

Dealing with the Unreasonable Opponent

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By The Honorable Ralph Artigliere

Has the following happened to you? Your client has an excellent case based in large part on electronically stored information (ESI) on devices owned and controlled by the opposing party. Knowing that ESI can degrade or be compromised or lost, you and your staff have worked diligently to prepare discovery requests carefully and narrowly drawn and proportional to the case to avoid objection. If you can just get the information your client is entitled to receive, you will be able to prepare a summary judgment motion that will get your client the proper relief. However, the opposing party vaguely objects to all the discovery requests and puts up obstacle after obstacle to moving the case forward. Efforts to discuss discovery with opposing counsel are met with either no response or disrespectful and belligerent emails in response. In addition, opposing counsel sends overbroad and oppressive discovery requests to your client and demands that you strictly meet every deadline. This paper raises some suggested strategies and tactics to deal with such an opponent and unprofessional discovery behavior.

From its outset, discovery in civil cases¹ was never designed to be a forum for bare-knuckled fighting in the name of trial advocacy. Under the federal rules and state rules of procedure that followed in their wake, parties were always obligated to exchange requested relevant information without undue resistance.² Yet, the message either did not get through or it became muddled over the years, and fights over entitlement, form, amount, timing, methods, or burden of discovery became more common than compliance with requests.³ Every judge and civil trial lawyer knows lawyers – and even law firms – that engage in delay, obstruction, and obfuscation during discovery as a matter of routine practice. Trial lawyers and judges regrettably must learn to deal with the unreasonable advocate. This problem became untenable with the emergence of the digital age and the accompanying explosion of data and

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¹ Counsel in criminal cases operate under a different set of standards for discovery and motion advocacy, which are beyond the scope of this paper. However, many of the suggested solutions here are based on successful negotiation strategies and dealing with lawyers and judges as officers of the court and may work in criminal cases as well.

² Rule 1, Federal Rules of Civil Procedure was enacted in 1937 to secure the “just, speedy, and inexpensive” resolution of civil disputes. The Rule 1 doctrine was reinforced when the Fed. R. Civ. P. 26 was amended in 1983 and again in 2015, when proportionality was placed more prominently in Rule 26. See Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26 Notes of Advisory Committee on 2015 Amendments. Thus, the drafters of the original 1937 federal rules intended that discovery was to be a relatively inexpensive and uncontentious exchange of information, a concept that was reinforced by specific amendments over the years to Rule 26.

³ Boorish or uncooperative behavior has been justified by some in the name of zealous advocacy. The ABA Model Rules of Professional Conduct and most state rules that follow them were modified to temper the use of “zealous advocacy” to justify unreasonable or uncivil conduct by counsel. Comments to Model Rule 1.3 promote zealous advocacy, and Comment 1 to the Rule speaks to the depth of that duty; but the model rule comments go on to explain: “A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” (Rule 1.3 Cmt. 1)

costs of accessing and processing it. Here are some ways to handle the opponent who behaves in an obstructionist rather than a reasonably transparent fashion.

1. Start by being reasonable, proportional, and cooperative in your requests and responses to discovery. Rule 1 and its state counterparts require all parties and the court to seek “the just, speedy, and inexpensive determination of every action and proceeding.” This means that the case itself – as well as any component of the case, such as resolution of a discovery dispute – are subject to the Rule, and “[e]ffective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.”⁴
2. Do not rise to the bait by lowering yourself to your opponent’s level of conduct. The best response to lack of cooperation is continued cooperation and reasonableness. This has the potential of defusing the opponent’s negative behavior, and if it does not, it provides you and your client with the best opportunity for credibility before the court and even before the finder of fact. Jurors, arbitrators, mediators, and judges regard obstructive conduct to be a sign of either hiding something bad or a lack of respect for the process or participants in the process. As for the judges, having two lawyers each pointing to the other’s bad behavior is not good for either side or for case progress. It is never wise to justify your behavior by pointing to the opponent’s bad behavior. Ask any judge.
3. Do not overreact. Think ahead to the judicial response to the issue at hand. Frame the dispute in a way which will provide a pathway for the judge to assist in getting the matter back on track. Give the opponent an opportunity to do the right thing before appearing at a hearing on a motion for sanctions. Make requests for sanctions or remedies commensurate with the injury sustained for failure to make discovery. Set an objective and shoot for that. If the need is getting the discovery, work towards that goal. If it is necessary to change the behavior of the opposing counsel or party, then work towards sanctions that will accomplish such change. Overreach can lead to a less than effective result. Remember that judges must be careful to render rulings proportionate to need and entitlement.
4. Try to determine who is actually causing the problem. If it is the opposing lawyer, your methods toward resolution may be different than if it is the opposing client. If the lawyer is the problem, sanctions for failure to make discovery may result in remedies against the lawyer as well as the client. Obstruction by the opposing party may lead to greater opportunities for impeachment or inference sanctions at trial.
5. Give the opposing counsel the benefit of the doubt and continue to try to get the matter on track by agreement. Avoid motion practice. If necessary, explain why the discovery is needed. However, in every opportunity, avoid talking down to the opposing lawyer or raising threats. Ask instead why there is a problem and what can be done to resolve it. Inform the opponent of the intent to involve the court without making it a threat. A meet-and-confer session is more likely to yield better results than communications exchanged through e-mails or letters.

⁴ Fed. R. Civ. P. 1, Committee Notes on Rules—2015 Amendment.

6. If the lawyer is uncooperative or unresponsive, be prepared to document fairly the nature of the failure to cooperate or respond without resort to overstated or self-serving letters or emails. Make a good record of cooperative and reasonable efforts to resolve the matter from the start and ensure that any motion is complete and supportable by the record. Do not create a document after the fact that subjectively outlines a version of a pattern of behavior that may be denied by an opposing version.

Trial lawyers are indeed advocates for their client. But the best trial lawyers are not the noisiest, most belligerent, and most obstructive people in their conduct. Effective advocates know their case, know the rules, and prepare for whatever may come from the opposing side. Good trial lawyers see unreasonableness by the opponent as an opportunity for the advantages afforded under the rules and common sense. Advocates first try to change the conduct of the opponent by negotiation. If that fails, judicial intervention, when carefully and properly invoked, can open doors wider and faster, provided there is a legitimate need.

Most importantly, going up against an obstructive opponent may be an opportunity to expose the credibility of the opposing side while enhancing your own credibility or client's standing by contrasting continued appropriate behavior with that of the other side. Judges and hearing officers are human beings. Paint the picture accurately, and you and your client will be rewarded with a smoother trip through litigation.