Pretrial Practice & Discovery
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Discovery Disputes: Best Practices from the Bench

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For judges and their law clerks, one of the most frustrating aspects of pretrial practice is managing discovery disputes. Some advocates view them as hiccups—trivial quarrels that demand little of the court's time—but discovery disputes often present the first meaningful opportunity for parties to interface with the court. (Case-management conferences, brief as they are, and narrowly focused on scheduling and housekeeping matters, rarely present the same opportunity.) And discovery disputes can, in fact, win and lose cases, color pretrial proceedings by sowing antagonism between the parties, and bring a case to a halt.

This article cobbles together the views of numerous federal and state judges, as well as former and current law clerks, regarding best practices for addressing discovery disputes to the court. Some of these best practices are obvious, but litigants routinely fail to heed the obvious, according to the judges and law clerks who generously shared their views on this topic.

Know the Rules

Judges are unanimous: Review local and judge-specific rules. Ignoring this obvious but often-neglected advice can chip away at a lawyer's credibility, clutter the record, and create unnecessary work for all involved. Numerous judges, for example, require parties to informally notify chambers of discovery disputes before filing formal discovery motions. This requirement advances the goals of efficiency and helps keep costs down, and some judges will deny or strike a formal discovery motion filed in violation of it.

Vet Your Position

"My first piece of advice when a litigator arrives at an impasse with opposing counsel regarding a discovery issue is to carefully review the [procedural rules] on point and research caselaw to ensure that the position you are taking is sound." One judge estimates that 70 percent of discovery disputes can be resolved under a straightforward application of black-letter rules and law. And it is "far better to back down from a position during

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negotiations if the law does not support your position than when you are before a judge." Failure to back down can result in sanctions, one judge reminds.

Confer

"If you haven't conferred before contacting the court, you are doing it wrong!" Confer and confer early, but also make it meaningful—don't just go through the motions. Adequate conferral may resolve the dispute, removing the court from the equation altogether. Even if opposing counsel refuses to engage in good-faith conferral efforts, attorneys should create a record of their attempts to confer to present to the court if necessary.

Don't Dawdle

"Don't—do *not*—wait until the day before the close of discovery to present a discovery dispute to the court." Inform the court of a discovery impasse at the soonest possible time and, if necessary, seek an extension of any relevant deadlines.

Be Clear and Know the Ask

When addressing a discovery dispute to the court, clearly articulate your arguments and know what relief you are seeking. "Describing the dispute in general terms and not specifying the precise relief you want is going to decrease your odds of success substantially." Limit your arguments to the principles that support your position, e.g., relevance or privilege, says one clerk. Be specific about the relief you seek, says another, but also be prepared to offer alternative forms of relief.

Some Context Matters

"Contextualize the dispute by explaining where the parties are in discovery and why the requested information is important to moving discovery forward." Your case may be but one of hundreds on a judge's docket. Providing some context for a discovery dispute orients the court and can provide a helpful framework for wading into the key issues. But judges warn that too much context can be counterproductive. Rehashing every micro-dispute needlessly overcomplicates matters.

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Less Is More

Don't inundate the court with irrelevant materials. Attorneys often overlook this advice, and a great many present discovery disputes atop a mountain of attorney emails and correspondence that "usually just show personal hostility or bickering and are not helpful to the discovery dispute." The better practice? "Any discovery materials provided to the court should be narrowly tailored to the dispute at hand and their importance should be clearly explained to the court."

Civility

Finally, judges advise to handle discovery disputes with civility and in full compliance with rules of professional conduct. One judge recommends that counsel revisit those rules, citing the common practice of weaponizing discovery to gain a tactical advantage, rather than invoking the rules of discovery to advance a good-faith position.

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