

Case Management Orders and Discovery Scheduling
Orders Presentation
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CREDITS


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YOU GET ASSIGNED A MEDICAL MALPRACTICE CASE
NOW WHAT?



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GET A CASE MANAGEMENT ORDER (“CMO”) OR A DISCOVERY SCHEDULING ORDER (“DSO”) ENTERED.



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HOW DO YOU DO THAT?




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CAN BE FORMAL OR INFORMAL


LIVE HEARING
ZOOM/WEBEX
CONFERENCE CALL
EMAIL TO PARTIES



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WHAT IS THE LEGAL BASIS FOR THIS?



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MEDICAL MALPRACTICE DISCOVERY CONFERENCE—RULE 26(f)


“UPON THE CASE COMING AT ISSUE OR THE FILING OF A RESPONSIVE PLEADING OR MOTION REQUIRING DETERMINATION BY THE COURT, THE JUDGE SHALL, WITHIN 30 DAYS, DIRECT THE ATTORNEYS FOR THE PARTIES TO APPEAR FOR A DISCOVERY CONFERENCE.”



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THE COURT MAY/SHALL:

RULE ON ALL MOTIONS;
 ESTABLISH A SCHEDULE FOR DESIGNATING EXPERT WITNESSES;
 ESTABLISH BY ORDER AN APPROPRIATE DISCOVERY SCHEDULE; and
 APPROVE ANY CONSENT ORDER RELATING TO THESE SUBJECTS
 (unless the Court finds that the terms of the consent order are unreasonable).



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HOW LONG DO THE PARTIES HAVE FOR DISCOVERY?




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RULE 26(f) SAYS "DISCOVERY SHALL BE COMPLETED WITHIN 150 DAYS AFTER THE ORDER IS ISSUED."

THIS APPLIES "UNLESS GOOD CAUSE IS SHOWN AT THE CONFERENCE FOR A LONGER TIME."




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COMMON PROVISIONS IN CMOs AND DSOs

SCHEDULE FOR DISCLOSURE OF EXPERT WITNESSES
 FORM OF EXPERT DISCLOSURE—INTERROGATORY ANSWERS OR REPORTS
 DISCOVERY DEADLINE
 DISPOSITIVE MOTIONS DEADLINE
 SELECTION OF MEDIATOR AND DATE FOR MEDIATION
 TRIAL DATE



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OTHER PROVISIONS

- LIMITS ON LENGTH OF DEPOSITIONS
- EXPERT WITNESS FEES FOR BEING DEPOSED
- PROTECTIVE ORDERS
- TRIAL PREPARATION SCHEDULE (witness lists, exhibits, deposition designations)
- BRIEFING SCHEDULES AND LIMITS ON LENGTH OF BRIEFS
- CLAWBACKS FOR PRIVILEGED DOCUMENTS



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WHO PREPARES THE ORDER??



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THERE IS A KNOWLEDGE GAP

AS A JUDGE, YOU MAY KNOW THAT THE FILE EXISTS AND YOU MAY HAVE READ SOME PLEADINGS.


THE PARTIES HAVE SEEN THE MEDICAL RECORDS, HAVE TALKED TO WITNESSES, HAVE RETAINED EXPERTS AND KNOW ABOUT THE POTENTIAL DAMAGES IN THE CASE.



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LET THE PARTIES ATTEMPT TO DRAFT A CMO/DSO AND IF THEY CAN'T, THEN THEY CAN BRING THEIR DIFFERENCES TO YOU FOR RESOLUTION.



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ISSUES THAT ARISE AT TIMES:

SIMULTANEOUS DISCLOSURE OF EXPERTS vs. SEQUENTIAL DISCLOSURE

ROLLING EXPERT DISCOVERY DEADLINE vs. A FIRM DATE TO COMPLETE THE EXPERT DISCOVERY STAGE ("within 60 days of the last deposition of the plaintiff's experts, the defendants shall designate their expert witnesses....")

SEPARATE STAGES FOR EXPERT DISCLOSURE (standard of care, damages, causation)

LIMITS ON THE NUMBER OF EXPERT WITNESSES



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REQUIRING PERSONAL ATTENDANCE OF EXPERTS AT TRIAL (conflicts with Rule 32(a)(4) of the Rules of Civil Procedure.)

DISCOVERY DEPOSITIONS AND FOR TRIAL DEPOSITIONS

DAUBERT CHALLENGES AND RULE 702 DISPUTES


EARLY MOTION HEARINGS (Rule 9(j), Statute of Limitations or other issues)



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ARE TREATING PHYSICIANS EXPERT WITNESSES??



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MAYBE YES OR MAYBE NO.

IT SHOULD BE NOTED THAT THE SUBSECTION (Rule 26(b)(4)) DOES NOT ADDRESS ITSELF TO THE EXPERT WHOSE INFORMATION WAS NOT ACQUIRED IN PREPARATION FOR TRIAL BUT RATHER BECAUSE HE WAS AN ACTOR OR VIEWER WITH RESPECT TO TRANSACTIONS OR OCCURRENCES THAT ARE PART OF THE SUBJECT MATTER OF THE LAWSUIT. SUCH AN EXPERT SHOULD BE TREATED AS AN ORDINARY WITNESS.

