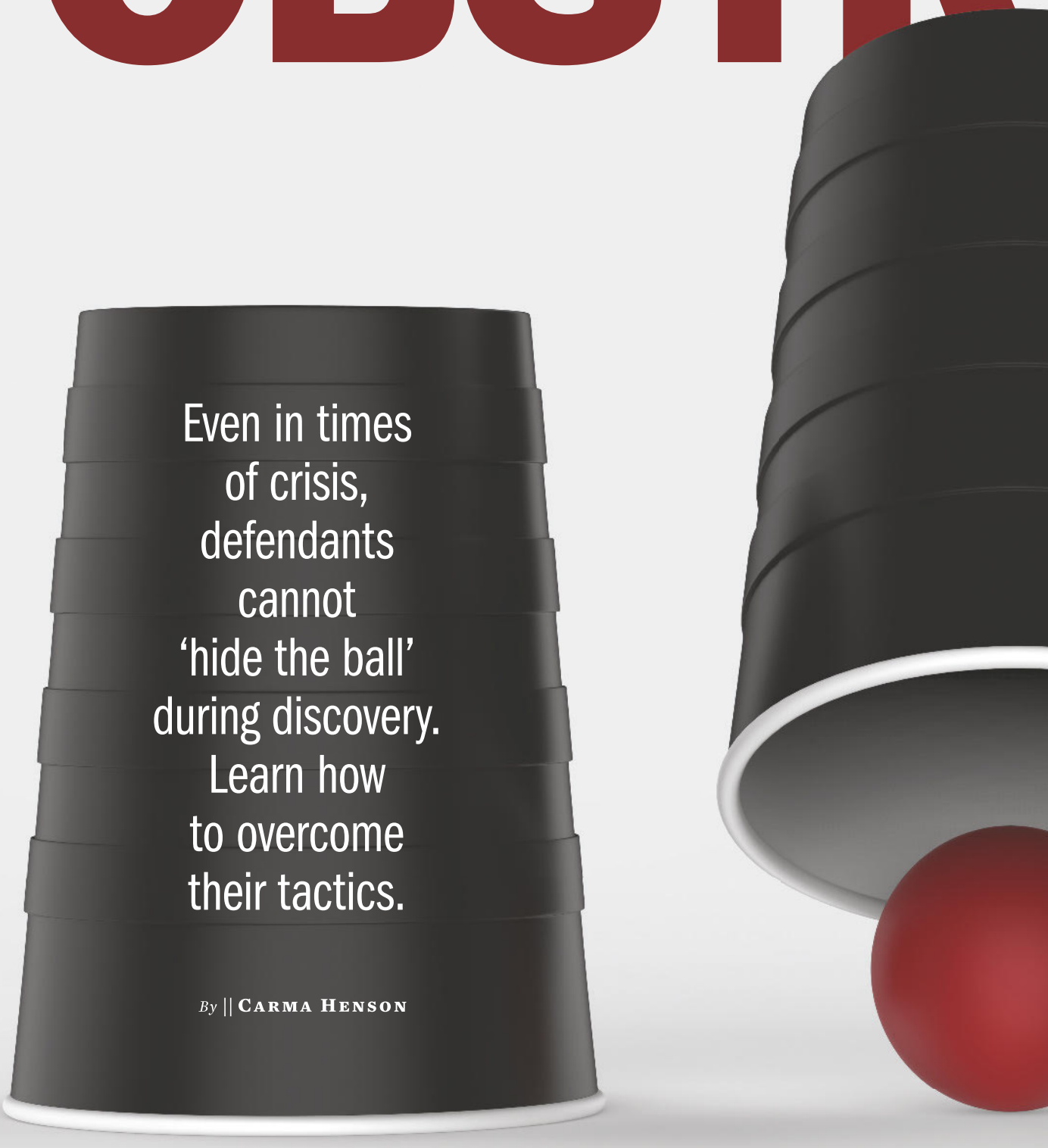
DISCOVERY OBSTR



Even in times of crisis, defendants cannot 'hide the ball' during discovery. Learn how to overcome their tactics.

