Judge Lawrence P. Riff
LOS ANGELES SUPERIOR COURT

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It's past time to fix our broken discovery culture

KEEP YOUR DISCOVERY DISPUTES OUT OF MY COURT – HERE'S HOW TO DO IT

Oh no! Here comes another judge hand-wringing about civil discovery disputes. What on earth is there new to say on this dismal subject? Short answer: Nothing new but still plenty to say. This author – now in his 41st year in the law world, having played the part of in-house counsel, law firm associate, law firm partner, law firm practice group leader, ABOTA-member trial lawyer, and judge in the criminal, family law and civil divisions of the Los Angeles County Superior Court – believes that there is so much wrong, and so much that could be right, in the way civil discovery is customarily performed. The problem, I think, is a failure to teach our children well. I hereby call upon every lawyer who aims or claims to be a mentor to pick up the torch and illuminate the path forward.

Resolve discovery disputes out of court

There is nothing wrong with the discovery statutes or rules of court as they pertain to civil discovery. No, "The fault, dear Brutus, is not in our stars / But in ourselves …." (Julius Caesar, Act I, Scene III, lines 140-141.) Culture, even in litigation, is "the way we do things around here." Our civil discovery culture – the way we do things around here – is broken. We are sleep-walking our broken practices into the next generation. To the generation of lawyers in your early years of practice and seeking to master your professional skills, I say unto you: Do not model your discovery behavior on that of your elders. Indeed, throw out your discovery form files and your model "meet and confer" letters. Put your shopworn and dog-eared "general objections" in the dustbin of verbose uselessness. Let's go to the first principles.

Civil discovery is designed to be self-regulating. The court should not be involved. Ever. If one finds oneself before a judge on a discovery motion, it represents a unilateral or bilateral professional failure, of imagination, negotiation, oversight or professionalism – usually all four. Certainly, that is what your judge is thinking immediately upon seeing the motion: These lawyers have failed and now they're bringing their failure to me to fix for them. Often the discovery dispute is the first substantive matter in the case to be presented to the judge. One's only opportunity to make a good first impression has been squandered. So, please, despite whatever you have previously been taught or have gleaned from the behavior of others, do not be misled:

A discovery fight is not a proxy or warm-up bout for the underlying dispute; it is not a way to "earn your bones" or notch your belt; discovery is not something to be "won" or "lost"; nor is discovery a forum to show fierceness or mule-like stubbornness to one's client, opponent or managing partner.

At the risk of enunciating a harsh truth, I say that the correct metaphor for a discovery dispute is that a skunk has sprayed the parties and now they – and you – are stinking up the courthouse. I tell you when there are smart, good lawyers on both sides, they never take a discovery dispute to court. Does that mean that all is kumbaya in those cases? Of course not. It means that the lawyers understand "self-regulating," understand meet and confer, understand how to cut a deal, and understand the Jagger/Richards dictum that if you try sometime, you just might find, you get what you need. Thus, if it is humanly possible, don't take a discovery dispute to court. There is no upside for anyone.

Narrowly tailor your discovery request

When propounding discovery, give it some careful thought at the front end. Tailor it to the case and the specific controversy. Go narrow and specific, not broad and general. (There is one exception; see below.) Most discovery fights arise and then get stuck on an overbroad request – overbroad in time, scope and/or definition. Usually, also overbroad in practical reality: It is calling for an act of information production that no litigant can possibly perform.

In a recent lemon law case, plaintiff sought from one of the world's largest vehicle manufacturers "all documents pertaining to YOUR customer call centers." And following a purported (but vapid and hopeless) meet and confer, plaintiff brought this to me to enforce on a motion, citing to me language from cases on the benefits of far-reaching discovery in our adversarial system. The defense position boiled down to, "See what I've been dealing with, Judge?" I saw.

Seriously, "all documents" (never mind the lack of any time limitation)? The defendant produces vehicles in 30 countries. Apparently one of its call centers is in Luton, England, part of a 550-person call center team in Europe that supports 210 phone lines in 19 different languages. I asked counsel, "So are you needing personnel records from the European call centers relative to your client's claim concerning a hard-shifting transmission on the 2018 pickup he bought in Duarte?" The answer: "Of course not." Next question (and, oh dear reader, mark this question well): "So, counsel, what do you really need?" And then, a thoughtful answer: "Well, we need to know if other owners of 2018 pickups of that model also complained of a hard-shifting transmission."

Fair enough, I think. I ask, "So if there were hypothetically at least 50 such calls, that would meet your need to show

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corporate knowledge of a non-conformity?" "Yes," I'm told. My order was for the defendant to produce call center records that document 50 separate customer complaints concerning hard-shifting transmission problems on 2018 pickups of that model. I'm told the defendant has such records electronically stored and with a couple of mouse clicks, the 50 documents can be produced. The wisdom of Solomon? Hardly.

