Cost-of-motion sanctions for discovery abuse

Will judges ever get with the program?

By Chuck Cordes

I don't think it can be seriously debated that civil discovery costs too much and yields too little. The amount of time, effort and money, mostly money, it takes to finally shake useful information out of a recalcitrant opponent can make issuing discovery requests seem like a useless and empty exercise. I have been litigating cases for just over 10 years. In that time I have prepared hundreds of discovery requests. I have reviewed and responded to hundreds more. I have met and conferred with, haggled, postured, cajoled and complained to opposing counsel in a seemingly never ending process of adversarial combat.

In darker moments, I have shaken my fist at the sky and cursed a process that seems drawn straight from Dickens' Bleak House. And in lighter moments of mere anger and righteous indignation, I have turned to the painstaking task of preparing and filing many more motions to compel than I ought to have had to. Every one of these mostly-successful motions included a request for cost-of-motion sanctions and only once was the request granted – in part. Over the years my many colleagues and lawyer acquaintances have reported similar experiences. If my discovery battles have taught me anything, it is, first, that misuse of discovery is the norm not the exception, and second, that judicial indifference to the situation is equally the norm.

Of course discovery abuse runs along a spectrum, from mis- to malfeasance. We all know about the extreme end of the spectrum, the kind of case where a litigant repeatedly flouts the court's orders, actually destroys harmful evidence, and lies in the face of damning truth. To their credit, courts seem both equipped and inclined to penalize these actions. Yet what about the flagrant violation's lesser, but more invidious cousin – a pervasive subversion of the intent behind the discovery rules?

A brief history

It is worth noting briefly where the discovery ideal came from. The California state court discovery rules reach back to 1957, when the original Discovery Act, modeled on the 1938 federal discovery rules, were adopted by the state legislature. Before the Discovery Act, the parties to litigation had limited access to information held by each other. Trials were theaters of surprise. Both defendant and plaintiff could be absolutely blindsided by facts of a terrific, game-changing nature, and have to deal with them extemporaneously – a state of affairs not for the faint of heart. The Discovery Act was intended to end "trial by ambush" and create a level playing field where litigants could go to trial without the fear of the other side revealing a case-crushing secret.

We are all too familiar with the modes of discovery codified by these twentieth century enactments: (1) Production of Documents (2) Interrogatories, (3) Requests for Admissions, and (4) Oral and Written Depositions. These are the vehicles by which the free flow of information and a level playing field were to be achieved. It seems, however, that a key factor was left out of the equation: the

lawyers. While the rules may be aimed at revealing all the facts, bad and good, the advocates themselves, as well as their clients, have a distinct liking for the good only. Mischief soon followed.

The Brazil study

In a now-famous 1980 study of litigators' attitudes and practices relating to civil discovery, retired judge Wayne Brazil, then an associate professor at Hastings College of the Law in San Francisco, got 180 litigators to reveal through in-depth interviews not only their attitudes about discovery, but the many ways in which they intentionally thwarted their opponents' efforts to discover relevant facts.[1] The group's general attitude was succinctly captured by one interviewee: "In the adversarial system it's one group's job to get information and the other's not to give it to them." Another lawyer candidly described how discovery rules favor well-heeled litigants. "You want to win, so if breaking a guy will enable you to win you will do it. Discovery gives incredible leverage to parties and firms with big resources. Use this power to penalize opponents."[2]

Brazil describes "evasion" as the centerpiece of civil discovery. Strangely, many of the practitioners of evasion interviewed by Brazil also decried its ubiquity. Thus, he states, "among the lawyering practices targeted for blame, none commanded more negative attention than the redoubtable art of evasion. … [I]t would be difficult to exaggerate the pervasiveness of evasive practices or their adverse impact on the efficiency and effectiveness (for information distribution) of civil discovery. Evasion infects every kind of litigation and frustrates lawyers in every kind of practice."[3]

Changing the rules

The California legislature took heed and in 1986 it passed sweeping changes to the state's discovery rules in large part aimed at addressing discovery abuses of the kind so aptly described in Brazil's report. This revised legislation is, in large part, the Discovery Act that we litigators deal with today. As one who sees essentially an unchanged landscape from the world described by the litigators in Brazil's report and today's discovery environment, it is somewhat comical to read contemporaneous commentary on the 1986 Act, with its breathless enthusiasm about the new procedures and the certainty of a brave new world of civility and free exchange of information.

