

MOTIONS TO COMPEL + MOTIONS FOR SANCTIONS

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H | P | Y

Motions to Compel

- ▶ First, determine whether it is necessary to file the motion to compel.
- ▶ Non-compliance with the rules of civil procedure?
- ▶ Non-compliance with agreement between attorneys?

Motions to Compel

- ▶ **STEP ONE:** Communicate with opposing counsel.
- ▶ (Thanks for the advice.)



Motions to Compel

- ▶ What is the issue?
- ▶ Is the response overdue (i.e., no response)?
- ▶ Deficient responses?
- ▶ Deposition? Something else?
- ▶ BACK TO STEP ONE: Communicate with opposing counsel.
- ▶ If they are just overdue, call or email.
 - ▶ Confirm response date in writing if you call.
- ▶ If the responses are deficient -> send a letter -> then schedule a time to discuss the responses with opposing counsel.

Motions to Compel

HAWKINS PARNELL
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October 1, 2018

VIA EMAIL

Joe Attorney
Downtown Law Firm, LLC
100 Main Street
St. Louis, MO 63101

RE: Paul Plaintiff v. ABC Corp.

Dear Counsel:

We are in receipt of Plaintiff's initial discovery responses. Please allow this to correspond to serve as a good faith effort to resolve any dispute regarding Defendants' discovery requests to Plaintiff. At this time, I note the following deficiencies:

Interrogatory No. 4 and Request for Production Nos. 1 and 4: If there are any photographs taken by counsel or subject to insurer-insured privilege, please provide a privilege log so that Defendants may ascertain whether or not the photographs are privileged. For example, if counsel took photographs at the scene of the occurrence on the date of the occurrence, they could be discoverable.

Request for Production No. 11: Many items in Plaintiff's employment file are discoverable. Defendant is willing to limit some of the items requested. Please have Paul Plaintiff execute the attached employment authorization.

Request for Production No. 18: Any drug or alcohol testing administered to Paul Plaintiff prior to the occurrence is discoverable. Evidence of any prior alcohol or drug use by Paul Plaintiff is relevant and may lead to the discovery of admissible evidence. Please withdraw your objection to this request and have Paul Plaintiff execute the attached authorization.

Please supplement your responses to these discovery requests. To the extent that Plaintiff's supplemental responses identify documents in Plaintiff's possession not previously produced or disclosed, please produce them. Please note the above is not intended to serve as an exhaustive list and Defendant reserves the right to raise additional concerns about Plaintiff's discovery responses in the future.

Please call me if you would like to discuss any of these issues. I look forward to your response to this letter.

Very truly yours,

Michael J. Hart

Motions to Compel

- ▶ If you cannot reach an agreement with opposing counsel about the responses, then file your motion to compel.
- ▶ CHECK THE LOCAL RULES, to meet the Court's requirements!
 - ▶ St. Louis City 33.5. You must file a certification with the notice of hearing "which states that the attorney has attempted to discuss the matter with opposing counsel in good faith effort to resolve the disputed issues."
 - ▶ St. Louis County 33.5. Court won't hear a motion for sanctions or a motion to compel unless there is "a certification signed by the attorney for the party calling for the hearing which states he has attempted to discuss the matter with opposing counsel in a good faith effort to resolve the disputed issues."

Motions to Compel

- ▶ Some Judges have specific rules regarding discovery disputes.
- ▶ E.g., Division 12 (Judge Wallach) St. Louis County
- ▶ **Standing Order for Discovery Disputes in All Civil Cases:**
- ▶ “In addition to the requirements of the Missouri Rules of Civil Procedure and the requirements of the Local Rules of the 21st Judicial Circuit, no discovery disputes, including motions to compel discovery responses or motions for sanctions, will be heard in Division 12 unless, prior to obtaining a hearing date from the Division Clerk, counsel for the parties meet at least once **in person** in a good faith effort to resolve their discovery disputes and file their joint Memorandum with the Court, substantially in the form attached hereto, setting forth:
- ▶ The date, time and place of the meeting(s); [t]he names and bar numbers of the attorneys attending the meeting(s); [t]he length of the meeting(s); [a] brief description of any discovery disputes not resolved at the meeting(s), with a copy of the discovery request and the objections thereto attached; and [a] certification by counsel that their respective clients have been informed of the meeting(s) and the inability of counsel to resolve their discovery disputes without a court appearance.”

