

CIVIL DISCOVERY PRIMER

By Derrick H. Wilson

1. Protective Orders.

Under Trial Rule 26, upon motion and for good cause shown, the Court may grant a request for a Protective Order. The Court may order that discovery not be had, had only on specified terms and conditions, by a different method of discovery, to limit those present during depositions, or to limit the areas of inquiry for the deposition. In Penn Central Corp. v. Buchanan, 712 N.E.2d 508 (Ind.App. 1999), the Court noted that when a Protective Order is either entered or denied a presumption arises that the trial court will also order reimbursement of the prevailing party's reasonable expenses. In Penn Central, one party noticed the deposition of the other party's counsel. Prior to filing his Motion to Quash, the attorney sent letters to the requesting party on two (2) separate occasions to withdraw the Notice of Deposition. After the hearing, the Trial Court held that the requesting party should pay the costs and expense of attorney fees incurred by the attorney to avoid such discovery. The total expenses assessed against the requesting party was \$11,304. The Court noted that a request for discovery must be substantially justified to avoid the sanctions provided by Trial Rule 37(a)(4). On appeal, the trial court reversed saying that reasonable people could differ as to whether the deposition of opposing counsel was relevant on the facts of the case.

In Howard Publications v. Lake Michigan Charters, 649 N.E.2d 129 (Ind.App. 1995), the Court held that a Protective Order may limit even a third-party's use of information acquired from Court records without violating the First Amendment and that such an Order becomes effective when issued even though the third-party secured access to the discovery materials before the Order was entered.

In most situations, Protective Orders are sought to protect confidential information. Once a matter comes within the confines of a Protective Order, courts are reluctant to rewrite the terms of the Order unless the information does not fall within the confines of the Protective Order. In Statewide Aluminum v. Postle Distributors, 626 N.E.2d 511 (Ind.App. 1993), the Defendant sought a Protective Order from the Court to prevent the Plaintiff from obtaining information that could be used against it in the marketplace. In most of these cases the Orders are reciprocal. In Statewide Aluminum, the Court noted that confidentiality orders can trump the First Amendment rights of free speech. Id at 517. After obtaining certain information from a deposition, the Plaintiff in Statewide tried to revise the scope of the Protective Order to allow the disclosure of such information outside the scope of litigation. The Court noted that if a party seeks a partial release of information obtained under a Trial Rule 26(c) Protective Order, that party bears the burden of showing that the trial court's granting of the Protective Order was an abuse of discretion. Id at 518. The Court found that the Plaintiff could not meet this burden of proof.

It is important to remember that a Protective Order may be sought by a non-party to an action from whom discovery is sought. In Dahlin v. Amoco Oil Corporation, 567 N.E.2d 806 (Ind.App. 1991), the Defendant sought information from a bank to investigate their allegations of judicial bias.

The Defendant sent out Interrogatories as well as a Request for Production of Documents to the non-party. Trial Rule 34(c) does not allow Interrogatories. The Court held that:

“Trial Rule 26(c), protects an individual from fishing expeditions into irrelevant or privileged materials . . . thus it is particularly appropriate here to halt a wild goose chase as are the sanctions under 37(a)(4) to impose its cost upon the errant hunter.”

and affirmed the trial court’s imposition of cost.

2. Privilege Issues in Discovery.

Generally speaking, a blanket claim of privilege will not suffice. In State v. Hogan, 588 N.E.2d 560 (Ind.App. 1992), the Court noted that a party seeking to avoid discovery has the burden of establishing the essential elements of the privilege being invoked. The Court stated that a claim of privilege must be made on a question-by-question or document-by-document basis. In Hogan, the Court remanded the case for an evidentiary hearing on the discovery of particular documents noting that documents received after receipt of a Notice of Tort claim are discoverable only upon a showing of substantial need and the inability of the requesting party to abstain the substantial equivalent materials without undue hardship pursuant to Trial Rule 26(b)(3).

It is important to keep in mind that the mere fact that an attorney receives a document or is aware of the document, does not make the document privileged. In Owens v. Best Beers of Bloomington, 648 N.E.2d 699 (Ind.App. 1995), the Defendant asserted attorney-client privilege on a number of issues including the substance of an agreement pertaining to compensation. In a lengthy analysis of the attorney-client privilege, Plaintiff noted a number of exceptions to attorney-client privilege; for example, communications in which the attorney was participating as a third party. Likewise, documents created by an attorney which are intended to be communicated to a third party, are not privileged. In Corll v. Edward D. Jones & Co., 646 N.E.2d 721 (Ind.App. 1995), the Court discussed other examples of things which did not fall within the attorney-client privilege, including information regarding the client’s attorney fees and the client’s identity. In Corll, the Court stated that, once a party invoking attorney-client privilege has shown that the consultation was for the purpose of obtaining professional legal advice, then the burden shifts to the party opposing the assertion of the attorney-client privilege to show that the communications were not protected by the privilege because the confidentiality was waived or otherwise nullified.

3. Miscellaneous Deposition Provisions.

A. Out-of-State Depositions.

Trial Rule 28, although rarely used, has some nuggets which may be of assistance. Trial Rule 28 sets up the procedure for doing depositions in foreign countries or out-of-state. Typically, if you wish to depose a party out-of-state who is unwilling to voluntarily appear at a deposition, you would request an Order from the Indiana court requesting the foreign court to issue a Subpoena. For example, in Kentucky under Civil Rule 28.03, if you wish to take a deposition in Kentucky while

an Indiana case is pending, you tender an Indiana Commission authorizing the taking of the deposition and the Kentucky Judge will then issue Subpoenas. If the party to be deposed fails to show up in response to the Subpoena, it will be treated as a contempt in the court where the deposition is to be taken.

B. Stipulations.

During a deposition, the parties may agree to various stipulations. Trial Rule 29 provides that the parties can, by written stipulation, modify discovery procedures. Although Trial Rule 29 refers to a written stipulation, oral stipulations during a deposition will also be sufficient. For example, you may well want to stipulate that a court reporter from Kentucky can take an Indiana deposition even though that is in violation of the rules. Likewise, the parties may stipulate that the deposition is to be used for discovery purposes only and not to be used for evidentiary purposes, even though the Rules expressly provide that certain depositions can be used for this purpose. Likewise, the witness ordinary has the right to review and sign his deposition. The parties can stipulate that the signature is not required. Prior case law held that a deposition was inadmissible if the record did not show that the party waived signature. Trial Rule 30(e)(4) resolves this problem; if the deposition is not returned within thirty (30) days after it has been submitted to the witness, the court reporter shall execute a certificate to that effect and the deposition can be used as though the original had been signed.

4. Using Depositions at Trial and for Pre-Trial Proceedings.

Under Indiana law, admission or exclusion of a deposition is within the sound discretion of the trial court. The person offering the deposition bears the burden of establishing its admissibility. LKI Holdings, Inc. v. Tyner, 658 N.E.2d 111 (Ind.App. 1999). In LKI Holdings, one party deposed an opposing party in unrelated litigation and then attempted to use the deposition in another related case. Opposing counsel in the second case had no notice of the deposition. Notwithstanding the argument that the deposition was the deposition of a party (the witness was a Defendant in both actions) and, therefore, a statement against interest, under Rule of Evidence 804(b)(3), the Court found that the absence of notice made the deposition inadmissible under Trial Rule 32. The Court, however, did allow the deposition to come in as a substitute affidavit for purposes of a Motion for Summary Judgment under Trial Rule 56.

