# 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. 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. *See* Fed. Rule Civ. P. 26(b)(1), Advisory Committee Note (2000) ("The court ... has the authority to confine discovery to the claims and defenses asserted in the pleadings, and ... the parties ... have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.") *cited in In re Zantac (Ranitidine) Prod. Liab. Litig.*, No. 20-MD-2924, 2020 WL 5585137, at *2 (S.D. Fla. Sept. 16, 2020) *aff'd*, No. 20-MD-2924, 2020 WL 6440461 (S.D. Fla. Nov. 3, 2020). That is, the requested information must have some connection to proving or disproving an *existing* claim or defense. *Turco v. Ironshore Ins. Co.*, No. 218CV634FTM99MRM, 2019 WL 2255654, at *5 (M.D. Fla. Mar. 4, 2019) ("Relevance is determined on the basis of the existing claims and defenses in the litigation, not on unasserted claims and 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, which is that the requested discovery is relevant and reasonably calculated to lead to the discovery of admissible evidence.

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).

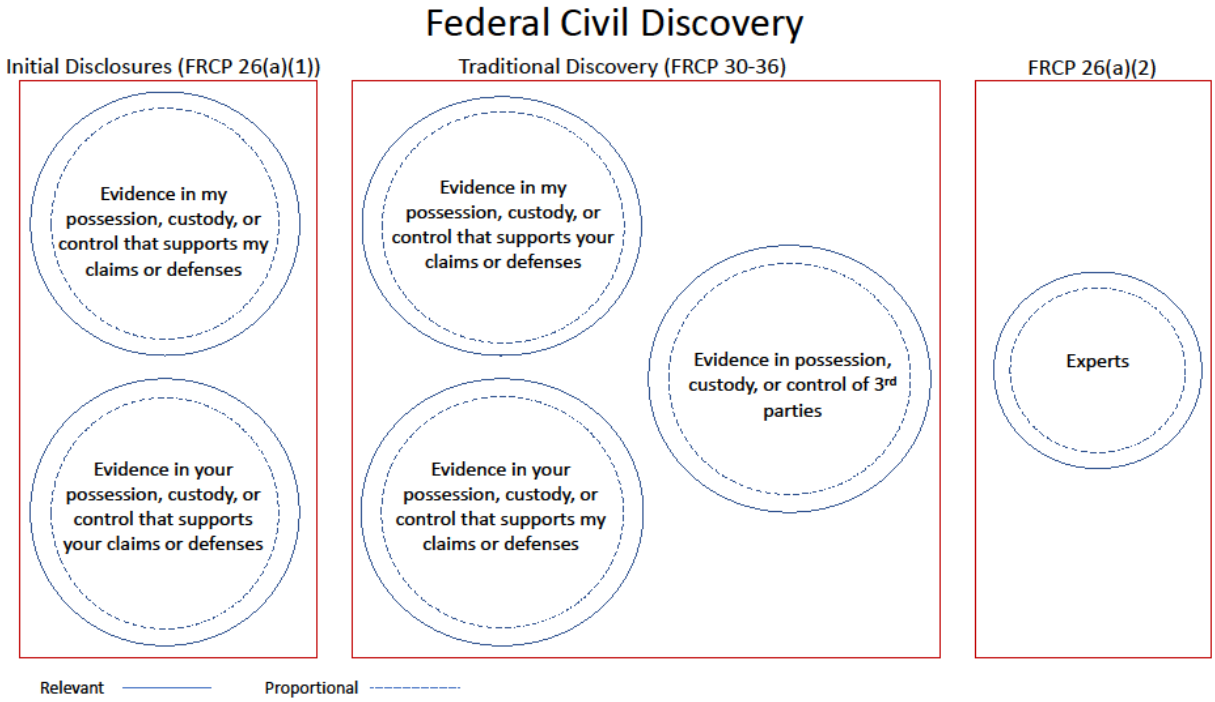
Requests for production extend to all materials in the respondent's possession, custody, or control. Fed. R. Civ. P. 34(a). "Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand." *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984); *see also Costa v. Kerzner Int'l Resorts, Inc.*, 277 F.R.D. 468, 470–71 (S.D. Fla. 2011) (allowing discovery based on a "practical ability to obtain" responsive documents); *In re Zantac (Ranitidine) Prod. Liab. Litig.*, No. 20-MD-2924, 2021 WL 1522449, at *1 (S.D. Fla. Apr. 16, 2021) (discussing "control" in parent-subsidiary context). But, even though many Requests for Production demand "any and all" documents that fall within a particular topic, "Rule 26(g) does not require a comprehensive search of all possible locations where responsive evidence may be found. Nor does it require a perfect or even optimal search. It requires a 'reasonable' inquiry." *In re Zantac (Ranitidine) Prod. Liab. Litig.*, No. 20-MD-2924, 2021 WL 5299847, at *4 (S.D. Fla. Nov. 15, 2021) (approving plaintiff's proposed search protocol).