Motions to Compel

- ▶ Division 12 Standing Order, continued.
- ▶ *Good Cause Exception and Sanctions*
- ▶ “A party may request excusal from the in-person meeting requirement of this Order for good cause shown, such as out-of-town counsel’s unavailability to meet in person or opposing counsel’s refusal to respond to requests to meet and confer. In the event of such refusal, the moving party shall advise the Court in its motion as to what, if any, sanctions it seeks against the non-complying party.”
- ▶ Back to STEP ONE (yes, again): COMMUNICATE WITH OPPOSING COUNSEL!

Motions to Compel

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

PAUL PLAINTIFF)
)
Plaintiff,)
)
vs.)
)
ABC MANUFACTURING)
COMPANY, INC.)
)
Defendant.)

Cause No. 18SL-CV05678

DEFENDANT'S MOTION TO COMPEL

COMES NOW Defendant ABC Manufacturing Company and for its Motion to Compel Paul Plaintiff, to respond to discovery, respectfully states as follows:

1. On or about July 1, 2018, Defendant served his First Request for Production upon Plaintiff. *See* Exhibit 1.
2. Defendant did not receive the responsive documents nor Plaintiff's objections within 30 days. On August 10, 2018, Defendant's counsel e-mailed Plaintiff's counsel a letter inquiring about the responses. Plaintiff's counsel promptly responded stating that he would search for the documents. *See* Exhibit 2.
3. On August 26, 2018, Defendant's counsel attempted to call and email Plaintiff's counsel to request a status update. Plaintiff's counsel did not respond.
4. To date, Plaintiff has not responded to Defendant's First Request for Production.
5. Defendant needs this information to properly defend this case.
6. Defendant has attempted to resolve this matter informally prior to presentation of this motion to the Court in his emails dated August 10, 2018 and August 26, 2018.

WHEREFORE, for the foregoing reasons, Defendant respectfully requests an Order from this Honorable Court compelling Plaintiff to fully respond to Defendant's First Request for Production within ten (10) days thereof and for such other and further relief as this Court deems just and proper under the circumstance.

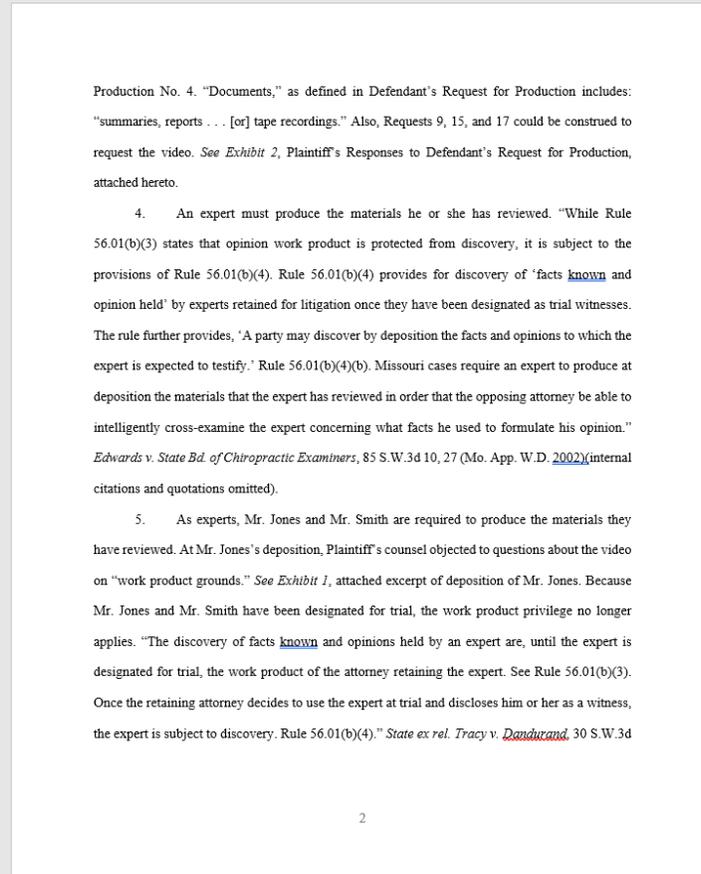
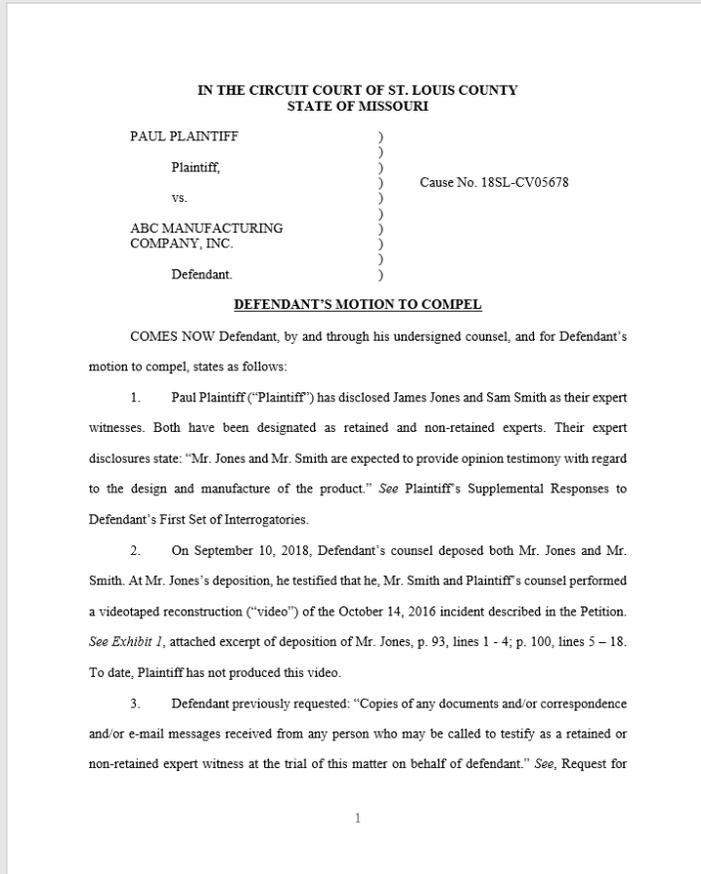
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Attorneys for Defendant