Under Trial Rule 32, a deposition of a party can be used for any purpose and the deposition of a witness may be used if the witness is dead, outside the state, unable to attend to testify because of age, sickness, infirmity or imprisonment, or the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Trial Rule 32 also recognizes under 32(a)(3)(e), that, under exceptional circumstances, the Court can allow the deposition to be used. For example, the Courts have held that a party's inability to testify at trial because of his position as sole proprietor of a business was sufficient under (a)(3)(e). Cooper v. Indiana Gas and Water Co., 362 N.E.2d 191 (Ind.App. 1997); affirmed on other grounds, 381 N.E.2d 1250 (1978). The same Court held that the inability to get a babysitter or caring for a sick mother also justified use of the deposition. The Trial Court has also allowed the depositions of parties to be utilized in lieu of live testimony under the right circumstances. Ramben Realty Co. v. Backstreets Band, 482 N.E.2d 741 (Ind.App. 1985)

(deposition of two band members concerning stolen equipment; admitted where band members were in Ohio and the size of the claim did not justify flying back to appear for trial.) Physicians, as a general rule, do not have to appear live if they have necessary medical work to perform. Mundy v. Angelicchio, 623 N.E.2d 456 (Ind.App. 1993). A deposition is also admissible under (a)(3)(e) if an opponent invokes his Fifth Amendment privilege to remain silent when called as a witness. Diggs v. State, 531 N.E.2d 461 (Ind. 1988).

5. Deposition Objections.

It is always confusing to figure out what objections have to be preserved by timely objection during the deposition and what objections need not be made.

In Mundy v. Angelicchio, 623 N.E.2d 456 (Ind.App. 1993), the Court held that the Plaintiffs waived any error regarding impermissible legal conclusions by failing to object to the form of the question or answer when the deposition was taken. In State v. Bailey, 714 N.E.2d 1144 (Ind.App. 1999), the Court held that where counsel did not attend the deposition, to the extent that he was absent, his client waived any alleged errors or irregularities that occurred during the deposition. In Richardson v. State, 496 N.E.2d 620 (Ind.App. 1986), the Court held that the absence of an objection about the qualifications of the officer taking the deposition waived the issue.

Under Trial Rule 32(d), errors and irregularities in the notices of taking depositions are waived unless written objections are promptly served upon the party given notice. Errors in the form of questions or answers in the Oath or Affirmation or in the conduct of the parties and errors of any kind which may be obviated, removed or cured if promptly presented, are also waived unless an objection is made. Under Trial Rule 32, objections to the competency of a witness or the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition. As noted by the Court in Wynder v. Lonergan, 286 N.E.2d 413 (1972), the inadmissibility of deposition testimony cannot be waived by failure to object when the deposition is taken unless the testimony falls within one of the listed categories under Trial Rule 32.

Under Trial Rule 32, any party, not only the party who took the deposition, may use any part or all of a deposition of a witness for any purpose if the party demonstrates the existence of one of the conditions in 32(a)(3) and the party against whom the deposition is used was present or represented at the taking of the deposition. Sullivan v. Fairmont Homes, 543 N.E.2d 1130 (Ind.App. 1989). In Sullivan, the Court allowed one party to use a deposition primarily developed by another party who ultimately settled. Over the opposing party's objections, the Court also noted that the Rule does not constrain the party taking the deposition to the portion of the testimony developed by that party. The Court has discretion, however, to limit the use of selected portions of a deposition if the selected portions create a misimpression. Clark v. Sporre, 777 N.E.2d 1166 (Ind.App. 2002).

6. Interrogatories.

Several cases underscore a party's obligations in answering Interrogatories. In Castillo v. Ruggiero, 562 N.E.2d 446 (Ind.App. 1990), the Plaintiff responded to the Defendant's Interrogatories that he could not recall a number of different things, including physicians who treated him and the like. In response to questions about any statements from the Defendant, the Plaintiff responded "do not have facts with which to respond to this question." The Court stated succinctly "These answers are wholly inadequate". The Court noted that if an objecting party takes the position that information is not available, it is that party's burden to show that it is not available. A party may not refuse to answer an Interrogatory on the grounds that the party would have to consult records in order to answer. Likewise, a party may not respond by saying that the information is unavailable because it is in the attorney's possession and has not been given to the party. Responding to a request for each and every act of negligence of the Defendant by stating "See the Complaint" was also inadequate.

As Interrogatories represent the answers of parties, the Answers to Interrogatories can be used at trial although the persons involved are present in Court at the time of the trial. Scott County School District v. Asher, 312 N.E.2d 131 (1974); affirmed, 324 N.E.2d 496 (1975). If a party gives an answer to an Interrogatory which is inconsistent with the party's testimony at trial, both the Answer to the Interrogatory and the testimony are considered as evidence and the issue is then one of credibility. Vlatos v. Indiana Bonding and Surety Co., 333 N.E.2d 835 (Ind.App. 1975).

7. Non-party Discovery.

Under Trial Rule 34, production requests can be made to non-parties, but fifteen days notice must be given to all other parties prior to actually serving out the Request or Subpoena unless there is a bona fide emergency or hearing set within fifteen days. Trial Rule 34 specifies that a non-party request must state: 1) that the responding party is entitled to security against damages or payment of damages resulting from such request; 2) that the party has the option to Move to Quash as provided by Trial Rule 45(b). If a party fails to comply with the provisions, the Court may grant a Protective Order in favor of the responding party. Keesling v. Baker & Daniels, 571 N.E.2d 562 (Ind.App. 1991). Under Trial Rule 34, the Court can order the Plaintiff to execute medical authorizations so the Defendant can obtain medical records from out-of-state providers. Andreatta v. Hunley, 714 N.E.2d 1154 (Ind.App. 1999).

8. Subpoenas.

Whether used in connection with a deposition notice or a non-party request, attorneys admitted to practice law in Indiana can issue subpoenas. Subpoenas under Trial Rule 45 can command the person to bring along documents as well. The responding party may move to quash or modify the subpoena. Under Trial Rule 45(d)(2), an individual may be required to attend a deposition only in the county wherein he or she resides or is employed or transacts business in person unless otherwise fixed by the Court. A non-resident can only be compelled to attend in the State and County wherein he is served with the subpoena or within forty miles from that place. A non-resident Plaintiff, however, can be required to attend an examination in the county where the

action is commenced. Under Trial Rule 45(g), you must tender mileage and a witness fee for one day's attendance with every subpoena if it is a subpoena for a deposition or trial testimony. It is impermissible to use a subpoena to obtain an *ex parte* deposition. Rita v. State, 674 N.E.2d 968 (Ind. 1996).

9. Physical/Mental Examinations.

Trial Rule 35 provides that, if the mental or physical condition of a party is in controversy, the Court may order a mental and/or physical examination. For example, the Court clearly has discretion to order paternity blood tests. Cooper v. Cooper, 608 N.E.2d 1386 (Ind.App. 1993). Under Trial Rule 35, the Rule allows examinations by a physician. In an interesting twist, the Court of Appeals in Old Indiana, LLC v. Montano, 732 N.E.2d 179 (Ind.App. 2000), held that, because the Rule requires a physician, a psychologist cannot do an independent mental examination, even if otherwise appropriate. The Court of Appeals noted that the federal equivalent allowed examinations by a suitably licensed or certified examiner, but Indiana's Rule did not. In Jacob v. Chaplain, 639 N.E.2d 1010 (Ind. 1994), the Court held that a party who is subject to a court ordered medical examination may tape record all conversations the party has with the examining physician at the time of the examination. In most instances, the Court will also allow a video-tape examination. **Note that the word "independent" does not appear in Rule 35.** Under Trial Rule 35, the written report should set up all of the examiner's findings.

