Thinking of a Master Plan

The Basics of Strategy in the Discovery Process

By Sean C. Griffin

The best strategy will establish goals for the discovery process that go beyond creating a "checklist."

Nicky Porter didn't see what the problem was.

"I don't know what else you want from a discovery plan," she said. We have a lay discovery cutoff, we have deadline for expert discovery, another deadline for dispositive motions. It's all there."

Ellery King sat forward in his chair. "You are technically correct," he said.
"That's the best kind of correct."
"That's what most lawyers think. But I think we can do more than the minimum here."
"But what's wrong with this plan?"
"If you want to be an excellent attorney, it's not enough not to do things wrong. You have to do them right."
Nicky sighed. "Okay, what's not right about this plan?"
"Your discovery plan doesn't have a plan," Ellery said.
"What kind of plan?"
"A plan that advances your litigation strategy."
"A litigation strategy! We just got the complaint. Do we already need a litigation strategy?"
"You either fail to plan, or you plan to fail."

Federal Rule of Civil Procedure 26(f)(2) requires the parties to meet and confer to do the following:

- "Consider the nature and basis of their claims and defenses."
- Consider "possibilities for promptly settling or resolving the case."
- "Make or arrange for" initial disclosures.
- Discuss any issues about preserving discoverable information.
- Develop a proposed discovery plan.

Most attorneys treat these as checklist requirements. They sit down with a plaintiff's attorney, read aloud each item on the list (for the first time since their last discovery conference), and discuss each item in turn. This fulfills Rule 26's requirements, but it does little to advance a client's strategic goals.

To advance your client's strategic goals, you have to have a strategy. That strategy will depend on the case, but in any case, you and your client will need to set certain goals for the discovery process. These goals may include limiting discovery costs (especially costs relating to document production); forcing the plaintiff to state explicitly the bases for the claim, if the complaint

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does not stave off a potential class action; and gauging the plaintiff's attitude toward settlement.

Rule 16(b) makes the discovery plan due twenty-one days before the scheduling conference, which, in turn, must occur ninety days after service or sixty days after any defendant's appearance. Thus, using your discovery plan to advance your strategy requires you to formulate a strategy very early in the litigation—probably within days of receiving the complaint. The more detailed your strategy, and the earlier you formulate it, the better your discovery plan will serve your client's interests. Well-thought-out discovery plans will take a good, hard look at initial disclosures, interrogatories, and privilege logs.

Initial Disclosures

The next week, Nicky was pacing around in Ellery's office.
"The initial disclosures are 100 percent accurate," she said. "I've double-checked them, then I double-checked my double check."
"I'm sure they are," Ellery said.
"So, they're perfect."
"Just because something is perfect does not mean it cannot be improved."

In the early 2000s, the phrase "shock and awe" entered the public consciousness. The phrase referred to an early, overwhelming show of force that would so thoroughly overwhelm the opposition that the resulting demoralization would render it unwilling, or even unable, to fight back.

Few, if any, entities can muster a sufficient show of force to "shock and awe" an opponent into immediate submission. However, most entities can exhibit a show of force that will signal a readiness and ability to mount a vigorous opposition. The key is to start your show of force early—in your initial disclosures.

Rule 26 requires you to provide this information, without waiting for a discovery request:

- the name, address, and telephone number of every person likely to have discoverable information that the disclosing party may use to support its claims or defenses, including the subject matter of that information;
- a copy (or a description by category and location) of all documents, electronically stored information, and tangible things the disclosing party may use to support its claims or defenses;
- a computation of damages; and insurance information.

Many attorneys do not take these requirements seriously. Rule 26 advises that "[a] party is not excused from making initial disclosures because it has not fully investigated its case." Fed. R. Civ. P. 26(a)(1)(D). And many attorneys take this to heart, choosing to send initial, vague disclosures that reflect the incomplete state of their investigation:

- Witness A can be reached through counsel. Witness A has information generally relating to the allegations in the complaint.
- Witness B can be reached through counsel. Witness B has information relating to the defendant's treatment of the employee.
- Witness C can be reached through counsel. Witness C has information generally relating to payment of the plaintiff's invoices.