Now the cranky judge asks plaintiff's counsel, "Why didn't you ask for that in the first place, then?" And a pointed question to the defense lawyer, "Why did you not offer that as a solution in your meet and confer?" Neither side's counsel can answer the questions because they imply positions that run counter to the discovery culture in which they were brought up. This is the failure of imagination. And, I suspect, because as relatively junior lawyers on the file, neither had authority from their bosses to do what the law requires: actually meet and confer, and cut a deal. This is the failure of oversight.

Asking for the moon

What does our broken culture teach our young? That the propounder should ask for the moon in the first instance. That the responder should then serve a page of objections. That the propounder should then write a dense letter exclaiming that seeking the moon was appropriate and necessary, and that all the objections are without any merit. That letter invariably concludes with some version of, "Because I'm categorically right and you're categorically wrong, I demand that you provide code-compliant responses and all responsive documents or I will move to compel and seek sanctions." That the responder should then send a responsive letter exclaiming that every objection is valid, and accusing the other of failing to "meet and confer." The set-piece is now complete and all the boxes have been checked.

Note that there has been no real communication on the common problem at hand. There it sits until it is presented to the judge to fix counsels' failures. And note that it all started with a plainly overbroad request. Seeking overbroad discovery is the single biggest mistake that can be made in discovery practice (well, right after ignoring the requests for admissions).

"But, Judge," I hear someone say: "if I don't ask for everything, I will get sandbagged at trial!" I disagree. In over 40 years of observing this dynamic, I have not seen it work out that way. In fact, it is the opposite. Because the opponent will not agree to produce the moon (because he or she can't) and because few judges will require it (because the demand is unreasonable), after the perfunctory non-informative letter-writing campaign, the discovery goes unanswered. The propounding party does not move to compel, probably because he or she sees that is a loser and will be sanctioned for trying. And the propounder having doubled down on the wrong horse and then run out of time, there is no discovery response at all. So, yes, now there is a risk of being sandbagged, whereas specific, tailored discovery would have all but eliminated that risk.

How to draft a winning request

I call upon all to unite on this proposition: When drafting special interrogatories, requests for admissions or requests for production of documents, be narrow and be specific. Tie the discovery to the facts of the case. Avoid asking for "all documents." There are different constructions that will get you what you need. Here's one example: "Produce the documents that YOUR organization utilizes to document the existence of …" Impose geographic and time limitations when seeking documents from large organizations, especially if the goal is to prove notice or knowledge. The real trick is this: Think about the inevitable "meet and confer" that would flow from your "all documents" overbroad request and think about what your good-faith position would be in that conversation. In other words, think: What do I really need? Then draft the discovery in the first instance based on your proposed good faith meet and confer position. Let the other side then tell the judge why that is not reasonable.

The exception: form interrogatories

Now the one exception to the specific over general rule: It is for Judicial Council form discovery, especially form interrogatories. Use them liberally; they are largely unimprovable. They are boilerplate in the original sense of the word: the huge sheets of steel placed on the hulls of wooden ships of war that would cause cannonballs harmlessly to be deflected. Rarely can one successfully object to a JC-drafted form interrogatory although we all know the term "INCIDENT" can cause trouble. Take good care to define it narrowly and clearly.

Objections? Think again

For this you'd better sit down. (Deep breath.) Virtually all your objections are worthless – stop interposing them; it's a waste of perfectly good printer ink. Sometime in our distant past, the culture arose of listing every discovery objection possible – and some that are not possible (my personal favorite is "assumes facts not in evidence") – no matter what. And so, we teach our young or they see our old forms and believe this must be the right way. They know no different and are afraid not to follow the received wisdom of the ages. They think, "Well, my boss does it, so it must be the way to go." It needs to stop if for no other reason than it is an embarrassment, and probably an ethical violation, for that lawyer to sign a response with all those non-meritorious objections. Very good lawyers respond to non-objectionable discovery with no objections whatsoever. They just (imagine!) answer the question. Doing so shows confidence and strength. "We have nothing to hide and we want you to know what we know" is the subtext.

When I was a struggling, brand-new in-house trial lawyer at the Southern Pacific Railroad, my boss – who had by then tried 400(!) cases to a jury – told me

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early on to never get into a discovery fight; there is no upside, he explained. He said, "If discovery doesn't call for something privileged and it can be obtained and produced without too much trouble, just fork it over and get on with your life. Don't worry about whether the other side is 'entitled' to it." He also said that lawyers who play games in discovery are playing with fire when it comes to trial. Many judges will be of the view, "you didn't produce it, you can't use it," and won't care whether the other side met and conferred. I lived my professional life so guided for many decades and it served me well.

As to the three objections that do matter – privilege, burden and privacy – each needs to be supported factually by the objecting party, either affirmatively on a motion for protective order or defensively on a motion to compel. My advice: Always be the party moving for the protective order because it shows initiative and gumption, and you will get to file a reply brief. The other alternative, being the respondent on a motion to compel, makes one appear foot-dragging and defensive. If there really is a privilege, an undue burden or a privacy issue, be prepared to prove it by a detailed and thoughtful declaration.