10. Requests for Admissions.

Trial Rule 36 is largely self-explanatory. In GMC v. Aetna Casualty & Surety Co., 573 N.E.2d 885 (Ind. 1991), the Supreme Court stated that a Request for Admission may be used for opinions, contentions or legal conclusions if the Request is related to the facts of the case. Any matter admitted under the Rule is conclusively established and, therefore, there is no need for the trial court to actually order the binding effect of such facts. Boling v. Mid-Continent Refrigerator Co., 411 N.E.2d 1255 (Ind.App. 1980). A Trial Rule 36 admission is not binding upon the person requesting it, nor any other parties. See, Indiana Construction Services, Inc. v. Amoco Oil, 533 N.E.2d 1300 (Ind.App. 1989). In Kerkhof v. Kerkhof, 703 N.E.2d 1108 (Ind.App. 1998), the Court clarified that just because a fact is conclusively established does not mean that same fact is admissible, however. For example, Request for Admissions are still subject to hearsay objections. In Kerkhof, the husband claimed that one of the Request for Admissions dealt with a statement made during settlement negotiations and, therefore, the Court could have determined that the statement was not competent evidence under Rule of Evidence 408.

Under Trial Rule 36, a party can move to withdraw a Request for Admission. The standard for granting such a withdrawal is: 1) whether withdrawal of the admission would further the presentation of the merits of the case; and 2) whether such a withdrawal would result in prejudice to the party who received the admission. Id at 1113. In a prior case, Gary Municipal Airport Authority District v. Peters, 550 N.E.2d 828, 831 (Ind.App.), the Court stated it "must be shown that reliance upon the admissions was reasonable". One consideration in determining whether the reliance was reasonable is the nature of the admissions made. In many cases, admissions are made which are so central to a case as to render reliance on them unreasonable. The court may also

consider whether the clarity of the Request for Admissions is adequate. The burden is upon the requesting party to artfully draft a statement of fact contained in the Request for Admission. If there is any error arising out of the inartful drafting, it is to be borne by the requesting party. F.W. Means and Co. v. Karstens, 428 N.E.2d 251, 257 (Ind.App. 1981). A court may not grant relief from admissions under Trial Rule 60(b). Pathman Construction Co. v. Drum-Company Engineering Corp., 402 N.E.2d 1 (Ind.App. 1980). The Trial Court's ruling on a Motion to Withdraw Admissions will be reversed only upon a showing of abuse of discretion. Snell v. Snell, 581 N.E.2d 463 (Ind.App. 1991).

11. Motions to Compel and Sanctions.

The court's discretion on sanctions is extremely broad. In one case, an attorney was suspended from the practice of law for her failure to comply with discovery. In Re: Trueblood, 616 N.E.2d 8 (Ind. 1993). The court may dismiss the case. Drew v. Quantum Systems, 661 N.E.2d 594 (Ind.App. 1996). The court may exclude testimony or grant a continuance. Richardson v. State, 388 N.E.2d 488 (1979). A court may also strike defenses as a sanction. State v. Wilbur, 471 N.E.2d 14 (Ind.App. 1984). In one strange case, the Trial Court prohibited a party from maintaining a Motion to Dismiss for Lack of Personal Jurisdiction as a sanction for the Defendant's failure to comply with the Court's discovery orders relating to jurisdictional facts. Bankmark of Florida, Inc. v. Star Financial Card Services, Inc., 679 N.E.2d 973 (Ind.App. 1997).

Under Trial Rule 37(c), as to a Request for Admissions specifically, if a request is denied improperly, the court shall make an order for expenses, including fees, unless it finds: 1) the request was objectionable pursuant to Trial Rule 36(a); 2) the admission sought was of no substantial importance; 3) the party failing to admit had reasonable grounds to believe that he might prevail in the matter; or 4) there was other good reason for failure to admit. In Hyundai Motor Co. v. Stamper, 651 N.E.2d 803 (Ind.App. 1995), the President of Hyundai Motors allegedly made certain statements in a magazine article. The Plaintiff sent out a Request for Admissions confirming that the statements were accurately made and were admissible into evidence as admissions of a party. The Defendant refused to admit that the statements in the articles were accurate. As a result, the Plaintiff had to depose the Director of Public Relations for Hyundai, two reporters and another individual. As a result of the Defendant's failure to admit these facts, the Court ordered Hyundai to pay expenses in the amount of \$6,257 and attorney fees in the amount of \$28,000. The Court also found that, independent of 37(c), the Defendant's conduct warranted sanctions for bad faith. On appeal, the Court of Appeals also ordered appellate attorney fees because Hyundai conceded that the quotes were accurate.

Prior Indiana case law suggested that lesser sanctions should be imposed on parties before dismissal or the like, but more recent cases indicate that Indiana does not require trial courts to impose lesser sanctions before applying the ultimate sanction of dismissal or default judgment. Nesses v. Specialty Connectors Co., 564 N.E.2d 322 (Ind.App. 1990).

Procedurally, a court does not have to have a hearing on a Motion to Compel or to impose sanctions so long as the opposing party is given an opportunity to respond. Hatfield v. Edward J. Debartolo Corp., 676 N.E.2d 395 (Ind.App. 1997). Just as the court has discretion to impose

sanctions, the court has the discretion to remove sanctions. Associates Financial Services Co. v. Knapp, 422 N.E.2d 1261 (Ind.App. 1981). Even though requests for sanctions are part of a case, under Trial Rule 37, a Request for Sanctions can survive a grant of Summary Judgment because it is considered a collateral matter that survives judgment and non-suit. Stachurski v. Moore, 610 N.E.2d 272 (Ind.App. 1993). An application for sanctions, however, will be barred after Entry of Satisfaction and Release of Judgment. Id.

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APPENDIX

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COMPARISON OF FEDERAL AND STATE RULES

ISSUE	FRCP	IND. TRIAL R	N.D. IND LR	S.D. IND. LR	YOUR LOCAL R.
INTER. LIMITS	25 (FRCP33)	None	n/a	n/a	
RFP LIMITS	none	none	none	none	
RFA LIMITS	none	none	30 (LR26.1)	25 (LR36.1)	
NO.OF DEPOS	10 (FRCP30)	n/a	n/a	n/a	
NO. OF DEPO HRS	7	none	none	none	
INSTRUCTIONS NOT TO ANSWER	Only privilege (FRCP30(d))	Broader, annoyance, embarrassment, or oppression (TR30(d))	n/a	n/a	
MOTION TO COMPEL REQUIRES WRITTEN EFFORT TO RESOLVE	Yes, FRCP 37(d)		Yes, detailed statement (LR37.1)	Yes, detailed certificate (LR37.1)	
MISC			No depo. w/o 14 days	No private atty/client conference during depo., except to determine privilege	

PLAINTIFF'S INTERROGATORIES TO DEFENDANT

Pursuant to Rule 33 and Rule 34 of the Indiana Rules of Civil Procedure, Plaintiff requests that the Defendant answer the following interrogatories under oath and produce for inspection and copying the documents designated herein. Defendant shall serve his answers and objections within thirty days of receipt. Inspection of documents shall take place within thirty days of receipt at the offices of _____, at a mutually convenient time.

