

Subject: Doe v. Coder et al.
From: John Doe <jackbauer230@gmail.com>
Date: Fri, 12 Nov 2010 13:09:28 -0800
To: neilll.tseng@usdoj.gov

Mr. Tseng,

A few housekeeping matters--

When would you like to do the Rule 26(f) conference?



Do you have a standard joint case management statement that you use? I could fill in the facts section which should make it easier.





Thanks,


John Doe

Subject: RE: Doe v. Coder et al.
From: "Tseng, Neill (USACAN)" <Neill.Tseng@usdoj.gov>
Date: Fri, 12 Nov 2010 18:03:13 -0500
To: "John Doe" <jackbauer230@gmail.com>

Mr. Doe,

How about **January 6** for the Rule 26(f) conference? I am available any time in the afternoon. 

For the joint case management statement, we use the format set forth in the standing order issued by the N.D. Cal. judges, which I believe is available on the district court website. If you would like to do the initial draft, then that is fine by me. 

On another matter, our answer is due on December 27. I will be out of town and, given the holidays, **I was wondering if you would be willing to grant us a 14-day extension** until January 10. Hopefully that would not be a problem since the initial CMC is not until January 27. 

Thanks, and I look forward to working with you. 

Neill T. Tseng
Assistant U.S. Attorney
U.S. Attorney's Office
Northern District of California
450 Golden Gate Ave, 9th Floor
San Francisco, CA 94102
(415) 436-7155 (Direct)
(415) 436-6927 (Fax)
neill.tseng@usdoj.gov

-----Original Message-----

From: John Doe [<mailto:jackbauer230@gmail.com>]
Sent: Friday, November 12, 2010 1:09 PM
To: Tseng, Neill (USACAN)
Subject: Doe v. Coder et al.

Mr. Tseng,

A few housekeeping matters--

When would you like to do the Rule 26(f) conference?

Do you have a standard joint case management statement that you use? I could fill in the facts section which should make it easier.

Thanks,

John Doe

Subject: Re: Doe v. Coder et al.
From: John Doe <jackbauer230@gmail.com>
Date: Fri, 12 Nov 2010 20:20:08 -0800
To: "Tseng, Neill (USACAN)" <Neill.Tseng@usdoj.gov>

Mr. Tseng,

Thank you for your message.

While I appreciate your offering to set the Rule 26(f) conference for January 6, 2011, which is the last possible date, respectfully I cannot agree to this. I have two jury trials set for early and mid-January and I will be in the midst of preparations. But that is secondary; the earlier we discuss discovery in this matter, the better. Do you think you could find an hour for me some time in the next 30 days, perhaps early December?

As for the defendants' answer, unfortunately I am unable to extend the time available for the same reasons. It is also important to me to have your answer/Rule 12 motions in hand well before the CMC so that we can include these subjects in the joint Case Management Statement. Of course I would be willing to do the initial draft of the CMC statement for your review.

I look forward to working with you to resolve this challenge.

Best,

John Doe

On 11/12/2010 3:03 PM, Tseng, Neill (USACAN) wrote:

Mr. Doe,

How about January 6 for the Rule 26(f) conference? I am available any time in the afternoon.

For the joint case management statement, we use the format set forth in the standing order issued by the N.D. Cal. judges, which I believe is available on the district court website. If you would like to do the initial draft, then that is fine by me.

On another matter, our answer is due on December 27. I will be out of town and, given the holidays, I was wondering if you would be willing to grant us a 14-day extension until January 10. Hopefully that would not be a problem since the initial CMC is not until January 27.

Thanks, and I look forward to working with you.

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(415) 436-7155 (Direct)
(415) 436-6927 (Fax)
neill.tseng@usdoj.gov

-----Original Message-----

From: John Doe [<mailto:jackbauer230@gmail.com>]

Subject: RE: Doe v. Coder et al.
From: "Tseng, Neill (USACAN)" <Neill.Tseng@usdoj.gov>
Date: Mon, 15 Nov 2010 14:27:50 -0500
To: "John Doe" <jackbauer230@gmail.com>

Mr. Doe,

Thank you for your email. I believe we can work something out.

As an initial matter, please be aware that I cannot meet with you for the Rule 26(f) conference until the defendants' representation requests have been approved. Based on my past experience, that may not happen by early December. Unfortunately, I do not have any control over that process. If and when they are approved, I will need sufficient time to get up to speed to conduct an informed Rule 26(f) conference. Nevertheless, I believe we can work out a compromise to accommodate both of our schedules.

To accommodate your trial schedule, I am willing to accept only a 7-day extension to file the answer instead of 14 days. It would then be due on January 3. You would have it "in hand well before the CMC," since the CMC statement would not be due for 17 days and the CMC would not be for 24 days. That should be more than enough time for us to "include these subjects in the joint Case Management Statement." I do not believe the court would find a 7-day extension unreasonable given the circumstances of the holidays, which will impact not only me but likely also the four defendants and agency counsel, all of whom could be critical for the answer or motion.