The sanctions provision

The greatest praise was lavished on Code of Civil Procedure section 2023, the revised sanctions provision, which "surpasses the federal rules and breaks new ground, for example, with its adaptation of the labor law concept of 'meet and confer' requirements to counsel."[4] The meet and confer requirement, it was predicted, would force lawyers into a dialogue leading ineluctably to accord. Having personally spent four full work days drafting a single meet and confer letter relating to avalanche-style written discovery requests, the 1986 Act's "new" meet and confer requirement seems to have not turned out so well. Meet and confer letters are more often than not simply putative exhibits to the motion to compel you are threatening to file. Nor are meet and confer conversations necessarily the answer, because they simply get turned into letters or e-mails "confirming" what was said and often become the source of further dispute about what was or was not agreed to. In the end, no amount of mandated meet and confer can turn the unreasonable mind reasonable.

Other comments regarding changes under the 1986 Act seem like Pollyanna effusion: "The new law adopts a fresh approach by listing nine acts which constitute discovery misuses."[5] Several of these harken to Brazil's study, including using a discovery method to oppress or unduly burden a party; failing to respond or to submit to an authorized method of discovery; asserting bogus objections; and making evasive discovery responses. I must admit that I snickered smugly when I read the following prediction about the likely impact of codifying specific examples of misuse. "The significance of listing misuses is twofold. First, it gives timid judges a solid foundation from which to work. It relieves them, in part, from making discretionary judgment calls, by providing a statutory framework to support the imposition of sanctions. … Second, the listing adds clarity and predictability to pretrial procedures, enabling both judges and attorneys to better understand whether or not specific acts constitute misuses." It is hard to imagine that neither litigators nor judges were aware, prior to the laundry list, that it was improper to evade answering discovery or to issue hundreds of make-work interrogatories.

Perhaps the most risible of all the commentator predictions pertained to the practice of issuing mass special interrogatories. Henceforth, this abuse would be abolished by capping special interrogatories at 35! Any lawyer wishing to exceed that number would now have to submit a declaration, along with the hundreds of interrogatories, attesting to the real need for all the information requested.[6] I can think of few discovery provisions more pro forma and mechanical than the kind of check-the-box declarations that practitioners toss in with every round of mass, make-work interrogatories shipped off to an opponent. Moreover, the recipient of this declaration must still answer all the interrogatories or seek a protective order. In other words, the target attorney must either waste their time and/or the client's money answering make-work interrogatories or waste it preparing a motion for a protective order that might be denied and in any event is unlikely to produce an order recouping costs.

Finally, commentators also put a great deal of stock in the mandatory language and apparent burden-shifting effected under the 1986 revisions with respect to motions to compel. Under the former law, if the court found counsel's refusal, failure, or objection to comply with the discovery process to be without

substantial justification, it could exercise its discretion to impose monetary sanctions. The moving party had the onus to demonstrate that the opposing party acted without substantial justification. The new language stated that the "court *shall* impose the sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

Commentators assumed that the "non-moving party is now forced to prove a defense. … No longer can an advocate who is accused of a pretrial discovery abuse, which mandates the imposition of a monetary sanction, remain silent, awaiting the moving party's substantiation of his claim."[7] A judge opined at the time that "sanctions will be awarded in far more cases than before. And that, in turn, is supposed to encourage parties and their counsel to cooperate with discovery and avoid unnecessary court proceedings." Did it? It surely doesn't seem that way from the perspective 26 years hence.

Monetary sanctions

There is not a lot of empirical data tracking the incidence of superior court judges' awards of monetary sanctions following the 1986 rule changes. In "Pretrial Sanctions: An Empirical Study," Loyola Law School professor Florrie Roberts studied 516 motions for sanctions under Code of Civil Procedure sections 2023 and 128.5 filed within a two-month period in the central district of the Los Angeles County Superior Court in the summer of 1989.[8] Surprisingly – at least to me – she found that approximately half of the requests for sanctions were granted.[9]

But a closer look at the numbers undercuts the notion that a sea change had occurred. First, there was wide variation among judges. Some judges granted most sanctions requests while many others granted few or none.[10] Thus, lawyers who knew their judge, i.e. those assigned to a single judge or litigating in a predictable law and motion environment, would be able to gauge how careful they had to be with respect to discovery abuse. Second, the average amount of monetary sanctions awarded was approximately one quarter the amount sought.[11] In other words, the vast majority of attorneys filing a motion to compel did not recoup anywhere near the cost of the motion.