Definitions & Instructions

The following definitions and instructions apply to each of the Interrogatories and Request for Production of Documents hereinafter set forth unless expressly stated to the contrary:

(1) Whenever the term "**you**" or "**your**" is used, the same refers to the Responding Party and all other persons under Responding Party's direction, supervision, or control.

(2) The term "**document**" as used herein, includes, but is not limited to, any printed, written, recorded, taped, electronic, graphic, any copies which vary from the original document, or other tangible matter from whatever source, however produced or reproduced, whether in draft or otherwise, and any material underlying, supporting, or used in the preparation of any document.

(3) The term "**person**" means any person, firm, association, partnership, joint venture, corporation, or other legal entity, including any successor in interest of such entity if liquidated or merged.

(4) The term "**identify**" requires: name and address if a person; description, location, and known witnesses, if an event; and description, date, and author(s) if a document.

(5) The term "**communication**" includes any oral or written transmittal of information or request for information and includes all documents relating to such transmittal or request.

(6) If you cannot answer the following interrogatories in full or supply the documents requested, after exercising due diligence to secure the information to do so, state the answer to the

extent possible, specifying your inability to answer the remaining portions and stating whatever information or knowledge you have concerning the unanswered portion.

(7) The following Interrogatories and Requests for Production are continuing so as to require supplemental responses if you obtain further information or documents with respect to the same between the time your initial responses are served and the time of trial.

(8) If any document is claimed to be immune from discovery on grounds of privilege or confidentiality, specify the author, date, recipient, and general subject matter of the document, together with the basis on which the privilege or confidentiality is asserted and the total number of documents claimed as privileged or confidential. All documents for which defendants claim confidentiality or privilege shall be placed in a sealed file for in camera review.

(9) If Plaintiff objects to any interrogatory on grounds of vagueness or overbreadth, Plaintiff shall, at a minimum, respond to the interrogatory as it relates to the Defendants.

(10) If Plaintiff has no knowledge, but knows the identity of persons who have such knowledge, Plaintiff shall identify such persons.

(11) The term document shall include, electronic documents such as, including but not limited to, E-mail messages, electronic bulletin board messages, automatic computer backup files, data kept in ROM format, RAM format, CD ROM, laser disk, mini disks, floppy disks, tape backup, data base files, spreadsheet files, electronic notepads, as well as floptical disks.

The person responsible for gathering information or responding to document requests is responsible for reviewing all the above information to determine whether a particular document is covered by these requests whether the information be located on a local area network, personal computer, word processing file, spreadsheet file, database file, E-mail system, notebook or portable computer, computer backup, or any other documents as defined above. Your failure to exercise due diligence in reviewing these particular sources of documents will be considered a failure to seek the

requested information. Any and all data compilations, including, but not limited to, specialized computer data bases or other compilations of data for which you allege attorney/client, or work product privilege, must be identified and the following information provided:

1. The basis of your claim for privilege;
2. The format of the information;
3. The person who is responsible for the maintenance of this information;
4. Whether your claim includes both data and program information.

In responding to these requests, you are required to exercise reasonable diligence in ascertaining whether discoverable documents exist, including, but not limited to, using the ordinary and customary methods of obtaining the documents in the course of your business. This requirement includes your use of electronic means to locate documents or compile information.

If any document maintained in electronic format has been deleted or transferred to another individual, please state the date of the transfer or deletion, the person responsible for the deletion or transfer and the current whereabouts of the transferred data or the computer from which the information was deleted.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify whether you believe that you have not been properly named in this action. If so, please state:

- a) What you believe the proper legal name to be; and
- b) The proper address of the proper party.

ANSWER:

INTERROGATORY NO. 2:

Identify any non-parties who you believe to be responsible, in whole or part, for Plaintiff's claimed damages. Please state:

- a) The name of the non-party;
- b) The relationship with you, if any;
- c) The non-party's address, if known; and
- d) The specific facts which you allege make this party responsible.

ANSWER:

INTERROGATORY NO. 3:

Identify any and all facts supporting your affirmative defenses. Please state:

- a) The name of any witnesses who will testify to such facts;
- b) Identify any documents which establish these facts; and
- c) Identify the specific facts upon which you based your affirmative defense.

ANSWER:

INTERROGATORY NO. 4:

Identify any and all exhibits you plan to introduce at the trial of this matter. Please state:

- a) The author of the document;
- b) The recipient of the document;
- c) The date of the document; and
- d) The general substance of the document.

ANSWER:

INTERROGATORY NO. 5:

Identify each and every witness which you plan to have testify at the trial of this case. Please state:

- a) The name of the witness;
- b) The address of the witness;
- c) The general substance of the witness' testimony;
- d) Any documents created by the witness in connection with the events alleged in Plaintiff's Complaint; and
- e) Any documents you expect the witness to rely upon at trial.

ANSWER:

INTERROGATORY NO. 6:

Identify any and all expert witnesses you plan to have testify at the trial of this matter. Please state:

- a) The name of the expert;
- b) The expert's address;
- c) The expert's profession; and
- d) The opinions that the expert is expected to testify about.

ANSWER:

INTERROGATORY NO. 7:

Identify any and all documents relied upon by any experts in reaching their opinions.

ANSWER:

INTERROGATORY NO. 8:

Identify any and all litigation your expert witnesses have testified in during the last five (5) years.

ANSWER:

INTERROGATORY NO. 9:

Identify whether the expert has prepared a report and when the report was made.

ANSWER:

INTERROGATORY NO. 10:

Identify any statements in your possession, custody or control from the Plaintiff or the Plaintiff's agents or employees. Please state:

- a) The person taking the statement;
- b) The date of the statement;
- c) The form of the statement, whether by e-mail, voice transcription, handwritten or otherwise;
- d) The date of the statement; and
- e) The persons present when the statement was given.

ANSWER:

INTERROGATORY NO. 11:

Identify whether any documents relating to the events alleged in Plaintiff's Complaint have been destroyed. Please state:

- a) The nature of the document;
- b) The date of the destruction;

- c) The reason for the destruction; and
- d) Whether the Defendant has an established document retention policy concerning these documents.

INTERROGATORY NO. 12:

Identify whether you believe Plaintiff's damages are the result of a defective product. Please state:

- a) The nature of the product;
- b) The manufacturer, in known;
- c) Why you believe the product caused Plaintiff's damages;
- d) Any documents which support this believe; and
- e) Any witnesses which support this believe.

ANSWER:

DEFENDANT'S INTERROGATORIES TO PLAINTIFF

INTERROGATORY NO. 1:

Please state your:

- a. full name;
- b. date of birth;
- c. present address;
- d. social security number; and
- e. all other names, if any, by which you have been known.

ANSWER:

INTERROGATORY NO. 2:

If you are married at the present time, please state:

- a. your spouse's full name, age, present occupation and present address;
- b. the date and place of your marriage and the names and ages of all children born as a result of your marriage, if any;
- c. whether you were married to this spouse at the time of the incident referred to in the Complaint filed on your behalf in this case;
- d. the names and last known address of all prior spouses.

ANSWER:

INTERROGATORY NO. 3:

Please state:

- a. the full name and address of each of your employers for the last five (5) years, including the commencement and termination dates of each employment;
- b. your average weekly earnings in each employment; and
- c. the name of your immediate supervisor during each employment.