Motions to Compel

- ▶ Sometimes they aren't so simple.



Motions to Compel

Production No. 4. "Documents," as defined in Defendant's Request for Production includes: "summaries, reports . . . [or] tape recordings." Also, Requests 9, 15, and 17 could be construed to request the video. See *Exhibit 2*, Plaintiff's Responses to Defendant's Request for Production, attached hereto.

4. An expert must produce the materials he or she has reviewed. "While Rule 56.01(b)(3) states that opinion work product is protected from discovery, it is subject to the provisions of Rule 56.01(b)(4). Rule 56.01(b)(4) provides for discovery of 'facts known and opinion held' by experts retained for litigation once they have been designated as trial witnesses. The rule further provides, 'A party may discover by deposition the facts and opinions to which the expert is expected to testify.' Rule 56.01(b)(4)(b). Missouri cases require an expert to produce at deposition the materials that the expert has reviewed in order that the opposing attorney be able to intelligently cross-examine the expert concerning what facts he used to formulate his opinion." *Edwards v. State Bd. of Chiropractic Examiners*, 85 S.W.3d 10, 27 (Mo. App. W.D. 2002)(internal citations and quotations omitted).

5. As experts, Mr. Jones and Mr. Smith are required to produce the materials they have reviewed. At Mr. Jones's deposition, Plaintiff's counsel objected to questions about the video on "work product grounds." See *Exhibit 1*, attached excerpt of deposition of Mr. Jones. Because Mr. Jones and Mr. Smith have been designated for trial, the work product privilege no longer applies. "The discovery of facts known and opinions held by an expert are, until the expert is designated for trial, the work product of the attorney retaining the expert. See Rule 56.01(b)(3). Once the retaining attorney decides to use the expert at trial and discloses him or her as a witness, the expert is subject to discovery. Rule 56.01(b)(4)." *State ex rel. Tracy v. Dandurand*, 30 S.W.3d

831, 834 (Mo. 2000). At this stage in the litigation the video is not attorney work product. Why counsel believes this video is work product is unknown.

6. Missouri law is clear on this issue. The video is discoverable and must be produced.

WHEREFORE, Defendant requests this Court enter an order requiring Plaintiff to produce the aforementioned materials within five (5) days and for such other and further relief as just and proper under the circumstance.

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Attorneys for Defendant

Motions to Compel

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO: 502005 CA 004986 XXXX MB AG

BOYD LENKERSDORF and
MARY LENKERSDORF, his wife,

Plaintiffs,

-vs-

MICHAEL SORRENTINO,
WILLIE CLARKE and LEILA CLARKE,

Defendants.

