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Are We There Yet? Discovery for the New Litigator

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"Our battered suitcases were piled on the sidewalk again; we had longer ways to go. But no matter, the road is life."
—Jack Kerouac

If the road is life, then discovery is litigation. It is how we reach our destination. Unfortunately, discovery is like getting there with someone in the backseat.

Anyone who has ever traveled with passengers, especially children, knows how it plays out. In the beginning, everybody is excited. Everyone gleefully piles into the car, eager to launch. No one has any trouble amusing themselves. A couple hours in, a bathroom break and gas station snack later, it hits. The adrenaline wears off and the tedium kicks in. And then you hear the dreaded cry coming from the rear: *Are we there yet?*

Like any road trip, discovery has its highs and lows. Developing a good discovery plan can be interesting and rewarding. Discovery brings us the facts—and the evidence we need to prove them. It fills the gaps in our case. Plus, without discovery, we would not know the thrill of finding that gem of a document, securing the admission during a deposition, or uncovering those deliciously indiscreet internal emails. Litigation without discovery would be like riding in a car blindfolded; there would be no way to mark our progress, we would miss all the roadside attractions, and bad things would almost certainly happen.

But discovery can also be awful. It is long, painful, often contentious, always time-consuming and expensive, and frequently fraught with unnecessary skirmishes that take place under the guise of genteel or congenial "meet-and-confers." We find ourselves dealing with difficult lawyers and even more difficult witnesses—some of whom may be on our side. It can be like a road trip through a construction zone, during a snowstorm, surrounded by student drivers.

So how can we make the best of it? How can we master its potential? How can we use it strategically, effectively, and efficiently? Our civil procedure class in law school may have introduced us to Rules 26 through 37, but how do we learn when and how to deploy the right discovery tool? If we master these lessons, can we actually—gasp—enjoy the ride of discovery? After all, it is about the journey, not the destination, right? Isn't that what Jack Kerouac told us? And how can we resist advice from someone that cool?

In this metaphor, we litigators are the drivers and our clients are the often unhappy and increasingly grumpy passengers. They are constantly bellowing from the discomfort of the backseat, "How much farther?" "It's going to cost how much?" And, of course, "Are we there yet?" Whether "there" is trial, settlement, or judgment, we must figure out how to get them where *they* want to go. We must navigate, drive, and course-correct throughout it

all. And we must do so at a reasonable cost and without any unnecessary stops, detours, or—heaven forbid—U-turns.

The Discovery Road Map

Wouldn't it be nice if there was a map, a travel diary, a TripTik, if you will, to guide us? This article endeavors to provide that road map, offer direction, alleviate some of the driver fatigue, and encourage more enjoyment of the journey. Although we have written this piece with the new litigator in mind, we suspect that even the most experienced drivers could do with a refresher.

"If you don't know where you are going, you might wind up someplace else."

—Yogi Berra

Discovery requires thoughtful planning. Period. Full stop.

Consider your objectives: What do you want? Why do you need it? To what issues, claims, defenses does the information relate? Who bears the burden of proof? What is at stake? What is the budget? A beat poet has the luxury of just getting in the car and going; a litigator does not. Answering these questions is rarely easy, but getting back to basics often helps: Review the elements of the claims and defenses; start a chronology or proof chart and look for the gaps, key events, and areas of focus. Talking it through with a colleague also never hurts. (That's why we like to go on a road trip with a navigator riding shotgun, right?)

Only after you can answer those essential questions can you determine the appropriate tools to accomplish your discovery objectives. Too often litigators default to boilerplate discovery requests, waiting until all documents are exchanged before taking any depositions and delaying too long to engage and consult with experts. They have a particular way of doing things and do not deviate from it. But this wooden consistency makes no more sense than starting off every road trip by going north and hanging a right.

When done correctly, discovery is strategic and specific to the case. There is a style, an art, a focus that compels the process. Discovery is a means to an end; however, very few lawyers put enough advance critical thought into what is the "end" for their clients and how they will know when they get there. Instead, they wander through discovery listlessly, going through the motions without purpose. A sort of highway hypnosis sets in—they just keep going, regardless of what the case requires. This is a waste of time and resources, and the root of our disdain for the process altogether.