Don't be the boy who cried wolf

As it is sometimes said, don't talk the talk unless you can walk the walk. When every objection is made no matter what, it calls to mind the fable of the boy who cried wolf. How about the lawyer who cried objection? What are you going to do when you have an objection you want someone – for example a judge – to take seriously? But let's say the discovery item truly is vague, ambiguous or overbroad. What then? I think the best practice is to make the objection, and then immediately construe the discovery item in the fashion that your client will take in the future meet and confer and respond accordingly. Example: "The request as phrased is overbroad as it is unlimited as to time, geographical location and calls for 'all documents.' However, the defendant will construe the request as calling for it to produce call center records that document 50 separate customer complaints concerning hard-shifting transmission problems on 2018 pickups of X model, and so construing the request, defendant responds that it will comply with the request." Now let the propounding party explain to the judge why that is not sufficient.

Last words on objections: Be sure to say, one way or the other, whether your client is or is not withholding any information or documents on the basis of any asserted objection. For most propounding litigants, so long as he or she can be assured that nothing is being held back – objections or not – there is no problem to be solved, no meet and confer to be had, no motion to be brought. But it is the lack of clarity that causes the issue. Often a responding party will say, "Notwithstanding and without waiving any such objection, responding party says: None." That probably means there are no responsive documents at all, subject to any objection or not. But it really is not clear. It might mean "none except for privileged documents that you don't get to see" or "none, excluding the ones that we think are too burdensome to locate." The A+ way of handling it: "Notwithstanding and without waiving the objections interposed to this discovery item, the responding party states that it is not withholding any responsive information or documents on the basis of those objections." Or, "Notwithstanding and without waiving the objections interposed to this discovery item, the responding party is not withholding any responsive information or documents on the basis of those objections except for documents containing attorney-client privileged communications as reflected in the contemporaneously served privilege log." Again, either way, just be clear as a bell as to what you are doing.

Meet and confer productively

Meet and confer as if your goal is really to solve a problem. The Discovery Act requires the parties to "meet and confer" on discovery disputes. The common understanding of those words suggests a real-time exchange of ideas on the point of dispute. Our broken discovery culture has evolved into something else entirely: a formalistic letter-writing campaign purported to vindicate poorly drafted discovery and non-meritorious objections, with no real narrowing of any dispute. The meet and confer process requires good faith. Good faith on the responder to recognize that the propounder has a right to discovery, has a right to look under dark rocks that are inconvenient to lift up, and that the bar on obtaining discovery is really low. And good faith on the propounder to recognize that clarity, burden, privilege, and privacy are real concerns that will often foreclose certain avenues of inquiry.

The meet and confer is also a great opportunity to learn more about the other side's case. Asking a polite question can yield important information. "Can you help me understand why you think you need that information?" is a great way to start. Perhaps that leads to a stipulation where certain issues are removed from the case, obviating the discovery dispute entirely. It is also a great way to start a settlement conversation. A true meet and confer proceeds from two questions: "What do you really need?" and "What is the problem with the discovery item as drafted?" Parties should be cutting deals in the meet and confer process without anybody giving up ultimate rights. A schematic might work like this: "Look, you say you need A, B, C, D, E and F from us. We say that coming up with D and F is going to be really difficult and expensive, and frankly, we don't think you truly need it. Accordingly, we propose (1) we will produce A, B, C and E; (2) we promise not to use D and F at trial; (3) after we produce A, B, C and E – if you still think you need D and F, we will come back together to discuss it further, including possible limitations; and (4) in the

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meantime, we will extend your right to move to compel D and F to 30 days after we tell you we have produced everything on A, B, C and E." Perhaps the propounding party wants a little more and offers, "Well, look we want D also, but we agree to limit D geographically to California and on a time frame from 2018 to the present, but without waiving our right to seek more of D and all of F later." These parties have all but made a deal – this is the self-regulation that the legislature intended under the Discovery Act.

Conclusion

We can and should fix our broken discovery culture. Mentors out there, spend some time with your mentees and show them the path forward.

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The Hon. Lawrence P. Riff is a superior court judge in Los Angeles. Following Judge Riff's appointment in 2015, his assignments have included criminal misdemeanors, civil small claims, civil trial court, civil I/C court, Coordination Trial Judge for the LASC's Asbestos Complex Department, and family law home court and long cause trial. Judge Riff currently is assigned to a Complex Civil department in the Spring Street Courthouse. Judge Riff received the LevittQuinn Outstanding Community Service Award, the Beverly Hills Bar Association Family Law Legacy Award in 2021, and the American Academy of Matrimonial Lawyers (So. Cal. Chapter) Distinguished Jurist Award in 2020. Judge Riff writes frequently on issues of evidence, procedure, trial practice, and substantive civil and family law.