By || CARMA HENSON

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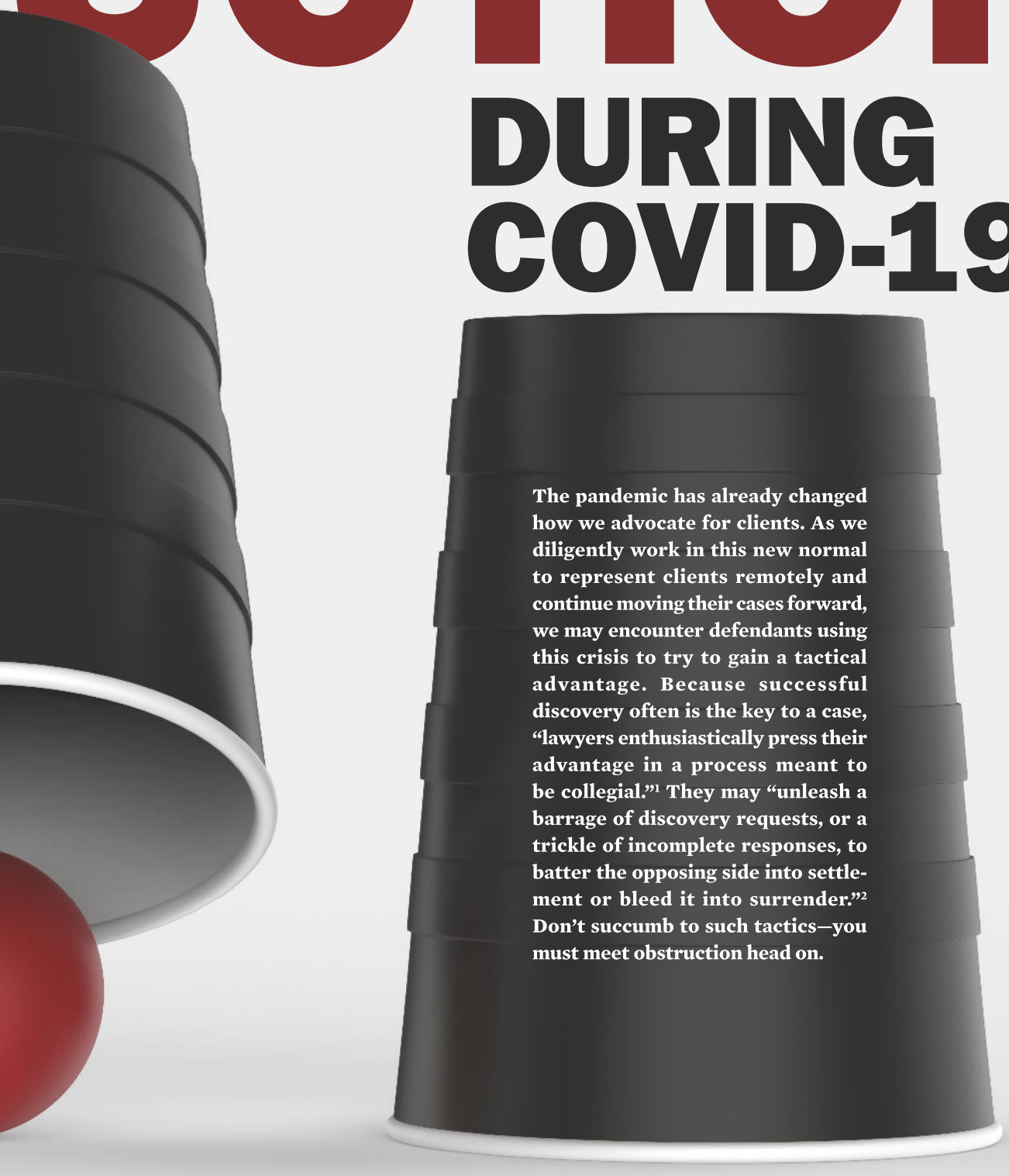
DURING COVID-19



The pandemic has already changed how we advocate for clients. As we diligently work in this new normal to represent clients remotely and continue moving their cases forward, we may encounter defendants using this crisis to try to gain a tactical advantage. Because successful discovery often is the key to a case, "lawyers enthusiastically press their advantage in a process meant to be collegial."[1] They may "unleash a barrage of discovery requests, or a trickle of incomplete responses, to batter the opposing side into settlement or bleed it into surrender."[2] Don't succumb to such tactics—you must meet obstruction head on.