Don't be lazy. Review the pleadings. Conduct the initial witness interviews. Identify your client's goals. Think—really think—about what evidence is necessary to support your client's story, develop your themes, and advance the case toward a successful resolution. A discovery plan will come together as these questions are answered. Once you have a plan in place, revisit it as the case rumbles along. Do not map things out just at the beginning.

Now that you have a plan—a road map—what is your method of transport? How do you get there? The Federal Rules of Civil Procedure provide several methods of discovery, including document requests, interrogatories, requests for admission, subpoenas, and depositions.

Illustration by Ellen Marello

Don't forget that informal methods of factual investigation are also available and can be used before a case is even filed. Think through the utility of public records requests, internet research, and other tools not based in rules for fact investigation. You have options—use them wisely.

Rules of the Road

The following are a few of our favorite travel tips and rules of the road.

Document requests (Rule 34). Document requests are among the most helpful of discovery tools. This is so for a simple reason: They seek evidence that existed *before* the lawsuit started. Interrogatory responses, deposition testimony, and answers to requests to admit are subject to considerably more manipulation by opposing parties and lawyers. Documents have a unique permanence and therefore a unique usefulness.

Of course, less-than-honest parties and lawyers can play games and hide documents from disclosure. In our experience, however, sooner or later documentary evidence tends to come to light. And there are few things more enjoyable in the litigation process than being able to show that the other side wrongfully destroyed or concealed a document. It is like finding that your road trip has taken you to the World's Largest Ball of Twine—with an adjoining cocktail lounge.

While there is a reason certain roads are more traveled, don't get stuck in a rut. Beware of trotting out the same boilerplate document requests that typically glean little useful information. Rather than asking for "every document relevant to the allegations in the complaint," think about exactly what it is that you need. In larger cases, consider attacking in waves (though, be diligent on applicable time constraints), by claim, issue, or time frame. In smaller cases, identify the essentials and focus there first.

Be especially careful about using boilerplate definitions. The definitions are in there in case a dispute arises and you need to persuade a judge that your request was clear. If the definitions contain words that are not in the requests, or do not contain words that are, then they will be worse than useless.

No matter your plan, never forget that discovery is a two-way street. Know your client's discovery strengths and weaknesses. If you want to take an aggressive approach that could be returned in kind, make sure your client can respond. You do not want your client to wake up to the headlights of an oncoming tractor-trailer that you failed to warn your client about.

Finally, with respect to documents, don't forget to map your stops. Early on, negotiate search terms, custodians, and use of technology-assisted review (TAR). Depending on the size of the case and the scope of electronically stored information (ESI), early negotiation of these issues can alleviate expensive, cumbersome, time-consuming motion practice down the road.

Interrogatories (Rule 33). We mention interrogatories next because, like document requests, they usually play their most important role toward the beginning of your journey. Sometimes sending out interrogatories later in a case makes sense. Generally, though, interrogatories lose their value as the case proceeds because there will not be time to follow up on the answers you receive with document requests and depositions. It is a bit like looking for a gas station after your tank is already empty, the car is stalling, and you've eaten the last potato chip.

Interrogatories are best used early to address specific, targeted issues or questions. Identify individuals with knowledge. Identify the damages sought, including the method for calculating the amount. Identify all members of ABC, LLC. Identify the amount of shareholder distributions you received from XYZ, Inc., in 2019, including the date of each distribution. Identify each financial institution and the last four digits of the account numbers where you maintain an account of any kind. See a pattern here?

Interrogatories are not meant to replace depositions. When you ask a question at a deposition, you get the witness's answer. When you send an interrogatory, you get opposing counsel's answer. A common error of new lawyers is to issue interrogatories that are better left to depositions. All this does is allow your opposing counsel to write the answer, which their client can then memorize.

If your request calls for an extended travelogue from the other side, then revise it. What are you *really* after here? What do you *realistically* expect to gain by asking the interrogatory? How can you use the response to cultivate other discovery, such as better lines of questions at depositions?

Also, be particularly careful with "contention interrogatories," or interrogatories that seek to explore an adversary's factual support for legal contentions. You know how these go: "State all facts in support of paragraph 10 of the complaint." While usually permitted at some point in litigation, some courts regulate the timing of contention interrogatories, generally prohibiting litigants from using the tactic too early in the discovery process. Fed. R. Civ. P. 33(a)(2).