Conceivably, some attorneys propounding these disclosures imagine that they are "hiding the ball" for as long as possible, thereby delaying their opponents' discovery of their case (and their case's weaknesses). In reality, propounding vague initial disclosures announces to opposing counsel that you have not yet interviewed the key witnesses in your case, and you have little idea what they will say at deposition or trial. This, in turn, means that the propounding attorney does not have a firm grasp on the case or the subject matter.

Nicky asked, "Why do we have to improve our initial disclosures? Why don't we just dash off the initial disclosures and move on?"
"Move on to what?"
"Written discovery, then depositions. We keep the costs down until we get to trial. The trial is the point, right?"
"Really? What percentage of the case do you think discovery is?"
Nicky thought for a second. "Maybe 50 percent."
"Guess again."
"75 percent?"
Ellery shook his head. "Most cases don't go to trial. For most cases, discovery is the closest you get to trial. So, discovery is your only chance to prove your case to the only decision maker who matters."
"The judge?"
"No," Ellery said. "Opposing counsel."

Depending on who you ask, between 80 and 99 percent of civil litigation resolves before trial—by settlement, summary judgment, or otherwise. *See* Lynn Langton & Thomas H. Cohen, Civil Bench and Jury Trials in State Courts, 2005, Bur. Justice Stat. (Oct. 28, 2008); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone*, Judicat., vol. 101, no. 4, Winter 2017, at 26, 28; Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. Times, Aug. 7, 2008. In Florida, for example, only about 5 percent of case dispositions occurred after trial. Florida Office State Courts Admin., "Circuit Civil Overview," in *Florida's Trial Courts Statistical Reference Guide FY 2017–*18 4-22 (Feb. 2019).

This means that your case probably will not make it to trial. It will probably settle, which means that discovery will provide your only chance to "try" the case, and you and the opposing counsel will be the only jury. Therefore, if you are an experienced defense attorney with a strong case, you should understand the benefits of conveying the strength of your case to your client and opposing counsel during discovery.

The initial disclosure requirement provides an unmatched opportunity to shock and awe your opponent at the start of litigation. Just as vague initial disclosures signal that the proponent does not have a handle on his or her case, specific initial disclosures signal a well-prepared defendant.

Compare the vague disclosures above to the following:

- Witness A was the plaintiff's co-worker for three years. She witnessed the plaintiff's unsafe work practices with respect to the equipment at issue on several occasions. On one such occasion, the defendant company relied on witness A's eyewitness account to place a written reprimand in the plaintiff's employment file, which the plaintiff did not dispute at the time.
- Witness B saw the accident (as the complaint defines that term). Witness B

is an experienced crane operator. She is expected to testify that she saw the plaintiff looking down and away from the equipment as the crane swung toward the building. Witness B is also expected to testify that she noticed that the plaintiff only had one hand on the equipment, although from her experience, she knows that the crane in use requires two hands to operate properly. Witness B is expected to testify that she tried to warn the plaintiff, but he heeded her warning too late to avoid the accident.

- Witness C is expected to testify that he went out with the plaintiff to several bars the night before the accident (as the complaint defines the term). Witness C is expected to testify that he returned the plaintiff to his home at 2 a.m. and that the plaintiff had advised him that he had a 7 a.m. shift.

These disclosures outline clearly and specifically several possible defenses against the cause of action. They also notify the plaintiff's attorney that defense counsel has done the homework necessary to mount a substantial defense against this particular claim. The speed with which the defense attorney has done so signals that the defendant intends to mount an aggressive, thoroughly prepared defense, and this, in turn, will encourage many plaintiffs' attorneys to take a more reasonable approach to a quick settlement. Granted, few plaintiffs will settle immediately upon receiving initial disclosures no matter how good they are, but at least the early preparation necessary to draft thorough initial disclosures gives defense counsel a head start.

An aggressive, organized document production can provide the same benefits. If you know enough about a case to file an answer, then you have reviewed a lot of relevant, non-privileged documents. Produce these documents during initial disclosures. You will have to produce them at some point, and there is rarely, if ever, a benefit to delaying production.