The frequency of monetary sanction grants described in Roberts' study certainly does not comport with my 10-plus years of practice. Moreover, despite the purported uptick in sanctions, it certainly seems to this practitioner that delay, obfuscation, and outright stonewalling – in clear contravention of the intent and text of the Discovery Act – still form the meat and potatoes of lawyerly experience, just as they did when described in interviews of 180 litigators undertaken by Wayne Brazil more than 30 years ago. For over a decade now I have not been able to understand why this situation is tolerated. Countless colleagues have complained about this or that lawyer who is stonewalling or issuing hundreds of interrogatories or requests for admission, only to roll their eyes and concede that in their experience the court is simply not interested in reining in discovery abuse.

In my experience reason is often not rewarded. When your opponent wants to run up the bill, or is just plain ornery, there's not a lot you can do. The discovery rules clearly sanction what I would call "garden variety" discovery abuse, but judges seem resolutely uninterested in cracking down on this kind of lawyerly misfeasance. In so doing they create an environment of cynicism and resignation among practitioners, add to the legal arena's poor reputation among non-lawyers, and present the ethical practitioner with a Hobson's choice: Put up with your opponent's shenanigans and possibly not get the information you need or spend thousands of your client's dollars trying to make your opponent do what the rules clearly spell out should be done.

"Professional acculturation"

A concept presented in Brazil's study might explain lawyers' failure to evolve out of discovery abuse and the judiciary's failure to manage and sanction it away. Brazil describes "professional acculturation" as a process in which values and beliefs about how a system ordinarily works become transparent to the operatives within the system. Brazil found that the lawyers he interviewed unconsciously distinguished between the discovery rules themselves, and the system, i.e., the responses and actions taken by other lawyers and judges in response to the rules. The lawyers viewed the rules as being perfectly adequate and the system, even fraught as it was with evasion and duplicity, as generally manageable. Because it was so outside the norm of their experience, the lawyers had little capacity to even imagine a system in which information flowed freely.

Accordingly, what they considered discovery "problems" tended to be only those which exceeded the usual amount of delay, evasion and obstinacy. Only when the lawyers were prompted to imagine a system in which discovery requests were responded to timely and honestly did they really begin to elaborate on the manifold problems they faced in obtaining or responding to discovery. Another aspect of acculturation was the pervasive view that a good advocate engaged in questionable discovery tactics because to do otherwise would constitute bad lawyering.

Brazil describes lawyers who at first candidly admitted to following the rules suddenly becoming defensive and openly fretting about their commitment to advocacy. In short, most lawyers believed that if your opponent is abusing the process and getting away with it, you're a fool not to respond in kind.

"Ever has it been so"

Since judges are usually former litigators, they are professionally acculturated to the use of discovery tactics to professional advantage. When they see

litigants on a motion to compel, it is presumably not difficult for them to silently say to themselves "ever has it been so." Monetary sanctions must be awarded unless the resisting party's actions were "substantially justified." When an acculturated judge sees garden variety discovery abuse, in support of garden variety advocacy, he or she is likely to see substantial justification. Thus, absent some wave of enlightenment, 30 years from now lawyers are likely to be taking the same liberties with the rules that they were thirty years ago, and judges are likely to be thinking "ever has it been so."

Chuck Cordes is a freelance litigator who lives and works in San Francisco. In his spare time he promotes meditation for lawyers on his blog "Guru at Law." See guruatlaw.wordpress.com. He can be contacted at chuckcordes13@yahoo.com.


Cordes

Endnotes:

[1] Wayne D. Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found. Res. J. 787 (1980).
[2] *Ibid.* at 857.
[3] *Ibid.* at 828-29.
[4] Timothy M. Donovan, The Sanction Provision of the New California Civil Discovery Act, Section 2023: Will it Make a Difference or is it Just Another "Paper Tiger"? 15Pepp. L. Rev. 401 (1988).
[5] *Ibid.* at 404.
[6] Diane Mares, The California Civil Discovery Act of 1986: Discovery The New Fashioned Way, 18 Sw. U. L. Rev. 233, at 244-245 (1989).
[7] Donovan, *ibid.* at 410.
[8] 23 Pac. L. J. 1 (1991).
[9] *Ibid.* at 4.
[10] *Ibid.* at 13.
[11] *Ibid.* at 17.