BEST PRACTICES FOR DISCOVERY IN FEDERAL COURT

This article expands on some topics discussed during a panel discussion at the 2020 Bench-Bar Conference Federal Practice session. The ideas expressed are purely my own , in my individual capacity, and do not necessarily reflect the views of other judges, the moderators, or the other panelists.

1. The Federal Discovery Framework

Many attorneys who generally practice in state court are not familiar with the differences in discovery practices in federal court. Federal court is a fact pleading system, not notice pleading like in Florida state court. Under the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), a complaint is subject to dismissal if it does not contain sufficient facts to state a plausible claim for relief. The factual assertions must be "entitled to the assumption of truth," *Iqbal,* 556 U.S. at 679, so facts alleged "on information and belief" don't count. *See Scott v. Experian Info. Sols., Inc.*, 2018 WL 3360754, at *6 (S.D. Fla. June 29, 2018)

The actually-pled, plausible claims and defenses frame the scope of discovery. Discovery must be relevant to these claims and defenses, so you can't get discovery for the sole purpose of developing new claims or defenses. Even if relevant, discovery must also be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.". Fed. R. Civ. P. 26(b)(1). There is no proportionality requirement in state discovery. The Rule 26(b)(1) standard is narrower than the discovery allowed under Florida Rule of Civil Procedure 1.280. Specifically, the sole argument that discovery is reasonably calculated to lead to admissible evidence is not a valid one in federal court.

In federal court, a party has an obligation to consider proportionality before propounding a discovery request. By signing a discovery request, a party is certifying that the request is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." Fed. R. Civ. P. 26(g)(1)(B)(iii). That being so, requests for production should not reflexively seek "any and all" documents on every topic.

The federal rules incorporate the concept of initial disclosures, which require a party to produce discovery even without a formal request. Early in the case, a party must:

- Identify the witnesses whom the party intends to use to prove the case-in-chief for its claims or defenses;

- Produce or describe by category and location "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support" its case-in-chief;
- Provide a computation of each category of damages claimed by the disclosing party, including the evidence that supports that computation; and,
- Produce any insurance policy that may be available to satisfy all or part of a possible judgment.

Fed. R. Civ. P. 26(a)(1). A party can be sanctioned for not providing all required information. Fed. R. Civ. P. 37(c). Parties often wrongly treat initial disclosures as a trivial formality. In reality, they are designed to expedite the exchange of the bulk of discovery. Think about it, what should be left for discovery from the other side after proper initial disclosures? Logically, it's only (1) impeachment information and (2) evidence one side has that might support the opponent's claims or defenses.

Finally, unlike state practice, the federal rules require a party to supplement all discovery responses, including initial disclosures, without further request from the opposing party. *Compar*e Fed. R. Civ. P. 26(e) *with* Fla. R. Civ. P. 1.280(f).

2. Discovery Response Cheat Sheet:

1. Written Discovery

There are generally four possible responses to a written discovery request, and there is a logical reaction to each one. To assist practitioners, here are the responses and reactions in a simple chart:

Response	Reaction
We have it, here's all of it	Requesting party should say "thank you"
I can't understand what you're asking for	Responding party should contact opposing counsel and ask for clarification. DO NOT OBJECT ON VAGUENESS GROUNDS WITHOUT FIRST SEEKING CLARIFICATION. In fact, unless the other party refuses to clarify, a Court should NEVER be presented with a vagueness objection.
We don't have any	Responding party should serve a written response stating that it has no responsive documents in its care, custody, or control
We have responsive documents, but you're not legally entitled to have some or all of them	As required by Fed. R. Civ. P. 34(b)(2)(C), the responding party should serve an objection stating that responsive documents exist, but are being withheld based on legal objection. Then, they should state the legal objection: -overbroad/disproportionate -irrelevant -privilege (provide a privilege log)

	- annoyance, embarrassment, oppression, undue burden or expense After meeting and conferring, the parties can ask the Court to rule on the legal objection

That's it. Note that only one of those scenarios requires the Court to get involved.

A brief aside. I must note one of my favorite objections. Here's the scenario: Party A responds to a request for production by saying either (1) it has produced all responsive documents or (2) it doesn't have any within its possession, custody, or control. Party B objects that additional responsive documents must exist, so Party A's response is inaccurate. What exactly is the Court supposed to do? Go to Party A's offices and conduct an independent search? No. The proper remedy is for Party B to develop a record through interrogatory or corporate representative deposition of what Party A did to try to identify responsive documents (Where did they look? Who was involved in the search process? Etc.). If Party B then believes Party A has not fully complied with the discovery request, Party B can seek an appropriate remedy on a developed factual record.

