Litigating civilly: Ten self-serving ways to "play nice" in discovery

These discovery tactics will help you advance your clients' interests while fostering productive relationships with opposing counsel

John Kelley and Peter Vestal

Sooner or later all civil litigators encounter behavior that is, well, uncivil. The inherently contentious nature of litigation leads some lawyers to blur the line between zealous advocacy and unprofessional, derogatory and even abusive conduct. Uncivilized actions often result from the desire to seek advantage, although sometimes the culprit is little more than poor case management or people skills. The discovery phase provides fertile ground for instances of incivility. If you toil in the fields of litigation, you need pause only a few moments to recall several examples of unreasonable behavior by your less considerate colleagues.

Civility is not inconsistent with self-interest

The topic of professional courtesy has gained visibility in the past year thanks to the efforts of the California State Bar, which adopted "California Attorney Guidelines of Civility and Professionalism" in July. The current civility push – like most bar association model civility codes – primarily characterizes civil behavior among lawyers as something one *should* do. While civility is certainly a worthy goal in and of itself, there may be specific, strategic reasons to take the high road in dealings with opposing counsel. It is frequently possible to simultaneously advance your client's interests, alleviate the seemingly inherent frustrations of discovery, and foster productive relationships with opposing counsel. Skeptical? Here are ten discovery tactics that couple civility with self-interest.

- **Make informal discovery exchanges**

Experienced litigators know that only a small subset of the documents produced in discovery ends up being *key* to resolution of a given dispute. Keep this in mind at the very beginning of a controversy and work together with opposing counsel to identify and exchange the information that really matters. You may save your client considerable time and money by producing a limited, but truly instructive, set of documents that the other side may rely upon to evaluate your case. The federal courts adopted a version of this principle years ago. Federal Rule of Civil Procedure 26 requires litigants to produce

to each other – very early in the proceedings and without the requirement of a formal discovery request – all documents that they expect to use to support their claims and defenses at trial. Use a letter agreement to memorialize the nature and scope of what each party will produce, and provide a verification of completeness if necessary.

• Exchange discovery electronically

Yes, your blood pressure may rise when you think of providing the other side with an electronic version of your own documents. But agreeing to exchange electronic versions of written and documentary discovery requests facilitates the creation of discovery responses that incorporate the requests, thereby making the responses much more user-friendly. Should a discovery dispute arise regarding the responses, you will have the request and response together in one place, ready for copying into your first meet-and-confer letter. A caveat: Be sure to strip out sensitive meta-data, which may include draft text subsequently removed from the final version.

• Use e-mail

E-mail is virtually universal; acknowledge and take advantage of this reality. Once you have agreed with opposing counsel to exchange electronic versions of discovery requests and responses, it is simplest and fastest to exchange those documents electronically in the form of file attachments. Of course, you should confirm in writing the specific terms of your agreement with opposing counsel. Request that opposing counsel acknowledge receipt of the e-mailed communications, and reach agreement as to the extension of time (if any) for service by e-mail. Avoid the "informality trap" posed by e-mail; treat e-mail correspondence with opposing counsel just as you would regularly mailed communications.

• Address electronic discovery early

These days, parties may possess large quantities of electronically stored data that are conceivably relevant to their dispute. Federal Rule of Civil Procedure 26 now requires the parties to discuss any issues related to the disclosure or discovery of electronically-stored information. Whether your case is in state or federal court, you stand to benefit by negotiating a protocol for electronic discovery early on. Developing a mutually agreeable framework will reduce discovery costs and reduce the aggravation and additional expenses associated with litigating electronic discovery issues later. Items to consider include data preservation, scope of discovery, production of sample data, document production formats, methods for handling native file formats and privileged documents, use of third-party vendors and allocation of discovery costs.

• Narrowly tailor discovery requests

Broadly worded "fishing expedition" discovery requests may be cheap and easy to draft, but they usually get whittled down in scope through objections and the meet-and-confer process. Take the time to craft clear, specific and concise discovery requests designed to obtain the key information you need. Opposing counsel will have a much harder time coming up with plausible objections to such specific requests. In the long run, your early investment will easily offset the effort that you would otherwise spend responding to opposing counsel's objections of vagueness, ambiguity, irrelevance, or overbreadth, and you will stand a much better chance of actually receiving a reasonable, good faith – and timely – response to the requests.

• Contact opposing counsel to schedule depositions

Invariably, depositions scheduled without consultation will have to be rescheduled. Be proactive and contact the other lawyer to agree on a date ahead of time. You will avoid the hassle of sending out an amended notice of deposition, and take another step toward building a cordial, professional relationship with your opponent. Memorialize the agreed-upon date by serving a deposition notice. This approach works equally well with site inspections and independent medical examinations.

• Use a single numbering system for all deposition exhibits

Keeping track of exhibits across multiple depositions can get awkward; transcripts too easily end up with confusing references to the same exhibit number that the parties use to identify different documents. Sidestep this problem by reaching agreement with your counterpart to use a single numbering system across all depositions. For example, you could mark Exhibits 1-8 at the first deposition, followed by Exhibits 9-14 at the second deposition. Your references to deposition excerpts and exhibits will be much clearer in motion practice and at trial. You will also avoid the problem of having the same document marked with different exhibit numbers in different depositions.

• Stipulate that records will be self-authenticating at trial

In most cases, custodian-of-records depositions are an annoyance and waste time that you could better spend deposing more important witnesses. Even if you stipulate to the authenticity of such records, you can still reserve other objections for argument at trial such as hearsay, privilege and the like.

• Write every discovery communication as if the court will read it

Bullying behavior and its relative, the fulminating cat fit, is a turnoff. Countless attorneys have been embarrassed when their vitriolic, threatening, or otherwise unprofessional meet-and-confer letters show up as exhibits to a motion. These missives, often penned in the heat of the moment, tend to portray the author in an unflattering light. Plus, the approach rarely works: would you allow yourself to be intimidated by such uncivilized behavior? Of course not, and

your counterpart would probably react no differently. When opposing counsel writes or says something infuriating and unprofessional in the meet-and-confer context, take a deep breath, and…make a considered, professional response. Your reply helps bump the discourse back up to a professional level, and – remember, we are thinking tactically here – highlights the outrageousness, unreasonableness and unprofessionalism of opposing counsel's behavior in the event court intervention proves necessary.

• File discovery motions only as a last resort

California courts favor the resolution of discovery disputes through the meet-and-confer process, and therefore require parties to make such efforts before filing most discovery motions. Preparing and arguing discovery motions distracts you from other aspects of the case, and courts will not always agree with your position. You will exercise more control over the result of a disagreement if you are able to resolve it during the meet-and-confer process. Even if your efforts fail to achieve an acceptable result, first consider the alternatives to a discovery motion, such as a motion in limine at trial.

Conclusion

Civility codes are more likely to succeed if attorneys recognize that civility can be compatible with self-interest. Litigators who incorporate this principle into their practice are less likely to confuse working on the case with working over the opponent and more likely to save both time and money on behalf of their clients. In the words of former U.S. Supreme Court Justice Sandra Day O'Connor, "It is not always the case that the least contentious lawyer loses. It is enough for the ideas and positions of the parties to clash; the lawyers don't have to."


Kelley


Vestal

John Kelley and Peter Vestal, attorneys at Sequoia Law Group LLP, provide business advisory services and handle business, employment and personal injury litigation. They can be reached at jkelley@sequoialaw.com and pvestal@sequoialaw.com.