**PLAINTIFFS' MOTION TO COMPEL DEFENSE COUNSEL TO WEAR
APPROPRIATE SHOES AT TRIAL**

Plaintiff moves the Court for relief as follows:

1. This is an action alleging personal injuries to Plaintiff, BOYD LENKERSDORF as a result of a car collision which occurred on December 18, 2002.
2. Trial is set to begin on June 15, 2009.
3. It is well known in the legal community that Michael Robb, Esquire wears shoes with holes in the soles when he is in trial.
4. Upon reasonable belief, Plaintiff believes that Mr. Robb wears these shoes as a ruse to impress the jury and make them believe that Mr. Robb is humble and simple without sophistication.
5. Throughout the discovery of this case, Mr. Robb's clear strategy has been to attack the credibility of the Plaintiff and his counsel by suggesting that Plaintiff is faking his injuries and exaggerating his claims and demanding more compensation than he deserves because Plaintiff is greedy.

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Motion to Compel
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6. Part of this strategy is to present Mr. Robb and his client as modest individuals who are so frugal that Mr. Robb has to wear shoes with holes in the soles. Mr. Robb is known to stand at sidebar with one foot crossed casually beside the other so that the holes in his shoes are readily apparent to the jury who are intently watching all counsel and the Court at that moment.

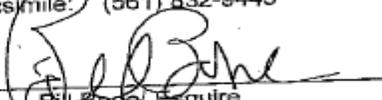
7. Then, during argument and throughout the case Mr. Robb throws out statements like "I'm just a simple lawyer" with the obvious suggestion that Plaintiff's counsel and the Plaintiff are not as sincere and down to earth as Mr. Robb.

8. Mr. Robb should be required to wear shoes without holes in the soles at trial to avoid the unfair prejudice suggested by this conduct.

WHEREFORE, Plaintiff prays this honorable court granted the relief herein requested.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. Mail to Vivian M. Knapp, Esquire, Law Offices of Vivian Knapp, 1450 Centrepark Blvd., Suite 250, West Palm Beach, Florida 33401, and Michael A. Robb, Esq., Clark, Robb, Mason, Coulombe & Buschman, Building 3 – Suite 207, 7501 Wiles Road, Coral Springs, FL 33067 on this 12th day of June, 2009.

Lamioyeux & Bone, P.L.
550 S. Quadrille Blvd, Suite 200
West Palm Beach, FL 33401
Direct Dial: (561) 832-8434
Facsimile: (561) 832-9445

By: 
Bill Bone, Esquire
Florida Bar No. 437549

Motions to Compel

- ▶ Federal Court Basics
 - ▶ FRCP 37
 - ▶ Eastern District of Missouri Local Rule 3.04
 - ▶ Must meet and confer and make “sincere efforts to resolve [your] dispute.” Must include a statement of the date, time and manner of the meet and confer, the names of the individuals participating, or state “with specificity the efforts made to confer with opposing counsel.”
 - ▶ Local Rule 3.04 (c)
 - ▶ Upon filing of a motion to compel, the Court may summarily overrule an objection to any discovery request if the objection is not stated in detail.

Motions to Compel

- ▶ Common theme here?



Motions to Compel

- ▶ Last...
- ▶ Motions to compel can be brought to compel a deposition or deposition testimony.
- ▶ Motions to compel can be brought to compel discovery of ESI.

Motions to Compel

- ▶ **QUESTIONS** about motions to compel?

Motions for Sanctions



Motions for Sanctions

- ▶ Missouri Rule of Civil Procedure 61.01. Failure to Make Discovery: Sanctions.
 - ▶ (a) Failure to Act - Evasive or Incomplete Answers
 - ▶ (b) Failure to Answer Interrogatories
 - ▶ (c) Failure to Answer Request for Admissions
 - ▶ (d) Failure to Produce Documents and Things or to Permit Inspection
 - ▶ (e) Failure to Appear for Physical Examination
 - ▶ (f) Failure to Attend Own Deposition
 - ▶ (g) Failure to Answer Questions on Deposition
 - ▶ (h) Objections to Approved Discovery

Motions for Sanctions

- ▶ 61.01 (a) Evasive or Incomplete Answers and (b) Failure to Answer Interrogatories.
- ▶ 61.01 (b)(1) - Court can strike pleadings, dismiss a case or render a default judgment.
- ▶ 61.01 (b)(2) - Court can allow additional time, but make an order that if the party fails to answer the interrogatories within the additional time, the pleadings shall be stricken, case dismissed or a default judgment taken.

Motions for Sanctions

- ▶ 61.01 (c) - Failure to Answer Request for Admissions.



- ▶ “shall be taken as admitted.”
- ▶ There’s more...

