply failing to respond to the motion.

RB: Concentrate your efforts on the issues presented by the case and cite Tenth Circuit authorities. If attorneys cite cases from outside the Tenth Circuit, they should explain how the case fits with Tenth Circuit law.

JB: Cite to my opinions instead of to Kansas judges. Most all of my opinions are available on Westlaw and/or Lexis. Research me first. That is where I am starting.

KBM: A single motion that addressing all claims (even if page extension is needed) is preferable to several motions addressing each claim separately with each motion regurgitating the same relevant facts and standards.

WPL: Accurately cite the facts. Cite the governing statutes/rules/case law. Organize your brief so we can follow the arguments easily. Select your best arguments and be brief - we are a busy court and appreciate good briefing.

SMV: Yes. File them earlier. Don't wait until the deadline. Figure out what you need to support the motion, do whatever discovery is necessary, and then file the motion. A dispositive motion decided early on can simplify the rest of the case, e.g., if punitive damages are taken out by summary judgment, there will be no fight later on over whether the plaintiff can discover the defendant's finances.

SCY: Cite to published cases in the Tenth Circuit before looking to other Circuits and cite to published cases from the District of New Mexico before looking to other districts. Attorneys should recognize and discuss contrary authority.