ANSWER:

INTERROGATORY NO. 4:

Please state the exact amount of income which you will contend upon trial that you have (a) lost to date and/or (b) will not be earned by you in the future as a result of the incident alleged in your Complaint, and the nature and source from which this income is normally derived.

ANSWER:

INTERROGATORY NO. 5:

Please list the exact amount of all incidental expenses and losses and identify each respective payee which you contend are special damages sustained by you as the result of the incident giving rise to your Complaint.

ANSWER:

INTERROGATORY NO. 6:

Please list the exact amount of all medical expenses and identify each respective payee which you contend were reasonably and medically necessary as a result of the incident giving rise to your Complaint.

ANSWER:

INTERROGATORY NO. 7:

With regard to each of the injuries allegedly sustained by you as a result of the incident complained of in your Complaint, please state:

- a. each injury of any type that will be an issue in this cause;
- b. the names and addresses of all health care providers, hospitals, clinics and offices of any type who examined you, rendered any treatment to you, performed any operative procedure upon you or were consulted by you regarding any of the above injuries, and state the date of each such examination, treatment, operative procedure or consultation;
- c. the nature of all examinations, treatments, or operative procedures performed upon you;
- d. whether or not said health care providers, hospitals, clinics and offices of any type rendered any reports concerning such examination, treatment, operative procedure or consultation and, if so, the date or dates upon which these reports were issued and the name and address of the person having custody of such reports;
- e. a total charge for services of each and every physician, specialist or health care provider to date;
- f. whether any medical provider has assigned a disability rating to you as a result of the injuries sustained in the accident in question and, if so, state the medical provider making such assessment, whether the rating was (or is) temporary or permanent and state the rating; and
- g. whether or not you have ever been treated for the same or similar injury before this accident.

ANSWER:

INTERROGATORY NO. 8:

Please state the names and addresses of all physicians from whom you have sought treatment within the past ten (10) years.

ANSWER:

INTERROGATORY NO. 9:

If you have suffered or received any physical or mental injury, illness, hospitalization or treatment at any time before or after the date of the incident giving rise to your Complaint for complaints, injuries or symptoms similar, related or identical to those identified in the preceding Interrogatory, please state with regard to each injury, illness, hospitalization or treatment the following information:

- a. the date of each injury, illness, hospitalization or treatment;
- b. how you came to be injured or ill;
- c. a description of each such injury, illness, hospitalization or treatment;
- d. the names and addresses of all health care providers whom you consulted or from whom you received examination, treatment or care with regard to each such injury, illness or hospitalization;
- e. the names and addresses of all hospitals and clinics rendering you treatment for each such injury or illness.

ANSWER:

INTERROGATORY NO. 10:

Please state the full name and last known address of every person known to you or your attorneys who has any knowledge of the facts and circumstances surrounding the incident giving rise to your Complaint including, but not limited to, eyewitnesses to said occurrence, and other persons having any information as to the cause of said occurrence and/or the nature and/or amount of damages being claimed by you in this cause.

ANSWER:

INTERROGATORY NO. 11:

State the name and address of each person expected to be called as a witness in the trial of this cause on your behalf.

ANSWER:

INTERROGATORY NO. 12:

If any persons will testify as an expert witness at the trial of this cause on your behalf, then state:

- a. the full identity and full address of each person whom you or your attorneys expect to call as an expert witness at the trial of this cause;
- b. the subject matter upon which each such expert is expected to testify at the trial of this cause;
- c. the substance of the facts to which the expert is expected to testify at the trial of this cause;
- d. the substance of the opinions to which the expert is expected to testify at the trial of this cause; and
- e. a summary of the grounds for each expert's opinion to be given on direct examination at the trial of this cause.

ANSWER:

INTERROGATORY NO. 13:

If you are still receiving medical services of any nature whatsoever, state:

- a. the name or names of person or persons attending you;
- b. the approximate frequency of said treatment or service;
- c. the nature of said treatment or service; and
- d. the date you last received such treatment or service.

ANSWER:

INTERROGATORY NO. 14:

Will it be necessary for you to have future medical treatment by reason of the injuries complained of in your Complaint? If so, state the nature of such future medical treatment and the names and addresses of the doctors prescribing such treatment.

ANSWER:

INTERROGATORY NO. 15:

If you and/or your attorney have any documents which will be offered into evidence upon a trial of this cause in support of your claim for damages, then state:

- a. a description of each such document;
- b. the date each such document was prepared;
- c. the full name and present full address of the person or entity who prepared such document; and
- d. the full name and present full address of the person or entity who presently has custody of such documents.

ANSWER:

INTERROGATORY NO. 16:

Please state whether any source has paid for or otherwise reimbursed you for the medical expenses which you contend you incurred as a result of the incident giving rise to your Complaint and, if so, state:

- a. the name and address of each payor of such benefits;
- b. the dates and amounts of each such payment;

- c. whether the payor has claimed or will claim any type of lien and/or subrogation rights arising because of such payment;
- d. the reason and relationship existing between you and each payor entitling you to benefits; and
- e. whether you paid any premiums or other monies for said benefit.

ANSWER:

INTERROGATORY NO. 17:

_____ State the name and address of any and all expert witnesses, including Plaintiff's treating physicians, who are expected to testify on behalf of the Plaintiff, and, for each, state:

- a. His or her education, expert qualifications and curriculum vitae;
- b. The nature of any tests, examination or inspection made by said expert;
- c. Whether said expert has prepared any reports or statement, and if so, attach copies of same hereto;
- d. The subject matter upon which each expert is expected to testify;
- e. The substance of the facts and opinions to which each such expert is expected to testify;
- f. A summary of the grounds for each such opinion.

ANSWER:

OBJECTIONS TO DISCOVERY AND RESPONSE OBJECTIONS

OBJECTION: The request is vague and ambiguous.

RESPONSE: Rephrase the request or do a letter confirming why it is not vague and ambiguous to set up a later Motion to Compel.

OBJECTION: Overbreadth, the request asks for way too much information.

RESPONSE: Have the other side quantify their efforts to determine the scope of the documents and the number of documents. More often than not, the other side has not actually seen the number of documents involved and it may be substantially less than believed. Alternatively, indicate that you are ready, willing and able to review the documents on-site. Typically, the other side doesn't want the other lawyer reading through the documents on-site.

OBJECTION: Attorney-client privilege.

RESPONSE: You are entitled to know the specifics of the privilege, i.e. - the parties involved, the time, the nature of the document, etc. Most courts, if pressed, will require the other side to produce a privilege log itemizing the specific documents not produced which are alleged to be privileged, particularly in federal court.

OBJECTION: The request is not in compliance with the discovery rules.

RESPONSE: If the issue is that you have asked too many requests in violation of a local rule, request leave from the court, if appropriate, to seek additional discovery and explain why the additional discovery is necessary.

OBJECTION: The documents are not in possession of this party.

RESPONSE: The obligation under the discovery rules is to produce documents within your possession, custody or control. The fact that you do not physically have possession of the documents doesn't mean that you do not have an obligation to try to get the documents.

OBJECTION: Discovery is on-going and the party has not had the opportunity to explore this issue.

RESPONSE: Please provide all facts within your possession, custody and control now at the present time and remember to request supplementation at a later date.

OBJECTION: Work-product privilege or that the request requires the disclosure of the mental impression of responding to the requesting attorney.

