

(d) Sequence and Timing of Discovery. Unless a Superior Judge upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and *the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.* (Emphasis added).

In support of her contention that Rule 26(d) is inapplicable here, Counsel cites language in the Administrative Order 19(B)(3): “Discovery proceedings under these rules are not subject to the Vermont Rules of Civil Procedure regarding discovery except those relating to depositions and subpoenas.” According to her theory, that language means Civil Rule 26(d) does not apply to this proceeding.

The exact language Counsel cites contradicts her position according to the phrase in italics here:

“Discovery proceedings under these rules are not subject to the Vermont Rules of Civil Procedure regarding discovery *except those relating to depositions and subpoenas.*”

This dispute is about *a deposition* – of Counsel’s expert. So, Rule 26(d) *does* apply here, and Counsel violated it by refusing Respondent’s requests to depose her expert. Counsel’s refusal to permit her expert witness deposition, as demonstrated in the Motion to Compel, constitutes intentional delay of this proceeding and a violation of the civil rules applicable to this proceeding.

Counsel also contends that she provided all necessary information to Respondent about her expert’s testimony. Respondent has no record of Counsel’s disclosure of the substitute expert’s opinions, the facts or grounds upon which they are based. Respondent is left to guess about those aspects of the expert’s opinion.

Using her mistaken legal theory, Counsel delayed the discovery process by extensive requests for documents that the Respondent produced or does not possess.

Counsel's maneuver warrants the Panel ordering that Respondent may take the deposition of her substitute expert witness. Counsel accuses Respondent of bad faith conduct amidst her own false report to the Panel concerning the rules applicable to this proceeding, as justification for denying his motion to compel. It was her own refusal to grant the request for a deposition, as well as her multiple false allegations concerning Respondent's document productions, that caused the delay in this proceeding.

Full and Complete Document Productions

Counsel avers to the Panel that "Respondent has not produced any documents in discovery." The truth is by 6/25/21, Respondent believed he had completed full and complete document production in his possession. (A compilation of his productions is attached as Exhibit 1).¹

Counsel's repeated requests for documents that do not exist also justifies the Panel ordering the substitute expert's deposition. One example is her request for ten years of Respondent's client billing records – an impossible feat. Her frequent negative claims and innuendos concerning Respondent's motivations, whether for allegedly withholding documents and failure to cooperate, failing to meet with her concerning discovery and failing to produce any documents in discovery, ring hollow in the context of Respondent's early cooperation in producing a full and complete set of all documents in his possession concerning the charges.

¹ Due to an internal miscommunication, there are some documents Respondent thought had been produced but had not been; recently, he discovered they had not been produced. Please refer to a list of Respondent's Supplemental Documents Productions, dated 3/8/22, attached as Exhibit 2.

Fairness and Judicial Economy

When Counsel requested to depose one of his hearing witnesses, Respondent complied. To preclude a reciprocal deposition of Counsel's substitute expert witness would prejudice Respondent by denying him advance notice of the expert's background and testimony, according to the standard procedure in a contested matter – whether civil, criminal or disciplinary in nature. It would unfairly disadvantage Respondent in this proceeding. ²

Moreover, Counsel's action punishes Respondent for alleged uncooperativeness and failure to produce documents. But it is impossible to produce a document that does not exist. Counsel could request any document she imagines Respondent possesses but if it does not exist, he cannot produce it. Punishment under the circumstances is patently unfair.

Counsel's continuing false allegations and failure to cooperate with Respondent's request for a deposition of her substitute expert witness will prove to be an imposition on the Panel and the participants, and will extend the hearing to include a *de facto* deposition of the substitute expert during the hearing.

Conclusion

For the foregoing reasons, Respondent urges the Panel to grant his motion to compel the deposition.

[SIGNATURE AND CERTIFICATE OF SERVICE ON FOLLOWING PAGES]

² Counsel contends the required Certificate concerning consultation among counsel about the dispute is inaccurate; yet she admits she and Respondent did consult about it at an earlier time.

Respectfully submitted on this 8th day of March, 2022.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he made service of ***Respondent's Reply to Counsel's Opposition to His Motion to Compel a Deposition of Counsel's Substitute Expert***, with ***Exhibits 1 & 2***, via email upon the following parties:

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DATED: March 8, 2022.



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