You should do more than just dump documents on the plaintiff's counsel, however. Unlike Rule 34, which requires parties to "produce documents as they are kept in the ordinary course of business," or "organize and label them to correspond to the categories in the request," a party can organize its initial document production in whatever order suits its interests. Fed. R. Civ. P. 34(b)(2)(D).

Take advantage of this flexibility to organize your documents to maximize their persuasive power. In an initial production, you can usually assume that the plaintiff's attorney will read the documents in the order that you produce them, which means that you can control how the documents shape the narrative in opposing counsel's mind. For example, you can make your key document the first document in the production, or you can put all the documents relating to your strongest defense first. If you have a "bad" document, you can surround it with documents providing necessary context.

A thorough, organized, initial document production notifies opposing counsel that you have done your research and are prepared to litigate this case aggressively. In contrast, a meager document production in a complex case signals that you are still figuring out your case and have not finished even an initial document review. Guess which case is a better candidate for early, favorable resolution.

Interrogatories

Nicky asked, "The interrogatories are good, right?"
"They're good," Ellery said.
"I thought about the information we will need to defend this case, and I asked questions relating to what we need."
"You did."
"But?"
"But you're asking a lot of questions here."
"Yeah," Nicky said. "That's the point of interrogatories."
"Again, you are technically correct. But what's the real point?"

A lot of attorneys—especially junior attorneys—see interrogatories as their chance to make opposing counsel do a bunch of homework for free. After all, attorneys get to ask a question that "relate[s] to any matter that may be inquired into under Rule 26(b)," that is, "any nonprivileged matter that is relevant to any party's claim or defense…." So many attorneys issue scattershot interrogatories to try to get a lot of information with a little effort. As a side benefit, inexperienced attorneys often revel in the opportunity to force opposing counsel to expend a lot of effort.

This is a mistake. Rule 33(a) only allows twenty-five interrogatories, including subparts. Consequently, you should design each interrogatory you issue to elicit a specific response that will prove useful at trial and that you cannot elicit through document requests or requests for admissions. If you cannot craft a pointed interrogatory, you may as well serve nothing at all.

In fact, poorly crafted interrogatories can be worse than nothing. You don't have to wait thirty days to get nothing. More importantly, broad, vague interrogatories yield only a slew of boilerplate objections and vague, meaningless responses, which, in turn, force you to initiate a protracted, expensive discovery fight. At the end of the fight, you revise your interrogatory to the one you should have propounded in the first place, and opposing counsel revises his or her response to the one that he or she could have given you at the outset, but is still less than what you requested. Then you give up because you realize how much money you will have to bill your client, and how much money you will have to forgo because you cannot bill your client for what you did.

So, use interrogatories sparingly. Opposing counsel tend not to know their case well enough to give useful answers, or they refuse to respond usefully because they know it will cost your client too much to compel them to do so.

Having said that, two interrogatories prove useful in most if not all litigation:

- If you dispute the genuineness or authenticity of any document that any party has produced in this case, state all bases for your dispute.
- If you refused to admit any party's request for admission, state all reasons for the denial.

Of course, these are not the only two, useful interrogatories in any case. But these two interrogatories signal to opposing counsel that you are preparing for trial—a signal that is especially useful in the early stages of a case. Additionally, because Federal Rule of Civil Procedure 26(e) requires parties to supplement their responses, these interrogatories can force

plaintiffs' counsel to alert you if their view of the case changes.

On the other side, the fact that no one else takes interrogatory responses seriously does not mean that you should do likewise. As with initial disclosures, thorough, detailed interrogatory responses—even to vague questions—can show the other side that you have investigated your case and prepared a vigorous defense. Objections have their place, but I try to answer interrogatories as completely as possible.

Speaking of objections, most attorneys issue a list of boilerplate objections at the beginning, then repeat each objection at the beginning of each response. Upon receiving interrogatory responses, most attorneys skip the boilerplate objections and go straight to the responses to see if they have anything to argue about. Absent privilege or confidentiality issues, try not to object to interrogatories that are legitimately aimed to elicit discoverable information—even if you can. The plaintiff is offering you a chance to explain your position in a more considered manner than a witness could at deposition. Use these opportunities to present your case to one-half of your likely "jury." Of course, many interrogatories are simply too objectionable to go unchallenged, but not all of them. (Also, if the plaintiff's counsel does move to compel, the judge will appreciate that you did not assert the same objections to every single interrogatory.)