The federal rules incorporate the concept of initial disclosures, which require a party — early in the case and without a formal request — to produce the evidence it will use to prove its own claims or defenses. Fed. R. Civ. P. 26(a)(1). Evidence not produced as part of the initial disclosures may be excluded at trial. Fed. R. Civ. P. 37(c)(1).

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 fact discovery should be left after proper initial disclosures? Logically, it's only (1) impeachment information, (2) evidence one side has that might support the opponent's claims or defenses, and (3) evidence in the possession of third parties. So, it is unnecessary (and moot) to propound Requests for Production asking for the evidence that an opponent will use to support its own 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).

The following chart is designed to show the parameters of federal discovery.




*2. Discovery Response Cheat Sheet:*

A. 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, based on a reasonable inquiry, it has no responsive documents in its possession, 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:<br>-overbroad/disproportionate<br>-irrelevant<br>-privilege (provide a privilege log)<br>- annoyance, embarrassment, oppression, undue burden or expense<br><br>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. Let me note two common, but unnecessary, discovery scenarios:

1. 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.

2. The parties cannot agree on ESI search terms, so they ask the Court to decide. How is the Court to know which terms to use, up front? The proponent is in the best position to identify the information being sought. Simply asking for "any and all communications" is not helpful. Ultimately, the responding party is the master of the response. If all else fails, it can unilaterally select search terms that it believes constitute the "reasonable inquiry" required by Rule 26(g). If the requester thinks the response is insufficient, they can then litigate the reasonableness of the search terms.

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.

B. 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. The Federal Rules of Civil Procedure prescribe particular remedies for particular conduct. *See* attached chart. Make sure that the remedy you seek conforms to the conduct in question and cite the rule that authorizes the 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 _____."<br><br>"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(a)(5)." |
| If you want non-monetary sanctions | "Strike non-movant's pleadings pursuant to Fed. R. Civ. P. 37(c)." |
| 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.

# DISCOVERY REMEDIES

| **Rule 37(a): Motion for an Order Compelling Disclosure or Discovery** | | | |
|---|---|---|---|
| | | | |
| | **Rule** | **Remedy** | **Fees?** |
| General Motion to Compel | 37(a)(1) | Order compelling disclosure or discovery | Yes, loser (counsel, client, or both) pays unless substantially justified or unjust |
| Specific Motions to Compel | 37(a)(3) | | |
| Failure to make or supplement initial disclosure* | 37(a)(3)(A)<br>37(c)(1) | Order compelling disclosure and for appropriate sanctions — 37(a)(3)(A)<br><br>Exclusion of non-disclosed evidence unless substantially justified or harmless — 37(c)(1)<br><br>Attorney's fees — 37(c)(1)(A)<br><br>Inform jury of failure to disclose — 37(c)(1)(B)<br><br>Other appropriate sanctions, including (i)-(vi) —37(c)(1)(C) | Yes<br><br>37(a)(5) – loser pays unless substantially justified or unjust |
| Failure to answer a depo question* | 37(a)(3)(B)(i) | Order compelling an answer, production, or inspection | |
| Failure to answer an interrogatory* | 37(a)(3)(B)(iii) | | |
| Failure to produce documents or permit inspection* | 37(a)(3)(B)(iv) | | |
| Failure to designate a 30(b)(6) witness | 37(a)(3)(B)(ii) | Order compelling a designation | |