Motions for Sanctions

- ▶ 61.01 (c)
- ▶ If the party fails to admit the genuineness of any document or the truth of any matter under Rule 59.01, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admission may apply to the court for an order requiring the other party to pay reasonable expenses incurred in making that proof, including reasonable attorney's fees.
- ▶ Court shall make the order unless it finds that...request for objectionable, admission of no substantial importance, party failing to admit had reasonable grounds to believe it might prevail or there was other good reason for failure to admit.

Motions for Sanctions

- ▶ 61.01 (d) - Failure to Produce Document and Things or to Permit Inspection.
- ▶ Similar to 61.01 (b), but allows the court to
 - ▶ (1) Enter an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting the disobedient party from introducing designated matters in evidence;
 - ▶ (2) Enter an order striking pleadings or parts thereof or staying further proceedings until the order is obeyed or dismissing the action or proceeding or any part thereof or render a judgment by default against the disobedient party;
 - ▶ (3) Enter an order treating as a contempt of court the failure to obey; or
 - ▶ (4) Enter an order requiring the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Motions for Sanctions

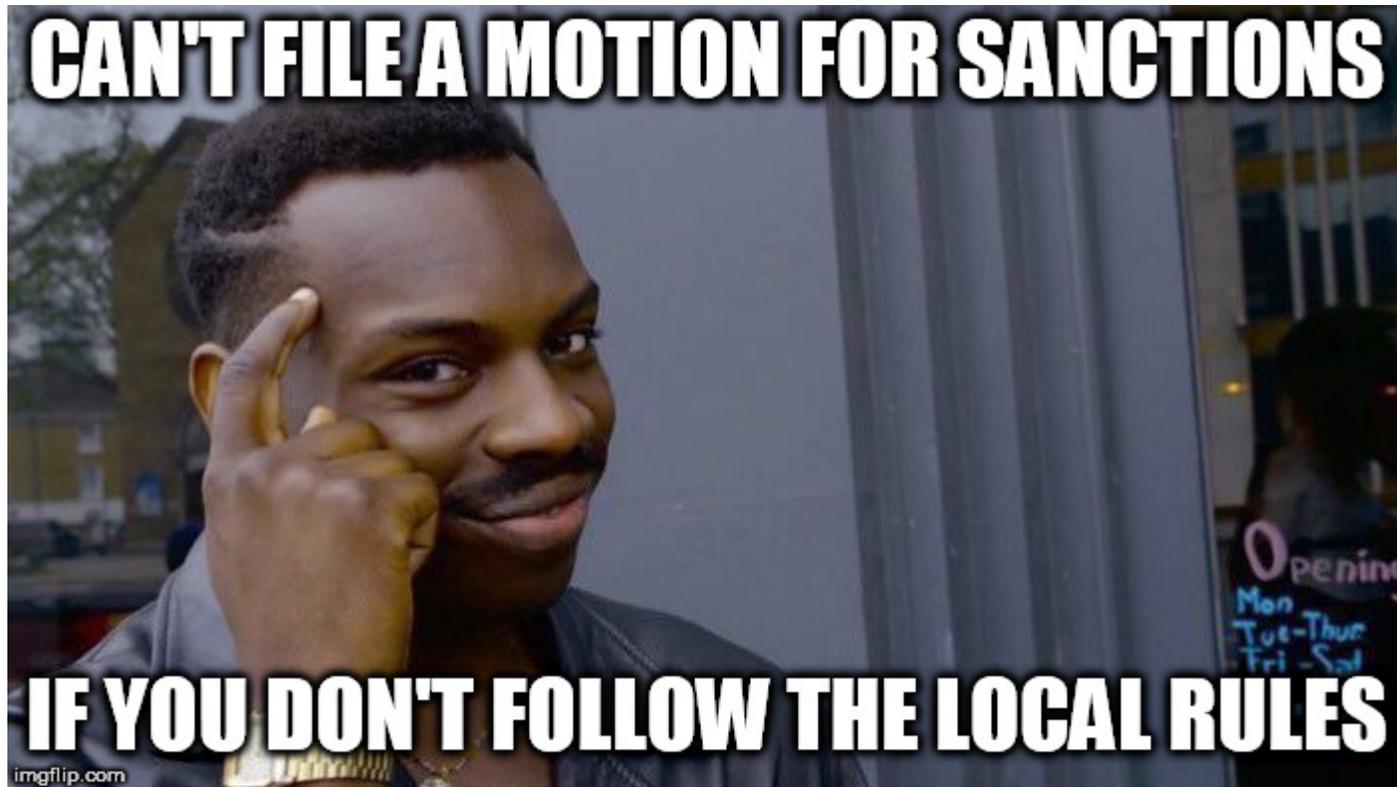
- ▶ 61.01 (e) - Failure to Appear for Physical Examination
- ▶ 61.01 (f) - Failure to Attend Own Deposition
- ▶ Essentially, for violations of these rules the Court can sanction a party as authorized under the other provisions contained in Rule 61.01.
- ▶ 61.01 (g) - Failure to Answer Questions on Deposition
 - ▶ EXAMPLE OF COMMON SITUATION
 - ▶ Court can award reasonable expenses to moving party, UNLESS the opposition was substantially justified or other circumstances make an award of expenses unjust.