Even if they are appropriately timed, pause and ponder before serving contention interrogatories. Improperly framed, they will draw an objection on the basis that they invade work-product protections. Far too many lawyers resort to them because they are easy rather than because they produce useful information. Discovery offers so many interesting vehicles for uncovering facts; why get behind the wheel of one with so little horsepower?

Finally, conserve your fuel. Rule 33(a)(1) limits parties to 25 interrogatories each, including subparts. Think about how and when to deploy them. Early on, assess whether you should ask for more. If you give enough advance thought to your discovery plan and realize 25 simply won't do, you can try to modify the number of requests as part of the Rule 26(f) discovery conference negotiations.

Remember that parties have an obligation to supplement their answers under Rule 26(e). Frame your interrogatories in ways that maximize this obligation—and avoid the need to issue subsequent requests (which may exceed the cap or cause unnecessary delay in receiving responses).

Requests for admission (Rule 36). New litigators sometimes overvalue the importance of requests for admission. Who can blame them? The idea that you can compel your adversary to admit something favorable to your case has considerable appeal.

Nevertheless, requests for admission suffer from the same critical limitation as interrogatories. The responses come to you filtered through the agendas of your opposing counsel. A lawyer of even middling cleverness could probably figure out a way to deny that shifting your car to "D" will make it go forward. (Denied: The car must also be operative and must have fuel, and you must have depressed the accelerator pedal.)

When done correctly, discovery is strategic and specific to the case.

That said, we still like requests for admission. When used properly and thoughtfully, requests for admission can be extremely effective. They can inflict death by a thousand cuts. Don't go for the jugular here; be surgical, specific, precise, and narrow in your requests.

Requests can be used for very basic things, like authenticating documents. But they have much greater potential. For example, imagine the following series of requests if the existence or validity of a contract were in dispute: Admit that you were authorized to sign the Agreement. Admit that you signed the Agreement. Or, let's say you need to establish a timeline and persons of knowledge by identifying who was present at certain meetings: Admit that you attended the November 5, 2019, meeting. Admit that you attended the November 5, 2019, meeting in person. Note how the requests can build on one another.

It is amazing how a few key admissions can narrow an issue, highlight a weakness, or open the door to an early motion for partial summary judgment. They can lock a party into certain facts and box a witness in before his or her deposition.

Caution—don't forget that this rule contains a speed trap. Requests for admission are self-executing if not responded to timely. Rule 36(a)(3) provides that the "matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection." If you are struggling to get discovery responses from an opposing counsel who is too busy or distracted, service of a set of requests for admission typically provides the nudge you need. Conversely, if you need more time to respond, ask for it; Rule 29 permits the parties to stipulate to a deadline extension (unlike some state analogues that require a court order).

Depositions (Rules 27–28 and 30–32). Much has been written about taking and defending depositions, fact versus expert depositions, and corporate representative depositions. We will highlight only a few essential rules of the road here.

Don't wait too long to get the journey started. Despite there being very few rules applicable to the timing of discovery, lawyers often wait to notice depositions until written discovery is complete. Some cases benefit from locking in a witness's testimony early. For example, if you are defending a consumer class action, the named plaintiffs typically have very few documents to produce, and there is a lot to be gained from securing their story before their lawyers have fully developed their case themes and had an opportunity to learn your client's story. Some employment cases are the same. There may also be circumstances that necessitate early depositions—age, health status, international travel, or relocation of a witness.

Keep your eyes on the road. New litigators often take depositions by preparing a detailed outline that they unwaveringly follow. One of the keys to taking an effective deposition, however, is to listen carefully to the witness's answer to the question. An old story tells of the new lawyer whose first deposition started like this:

> Lawyer: What is your name?
> Witness: John Smith.
> Lawyer: Where do you live?
> Witness: Look, I'm sorry. I can't go on with this charade. I have no claim. My lawyer set me up for this. He told me to lie under oath. But I just can't do it.
> Lawyer: And how long have you lived there?

Effective deposition taking requires the lawyer to connect with the witness and to pay close attention to the witness. Yogi Berra said you can observe a lot just by watching; well, you can hear even more just by listening.