RESPONSE: Facts are generally discoverable regardless. For example, if a particular affirmative defense is being raised, you are entitled to know the facts supporting that affirmative defense regardless if it is part of a legal argument. Otherwise, explore specifically why it is work product, i.e. - when the document was made, by whom it was made, and why it was made. Many routine investigation reports and the like may not come within the work-product privilege if they are done in the ordinary course of business.

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IN THE _____ COURT

STATE OF INDIANA

,

Plaintiff,

v.

CAUSE NO.:

,

Defendant.

PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT

Comes now Plaintiff, by counsel, and for his Request for Admissions to Defendant states as follows:

1. Admit or deny that Exhibit A attached hereto is a true and accurate copy of the inspection performed by the Indiana State Police on April 25, 2001.

RESPONSE:

2. Admit or deny that Exhibit A is a record kept in the ordinary course of business by the Indiana State Police and is admissible into evidence as a business record.

RESPONSE:

3. Admit or deny that as a result of inspection, William Jones was cited for not having his record of duty status current. (See attached Exhibit A)

RESPONSE:

4. Admit or deny that, pursuant to 49 C.F.R. 396.9(d), William Jones was required to complete a certification and return to the Indiana State Police an acknowledgment of the violation and the completion of effective corrective measures pursuant to page two (2) of Exhibit A.

RESPONSE:

5. Admit or deny that Defendant Jones never completed this certification.

RESPONSE:

6. Admit or deny that Exhibit B is a true and accurate copy of a bill from Scott Memorial Hospital.

RESPONSE:

7. Admit or deny that Exhibit B is admissible into evidence pursuant to Indiana Rule of Evidence 413.

RESPONSE:

8. Admit or deny that Exhibit B was incurred as a result of the accident which occurred on April 25, 2001.

RESPONSE:

9. Admit or deny that as a result of the accident of April 25, 2001, Frank Smith lost the revenues which could have been generated on his current load as well as the scheduled load that he had in the amount of \$10,375.

RESPONSE:

10. Admit or deny that in April of 2001 Frank Smith generated \$17,280 from gross revenue.

RESPONSE:

11. Admit or deny that Mike Flynn will testify that Frank Smith would have been able to average \$25,000 in gross revenue, per month.

RESPONSE:

12. Admit or deny that due to the accident Mike Flynn was forced to stop working with Frank Smith.

RESPONSE:

13. Admit or deny that Exhibit R is a true and accurate copy of Frank Smith's bills of lading for 2001.

RESPONSE:

14. Admit or deny that Exhibit S is a true and accurate copy of Frank Smith's bills of lading for 2002.

RESPONSE:

15. Admit or deny that the accident report attached as Exhibit T indicates that William Jones was at fault for following too closely.

RESPONSE:

16. Admit or deny that the accident report attached as Exhibit T indicates that William Jones' unsafe speed was a factor in the accident.

RESPONSE:

17. Admit or deny that Frank Smith was diagnosed with having a bulging disc at C3-C4 on May 17, 2001, as indicated on Exhibit U.

RESPONSE:

18. Admit or deny that Frank Smith was diagnosed with having a bulging disc at C4-C5 on May 17, 2001, as indicated on Exhibit U.

RESPONSE:

19. Admit or deny that on February 26, 2002, Frank Smith had an abnormal C6 dermatomal sensory evoked response indicating a mild left-sided rediculopathy, as indicated on Exhibit V.

RESPONSE:

20. Admit or deny that on July 29, 2002, an MRI showed a generalized disc bulge at L5-S1, as indicated on Exhibit W.

RESPONSE:

21. Admit or deny that on July 29, 2002, an MRI revealed a diffused bulge at L3-L4, as indicated on Exhibit W.

RESPONSE:

22. Admit or deny that Dr. Simon has opined that it's likely that Frank Smith's L5-S1 would need a discectomy and fusion, as indicated on Exhibit X.

RESPONSE:

23. Admit or deny that Dr. Simon has indicated that Frank Smith would be off work for a prolonged period of time after the discectomy and fusion, as indicated on Exhibit X.

RESPONSE:

24. Admit or deny that Dr. Simon has opined that a lumbar fusion would cost between \$75,000-\$85,000 for a one level fusion, as indicated on Exhibit X.

RESPONSE:

25. Admit or deny that Dr. Toia has opined that Frank Smith has a 20% impairment rating as indicated by Exhibit Y attached hereto.

RESPONSE:

26. Admit or deny that Dr. Simon has opined that Frank Smith has a 19% whole body permanent physical impairment rating as indicated by his letter attached as Exhibit X.

RESPONSE:

27. Admit or deny that you have no medical testimony suggesting that Plaintiff's failure to wear a cervical collar caused his condition to be worse.

RESPONSE:

PREPARING FOR YOUR DEPOSITION

Your deposition is one of the most important parts of the trial. In the deposition, the other lawyer gets to ask you a series of questions which, generally speaking, you have to answer. The fact that you are entitled to tell your story through these questions does not mean that this is your opportunity to tell the entire story. **This is not your time to score a touch down or a home run.** This is your time to limit damage. Your obligation is to fully cooperate and answer questions that are asked to you, but nothing more.

Rule 1 - Listen to the Question.

Lawyers sometimes speak using large words or sometimes use terms inappropriately. If the lawyer is using a term inappropriately, it is your obligation to point that out to avoid confusion later on. Likewise, if you simply do not understand the question, it is more important to ask the lawyer to rephrase or simply say that you do not understand the question than to answer a question which you are unclear about.

Rule 2 - Answer the Questions Appropriately, But Do Not Elaborate.

If the opposing lawyer asks you what the weather is like outside today, you do not need to tell him what the weather was like yesterday, the day before, or what you think it will be the day after. Limit your answers to the questions asked. You may wonder why a lawyer does not ask additional questions and you may think that this would be a great opportunity to insert additional information. Resist that temptation! This is the chance for the lawyer to explore facts. If he does not ask the right questions, it is not your obligation to correct that.

Rule 3 - Listen to Your Lawyer.

During the deposition, there may be times that I object to certain questions. It is important that you wait a second or two before responding so I have the opportunity to make objections. For example, if I object that the question is compound, I am indicating that the question actually has two different parts and not just one and to make you aware of that fact. Generally speaking, you are obligated only to answer one question at a time. Objection - the question is vague or ambiguous. This is simply my way of telling you that I don't understand the question to see if you are comfortable with the question. If you understand the question and feel comfortable about answering it, please do so. If you do not, however, ask the lawyer to rephrase. Objection - assumes facts is not in evidence. There are times where a lawyer asks a question which is not consistent with the facts of the case. If you are asked to assume a particular thing is true, think for yourself whether that fact is true or not.

Rule 4 - Take Breaks as Necessary.

If you feel that you are getting angry, that you are tired, or that you simply need a restroom break, please ask for a break. A deposition is not an endurance contest and if you are tired or angry,

you are not listening to the questions as well as you should be and potentially this will give the other lawyer opportunities to score points.

Rule 5 - Do Not Reveal Attorney-Client Communications.

As we discussed at the outset, the other lawyer has no right to ask questions about the conversations that you and I have had. If you volunteer this information, however, potentially you are waiving attorney-client privilege and the other lawyer may be allowed to explore further about these areas. If you have any questions at all about whether something is covered by attorney-client privilege or any other type of privilege, please ask before responding.

Rule 6 - Be Careful About Using Documents.

