Chapter 17

Responding to and Propounding Written Discovery

By Dennis J. Dozis, C. Scott Toomey, and James C. Ughetta

Before they even find the coffee machine, new attorneys often find themselves tasked with drafting or responding to written discovery. In written discovery, attorneys utilize the rules of civil procedure to exchange information with other parties, typically by means of interrogatories, requests for production of documents and requests for admissions. Written discovery requests can also be submitted to non-parties.

Consistent with the rules governing other forms of discovery in civil matters, the rules governing written discovery contemplates the exploration for information and materials that *might* have relevance to the case, rather than evidence which *does* have relevance to the trial. This broad concept allows the discovery of any material "reasonably calculated to lead to the discovery of admissible evidence." The scope of this standard clearly exceeds mere "relevance." The broader standard hints at the complications written discovery brings to young lawyers.

Even the newest lawyers soon become numb to the language used to draft discovery demands and responses. When starting out, new attorneys often turn to prior discovery demands and responses prepared by older and presumably savvier attorneys to understand the language and strategy employed. However, mastering the customary language wins only half the battle. Before delving into your law firm's computer databases to find a template from which to work (or, dare we say, to copy and paste), young attorneys may benefit from the following, not as frequently spoken, advice.

Familiarize Yourself with Your Clients

Often, when faced with a stack of written discovery, the existence of an actual client may seem remote to the young lawyer. But you have a client and the written discovery runs from and to that client. Some clients want more input in preparing written discovery and responses than others. Before drafting or responding to discovery demands, speak with your clients and get to know their role (or lack thereof) in the pending action and their desired level of input. Similarly, make sure you know the insurer's desired level of input.

Most often, the clients will have more experience with cases such as the one on which you are working, especially in pattern litigation scenarios. By speaking with them early and often, you allow their experience to educate you in those subject areas. You also need to know what responsive material they have in their possession and what they can produce if and when demanded. Some clients also will offer invaluable insight into materials they do not possess, but that may exist elsewhere. They cannot offer that insight if you do not ask

for it. Remember to take notes whenever you speak with your clients. The notes you prepare will serve as a useful outline for offensive discovery to your adversaries and non-parties, and will identify the limitations on what the clients can and cannot produce if and when demanded to do so.

To this end, the last thing that you want to do when responding to discovery demands is agree to produce something your clients do not have. Nor do you want a court to compel your clients to produce such nonexistent evidence. Conversations with opposing counsel regarding the scope of material the client can or will produce represent the perfect time to employ the most conservative judgment.

Similarly, your fiduciary duty to protect the client dictates that you refrain in most cases from producing evidence that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Even more important, do not disclose or produce a client's proprietary information or trade secrets without express authorization and without ensuring you have protected the client by obtaining or at least recommending a protective order safeguarding the confidentiality of the information. While the client may ultimately have to disclose sensitive information, understanding your clients' commercial concerns will take you a long way in keeping your clients satisfied, protected and happy with your performance.

You cannot understand the clients' needs, however, without communication. By speaking with your clients, you will be leaps and bounds ahead of your adversary because you will know what you need to obtain from your adversaries and non-parties, the evidence you can produce, and your limitations on production. Speaking with your clients during all aspects of discovery will enable you to avoid potential disasters and, perhaps most importantly, ensure that your clients are comfortable with the discovery process.

Familiarize Yourself with the Claims That Are Pled Against Your Clients

Equally important, you must know what claims are at issue in the case. Tailor your discovery demands to the claims actually made. Do not simply duplicate demands served in a different matter without understanding how they relate to your case. While no one wants to "reinvent the wheel," you need to ensure that any re-used wheel fits your car.

Along the same vein, avoid irrelevant or overbroad demands.[1] Doing so will make you look careless to your adversaries, clients and superiors and disinterested in the specifics of the case at hand.