Motions for Sanctions

- ▶ Last, 61.01 (h) - Objections to Approved Discovery.
- ▶ If the objections to the discovery are overruled, the court *may* assess against the objecting party, attorney, law firm, etc. the attorney's fees reasonably incurred in having such objection overruled.
- ▶ REMEMBER, if you need to file a motion for sanctions, there are rules and LOCAL RULES...

Motions for Sanctions

- ▶ CHECK THE LOCAL RULES FIRST!



Motions for Sanctions

- ▶ St. Louis County Local Rule 32.1 (7): Failure to answer or file objections to interrogatories within the time prescribed by Supreme Court Rule 57.01(a), or as extended by court order, shall be grounds for sustaining of a motion for sanctions. Such motions, upon notice to the opposing party, may be presented to the Court informally or at the call of any regular motion docket.
- ▶ Local Rule 33.5: Certificate of Attempt to Resolve. Court won't hear a motion for sanctions or a motion to compel unless there is "a certification signed by the attorney for the party calling for the hearing which states he has attempted to discuss the matter with opposing counsel in a good faith effort to resolve the disputed issues."

Motions for Sanctions

Trial courts in Missouri have significant discretion in imposing sanctions for discovery violations.

- ▶ When the conduct of a party manifests contumacious and deliberate disregard for the trial court's authority and is calculated to result in delay, courts have imposed sanctions. McManemin v. McMillin, 157 S.W.3d 304, 308 (Mo. App. S.D. 2005) (sanctions upheld when party's continual failure to produce documents was found to be contumacious and with deliberate disregard for the trial court's authority)
- ▶ Sanctions upheld when a defendant company was evasive and not forthcoming during discovery after its discovery objections were overruled, which obligated it to respond under Rule 61.01. Anderson v. Arrow Trucking Co., 181 S.W.3d 185 (Mo. App. W.D. 2005)

Motions for Sanctions

- ▶ In In re Marriage of Lindeman, 140 S.W.3d 266, 271-72 (Mo. App. S.D. 2004), the trial court did not abuse its discretion in striking a party's pleading and denying him the right to present witnesses when the court had earlier issued four orders to compel discovery, two of which awarded attorney fees, and warned that further failure to comply with discovery would result in pleadings being struck.
- ▶ Production of volumes of evasive, incomplete, and nonresponsive documents is sufficient to demonstrate the contumacious disregard necessary to support sanctions. Norber v. Marcotte, 134 S.W.3d 651 (Mo. App. E.D. 2004).
- ▶ There are limits to the court's discretion.

Motions for Sanctions

- ▶ Dismissal of an action for failure to comply with a discovery order is a harsh sanction that the court should order only in extreme situations showing a clear record of delay or contumacious conduct. Spacewalker, Inc. v. Am. Family Mut. Ins. Co., 954 S.W.2d 420, 423-24 (Mo. App. E.D. 1997); Foster v. Kohm, 661 S.W.2d 628, 632 (Mo. App. E.D. 1983)
- ▶ When a discovery sanction would destroy one party's case, it is an abuse of discretion for the trial court to impose such a harsh sanction without finding that the errant party has shown contumacious and deliberate disregard for the authority of the trial court. S.R. v. K.M., 115 S.W.3d 862, 865 (Mo. App. E.D. 2003)

Motions for Sanctions

- ▶ Federal Courts - Quick Primer.
- ▶ FRCP 37
- ▶ E.D. Mo. Local Rule 3.04.
 - ▶ Same as motions to compel.
 - ▶ Remember the meet and confer requirement and make "sincere efforts."

THE END

- ▶ QUESTIONS?
- ▶ Feel free to call me at
314-678-8644
- ▶ Or email:
mhart@hpylaw.com

H | P | Y