On the other hand, this would also free up time for us to have the Rule 26(f) conference before January as you desire. As the current schedule stands, I will need to have the answer/motion prepared by Dec. 20 (I go out of town starting on Dec. 21). Given all the work that will require, as well as my commitments in other cases, that will not leave me enough time to prepare for and conduct the Rule 26(f) conference beforehand. However, a 7-day extension would free up time to have the conference at a mutually convenient date and time on or before Dec. 20 (but, as I mentioned above, after the representation requests have been approved).

Please let me know what you think. Thank you.

Neill

-----Original Message-----

From: John Doe [<mailto:jackbauer230@gmail.com>]
Sent: Friday, November 12, 2010 8:20 PM
To: Tseng, Neill (USACAN)
Subject: Re: Doe v. Coder et al.

Mr. Tseng,

Thank you for your message.


While I appreciate your offering to set the Rule 26(f) conference for January 6, 2011, which is the last possible date, respectfully I cannot agree to this. I have two jury trials set for early and mid-January and

I will be in the midst of preparations. But that is secondary; the earlier we discuss discovery in this matter, the better. Do you think you could find an hour for me some time in the next 30 days, perhaps early December?

Subject: Re: Doe v. Coder et al.
From: John Doe <jackbauer230@gmail.com>
Date: Mon, 15 Nov 2010 15:47:21 -0800
To: "Tseng, Neill (USACAN)" <Neill.Tseng@usdoj.gov>
CC: "Porcelli, Stefania M." <Stefania.Porcelli@ic.fbi.gov>


Mr. Tseng,

Thank you for your message.

It is regrettable that you are not actually representing the defendants, because the contrary was implied by Assistant General Counsel Stefania Porcelli in a prior email message. 

As you are not authorized to make any agreements on behalf of the defendants, I am not prepared to agree to your requested extension. 60 days is more than enough time to answer the complaint or file a Rule 12 motion, regardless of who ends up representing the defendants. Perhaps we can revisit this issue once the defendants are represented. In any event, I'm sure you're going to file a Rule 12 motion, which extends your time to answer. So I'm not seeing the prejudice to your future clients' case.

Since you're not willing to hold a Rule 26(f) conference unless I grant you the extension to answer, it looks like January will have to work for that. I don't have my schedule in front of me but my best recollection is that my first trial starts [REDACTED] and the second one starts [REDACTED]. I guess January 6, 2011 as you originally suggested wasn't too bad of a suggestion.

My apologies for not being able to accommodate you. 

Best,

John Doe

On 11/15/2010 11:27 AM, Tseng, Neill (USACAN) wrote:

Mr. Doe,

Thank you for your email. I believe we can work something out.


As an initial matter, please be aware that I cannot meet with you for the Rule 26(f) conference until the defendants' representation requests have been approved. Based on my past experience, that may not happen by early December. Unfortunately, I do not have any control over that process. If and when they are approved, I will need sufficient time to get up to speed to conduct an informed Rule 26(f) conference. Nevertheless, I believe we can work out a compromise to accommodate both of our schedules.


To accommodate your trial schedule, I am willing to accept only a 7-day extension to file the answer instead of 14 days. It would then be due on January 3. You would have it "in hand well before the CMC," since the CMC statement would not be due for 17 days and the CMC would not be for 24 days. That should be more than enough time for us to "include these subjects in the joint Case Management Statement." I do not believe the court would find a 7-day extension unreasonable given the circumstances of the holidays, which will impact not only me but likely also the four defendants and agency counsel, all of whom could be critical for the answer or motion.


On the other hand, this would also free up time for us to have the Rule

Subject: RE: Doe v. Coder et al.
From: "Tseng, Neill (USACAN)" <Neill.Tseng@usdoj.gov>
Date: Mon, 15 Nov 2010 19:45:25 -0500
To: "John Doe" <jackbauer230@gmail.com>
CC: "Porcelli, Stefania M. (FBI)" <Stefania.Porcelli@ic.fbi.gov>

Mr. Doe:

My **understanding** is that you do not wish to discuss scheduling for the Rule 26(f) conference and the answer until after the representation requests have been approved. Thus, I will hold off and we can revisit that in the future. 

I feel it necessary to correct a couple of things from your email. **If** you are referring to the email from Ms. Porcelli to you last Friday that I was copied on, **she simply informed you that I am the assigned AUSA and asked that your contacts go through me.** This request continues to stand. 

I must also disagree with your statement: "you're not willing to hold a Rule 26(f) conference unless I grant you the extension to answer". I cannot refuse to hold a conference that is mandated by the rules. I simply requested extra time to answer during the holidays and noted that, if you agreed, it would benefit you by allowing us to hold an earlier conference. 

