

TAMING THE DISCOVERY MONSTER

What is the State of Discovery? It may not be as dismal as portrayed. Comparing the number of discovery motions to pending cases, it appears that discovery in most cases proceeds without court intervention or only requires limited judicial intervention and guidance. When polling attendees at C.L.E. programs, a significant majority indicate discovery works--- generally. Lawyers report the successful conduct of significant litigation with limited written discovery, few disputes, and no motions. That does not mean the system is working as it should; but it suggests the sky is not falling and that individual lawyers and judges make a significant difference.

Like the weather, everyone talks about the abuses and expenses of discovery. But what is the evidence that supports such concerns? What is the extent and what is the cause of abuses? Is there a consensus on the identification of specific problems? Where are the specific proposed remedies? While a high percentage of litigators would probably agree discovery is abused and too expensive, the percentage that admit to causing abuses or waste might be much lower. How many litigators agree that **they** engage in excessive discovery, that **they** abuse the discovery process, that **they** use discovery to increase their fees rather than prepare their cases, that **they** use discovery as a weapon in waging litigation?

When the discovery process malfunctions, the problem is most likely with the players: judges, lawyers and litigants; rather than with the rules or the process. Every rule is susceptible to abuse. Even "meet and confer rules", that revolutionized the motion process initially, are abused. Malfunctions result from misapplication of the rules or from ignorance, poor judgment or laziness in conducting discovery; some may be intentional. The discovery excesses referenced at page 47 in the last issue of *California Litigation* are unconscionable and unacceptable. Such practices are not authorized, encouraged or permitted by the discovery statutes or case law. The tools to avoid such abuses exist but they have to be used. To address discovery abuses, initially, we must look into the mirror; then we must properly apply the tools we have.

Do You Want Discovery To Work? It is often assumed that litigants want discovery to work efficiently and effectively. Yet, who wants to provide ammunition to the opponent? What ethical duties apply when a lawyer zealously represents the interests of the client? Recently, proposed CRC Rules 330 and 330.5 addressed in part the common abuse of responding to document requests with boilerplate, general objections rather than responses and production required by law. In California, such practice is improper and sanctionable. C.C.P. §§2031.210, 2031.240(b), 2031.250(c). *Korea Data Systems Co. Ltd. v. Superior Court* (1997), 51 Cal.App.4th 1513. In the 9th Circuit it is improper and may result in waiver of privileges. *Burlington Northern & Santa Fe Ry Co. v. U.S. Dist. Court* 408 F.3d 1142 (9th Cir.2005). Yet the practice is widespread. Is it ethical for a

lawyer to engage in such practices that delay and frustrate the intent of discovery? Spoliation, a discovery abuse that can be a crime, is generally defined as the destruction or concealment of evidence. Is the same result attained by evasive responses to discovery or the failure to conduct a reasonable search and respond in good faith? Is such conduct ethical? Experienced lawyers through their firms and bar association can promote ethics and professionalism in the discovery process. Many lawyers have devoted hours to writing rules of civility; we need to read, follow and enforce them.

Making the Rules Work. Lawyers and courts should be guided by the principles and objectives enunciated in the early Supreme Court decisions. Civil discovery law provides more than a set of rules to be used and abused in litigation strife. It provides a changing and adaptable organism of concepts and principles to facilitate the discovery of facts and evidence in accord with its purpose and function and the needs of the case. Its efficacy depends upon the proper application, grounded firmly in experience and knowledge, of such concepts as “good cause”, “undue burden”, “relevance”, “due process”, “cost shifting”, “cost / benefit”, and “reasonable particularity”. It expands, contracts and adapts to each case to solve new problems and challenges. The Discovery Act provides tools for lawyers to prepare cases. Each tool has its unique and limited function with advantages, disadvantages and the potential for use or abuse. The skill of the lawyer is in the application of these concepts and tools to the specific needs of the case.

Discovery works when lawyers follow and judges enforce the existing rules. Increasingly, judges accept responsibility and take the leadership in controlling abuses and expenses and in facilitating the discovery process. When they set the bar, lawyers will adhere to it; when they do not set the bar or set it too low, discovery is conducted in the proverbial town without a sheriff. When a party is forced to go to court to obtain discovery to which they are entitled, failure to fully compensate for such efforts punishes the innocent party and encourages discovery abuses. Judges have broad discretion and sufficient tools to make the process work. However, normally, judges do not perform their responsibilities unless and until lawyers ask them to do so by way of skillfully crafted motions.

While the meet and confer process is essential, early and informal intervention by the Court can quickly and effectively guide and resolve many disputes before they develop into expensive motions and before the consequences are severe. Today, judges recognize the importance and significance of discovery, the deleterious effect of discovery disputes on civil litigation, and the responsibility of the judiciary in facilitating the discovery process. They no longer eschew discovery disputes as petty bickering but recognize them as problems and disputes that must be resolved early. High tech provides us with the telephone; we should use it. Many lawyers might be surprised to learn that the local judge is available and willing to provide guidance when necessary. A brief telephone conference can avoid the expenditure of hours of judicial time as well as tens of thousands of dollars of motion costs.

Improving the Rules. How many persons who complain of discovery abuses have proposed specific provisions to remedy them? Rules can and should be reviewed and improved continually. Every judge and litigator should accept responsibility to do so.

Whenever you find the system does not function properly, take a moment to draft and propose a revision of a law or rule to institutions that can effectuate change: the Law Revision Commission, the Judicial Council, state or local or specialty bar associations, the judiciary committees in the legislature. Most improvements will be noncontroversial or will clarify ambiguities. While the wholesale revision of the Discovery Act may be expensive, time consuming and unproductive, tweaking individual sections may provide a gradual improvement that serves the system better.

Rules are too important to be left to the rule makers. Every litigator should monitor and comment on proposed rules and legislation. Every prospective needs to be represented and considered in the creation of generic rules. Often a comment of a single individual can significantly affect a proposal. New lawyers need not defer to the wisdom of experienced lawyers who may just be used to the system. Those who bring a fresh pair of eyes may offer the greatest insight.

Although the Discovery Act of 1986 failed to provide the promised reform, there is hope. For example, the limit of 35 interrogatories and admissions and prohibition on subparts, was easily circumvented by the form declaration and Judicial Council interrogatories containing subparts and some of the more abusive form interrogatories such as 15.0. In addition, many cases have multiple parties represented by one lawyer who is "entitled" to 35 interrogatories per party: e. g. a lawyer representing a hundred parties claims a right to propound 3500 interrogatories no matter how uncomplicated the facts and issues. In addition, lawyers track the pleadings with 35 admissions per party and serve form interrogatory 17.1 which is the standard contention interrogatory; this adds 105 boilerplate interrogatories per party that are excluded from the special interrogatory total. Such abuses can be foreclosed if there is a will to do so.

The Judicial Council has the power to adopt form interrogatories and admissions but has barely tapped that potential. A few years ago, employment lawyers from throughout the state and representing opposing sides drafted their own form interrogatories which the Judicial Council adopted. Lawyers specializing in other areas of litigation can follow that example and greatly reduce any need for special interrogatories.

Space does not permit a listing of the many ways in which the Discovery Act can be tweaked to pursue the illusive but attainable goal of cost effective discovery. Until discovery nirvana is reached, existing rules can be used effectively. Ultimately, whether the intent and purposes of discovery is attained in your cases will be determined by the knowledge, skills and judgment you employ. Do you want discovery to work?