Of course, keep in mind that the scope of discovery far exceeds the scope of admissibility at trial. Discovery supplies the building blocks necessary to admit evidence at trial. Do not limit your discovery demands to material you believe would be admissible at trial. Limiting yourself to demanding only admissible evidence may: 1) preclude you from obtaining and analyzing all information and material necessary to developing your case; 2) inhibit you from fully investigating the claims against your client; and 3) prevent you from developing every possible defense. Similarly, do not refuse to produce evidence when responding to demands

---

[1] *See*, *e.g.*, AF Holdings, LLC v. Doe, 752 F.3d 990, 996 (D.C. Cir. 2014) (finding that discovery demands were overbroad); Haase v. Countrywide Home Loans, Inc., 748 F.3d 624 (5th Cir. 2014) (affirming denial of discovery motion on the basis that the discovery requests were "overbroad and/or not relevant"); O'Flaherty v. Belgum, 115 Cal. App. 4th 1044, 1107 (Cal. App. 2d Dist. 2004) (holding that trial court did not abuse direction when it denied the discovery requests as vague, overbroad, irrelevant, and lacking a showing of good cause); Hegwood v. Mont. Fourth Judicial Dist. Court, 2003 MT 200 (Mont. 2003) (denying supervisory writ where District Court deemed the above discovery requests "overbroad and excessively burdensome" and ordered that Dr. Capps need not respond to the requests).

based solely on your opinion regarding its inadmissibility at trial. Rather, consider what may reasonably contribute to developing the case.

The disclosure of immaterial or unnecessary information also has consequences. Such inadvisable disclosures may prompt your adversaries to consider theories they did not before, and might never have considered. Knowing the claims pled against your client, and knowing those claims well, will assist you in determining what evidence is material, necessary and discoverable.

Familiarize Yourself with the Rules and Law Governing Discovery

You must familiarize yourself with the procedural rules and case law governing discovery in your jurisdiction. Jurisdictional and local rules of civil procedure govern the types of evidence and information that you can obtain from adversaries and that your client must disclose to adversaries. Case law interprets those rules and creates nuances that may vary from jurisdiction to jurisdiction. For example, jurisdictions may limit the types and number of interrogatories that can be served on adversaries.[2] Moreover, judges may impose individual rules of practice that deviate from a jurisdiction's procedural rules. Understanding the rules of civil procedure and local rules of practice will enable you to obtain all of the discovery you deserve, as well as the appropriate means for obtaining that information.

The jurisdictional rules of civil procedure may also set forth deadlines for interposing or responding to written discovery demands. Jurisdictions may require certain demands and disclosures by certain dates. Other jurisdictions may have steadfast deadlines for responding to discovery demands; the failure to respond to discovery demands by a certain date may mean the waiver of your right to object to those demands and may result in sanctions (such as occurs in California). Knowing the rules of civil procedure in the relevant jurisdictions, the case law interpreting those rules, and the judges' individual practices will permit a young attorney to navigate these deadlines and circumvent any avoidable pitfalls.

Familiarize Yourself with the Prior Court Orders

Likewise, young lawyers should review any prior court orders relating to discovery before expounding or responding to written discovery demands. Court orders, such as discovery orders, initial conference orders, and scheduling orders, may set forth discovery deadlines or parameters for discovery. Ask senior and supervising attorneys whether the court has issued any prior orders in the case and review those orders for all relevant deadlines and direction. Mark your calendars with those deadlines; doing so will ensure that you are timely with all discovery demands and responses.

Familiarize Yourself with Prior Discovery Demands and Responses

Early on, young attorneys learn not to reinvent the wheel when assigned tasks (such as preparing initial discovery demands upon joining issue) that have been performed hundreds of times before. Although you know (from earlier in this article) not to simply copy and paste discovery demands or responses from other cases without understanding why the attorney crafted those demands and responses in such a way, by no

---

[2] *See*, *e.g.*, Shaw Group v. Zurich Am. Ins. Co., 2014 U.S. Dist. LEXIS 61783 (M.D. La. May 5, 2014) (recognizing limit on available interrogatories); Mediatek, Inc. v. Freescale Semiconductor, Inc., 2013 U.S. Dist. LEXIS 122911 (N.D. Cal. Aug. 28, 2013) (same); Mitchell Co. v. Campus, 2008 U.S. Dist. LEXIS 47505 (S.D. Ala. June 16, 2008) (same).

means should you disregard prior demands and responses from your own or other cases. Prior discovery demands and responses may offer a wealth of information appropriate to the discovery in your case. Prior discovery demands and responses may also offer insight into appropriate language used in propounding and responding to written discovery, and can help ensure uniform discovery responses. Reviewing prior discovery demands and responses further serves as an important step for young attorneys to understand the types of discovery demands parties expound and how and why parties respond as they did. Moreover, by reviewing co-defendants' discovery demands and responses in the cases upon which they are working, young attorneys may also determine whether it is necessary to serve similar demands and responses on behalf of their own clients.