Under the Rules of Evidence, if you use documents to refresh your recollection prior to testifying, the other lawyer has the opportunity to review this information. Unless I tell you otherwise, bring nothing to the deposition room. Any documents you bring to the deposition will be noticed by the opposing lawyer and he may well ask to review those documents.

Rule 7 - If You Notice That You Have Answered a Question Inappropriately Later in the Deposition, Make Every Effort to Correct It.

There are times when you start a deposition that you are asked about a particular matter and you have a vague recollection, but then as you get through the deposition, you have a better recollection. If so, please correct that during the deposition. This avoids the impression that changes were made to the deposition by the lawyer afterwards or to correct a response which is helpful to the other side.

Rule 8 - If There Is Any Bad Information in Your Record, Please Let Me Know Before the Deposition.

During the deposition, you may be asked about prior litigation, prior criminal actions, or other areas in your life that may be embarrassing. It is important that I know this information prior to the deposition to avoid surprise. Much of these things may not ultimately come into evidence, but it is important that I know all of the facts, both good and bad.

Rule 9 - Review the Deposition Carefully.

Generally, you have the right to make changes to a deposition after it is typed up. Generally, these are either: 1) spelling errors or 2) where the court reporter misheard your answer. The other lawyer will certainly point out significant changes - such as changing the traffic light from red to green. Review the deposition carefully and call me before making changes.

In Ashley Lipson's book, *Guerilla Discovery*, he provides a number of universal orders for discovery practice. The ten rules are as follows:

1. Always be professional and courteous.
2. Familiarize yourself with the rules and orders.
3. Strike first, strike fast.
4. Do not accept less than you are entitled to.
5. Respond or object timely.
6. Prepare clients early.
7. Force the enemy to do the work.
8. Draft all of your pleadings with precision.
9. Do not unnecessarily stonewall small stuff.
10. Develop a battle plan.

The treatise goes through in a somewhat tongue-in-cheek manner the use of a number of discovery techniques and provides ample forms. It is currently one of the things I use in my library for discovery matters.

OUTLINE OF PLAINTIFF'S DEPOSITION

Date:

File Number:

Name of Plaintiff:

I. Discovery only (advise the Plaintiff) I'm here on behalf of _____.
(Name of Defendant.)

II. Presently on medication

A. Effects

III. Personal background

A. Full name and all previous names

B. Address

1. Current; past 10 years

2. When purchased/mortgages/describe house

3. Names and addresses of neighbors

C. General information

1. Driver's license number

a. Number of years driving

b. Insurance carrier

c. Insurance ever canceled

2. Social Security number

3. Height; weight

4. Place and date of birth

- D. Marital status/including divorce
1. Present
 - a. Date married/place
 - b. Name of spouse
 2. Children - names; date of birth; place of birth
 - a. Do you to have any more children?
 4. What do you together - activities
 - a. With spouse; with children
 - (1) Before/after
 - (2) Watch tv/movies/go out to eat
 - b. Typical or daily routine
 - (1) Now/before (2 years)
 - (2) Anything you can't do today that you could do before incident
 5. Divorce - who, what, when, where, why
 - a. Details; fault; problems;
 - b. Present location of ex-spouse
(ex-spouses are a good source of information)
 - c. Court
 6. Ever separated from present spouse
 7. Ever contemplate separation/divorce from present spouse
 - a. When; why
 8. Sex life (before/after)
 9. Talk about your feelings with anyone

- a. Spouse
 - 1. Does he/she help
 - 2. Relationship with spouse

IV. Educational Background

- A. High school(s) attended
 - 1. Name and location
 - 2. Date of graduation
 - 3. Courses taken
 - 4. Dates of attendance
 - 5. Grades achieved
- B. College name and location
 - 1. Scholarships
 - 2. Grades
 - 3. Ranking
 - 4. Degree
 - 5. Major
- C. Graduate school
- D. Athletics
- E. Vo-Tech/GED
- F. Other institutes attended
 - 1. Names/locations

V. Employment History

- A. Present and past occupations (10 years)
 - 1. Names, address, dates of each
 - 2. Nature of employment
 - 3. Immediate supervisor
 - 4. Supervisors at time of incident
 - 5. Salary
 - 6. Longest job held
 - 7. Ever laid off/fired; reason for leaving
 - (1) Present job
 - (2) Since accident
 - 8. Benefits (health, etc)
 - (1) Who pays
 - (2) Required to pay back
- B. Work at time of incident
- C. Member of a union
- D. Work for employer at time of incident
- E. Does spouse work
 - 1. Names, address, dates of each
 - 2. Nature of employment
 - 3. Supervisors
 - 4. Salary
 - 5. Longest job held
 - 6. Bankruptcy

VI. Vacations

- A. Last 5 years
 - 1. With present spouse
 - 2. With children
 - 3. Before/after
 - 4. Any video tapes

VII. Religion

- A. What church do you attend
 - 1. Regularity
- B. Names of ministers

VIII. Military history

- A. When
- B. What branch and unit and type of discharge
- C. Rank and responsibility

IX. Criminal

- A. Evidence that plaintiff has been convicted of committing or attempted is admissible to attack the witness' credibility (murder, attack, treason, rape, robbery, kidnaping, burglary, arson, perjury, false statement or crime of dishonesty)
- B. Arrests/Convictions

X. Other lawsuits/legal actions, insurance claims, worker's compensation claims

XI. Other interests

- A. Hunt, fish, sports, read, music
 - 1. Before after
 - 2. Any limitations
 - 3. Last time participated in the activity

XII. Parents/Family/Friends

- A. Names
 - 1. Father
 - a. Age/occupation
 - 2. Mother
 - a. Age/occupation
- B. Occupations/When
- C. Where live
- D. Relationship with each
- E. Assistance
- F. Do they help
 - 1. Financially/emotionally
- G. Siblings
 - a. Age/occupation
 - b. Address

XIII. Finances

- A. Advances
- B. Medication and health needs

- C. Education
- D. House (home mortgage, costs)
- E. Worker's compensation
- F. Who pays the medical bills
- G. Living expenses
- H. Food/Utilities/Insurance
- I. Interest income
 - 1. From what
- J. Banks
- K. Savings
- L. Money in bank
- M. Stressors
 - 1. Before/after

XIV. The incident, describe in detail, all that happened

- A. Date, time and location
- B. Scene
- C. Lighting condition
- D. Weather condition if significant
- E. Events leading up to incident
- F. Emergency vehicle called
- G. Where/When/Who helped/etc.
- H. What physically happened to the insured inside the car

- I. Describe impact, restraint devices
- J. Conversation after accident with witness, police

XV. Health

- A. Last 10 years
- B. Ever:
 - 1. Injured
 - 2. Use drugs/alcohol
 - 3. Hospitalized
 - 4. Operated on
- C. All doctors/hospitals last 10 years
 - 1. Name/address specialty
 - 2. When go to him/why
 - 3. Who sent
 - 4. Any recommendations
- D. Prior medical history
 - 1. Any problems
 - 2. Gastrointestinal
 - 3. Psychological
 - 4. Bladder
 - 5. Kidney
 - 6. Ulcer
 - 7. Ulcer like symptoms

8. Hypertension

9. Nervousness

10. Headaches

E. Psychiatrist/Psychologist

1. Ever consult, see or be treated by psych

2. Psych evaluation

3. Continuing psychotherapy

4. Medicals records at time of evaluation

5. Chief complaints

a. What talk about

b. What bothers you

c. Injury, problems of others, etc.