Know when to stop. New litigators, having successfully extracted the answer they want from a witness, will be tempted to "make sure" they got the testimony by asking the question again. And again. Or by saying: "So, you admit then that. . . ." This usually achieves nothing beyond allowing the witness to change course and head in a direction you do not like.

Make good time. Years ago, depositions that lasted for days were not uncommon. Those days are long gone. Time limits are

the norm. Federal Rule 30(d) limits depositions to "one day of 7 hours." Consequently, lawyers taking depositions of key witnesses must think about how best to use the time allotted or whether they are going to need more time. Prioritize. Determine what topics you need to cover and how you are going to cover them. Consider whether it makes sense to get the witness to talk about a subject and then (while the witness is talking and focused on the subject) go to the documents, rather than waiting until you have heard the entire story. Both methods can be effective when implemented correctly and thoughtfully.

Know when you've arrived. Every deposition should have a specific set of goals. When you've achieved them, the deposition should end. Dallying around lets the witness rethink his or her testimony, which usually will not help you.

"Some roads aren't meant to be travelled alone."

—Chinese proverb

When was the last time you took a road trip without the help of Google Maps, Waze, Yelp, or GasBuddy? You may not need each of these "experts" for every trip, but there are benefits to be considered and explored as part of your travel plan.

The same goes for discovery. Do any of your claims (or counterclaims) *require* expert testimony? Would any of your claims or defenses *benefit from* expert consultation or testimony? You do not have to go it alone. Experts can be invaluable in helping you prioritize discovery requests, understand and focus the information you have gathered, and give credibility to your arguments. A good and invested expert can be vital to the success of a case.

If an expert would be helpful, then get a travel buddy—early. Consider sharing a draft of your discovery requests with your expert and getting advice on lines of questioning during depositions. There may be jargon or key words used in the particular business or industry, and the expert's input can be used to improve the quality of the written requests and questions (while also signaling to the other side that you are prepared, knowledgeable, and thinking about the discovery—not just serving an off-the-shelf set). Experts may also have suggestions on third parties to subpoena, public records to request, and other discovery mechanisms to exploit.

"Sometimes the most scenic roads in life are the detours you didn't mean to take."

—Angela N. Blount

OK, "scenic" may not be the best descriptor here, but the discovery process is rarely smooth traveling. There are inevitable delays, detours, and disputes. Some opposing counsel are particularly prone to testing inexperienced fellow drivers. All these things can burden and consume the process if not handled properly. A few rules may help you steer your way through discovery disputes.

Plan for the (un)expected. Depending on the nature of the case, scope of information at issue, and method of production, consider whether it makes sense to put into place early such things as protective orders, ESI protocols, virtual deposition protocols, and limits on the scope or extent of discovery. Exploring these topics may, at a minimum, give you a good sense of how much compromise you can expect from your opponent. And judges generally look favorably on lawyers who try to address these things preemptively and cooperatively.

Call in the authorities, if necessary. Of course, you cannot plan for everything, and not everything can be worked out without judicial intervention. Motions to compel, motions for protective orders, motions to quash, and other mechanisms exist for just these occasions. But a word of warning: These tools should be used prudently and effectively. Do not waste these opportunities to demonstrate your client's reasonableness, focus, diligence, and candor. (And if your client doesn't have these qualities, expect a cross-motion.) Highlight your themes of the case and how the discovery sought supports those themes.

Trials are the exception—not the rule. Few clients set out in litigation to try their case to a jury. Clients want resolution—fast and final. This often requires settlement. The discovery process has natural inflection points that provide strategic off-ramps to resolution. Look for them. Plan for them. Negotiate them. Consider whether opposing counsel will agree to a truncated discovery schedule followed by mediation. Or whether it is advantageous to schedule certain key depositions following the production of certain documents to narrow the focus of the dispute and leverage a settlement before discovery takes a turn down a long, winding, expensive road with no rest stop for miles. Be flexible in your approach and your path; it may be what sets you apart and achieves real value for your client.

"No road is long with good company."

—Turkish proverb

Whenever possible, don't go things alone. Use mentors. Consult with colleagues. Become active in organizations that acquaint you with lawyers who are traveling the same highways so you can share your experiences.

And, finally, be good company to the other drivers. Be civil. Be professional. Be respectful. Don't be the person with whom everyone else hates to share the road. That just makes the road longer. The road is plenty long enough just as it is. ▪