Thus, before highlighting, copying or pasting discovery demands or responses from one document to another, the young attorney should take the time to review the prior demands and responses, determine why they are being interposed, and understand how they may lead to material and necessary information. After all, when a judge asks a young attorney during a discovery conference why the client made a particular demand or fashioned a specific response, giving an intelligible reason for doing so saves major discomfort.

Familiarize Yourself with Discovery Devices

Becoming familiar with the different written discovery devices available to attorneys in your jurisdiction and the mechanics of those devices is critical to propounding and responding to written discovery demands. Some devices include:

Interrogatories

Interrogatories are a formal set of written questions propounded by one party directed to and answered by another. In large part, they seek to determine which facts support the claims or defenses at issue.

Typically, the state's Rules of Civil Procedure govern the use interrogatories in state civil actions. While Federal Rules of Civil Procedure govern the use of interrogatories in the federal courts, local District Court rules may materially alter the responsibilities from one District Court to the next.

Requests to Admit

A request to admit is a series of declaratory statements sent by one party to another requesting that the responding party admit or deny the statements, or provide a justification as to why the party cannot admit or deny the statement. Failing to meaningfully respond to a request to admit may cause the court to deem the matter true and admitted. Unless the court permits a litigant to modify or rescind a response, an admission usually removes an issue from dispute once and for all.

Requests to admit can be a powerful tool in civil litigation because they enable litigants to narrow the scope of the issues in controversy. Where an opponent admits a statement, the propounding party need not conduct any further discovery regarding matter. Instead, litigants can focus their attention on developing discovery concerning other issues in the case.

To avoid an irretrievable waiver, young lawyers often seek to assert objections to the scope, content or phrasing of a request to admit. Be careful, however: some jurisdictions limit the use of objections to requests to admit. Some judges may also overrule objections they find improper and may deem the admission admitted. The young lawyer needs to know the rules of the jurisdictions and the tendencies of the presiding judges before too aggressively objecting to a request to admit

Litigation Hold

A Litigation Hold is a notice or letter sent to a party (or to a potential party in an anticipated litigation) to avoid spoliation of documents and materials that may be relevant to the litigation. Such documents and materials may include electronic data, pictures, charts, graphs, correspondence, agreements, and other data. Once received, the party has a duty to maintain such potential evidence and suspend the company's document retention destruction policies for the documents that may be relevant to a lawsuit or that are reasonably anticipated to be relevant. A litigation hold prevents destruction and alteration of evidence. Plaintiffs often serve litigation hold notices on defendants for this purpose. However, a company can also issue a litigation hold internally, or the company's attorney may issue a litigation hold using a litigation hold letter.

Although litigation holds originally applied to documentation and information, the digital age has expanded the application holds to electronically stored data. To this end, the Federal Rules of Civil Procedure now provide for the discovery of electronically stored information, thereby expanding the use of litigation holds beyond physical documents.

Follow-up for Discovery Responses

After your discovery demands have been served, the waiting game begins. Most jurisdictions afford your adversaries a specific amount of time in which to respond to discovery demands. Make note of all of these deadlines and add additional time (typically five days) for obtaining your adversaries' responses by mail.

When your adversaries' deadlines to respond to your written discovery demands comes and goes, it is time to begin your letter writing campaign. To this end, draft friendly letters (also known as a good faith effort) reminding your adversaries that you served discovery demands, but that you are still without responses. Remind your adversaries that you are writing to them in an effort to compel responses amicably and without the need for judicial intervention. In addition to writing letters, young attorneys should call their adversaries regarding outstanding discovery. Speaking with an adversary in addition to letter writing may encourage your adversaries to produce the evidence that you seek. Not only are telephone calls more personal, but they typically diffuse any unintended hostile tones that may be conveyed in letter writing only. Moreover, although it is easy for your adversaries to drop your good faith letters into a stack of other good faith letters that they will get around to addressing at some point in the future, actually getting your adversaries on the phone and informing them of what remains outstanding puts them on the spot and may compel a response where letters alone may fall on deaf ears. Depending on your adversary and the type of case, you may want to follow up with a letter that memorializes what was agreed to during the phone conversation. At the very least, keep records of all telephone calls that you make to your adversary and the outcome of any and all telephone discussions; some jurisdictions require you to "meet and confer" with your adversary prior to seeking judicial intervention and telephone calls should meet that requirement.[3]

