



## Good Counsel

# Coordinate With Clients on Discovery

BY ARIANA J. TADLER & TONY KIM

**D**iscovery is the key to unlocking the treasure chest of information that makes or breaks your client's case. Plaintiff lawyers tend to focus on their pursuit of—and expectations from—discovery from the defendant. But discovery is reciprocal.<sup>1</sup> Prioritizing coordination with your clients early about discovery—with a strategic plan that allows lawyers and clients to manage expectations from the beginning—is critical to a successful case. Doing so also will foster better client relationships that, in turn, will help you build your practice and reputation.

The Model Rules of Professional Conduct clearly map out the various hats lawyers wear throughout the discovery process—as advisor, advocate, negotiator, and evaluator.<sup>2</sup> *Advise* your client on what needs to be done and why; *advocate* for your client in responding to discovery requests; *negotiate* important boundaries or limits, using the art of persuasion to achieve compromises with the other side about scope, form, timing, and more;<sup>3</sup> and *evaluate* the extent to which the information in your client's possession, custody, and control warrants production or protection.

**Communicate clearly and regularly with your client.** In the first call with a prospective client—in addition to discussing the claim and its potential—alert your client to their responsibilities should they choose to proceed. These include the duty to preserve *any* information or items that relate to their claims and any potential defenses, as well as the obligation to respond to the opposing party's discovery requests—specifically, requests for production, interrogatories, requests for admission, and a potential deposition.

Lawyers who choose not to address these obligations early out of fear that such details will dissuade a client from proceeding risk failure before or at trial. They also miss the opportunity to establish trust and credibility with their clients. Clients prefer to know what to expect from the start.

**Keep your client in the loop.** Once retained, send a detailed letter setting forth the terms of your engagement as counsel.<sup>4</sup> Use the letter to reiterate the client's discovery obligations. This will reinforce what you outlined in the earlier conversation and further manage expectations. The consistency in messaging will strengthen your relationship with your client.

As you prepare the complaint, work with your client to gather information to support their claims. Ask where you can find data or tangible things supporting those allegations and any data or items that the defendant may request in production. Remind your client that it's critical to preserve these,<sup>5</sup> and consider whether you should collect them immediately to ensure preservation and easy accessibility when formal discovery proceeds.

Develop a plan to gather data and tangible items in anticipation of production. Secure anything you collect reliably and responsibly so that you can access it when needed. In today's world of data ubiquity, you may engage a third-party provider to assist in collection. Prepare your client accordingly, and participate in group communications to ensure your client understands what is happening and why. Remind your client to let you know about any potential difficulties or delays so that you can manage expectations for yourself and opposing counsel.

Clear communication is essential during discovery. Promptly forward any written discovery directed to your client—such as document requests, interrogatories, and deposition notices—so they can see what is being sought. Schedule a call to explain what each request is asking for and why. Identify any objections you intend to assert. It's important to use each conversation to reiterate and review your client's responsibilities at each stage of discovery.

Share drafts of written responses and objections with your client. Review them together to confirm their accuracy and ensure that your client understands what is being said on their behalf—especially since responses to certain discovery requests require the client's signature affirming their accuracy.<sup>6</sup>


**Prepare thoroughly for depositions.** Depositions are daunting for most clients. As lawyers, we tend to be acclimated to the various elements involved—questioning under oath

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and dealing with a stenographer, a videographer, and other strangers. Clients are not, and you need to prepare them. Take the time to meet with your client—often more than once—to discuss the substance and to alleviate the stress factors.<sup>7</sup>

Explain the purpose of the deposition; your client’s obligation to tell the truth and answer succinctly; and your role during the deposition, including the fact that although you cannot help them answer, you may object to certain questions. Reassure your client by reviewing the facts, allegations, claims, and potential defenses so that they are comfortable with the details and can answer the questions confidently.

Follow these steps to best position you and your client for the discovery phase of litigation. You will have managed your client’s expectations; prepared them for probing questions; strengthened their claims; anticipated vulnerabilities in the case; and successfully carried out your responsibilities as advisor, advocate, negotiator, and evaluator. 

#### NOTES

1. See, e.g., Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.”) (emphasis added).
2. See Model Rules of Pro. Conduct: Preamble & Scope (Am. Bar Ass’n 2020) (“As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client or to others.”).
3. See, e.g., Fed. R. Civ. P. 26(b)(1).
4. Model Rules of Pro. Conduct r. 1.5(b), which governs “Fees,” notes the preference that agreements be in writing; and r. 1.5(c) expressly states: “A contingent fee agreement shall be in a writing signed by the client.”
5. Cross-referencing the retainer letter and prior conversations establishes a continuum that manages and fortifies expectations.
6. See, e.g., Fed. R. Civ. P. 33(b)(5).
7. Many lawyers fail to invest the time to prepare a client for deposition. The adage often holds true: “Those who fail to plan, plan to fail.”

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