Recently, I received an email from defense counsel in a nursing home case requesting an extension of time to answer discovery. The reason for the request was that his clients—companies that own and operate a nursing home—were too busy "taking care of people and saving lives" to respond to my discovery. However, the information I requested would come from corporate office employees, not from the frontline workers at the individual nursing home. Is this a legitimate request, or are the litigant and attorney trying to turn lemons into lemonade? And how do you respond?

Be reasonable in your response, especially in times of crisis. Judges likely will be more lenient now over extension requests. In one case, the court granted a motion to stay the proceedings altogether, finding good cause based on the "disruption to business caused by the spread of COVID-19."[3] Additionally, several states have extended unexpired discovery deadlines automatically in response to COVID-19.[4]

But this is not the first crisis that has placed stress on the civil justice system, nor will it be the last.[5] "It is the duty of all legal organizations—the courts, the organized bar, prosecutors, public defenders, . . . individual lawyers—to undertake adequate planning and preparation to ensure that the legal systems, both civil and criminal, can continue to dispense justice in times of major disaster."[6] As such, the burden is on us to set fair and firm expectations about how discovery should proceed within the confines of the rules and to ensure that opposing counsel complies.

When setting forth expectations, always memorialize them in a way that incorporates the applicable ethics and legal requirements. Lawyers have an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of the Federal Rules of Civil Procedure.[7] Zealous advocacy for one's client never excuses conduct that violates the Model Rules of Professional Conduct or state equivalents.[8] Even during a pandemic, the rules governing civil procedure and attorney conduct still apply. Invoke those rules and the case law interpreting them in your "discovery expectation" letters and emails.

Spotting Thinly Veiled Abuse and Obstruction

Obstruction can be hard to recognize—there are many places to hide. If you don't know the rules, you can't recognize when they are being broken. My 12-year-old plays basketball, and I never understood why he got called out when he stayed in the "paint" too long. It turns out I didn't know the "three-second rule." Learn the rules and how to interpret them.

Avoiding discovery obligations. As a starting point, the model rules require attorneys to act with reasonable diligence and promptness.[9] Rule 3.4 prohibits a lawyer from unlawfully obstructing access to evidence, knowingly disobeying an obligation under the rules, and failing to make reasonably diligent efforts to comply with a legally proper discovery request.[10] Obstructive discovery tactics are prohibited.[11]

A clear example of an attempt to use the pandemic to avoid discovery obligations is the motion by defense counsel in a South Carolina wrongful death nursing home case asking the court to avoid taking two crucial depositions until the "crisis has ended," effectively stalling discovery. Defense counsel claimed that the nursing home is allegedly too busy "car[ing] for 180 of the most vulnerable of our citizens" and that producing the facility's administrator and director is an "undue burden" that "represents an attempt to annoy and distract."[12]

Plaintiff counsel—my colleague Matthew Christian—countered that the nursing home has not had any positive COVID-19 resident or staff cases, defense counsel did not try to resolve the issue before filing the motion, and defense counsel was unresponsive for months in attempting to schedule the depositions, even after the plaintiff filed a motion to compel.[13]

Attorney oversight. Federal Rule of Civil Procedure 26(g)(1) requires attorneys to sign every initial disclosure, as well as every discovery response or objection. This signature operates as a certification by the lawyer that the initial disclosure was complete and correct when it was made and that discovery responses and objections are consistent with the rules, warranted by existing law, and not interposed for an improper purpose, such as unnecessary delay.[14] Lawyers have a duty to oversee their clients' responses to discovery and to supplement their responses in a timely manner. They also have a duty not to lodge boilerplate objections or to engage in gamesmanship. Failure to comply with these requirements is sanctionable.[15]