---

[3] *See*, *e.g.*, Ariz. E. Ry. Co. v. State Dep't of Revenue, 2014 Ariz. Tax LEXIS 6 (Ariz. Tax Ct. Feb. 28, 2014) (observing that Rule 37 of the Arizona Rules of Civil Procedure requiring parties to meet and confer when any discovery disputes arise prior to filing discovery motions); Arnett v. Dal Cielo, 14 Cal. 4th 4 (Cal. 1996) (observing that a local rule that required parties to meet and confer before filing a "discovery" motion); Amy v. Kmart of Wash., LLC, 153 Wn. App. 846 (Wash. Ct. App. 2009) (observing that "cautious practitioners will want to comply with the meet-and-confer rule").

The number of letters that you write and telephone calls that you make to your adversaries prior to seeking judicial intervention will depend on each particular case and the jurisdictional rules governing discovery. Try to resolve any discovery disputes without involving the court. The court will appreciate efforts made by the attorneys to resolve discovery disputes.

They Still Haven't Responded?

Months have passed since you served your discovery demands without even as much as a telephone call from your adversaries. You have written good faith letters and called your adversary to compel production to no avail. Rest assured that all is not lost.

Discovery motions are a mechanism by which parties can seek judicial intervention to compel their adversaries to respond to outstanding discovery demands. However, before beginning to write a discovery motion, young attorneys should learn the specific jurisdictional prerequisites to discovery motions.

Many jurisdictions require a demonstration of good faith efforts prior to moving to compel the production of outstanding discovery. These efforts are made by way of letters or telephone calls. Now is the time to use your letters and/or phone calls. Where good faith efforts were made in writing, locate those letters and prepare to annex them as exhibits to your discovery motion. If the good faith efforts have been made by way of telephone, it may be necessary to prepare an affirmation or affidavit memorializing those efforts and annexing it in support of your discovery motion.

Prior to drafting your motion, find out whether your jurisdiction requires the court's permission for drafting discovery motions. Many jurisdictions mandate contacting the court prior to serving and filing discovery motions because many discovery disputes can be resolved via a court appearance or a conference call with the court without the need for motion practice.[4] Therefore, review the judge's individual rules of practice and the local court rules in order to find out whether such a requirement exists in your jurisdiction.

If the judge requires you to first address outstanding discovery issues with the court prior to filing a discovery motion, let your adversaries know that you will be contacting the court in order to discuss outstanding discovery prior to making any telephone calls to the court regarding outstanding discovery. Doing so will prevent your adversaries from accusing you of engaging in ex parte communications with the court. Additionally, the threat of being on the phone with a judge may be just what it takes to get your adversaries to produce outstanding discovery.

Irrespective of whether the judge requires you to appear in person or participate in a conference call to discuss outstanding discovery, always be prepared. Know the date upon which the discovery demand was served and the dates upon which you made all your good faith efforts to compel your adversaries to comply with outstanding discovery. Also be prepared to discuss any other outstanding discovery at that time. Judges do not like to address outstanding discovery in piecemeal; if your adversaries owe you additional responses, judges prefer to address everything outstanding in one fell swoop. In addition, the court may ask you what discovery you owe your adversary, so be prepared to address all discovery issues.

---

[4] *See*, *e.g.*, AQ Asset Mgt. LLC v Levine, 2014 N.Y. Misc. LEXIS 584 (N.Y. Sup. Ct. Feb. 4, 2014) (observing that the New York court rules required that parties meet and confer concerning any discovery issues, and if they fail to resolve the issues, to request a conference with the court).

After exhausting less formal good faith efforts at resolution, you may have no choice but to write your discovery motion. Anticipate that your adversary may "oppose" your motion by producing the outstanding discovery. To the extent that your adversary does so, consider whether you should withdraw your discovery motion prior to the return date on the grounds that the issues raised therein are moot, or whether the plaintiff's response is deficient or inadequate. Moreover, if your adversaries' failure to respond to discovery demands is part of a repeated pattern, you may still want to address the plaintiff's willful and contumacious conduct with the court.

Conclusion

The discovery phase of litigation is critical to our civil jurisprudence. By familiarizing themselves with their clients, the claims against those clients, the rules of civil procedure and the case law governing discovery, prior discovery orders, the various discovery devices, and the available remedies for failing to comply with discovery, young attorneys will be well under way to propounding and responding to written discovery and meaningfully participating in this critical phase of litigation and their careers.