COMMENT TO RULE 26(b)(4).

IT IS POSSIBLE FOR A TREATING PHYSICIAN TO BE A FACT WITNESS AND OFFER OPINIONS AS AN EXPERT



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BIFURCATION OF THE TRIAL

RULE 42(b)(3) PROVIDES THAT:

UPON MOTION OF ANY PARTY IN AN ACTION IN TORT WHEREIN THE PLAINTIFF SEEKS DAMAGES EXCEEDING ONE HUNDRED FIFTY THOUSAND (\$150,000), THE COURT SHALL ORDER SEPARATE TRIALS FOR THE ISSUE OF LIABILITY AND THE ISSUE OF DAMAGES, UNLESS THE COURT FOR GOOD CAUSE SHOWN ORDERS A SINGLE TRIAL.

EVIDENCE RELATING SOLELY TO COMPENSATORY DAMAGES SHALL NOT BE ADMISSIBLE UNTIL THE TRIER OF FACT HAS DETERMINED THAT THE DEFENDANT IS LIABLE.

THE SAME TRIER OF FACT THAT TRIES THE ISSUES RELATING TO LIABILITY SHALL TRY THE ISSUES RELATING TO DAMAGES.



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POTENTIAL FOR LAST MINUTE SCHEDULING PROBLEMS IF THE BIFURCATION REQUEST COMES IN AT THE 11TH HOUR.



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PROVISIONS FOR CONSENT TO EXTEND THE DEADLINES
WATCH FOR THESE!!!



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SOME SAMPLES

THE TERMS AND CONDITIONS OF THIS ORDER MAY ONLY BE MODIFIED BY THE WRITTEN CONSENT OF ALL PARTIES AND/OR A SUBSEQUENT ORDER OF THIS COURT.

THE TERMS OF THIS ORDER, EXCEPT THE TRIAL DATE, MEDIATION DEADLINE, AND DISPOSITIVE MOTION DEADLINE, MAY BE MODIFIED BY WRITTEN AGREEMENT OF THE PARTIES.



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MOTIONS TO AMEND DISCOVERY SCHEDULING ORDERS

ORDERS INVOLVING DISCOVERY MATTERS ARE ORDINARILY WITHIN THE TRIAL COURT'S DISCRETION.

Alston v. Duke University, 133 N. C. App. 57, 61, 514 S.E. 2d 298 (1999).

THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION TO DENY AMENDMENT OF THE DISCOVERY SCHEDULING ORDER IN THIS CASE.

Alston, 133 N. C. App. at 61.




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THE BEST LAID SCHEMES O' MICE AN MEN

GANG AFT AGLEY

ROBERT BURNS IN "TO A MOUSE" 1785




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STUFF HAPPENS

FLU OUTBREAK
PARTY DIED
EXPERT WITHDREW DUE TO CORONARY ISSUE
SURPRISE MEDICAL RECORD APPEARED



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TECHNICALITIES AND FORM ARE TO BE DISREGARDED IN FAVOR OF THE MERITS OF THE CASE. ONE OF THE PURPOSES OF THE RULES WAS TO TAKE THE SPORTING ELEMENT OUT OF LITIGATION.

LEMONS v. OLD HICKORY COUNCIL, 322 N. C. 271, 367 S. E. 2d 655 (1988).

THE RULES ARE DESIGNED TO ELIMINATE LEGAL SPARRING AND FENCING AND SURPRISE MOVES OF LITIGANTS. THE AIM IS TO ACHIEVE SIMPLICITY, SPEED AND FINANCIAL ECONOMY IN LITIGATION.

LEMONS, 322 N. C. at 275.




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THE FUNDAMENTAL PREMISE OF THE FEDERAL RULES IS THAT A TRIAL IS AN ORDERLY SEARCH FOR THE TRUTH IN THE INTEREST OF JUSTICE RATHER THAN A CONTEST BETWEEN TWO GLADIATORS WITH SURPRISE AND TECHNICALITIES AS THEIR CHIEF WEAPONS.

SHUFORD, NORTH CAROLINA PRACTICE AND PROCEDURE, 3rd ed. Section 1-3.




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"A SUIT AT LAW IS NOT A CHILDREN'S GAME, BUT A SERIOUS EFFORT ON THE PART OF ADULT HUMAN BEINGS TO ADMINISTER JUSTICE AND THE PURPOSE OF PROCESS IS TO BRING PARTIES INTO COURT. IF IT NAMES THEM IN SUCH TERMS THAT EVERY INTELLIGENT PERSON UNDERSTANDS WHO IS MEANT...IT HAS FULFILLED ITS PURPOSE: AND COURTS SHOULD NOT PUT THEMSELVES IN THE POSITION OF FAILING TO RECOGNIZE WHAT IS APPARENT TO EVERYONE ELSE."

WILES v. WELPARNEL CONSTRUCTION CO., 295 N. C. 81, 243 S. E. 2d 756 (1978)



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"IT IS THE ESSENCE OF THE RULES OF CIVIL PROCEDURE THAT DECISIONS BE HAD ON THE MERITS AND NOT AVOIDED ON THE BASIS OF MERE TECHNICALITIES."