Neill T. Tseng
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Northern District of California
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San Francisco, CA 94102
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(415) 436-6927 (Fax)
neill.tseng@usdoj.gov

-----Original Message-----

From: John Doe [<mailto:jackbauer230@gmail.com>]
Sent: Monday, November 15, 2010 3:47 PM
To: Tseng, Neill (USACAN)
Cc: Porcelli, Stefania M. (FBI)
Subject: Re: Doe v. Coder et al.

Mr. Tseng,

Thank you for your message.

It is regrettable that you are not actually representing the defendants, because the contrary was implied by Assistant General Counsel Stefania Porcelli in a prior email message.

As you are not authorized to make any agreements on behalf of the defendants, I am not prepared to agree to your requested extension. 60 days is more than enough time to answer the complaint or file a Rule 12 motion, regardless of who ends up representing the defendants. Perhaps we can revisit this issue once the defendants are represented. In any event, I'm sure you're going to file a Rule 12 motion, which extends

Subject: Re: Doe v. Coder et al.
From: John Doe <jackbauer230@gmail.com>
Date: Tue, 16 Nov 2010 07:38:11 -0800
To: "Tseng, Neill (USACAN)" <Neill.Tseng@usdoj.gov>
CC: "Porcelli, Stefania M." <Stefania.Porcelli@ic.fbi.gov>

Mr. Tseng,

Thank you for your message.

I am fine with discussing scheduling and the answer/Rule 12 motions, but because no agreements we make would be enforceable against the defendants, as you do not represent them, I am not prepared to agree to grant an extension. I would certainly like an early Rule 26(f) conference, but you have indicated you cannot hold the conference until the defendants are represented. You have indicated that you do not know when their applications for a defense will be decided. As I stated, revisiting the issue with you once the defendants are represented may be the most prudent course of action.

Regarding "representation," I'm sure you are aware that I was referring to Ms. Porcelli's email message of 11/12/2010 wherein she states "Please immediately cease any further attempt to communicate [sic] directly with FBI officials concerning the subject matter of this civil action."

Although "FBI officials" was not defined and appeared to refer to FBI executives, I took that as a "cease and desist" letter also applicable to communications with the defendants. Such a demand would only be appropriate if the defendants were represented. As you have indicated, they are not represented, and I may well have to communicate with them in order to comply with the Court's orders. If the defendants do not respond, I will need to inform the Court of the status of their representation and my inability to secure their agreement to important matters.

You seem certain that the defendants will receive representation through your office. My understanding is that intentional torts are outside the scope of what DOJ is willing to defend. Is that not the case? Could you please provide me with the contact information for whoever is making the coverage decision so that I can answer any questions he or she might have about my claims?

Best,

John Doe

On 11/15/2010 4:45 PM, Tseng, Neill (USACAN) wrote:

Mr. Doe:

My understanding is that you do not wish to discuss scheduling for the Rule 26(f) conference and the answer until after the representation requests have been approved. Thus, I will hold off and we can revisit that in the future.

I feel it necessary to correct a couple of things from your email. If you are referring to the email from Ms. Porcelli to you last Friday that I was copied on, she simply informed you that I am the assigned AUSA and asked that your contacts go through me. This request continues to stand.

I must also disagree with your statement: "you're not willing to hold a

Subject: RE: Doe v. Coder et al.
From: "Tseng, Neill (USACAN)" <Neill.Tseng@usdoj.gov>
Date: Wed, 17 Nov 2010 13:49:47 -0500
To: "John Doe" <jackbauer230@gmail.com>
CC: "Porcelli, Stefania M. (FBI)" <Stefania.Porcelli@ic.fbi.gov>

Mr. Doe,

Thank you for your email. As you have indicated that you would prefer to revisit the scheduling issues once defendants are represented, then I will wait to do so.

As for Ms. Porcelli's email, it speaks for itself. You apparently interpreted it in a certain way which we have informed you was erroneous. Now that things have been cleared up, I don't see any need to continue discussing it.



I am not "certain" that defendants will receive representation through my office. I have been given no reason to believe that the representation requests will not be approved and I am proceeding under the assumption and belief that they will be. However, as I told you earlier, I have no control over that process. Please be assured that the DOJ has your contact information and that if anyone at DOJ needs to contact you about your claims, they know where to reach you.



Regarding the issue of contact with the individual defendants, are you willing to have your contacts go through me as we have requested? If not, what specific communications/contacts do you seek to have with the individual defendants as we wait for the representation requests to be processed? You have mentioned in a general sense compliance with court orders, but I think it would help if we got into specifics because it may turn out that we don't have a significant dispute or it is one that we can resolve.



