



Discovery in Section 337 Investigations
The Familiar at Hyper Speed
Larry L. Shatzer
Foley & Lardner LLP

I. Introduction

Section 337 investigations use all of the forms of discovery provided by the Federal Rules of Civil Procedure: interrogatories, request for production, subpoenas, requests for admission and depositions. The real difference lies in the speed with which responses are expected and disputes are resolved. These differences are created by both the ITC Rules of Practice and Procedure (19 C.F.R. § § 210.1 *et. seq.*) and the individual Administrative Law Judge's ("ALJ") Ground Rules. These rules are very similar to the Federal Rules of Civil Procedure (except for the shorter time frames). The differences, however, create potential traps for the unwary.

As an initial matter, it should be noted that in a typical investigation with a fifteen (15) month target date, the discovery period is normally around six (6) to seven (7) months, much shorter than the typical district court case. The ITC Staff Attorney's participation as an additional party to the investigation is another difference over district court litigation.

II. Written Discovery

A. Interrogatories

The ITC rules leave it to the ALJ to determine the time frame for responding to interrogatories. 19 C.F.R. § 210.29(b)(2). Currently, every ALJ sets the deadline as ten





(10) days from service.¹ Some judges limit the number of interrogatories in their Ground Rules (Bullock, Essex – 175 per party (including subparts), Luckern, Charneski – no presumptive limit).

B. Requests for Production and Requests for Entry Upon Land

The ITC rules leave it to the ALJ to determine the time frame for responding to requests for production. 19 C.F.R. § 210.30(b)(2). Each of the ALJ set the deadline as ten (10) days from service. As under the Federal Rules, the documents need not to be produced with the written responses, but will need to be produced promptly thereafter so that that depositions can move forward under the compressed discovery schedule. See *Certain Display Controllers*, Inv. No. 337-TA-491, Order No. 4 (June 3, 2003). The ITC has allowed inspections of respondents' production facilities outside the United States. See *Certain Anisotropically Etched One Megabit and Greater DRAMs*, Inv. No. 337-TA-345, Order No. 5 (March 24, 1993); *Certain Acesulfame Potassium*, Inv. No. 337-TA-403, Order No. 4 (February 6, 1998).

C. Requests for Admission

The ITC rules leave it to the ALJ to determine the time frame for responding to requests for production. 19 C.F.R. § 210.31(b). Each of the ALJ's set the deadline as ten (10) days from service. Only one ALJ (Luckern), permits service of requests for

¹ Under the ITC rules, intermediate weekends and holidays are counted unless the time for response is less than seven (7) days. 19 C.F.R. § 201.14(a).



admissions within twenty (20) days of service of the Complaint and Notice of Investigation.

D. Subpoena

ITC procedures for obtaining and enforcing a subpoenas differ significantly from those under the Federal Rules of Civil Procedure. In Section 337 investigations, attorneys cannot simply sign and serve subpoenas as they can under the Federal Rules. Rather, the attorney is required to file an *ex parte* application with the ALJ. 19 C.F.R. § 210.32. The ALJ Ground Rules provide sample subpoenas for use by the parties. Once the ALJ signs the subpoena it can then be served on the third party. Some ALJ's require disclosure of the application after the subpoena issues (Essex, Luckern), other do not (Bullock, Charneski). The ALJ provide that any motion to limit or quash shall be filed within ten (10) days after service of the subpoena (Bullock, Charneski) or allow the parties to propose a time frame (Essex, Luckern). If enforcement of the subpoena is necessary, the party issuing the subpoena must make application to the ALJ to have the ITC enforce the subpoena. Should the application be granted the ITC will go to U.S. District Court to enforce the subpoena.

III. Depositions

The ITC rules do not contain the seven (7) hour limit provided for in Fed. R. Civ. P. 30(d)(1), nor do they incorporate the presumptive limit of ten (10) total depositions found in Fed. R. Civ. P. 30(a)(2)(A)(i). The ALJ have various rules to expedite depositions and eliminate disputes. Some ALJ's require the parties meet and confer before a



deposition notice issues (Luckern). Others require at least ten (10) days notice for depositions in the U.S. and fifteen (15) days for persons outside the U.S. (Essex, Bullock, Charneski).

IV. Resolution of Discovery Disputes

Each ALJ requires the parties meet and confer before a discovery related motion is filed. Some ALJ (Bullock, Essex), require bi-weekly meetings of a “Discovery Committee” comprised of lead counsel for each party and the Commission Investigative Attorney. This Committee is required to try to resolve any outstanding discovery disputes and file a report each month.

Given the tight time deadlines, some ALJ have Ground Rules that specifically permit telephone conferences to obtain immediate rulings on urgent matters (Luckern, Charneski). The ALJ Ground Rules also have provisions that permit briefing on discovery motions to be heard on an expedited basis if appropriate.

V. Strategic Considerations

The pace of a Section 337 investigation raises several pertinent strategic considerations with respect to discovery. For complainants, because a significant portion of the documents that will need to be produced are known before the complaint is even filed, a complainant should collect these documents and have them ready for production at the outset of the investigation. This permits the complainant to focus its discovery efforts on the respondents once the investigation commences. Respondents likewise should begin to collect relevant documents as soon as the complaint is filed,



rather than await institution or the receipt of discovery requests from the complainant. Waiting until discovery requests are received will slow the discovery process down at the front end and potentially create significant timing issues at the end of the discovery period when critical expert discovery is taking place. While this seems to be simple common sense, it is surprising how many parties in Section 337 investigations do not adequately prepare for document discovery.

Parties should also take advantage of the expedited procedures available to resolve significant discovery disputes. As noted, the ALJ's will hear matters on an expedited bases when they are truly time sensitive, such as when failure to resolve quickly might delay the investigation.

The most important strategic consideration related to Section 337's tight time deadlines is the need to focus. Focus your discovery requests, focus your depositions. There is simply not enough time to look under every stone. Smart and strategic decisions need to be made as to the most fertile areas to explore in discovery in order to be able to create a record that will permit you to win the case.