Many courts have examined Rule 26(g)'s attorney oversight requirements. They've found that "parties must respond truthfully, fully and completely to discovery or explain truthfully, fully and completely why they cannot respond."[16] Attorneys must "exercise some degree of oversight to ensure that their client's employees are acting competently, diligently and ethically in order to fulfill their responsibility to the court."[17] They must make a reasonable inquiry into the completeness of the clients' discovery responses, which requires more than just accepting a client's word on the matter.[18]

Misrepresentation of the availability of relevant information can expose counsel to liability.[19] For example, in

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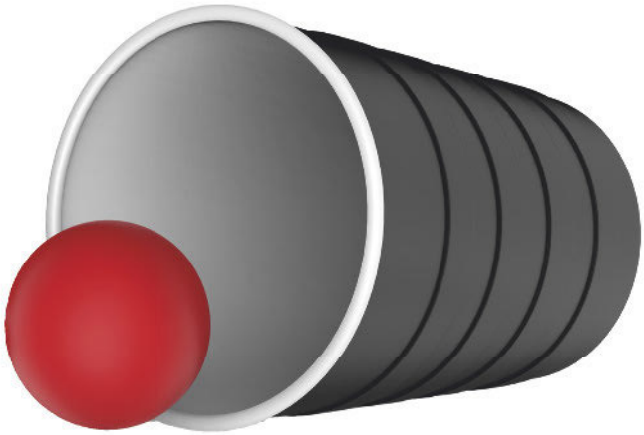

one case, trial counsel abdicated the responsibility to gather responsive documents to the client's general counsel and failed to exercise independent oversight of the discovery collection process.[20] General counsel was "grossly deficient" in his efforts to obtain the responsive discovery documents, which resulted in hundreds of relevant documents not being produced.[21]

The court sanctioned the defendant by entry of a default judgment on liability and set forth its expectations of trial lawyers' participation in the discovery gathering process: The court expects "any trial attorney appearing as counsel of record [to] formulate a plan of action which will ensure full and fair compliance with the [discovery] request." This includes communicating with clients to identify the proper people to gather information from, ensuring that all such individuals are interviewed, and ensuring that all documents identified by those interviews are retrieved. Counsel also should review all the documents to see whether they indicate other responsive documents exist that have not yet been received.[22]

Gamesmanship prohibited. Evasive and incomplete discovery is prohibited under Rule 37—it's treated as a failure to answer or respond.[23] Lawyers who are evasive or incomplete in responding to discovery, who delay discovery to achieve a tactical advantage, or who engage in any of the myriad forms of discovery abuse that are so common violate their duty of loyalty to the procedures and institutions that the adversary system is intended to serve.[24] Defense lawyers are using the pandemic as an excuse to delay and evade, claiming they cannot access the information needed to fully respond to discovery, or to delay producing witnesses for depositions.

In the South Carolina case described earlier, defense counsel claims he cannot produce the nursing home administrator for a deposition because the witness is too busy. However, it is known that the administrator's work hours and availability have not changed as a result of the pandemic—he continues to work from approximately 9 a.m. to 5 p.m. on weekdays, and there are no positive coronavirus cases at his facility. This is merely an attempt to evade discovery and to delay, delay, delay.

Sandbagging. Once a party learns that a prior discovery response is incomplete or incorrect, Rule 26(e) requires supplementation "in a timely manner."[25] Send letters often that remind defense counsel of their duty to timely supplement. The late production of documents will adversely affect your ability to prepare for trial: You'll need to question deponents about those documents and review them with your experts.

I recommend sending a letter requesting supplementation 30 days after you receive discovery responses, as my cases always have a claim that the defense will supplement "if and when additional information is received." Then continue to follow up quarterly.

Remind them that Rule 26(e) "does not give license to sandbag one's opponent" by producing information and documents only when they believe the information would be "desirable" or "necessary" to their case.[26] We must inform defense counsel that the rules still apply: They still must communicate with their clients, ensure the production of responsive information and documents, and otherwise meet their discovery obligations.

Boilerplate objections. Boilerplate objections to discovery requests—for example, that the requests are vague, overly burdensome, irrelevant, not calculated to lead to admissible evidence, and not proportional to the needs of the case—are commonly used to obstruct and delay. However, these objections are prohibited in most jurisdictions.[27] If defense counsel raises these objections, they are subject to sanctions. Rule 26(g) requires that objections not be made for an improper purpose.