Also, undue burden objections need to be supported by evidence that shows the burden. For example, how long will it take to search and produce the requested materials? How much will it cost? How voluminous are the materials? The same can be true of certain proportionality objections.

2. Depositions

I see two primary kinds of deposition-related objections. First, a motion to compel the deponent to appear for deposition because the parties cannot agree on a date. Unlike in state practice, this motion is unnecessary in the Southern District of Florida. Local Rule 26.1(h) permits a party to unilaterally set a deposition with sufficient notice. The burden then shifts to the deponent to seek a protective order. In the overwhelming majority of cases, through the lawyers' civility and professionalism, they can reach agreement on deposition dates. In the rare instances when they cannot, use Rule 26.1(h); don't file a motion to compel.

Second, the deponent will move in advance for a protective order to limit the scope of the deposition. The concern is that the deposition will tread on privileged or irrelevant information. This objection frequently arises in the context of a corporate representative deposition under Fed. R. Civ. P. 30(b)(6), where the deponent objects to the scope of the topics identified in the deposition notice. These preemptive motions are almost universally denied. The preferred practice is to (1) proceed with the deposition, (2) note objections on a question-by-question basis, and (3) if appropriate under Rule 30(c)(2), instruct the witness not to answer a question. After the deposition is over, either party can bring the disputed questions before the Court on a fully-developed record. That way, the Court is dealing with specific questions, not hypothetical ones.

3. **Be Careful What You Ask For**

If you are bringing a matter to the Court, you should be asking for some remedy. You should clearly explain what you want, why you're entitled to it, and when you want it. That seems self-evident, but frequently lawyers don't do it. Be careful, however, of going too far -- if you ask for too much, you may get nothing.

Do not ask for "such other relief as the Court deems just and appropriate." Except where bad faith exists, the Court lacks inherent authority to award relief. You need to identify a valid legal basis for relief. Then, the Court can evaluate whether you're entitled to it.

The corollary to this idea of asking for identifiable relief is the "no tattling" rule. Lawyers frequently want to tell the Court that the other side is misbehaving, but do not tie that misbehavior to a legal remedy. The signal is saying, "For the record" or "The Court needs to know". No, I don't. As I regularly tell litigants, "I'm not Santa Claus. I don't care who's been naughty and who's been nice. I'm here to resolve a legal dispute."

Almost always, the history behind that legal dispute is not relevant to who wins on the merits. But, the belief that it does matter has a pernicious effect on the conferral process. Instead of having a meaningful discussion to resolve their dispute, the lawyers are focused on posturing by sending self-serving emails they can show to the judge to make themselves look good and the other side look bad. Please know that the judges don't care. We're here to resolve the legal dispute. Unless the emails show a party refusing to confer or making a concession that they are now denying making, please don't submit them.

Here are some suggestions for best practices in framing discovery remedies:

Remedy you want	How to ask for it
If you want documents or responses produced by a specific date	"Overrule the objection and order them (1) to produce all documents responsive to Request for Production #__ and (2) to serve amended Responses to the Second Request for Production by _____." "Overrule the objection and order them to serve a complete response to Interrogatory #__ by ____."
If you believe you should not be required to respond to the discovery request:	"Enter an order finding that RFP #__ is irrelevant/disproportionate to the needs of the case/unduly burdensome."
If you want monetary sanctions:	"Award movant the fees and costs associated with this motion, pursuant to Fed. R. Civ. P. 37."
If you want non-monetary sanctions	"Strike non-movant's pleadings."
Overrule/Sustain a privilege objection	"Find that RFP #__/Interrogatory # __ [calls for/does not call for] information protected by the attorney client/work product privilege."

4. A Parting Thought

One closing thought. Discovery is a necessary part of litigation. Its purpose is to exchange information to allow the parties to efficiently evaluate and resolve their dispute. Financial costs, resource burdens, and time delays are a necessary consequence of proper discovery practice. That being said, it is unprofessional and unethical to make discovery requests and objections solely to drive up costs for an opponent or to delay the resolution of the case. Not only is using discovery litigation solely as leverage improper, it's also not fun. As Chief Justice Roberts said in his 2015 Year-End Report on the Federal Judiciary:

> I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics. The test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results

Use your lawyering skills to deal with the evidence, not to try to keep it from seeing the light of day. You will be a better, happier, more successful lawyer if you do.