d. Lawsuit

e. Therapy

(1) Ever increased/decreased

(2) Ever not cooperative

F. Injuries

1. Describe injuries suffered from incident

a. Did you ever lose consciousness

b. Describe symptoms

(1) When began

(2) Severity

(3) Frequency and duration

- (4) Date each symptom subsided, improved or worsened
- (5) Does activity help or aggravate

2. Medical Treatment

a. Taken to hospital from scene

- (1) By ambulance
 - (a) Name of service
 - (b) Who called
- (2) Length of initial stay
- (3) Names of treating physicians
- (4) Diagnosis and treatment
- (5) Prognosis

b. Other hospitals where treated

- (1) Date and length of stay
- (2) Names of treating physicians
- (3) Complaints which resulted in hospitalization
- (4) Diagnosis and treatment - tests, surgery, therapy, drugs
- (5) Prognosis

c. Other treating physicians

- (1) Name and address
- (2) How selected
- (3) Symptoms reported
- (4) Examinations
- (5) Tests

- (6) Diagnoses
- (7) Dates of treatment
- (8) Nature of treatment
- (9) Advice given
- (10) Prognosis
- (11) Was treatment helpful?
- (12) Was each symptom allegedly reported to a medical provider, treated by a medical provider: If not, why not?
- (13) Limitations

3. Drugs Prescribed

- a. By whom
- b. For what
- c. Dosage and length of time
- d. Result
- e. Where was prescription filled

4. Physical Therapy

- a. Who prescribed therapy
- b. Location of therapy
- c. Nature of treatment
- d. Length and frequency of therapy
- e. Results of treatment
 - (1) Decreased pain
 - (2) Mobility

5. Therapeutic Devices - braces, etc.
6. Is treatment completed or is future treatment anticipated
 - a. Name and address of physician from whom future treatment is anticipated
 - b. Nature of treatment
 - c. Length of treatment
7. Medical bills
 - a. Total amount of bills including therapy, hospital, physicians, drugs, surgery, etc
 - b. Future medical bills expected and basis for expectation
 - c. Amount of medical bills paid and by whom paid
 - d. If paid by insurance, who paid the premiums for the insurance?

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EXPERT DEPOSITION OUTLINE

1. Name
2. Profession
3. Training or specialized education
4. Rank in class
5. Text books used in college/professional school
6. Disciplinary actions against the expert
7. Prior suits against the expert
8. Prior expert testimony
9. Prior testimony on this topic
10. Text books in his library presently
11. Is he aware of how he was located by opposing counsel
12. First contact with opposing counsel - what documents provided
13. Review letters from requesting lawyer about the initial assignment
14. What was he asked to do
15. His rate for testifying - total of fees so far from testifying - what he anticipates trial testimony would be
16. How much money he makes a year from testifying
17. Percentage testifying Plaintiff/Defendant
18. The opinions in this case
 - a. The facts relied upon to reach those opinions: 1) any facts rejected in reaching that opinion; 2) if the rejected facts were true, how would that affect the opinion
 - b. Assumptions made; and, if the assumptions were wrong, how does that affect his opinion
 - c. Research which supports his opinions
19. Go over opinions in which your expert and the opposing expert do not disagree and have him confirm that your expert's opinions are true as to those issues
20. Prior connections with this lawyer or firm
21. Participation in expert referral services
22. Any documents which you requested that were not provided, were entire documents presented versus summaries
23. If pertinent, point out research going the other way from the expert's opinions
24. If pertinent, point out that the expert is contrary to multiple experts and have the witness commit that yes, he thinks his opinion is better than theirs
25. If pertinent, point out facts which do not support the assumptions made
26. If pertinent, point out the lack of contact with the plaintiff - i.e. - a treating doctor versus a hired expert
27. If pertinent, point out the lack of expert's experience in Indiana - i.e., an Indiana doctor versus an out-of-state doctor
28. A-Z approach: If appropriate, and the witness has testified extensively before, go through from A-Z the states or the areas in which the expert has testified if it is a long list
29. Determine if any draft opinions existed, if changes were made - why
30. **Review the entire expert file and verify the file is complete, including e-mails, PhoneSlips or the like**

IN THE _____ COURT
STATE OF INDIANA

,
Plaintiff,

vs.

CAUSE NO.:

,
Defendant.

MOTION TO COMPEL

Comes now Defendant, by counsel, and for his Motion states as follows:

1. On December 3, 2003, Defendant propounded Interrogatories and Request for Production of Documents to Plaintiff's counsel, attached hereto as Exhibit "A". Defendant wanted to ascertain any subsequent medical treatment by Plaintiff.

2. By letter dated January 19, 2004, attached as Exhibit "B", Plaintiff's counsel stated that he had "scheduled time to work on this case in March and April." At that time, the discovery responses were already overdue.

3. By response dated January 26, 2004, Defendant's counsel requested a verified response and requested a timely response to the discovery. A copy of this letter is attached as Exhibit "C".

4. As of the date of the filing of this Motion, defense counsel has never received verified responses confirming, in fact, whom Plaintiff has been seen by and any documents responsive to the requests.

5. Plaintiff's most recent response, attached as Exhibit "D", suggested that Plaintiff's counsel did not know any additional information.

6. By way of response, attached as Exhibit "E", defense counsel suggested that Plaintiff's counsel is responsible for ascertaining this information from his client, especially since now the information is over three (3) months overdue.

7. On or about April 5, 2004, Plaintiff's counsel indicated that he wished to depose Dr. Smith, a treating physician who has previously been deposed in this case. When this case was proceeding to trial in federal court, Plaintiff's counsel indicated that he was going to use a portion of this deposition for evidentiary purposes.

8. Defendant's counsel, in response to this Notice of Deposition, requested an explanation as to what Dr. Smith would be testifying to and whether he had seen the Plaintiff since the date of his deposition. (Attached hereto as Exhibit "F".)

9. Plaintiff's counsel is now attempting to use Dr. Smith as a testifying expert and not a treating expert. Defendant has requested supplementation of Plaintiff's expert disclosure, but Plaintiff has failed to provide any verified information.

10. Defense counsel has attempted to resolve this matter without court intervention and asked Plaintiff's counsel to provide the specific opinions upon which Dr. Smith is planning to testify.

11. Plaintiff's response does not answer the request and is not verified in any way, shape or form. (Attached hereto as Exhibit "G".)

12. The parties have set this matter for mediation in June of 2004. If the documents are not forthcoming promptly, the trial date of August 2004 will be in jeopardy.

WHEREFORE, Defendant requests the Court order Plaintiff to comply with the Defendant's previous discovery and to supplement his response as it relates to experts, including Dr. Smith.

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IN THE _____ COURT
STATE OF INDIANA

,

Plaintiff,

vs.

CAUSE NO.:

,

Defendant.

**ORDER SETTING HEARING REGARDING
DEFENDANT'S MOTION TO COMPEL**

This matter having come before the Court on Defendant's Motion to Compel and the Court being duly advised in the premises; it is hereby

ORDERED this matter be scheduled for a hearing regarding Defendant's Motion to Compel on the ____ day of _____, 2004 at _____ a.m./p.m.

DATED this ____ day of _____, 2004.

JUDGE, _____ Court

Copies to:

Derrick H. Wilson, MATTOX MATTOX & WILSON, P.O. Box 1203, New Albany, IN 47151-1203

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