Thanks,
Neill

-----Original Message-----

From: John Doe [<mailto:jackbauer230@gmail.com>]
Sent: Tuesday, November 16, 2010 10:38 AM
To: Tseng, Neill (USACAN)
Cc: Porcelli, Stefania M. (FBI)
Subject: Re: Doe v. Coder et al.

Mr. Tseng,

Thank you for your message.

I am fine with discussing scheduling and the answer/Rule 12 motions, but because no agreements we make would be enforceable against the defendants, as you do not represent them, I am not prepared to agree to grant an extension. I would certainly like an early Rule 26(f) conference, but you have indicated you cannot hold the conference until the defendants are represented. You have indicated that you do not know when their applications for a defense will be decided. As I stated, revisiting the issue with you once the defendants are represented may be the most prudent course of action.

Regarding "representation," I'm sure you are aware that I was referring

Subject: RE: Doe v. Coder et al.
From: "Tseng, Neill (USACAN)" <Neill.Tseng@usdoj.gov>
Date: Wed, 17 Nov 2010 13:52:06 -0500
To: "John Doe" <jackbauer230@gmail.com>
CC: "Porcelli, Stefania M. (FBI)" <Stefania.Porcelli@ic.fbi.gov>

PS - I believe you had previously said to Ms. Porcelli that California law permits contact with represented parties. Would you mind sending me whatever legal authority you have for that claim? Thanks.



Neill

-----Original Message-----

From: John Doe [<mailto:jackbauer230@gmail.com>]
Sent: Tuesday, November 16, 2010 10:38 AM
To: Tseng, Neill (USACAN)
Cc: Porcelli, Stefania M. (FBI)
Subject: Re: Doe v. Coder et al.

Mr. Tseng,

Thank you for your message.

I am fine with discussing scheduling and the answer/Rule 12 motions, but because no agreements we make would be enforceable against the defendants, as you do not represent them, I am not prepared to agree to grant an extension. I would certainly like an early Rule 26(f) conference, but you have indicated you cannot hold the conference until the defendants are represented. You have indicated that you do not know when their applications for a defense will be decided. As I stated, revisiting the issue with you once the defendants are represented may be the most prudent course of action.

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Although "FBI officials" was not defined and appeared to refer to FBI executives, I took that as a "cease and desist" letter also applicable to communications with the defendants. Such a demand would only be appropriate if the defendants were represented. As you have indicated, they are not represented, and I may well have to communicate with them in order to comply with the Court's orders. If the defendants do not respond, I will need to inform the Court of the status of their representation and my inability to secure their agreement to important matters.

You seem certain that the defendants will receive representation through your office. My understanding is that intentional torts are outside the scope of what DOJ is willing to defend. Is that not the case? Could you please provide me with the contact information for whoever is making the coverage decision so that I can answer any questions he or she might have about my claims?


Subject: Re: Doe v. Coder et al.
From: John Doe <jackbauer230@gmail.com>
Date: Thu, 18 Nov 2010 08:10:38 -0800
To: "Tseng, Neill (USACAN)" <Neill.Tseng@usdoj.gov>
CC: "Porcelli, Stefania M." <Stefania.Porcelli@ic.fbi.gov>


Mr. Tseng,

Thank you for your message.


Ms. Porcelli's email does indeed speak for itself; it appears to be an attempt to create an inaccurate record for use in this proceeding, which I cannot allow to go unanswered. Anyone reading her message would conclude that the defendants were represented parties; however, that is not the case and I appreciate your correcting the implications conveyed in her message. I agree there is no further need to discuss her message. 


Regarding your message, I have no planned communications with the defendants at this time. I am just pointing out that if their requests for DOJ representation are still pending in, say, mid to late December, it will be necessary to discuss with them the Rule 26(f) conference and joint case management statement required by the Court's orders. If they do not respond, I will need to advise the Court of their non-compliance with the standing orders. You have indicated it is a near-certainty that they will obtain representation; if so, I'm sure you and I can work out the details of those matters when the time comes.

While we're on the subject of matters to discuss, is there anything else we can provisionally meet and confer about before the defendants are represented? For example, any concerns you might have that might prompt time-consuming Rule 12 motions in this case? 

You have requested authority for the proposition that communication with represented parties is permitted under California law. That is not quite what I said. What I said was that a party, as opposed to an attorney representing a party, may communicate with another party to litigation despite the adverse party's representation by an attorney. 

Rule of Professional Conduct 2-100 provides the necessary authority; the Rule prohibits communication between (1) an attorney representing a client, and (2) an adverse party represented by an attorney. Although I am an attorney, this rule does not apply to me because I am a party in this case. The following quote from the official comments to Rule of Professional Conduct 2-100 is authoritative:

"Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation . . . Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status." 

Please let me know if you have any further questions or concerns about California law or any other matters. 

Best,

John Doe

On 11/17/2010 10:49 AM, Tseng, Neill (USACAN) wrote: