

In further support of this Objection and Motion to Strike, the Langs state that a letter request is an improper filing; the Rules of Civil Procedure and this Board's rules require Motions to be in appropriately supporting pleading form, and the Rules of Civil Procedure require consultation with other parties before filing a motion for a protective order.

MEMORANDUM OF LAW

Petitioner's May 24, 2017 request to limit discovery in the nature of a request for protective order should be struck as improperly filed.

The Vermont Rules of Civil Procedure, Rule 7, require Motions to contain a caption and otherwise follow the format of pleadings, and to include a statement of the facts and law relied upon to support the request:

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor including a concise statement of the facts and law relied on, and shall set forth the relief or order sought.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

VRCP 7(b).

The Rules of Civil Procedure are applicable to Board process via Board Rules 2.103, 2.104 and 2.105. Board Rule 2.216 specifically renders Vermont Rules of Civil Procedure Rule 26 applicable to discovery in matters before the Board.

Vermont Rules of Civil Procedure Rule 26(h) requires counsel to confer with other parties and attempt to resolve conflicts regarding discovery scope and procedure prior to filing a motion to constrain discovery. The process for doing so is stated in detail in the Rule:

(h) Objections and Motions Related to Discovery Procedure. Counsel have the obligation to make good faith efforts among themselves to resolve or reduce all differences relating to discovery procedures and to avoid filing unnecessary motions.

No motions pursuant to Rules 26 and [37](#) shall be filed unless counsel making the motion has conferred with opposing counsel or has attempted to confer about the discovery issues between them in detail in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory resolution. In the event the consultations of counsel do not fully resolve the discovery issues, counsel making a discovery motion shall file with the court, as part of his or her motion papers, an affidavit or a certificate of a party's attorney subject to the obligations of [Rule 11](#) certifying that he or she has conferred or has attempted to confer with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the court, and has been unable to reach such an agreement. If some of the issues raised by the motion have been resolved by agreement, the affidavit shall specify the issues so resolved and the issues remaining unresolved and the reasons therefor. The affidavit shall set forth the date or dates of the consultation with opposing counsel, and the names of the participants.

Except when the motion is based solely upon the failures described in [Rule 37\(d\)](#), memoranda with respect to any discovery motion shall contain a concise statement of the nature of the case and a specific verbatim listing of each of the items of discovery sought or opposed, and immediately following each specification shall set forth the reason why the item should be allowed or disallowed.

VRCP 26(h).

Petitioner's counsel here engaged in none of the steps required by Rule 26(h): She did not confer with the other parties and attempt to resolve the issues; she did not file an affidavit certifying that she did so; and she did not follow the basic motion requirements of Rule 7(b). Instead she submitted a request for discovery limitations in the guise of a

scheduling order when in fact the litigation schedule and the scope of discovery are two separate issues.

The Rules of Civil Procedure do allow for limitations to be placed on the scope or scale of discovery, but only upon certain findings by the trier of fact. Vermont Rules of Civil Procedure Rule 26(b) states:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by a Superior Judge if it is determined that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issue at stake in the litigation. The Superior Judge may act upon the Superior Judge's own initiative after reasonable notice or pursuant to a motion under subdivision (c).

VRCP Rule 26(b).

Petitioner's letter request offers no facts upon which this Board might base findings of fact on these points. To the extent that Petitioner asserts that this is a case with numerous litigants, they do not relate this point to any facts submitted in evidentiary form such as by affidavit that indicate that requests are unduly burdensome or expensive, or providing factual information regarding Petitioner's resources and the importance of the issue at stake in the litigation. The letter request should accordingly be struck, and Petitioner instructed to submit an appropriately supported Motion after consultation with other parties as required by Rule.

Petitioner also alludes to a request for rulemaking, asking this Board to adopt a New Hampshire rule regarding discovery; and further alludes to a request for compensation for expert witness time utilized in responding to discovery. If Petitioner wishes this Board to adopt a rule regarding discovery proceedings, Petitioner should submit same as a rulemaking request. As to the suggestion of a request for compensation for expert witness time, VRCP Rule 26 anticipates this process; however, long-standing Board practice has obviated this requirement, as well as the requirement that questions may be posed to expert witnesses only by deposition rather than by the less-expensive method of written interrogatories. To alter the present Board practice, especially without appropriate motion stating factual reasons and a legal basis therefore and allotting time for response, would not advance the interests of justice. Changing the practical rules mid-stream on this point would implicate due process for parties that entered the litigation and discovery process under the understanding that present Board practices would apply.

Wherefore, the Langs restate their opposition and objection to Petitioner's letter request to constrain discovery procedures in this matter, and move that such letter request be struck from the record.

Respectfully Submitted,

Cindy Ellen Hill, Esq.

Cindy Ellen Hill, Esq. DATE: 31 May 2017
Hill Attorney PLLC
144 Mead Lane
Middlebury VT 05753
802-989-6906
hillattorneypllc@gmail.com