MANGUM v. SURLES, 281 N. C. 91, 99, 187 S. E. 2d 697 (1972).



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SANCTIONS FOR FAILURE TO COMPLY WITH A CMO/DSO



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RULE 26(f) PROVIDES THAT:


"IF A PARTY FAILS TO IDENTIFY AN EXPERT WITNESS AS ORDERED, THE COURT, SHALL, UPON MOTION BY THE MOVING PARTY, IMPOSE AN APPROPRIATE SANCTION, WHICH MAY INCLUDE DISMISSAL OF THE ACTION, ENTRY OF DEFAULT AGAINST THE DEFENDANT, OR EXCLUSION OF TESTIMONY OF THE EXPERT WITNESS AT TRIAL."



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IN CLARK v. PERRY, 114 N. C. App. 297, 442 S. E. 2d 57 (1994), THE TRIAL COURT JUDGE EXCLUDED AN EXPERT'S OPINION TESTIMONY ON THE STANDARD OF CARE BECAUSE THE WITNESS WAS NOT DESIGNATED AS A STANDARD OF CARE EXPERT BY THE PLAINTIFF.

"WE FIND NO ABUSE OF DISCRETION IN THE COURT'S CHOICE OF SANCTION."
114 N. C. App. at 310.




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A JUDGE MAY ALLOW ENLARGEMENT OF TIME AFTER THE EXPIRATION OF A COURT-ORDERED DEADLINE ONLY UPON A SHOWING OF EXCUSABLE NEGLIGENCE.

SUMMEY v. BARKER, 357 N. C. 492, 496, 586 S. E. 2d 247 (2003).


(SUMMARY JUDGMENT GRANTED DUE TO PLAINTIFF'S LACK OF EXPERT TESTIMONY.)



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WHAT ABOUT OTHER VIOLATIONS OF A CMO/DSO??



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RULE 37(b)(2) OF THE RULES OF CIVIL PROCEDURE PROVIDES THAT:

IF A PARTY FAILS TO OBEY AN ORDER ENTERED UNDER RULE 26(f) "A JUDGE OF THE COURT IN WHICH THE ACTION IS PENDING MAY MAKE SUCH ORDERS IN REGARD TO THE FAILURE AS ARE JUST, AND AMONG OTHERS THE FOLLOWING..."

RULE 37 (b)(2) LISTS SANCTIONS INCLUDING THAT FACTS BE DEEMED ESTABLISHED, THAT A PARTY BE BARRED FROM SUPPORTING OR OPPOSING CERTAIN CLAIMS OR DEFENSES OR INTRODUCING EVIDENCE, THAT PLEADINGS BE STRUCK, THAT PROCEEDINGS BE STAYED, DISMISSING THE ACTION OR RENDERING JUDGMENT.

THE COURT CAN ORDER THE PAYMENT OF ATTORNEY'S FEES OR EXPENSES.



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THE TRIAL COURT ALSO RETAINS INHERENT AUTHORITY TO IMPOSE SANCTIONS FOR DISCOVERY ABUSES BEYOND THOSE ENUMERATED IN RULE 37.

CLOER v. SMITH, 132 N. C. App. 569, 512 S. E. 2d 779 (1999).



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COURTS OF JUSTICE ARE UNIVERSALLY ACKNOWLEDGED TO BE VESTED, BY THEIR VERY CREATION, WITH POWER TO IMPOSE SILENCE, RESPECT AND DECORUM IN THEIR PRESENCE, AND SUBMISSION TO THEIR LAWFUL MANDATES.

"THE POWER TO PUNISH FOR CONTEMPT IS INHERENT IN ALL COURTS; ITS EXISTENCE IS ESSENTIAL TO THE PRESERVATION OF ORDER IN JUDICIAL PROCEEDINGS, AND TO THE ENFORCEMENT OF THE JUDGMENTS, ORDERS AND WRITS OF THE COURT, AND CONSEQUENTLY TO THE DUE ADMINISTRATION OF JUSTICE."

EX PARTE McCOWN, 139 N. C. 95, 51 S. E. 957 (1905).



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“WITHOUT IT (THE POWER TO PUNISH FOR CONTEMPT) THE MAGISTRATE WOULD BE IN A PITIABLE CONDITION, COMPELLED TO HOLD COURT, TO INVESTIGATE CONTROVERSIES, EXAMINE WITNESSES AND LISTEN TO ARGUMENTS AND YET POWERLESS TO SECURE ORDER IN HIS PROCEEDINGS, TO ENFORCE OBEDIENCE TO HIS DECISIONS, TO REPRESS TURBULENCE OR EVEN TO PROTECT HIMSELF FROM INSULT.”

McCOWN, 139 N. C. at 103.



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SCHEDULING TRIAL DATES WILL REQUIRE SIGNIFICANT COORDINATION IN A POST-COVID WORLD.



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SOME SUGGESTIONS:

COORDINATE WITH TCA OR TCC

HOT BUNKING

GET CASES PREPPED FOR TRIAL AND THEN LOOK FOR AN OPENING



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