Certifying your interrogatory responses provides another opportunity to forward your strategy. Because a party must certify its interrogatory responses, preparing thorough responses allows you to teach your client about the case, and it helps ensure that your client representative can legitimately affirm the interrogatory responses at deposition. Again, this will require preparing your client, or client representatives, early and thoroughly. (This approach doubles as early deposition preparation.)

Privilege Logs

If you have handled your initial document production properly, then responding to plaintiffs' document requests should pose little difficulty. After all, you have already produced all documents relating to any claim or defense, so plaintiff's counsel will not ask for any additional documents, right?

Of course not. Plaintiff's counsel will issue numerous broad document requests to attempt to probe perceived or potential weaknesses in your case. Plaintiff's counsel may have poorly described their client's claims, or they may consider new claims. You may think up new defenses or counterclaims. Continued investigation may reveal the relevance of documents that previously seemed irrelevant. Nonetheless, if you have produced substantial documents at the initial disclosure stage, that production can often blunt plaintiff's counsel's typical complaints that your client is withholding documents or otherwise obstructing discovery.

In terms of preempting plaintiffs' complaints about your document production, your privilege logs can either hurt or help you. They can either provide the plaintiff fodder to run to the court spinning tales of a pernicious obstruction campaign, or they can demonstrate your transparency and thoughtfulness about discovery.

Rule 26 requires a party withholding information or documents based on privilege to (1) expressly make the claim, and (2) describe the information or documents withheld sufficiently "to enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5). Too many attorneys delegate this task to junior associates or paralegals without adequate supervision. Left to their own devices, most paralegals will simply list the documents by type, date, sender, recipient or recipients, the subject line, and the privilege asserted (as marked in your document management program of choice). For about 80 percent of privilege assertions, this will suffice, because a recognized attorney's name will appear as a sender or recipient, and most opposing counsel will leave it at that.

For the other 20 percent, however, this approach sets up the privilege holder for a losing battle. If a client sent its attorney an email with the subject line, "FW: Accident," it is far from certain that the email is privileged. Is the email truly seeking confidential legal advice? Is the email simply forwarding a statement by a company employee regarding the accident, which may not be privileged? Is the email part of a chain, only part of which may be privileged? Other than the recipient's status as an attorney, what indications do the other parties have that the email relates to the seeking or providing confidential legal advice? An aggressive plaintiff's attorney will force you to scramble to answer these questions, in the context of a motion to compel, which will waste thousands of dollars of your client's money.

Aside from risking unnecessary motions practice, a sloppy privilege log suggests that counsel has not carefully considered the potentially relevant privilege issues. This, in turn, suggests that the attorney has not carefully reviewed the potentially relevant documents. Again, you want to send exactly the opposite signal.

In short, a privilege log is too important to leave in the hands of an inexperienced, unsupervised paralegal or junior attorney. An experienced attorney should review the log carefully to ensure that it explains thoroughly and specifically the grounds for all privileges asserted, not just "AC/WP" followed by the subject line in the withheld letter or email.

Further, a well-prepared privilege log will take special care to explain documents for which the privilege is not readily apparent. For example, a document that recounts a privileged conversation with an attorney can still be privileged, even if no attorney has ever seen the document. A report can qualify as work product even if no attorney helped prepare it. *See* Fed. R. Civ. P. 26(b)(3) (protecting from discovery documents "prepared in anticipation of litigation or for trial by or for another party *or* its representative (including the other party's attorney….")) (emphasis added). Many attorneys will question including such documents in the privilege log, and you should take the time to describe such documents specifically.

Positioned to Win

Ellery stopped by Nicky's office. "How did the settlement conference go?"
"We settled," Nicky said.
"For how much?"
Nicky told him the number. "The client wants to celebrate," she said.
"I would imagine."
"She said she wants some really good bourbon."
"Do you need a recommendation?"
Nicky opened a desk drawer. "No need," she said. "I have prepared."