*Evasive or incomplete disclosure, answer, or response "must be treated as a failure to disclose, answer, or respond." — 37(a)(4)

| **Rule 37(b): Failure to Comply with Court Order** | | | |
|---|---|---|---|
| | | | |
| | **Rule** | **Remedy** | **Fees?** |
| Failure to comply with order to answer deposition question | 37(b)(1) | Contempt of Court in district where depo taken | Presumably yes as part of a contempt sanction |
| Failure to obey an order compelling discovery | 37(b)(2)(A) | Issue "further just orders" including (i) – (vii) and fees | Yes. Against party, attorney, or both — 37(b)(2)(C) |
| Failure to produce person for Rule 35 examination | 37(b)(2)(B) | (i)-(vi) unless party shows it cannot produce the person. | |

| **Rule 37(c) Failure to Disclose, Supplement, or Admit** | | | |
|---|---|---|---|
| | | | |
| | **Rule** | **Remedy** | **Fees?** |
| Failure to supplement discovery | 37(c)(1) | Exclusion of non-disclosed evidence unless substantially justified or harmless.<br><br>Attorney's fees — 37(c)(1)(A)<br><br>Inform jury of failure to disclose — 37(c)(1)(B)<br><br>Other appropriate sanctions, including (i)-(vi) —37(c)(1)(C) | Yes |
| Failure to admit | 37(c)(2) | Expenses (including fees), unless unless request was objectionable, fact was "of no substantial importance," or other good reason for failure to admit. | Yes. |

| **Rule 37(d): Failure To Attend Own Deposition, Serve Answers To Interrogatories, Or Respond To Request For Inspection** | | | |
|---|---|---|---|
| | | | |
| | **Rule** | **Remedy** | **Fees?** |
| Failure to attend own deposition, answer interrogatory, or respond to RFP | 37(d) | Issue "further just orders" including (i) – (vii) and fees<br><br>No defense that discovery was objectionable, unless file motion for protective order — 37(d)(2) | Yes, 37(d)(3). Against party and/or lawyer unless substantially justified or unjust |

| **Rule 37(e): Failure to Preserve ESI** | | | |
|---|---|---|---|
| | | | |
| | **Rule** | **Remedy** | **Fees?** |
| Failure to Preserve ESI | 37(e) | If no intent to deprive but prejudice, "measures no greater than necessary to cure the prejudice"<br><br>If intent to deprive, adverse presumption, adverse jury instruction or adverse termination of proceedings | Not explicitly |

| **Rule 37(f): Failure to Participate in Framing a Discovery Plan** | | | |
|---|---|---|---|
| | | | |
| | **Rule** | **Remedy** | **Fees?** |
| Failure to Participate in Framing Rule 26(f) Discovery Plan | 37(f) | Fees and expenses | Yes |

| **Rule 26(c): Protective Orders** | | | |
|---|---|---|---|
| | | | |
| | **Rule** | **Remedy** | **Fees?** |
| Protective Order | 26(c) | If annoyance, embarrassment, oppression, or undue burden or expense:<br><br>26(c)(1)(A)-(H) | Yes. Loser pays unless substantially justified or unjust. 26(c)(3) expressly incorporates 37(a)(5) |

| **Rule 26(g): Signing Documents and Discovery Requests, Responses, and Objections** | | | |
|---|---|---|---|
| | | | |
| | **Rule** | **Remedy** | **Fees?** |
| Failure to Sign | 26(g)(2) | Other parties have no duty to act and court can strike disclosure, request, response, or objection unless promptly cured | No |
| Improper Certification | 26(g)(3) | "appropriate sanctions on the signer, the party, or both" unless substantial justification | Yes. |

| **Rule 30(d): Deposition Behavior** | | | |
|---|---|---|---|
| | | | |
| | **Rule** | **Remedy** | **Fees?** |
| Impeding, delaying, or frustrating fair examination of deponent | 30(d)(2) | "appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party." | Yes |
| Conducting deposition in bad faith or to unreasonably annoy, embarrass, or oppress | 30(d)(3)(C) | Order that the deposition by terminated, limit its scope and manner through Rule 26(c) protective order. | Yes, if not substantially justified or unjust (expressly incorporates 37(a)(5)) |