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normal, as defense lawyers claim limited access to clients, or their clients claim that they cannot meet with the people needed to fully respond to discovery due to social distancing requirements. However, courts are strongly encouraging virtual communications and meetings. Continue to challenge these objections.

Responding to Discovery Obstruction

When you suspect obstructive discovery tactics are being used, immediately detail your concerns in a letter. Cite the law supporting your arguments, and invite defense counsel to meet and confer. This is required before filing a motion to compel.[28]

Document all offers to meet and confer, the results of any meet and confer sessions, and any deadlines you've agreed on. In doing so, you are setting the backdrop for any future motions. You'll also be better prepared to demonstrate that defense counsel engaged in discovery misconduct, abuse, and obstruction that violated the federal rules and rules of professional conduct. If they do not correct the discovery deficiencies, you are ready to file your motion to compel and for sanctions.

If counsel certifies a discovery response, disclosure, or objection falsely, you may bring a motion for sanctions pursuant to Rule 26(g)(3). The court *must* impose an appropriate sanction on the lawyer, the party, or both, which may include reasonable expenses and attorney fees.[29] Intent or bad faith is not required.[30]

If a party fails to disclose information pursuant to Rule 26(a), or fails to timely supplement pursuant to Rule 26(e), monetary sanctions—attorney fees and costs—*may* be awarded under Rule 37(c)(1). Additionally, Rule 37(c)(1) provides that the withheld information cannot be used by the withholding party at a hearing or trial unless there was substantial justification for the failure or if it is harmless.

Note, however, that this prohibition in Rule 37 is qualified by the next sentence, which states "in addition to or instead of this sanction, the court . . . may impose other appropriate sanctions." This provides counsel with an argument that exclusion is not automatically required under Rule 37.[31] As such, if the withheld information is important to your case or will prejudice your ability to advocate for your client, and you have reason to believe that opposing counsel or the defendant were not properly forthcoming in their production, I suggest additional inquiry into the reasons for the failure to disclose.

Determine whether a legitimate justification exists, such as a true inability to access information due to COVID-19. While discovery about discovery is not routinely permitted, courts have permitted it when necessary to determine whether counsel complied with Rule 26(g) obligations[32] and when counsel has legitimate concerns about the methods undertaken by opposing counsel or their clients to respond appropriately to discovery.[33]

Monetary sanctions *must* be awarded if a Rule 37 motion to compel is granted, unless you failed to meet and confer in good faith, the failure to comply with discovery obligations was substantially justified, or other circumstances make an award of expenses unjust.[34] Again, document all of your attempts to work things out before filing your motions.

In addition, if counsel fails to obey a court's discovery order, monetary sanctions *must* be imposed unless the failure is substantially justified. The court also may take other actions, such as striking pleadings, entering a default judgment, and finding a person in contempt of court.[35]

The federal rules and the model rules provide you with the power to ensure your client's case is fairly adjudicated. Demonstrate your knowledge of the rules and your willingness to hold defense counsel accountable for discovery misconduct—you likely will earn their respect and hopefully ward off any further attempts to hide the ball.

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Notes

1. Timothy Wilson, *A Mandate for Failure: The Sedona Cooperation Proclamation and Modern Discovery Under the Federal Rules of Civil Procedure*, 35 U. La Verne L. Rev. 165, 177 (2013) (quoting Ralph Nader & Wesley J. Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America* 63 (1996) and citing Marvin E. Frankel, *Partisan Justice* 18 (1980)).
2. *Id.* (citing Arthur L. Liman, *Lawyer: A Life of Counsel and Controversy* 234–35 (1998)).
3. *See* Order, *Garbutt v. Ocwen Loan Servicing*, No. 8:20-cv-136-T-36JSS, 2020 WL 1476159 (M.D. Fla. Mar. 26, 2020).
4. For example, since the pandemic started, the Supreme Courts of Alabama, Georgia, North Carolina, South Carolina, Tennessee, and Virginia have extended discovery deadlines multiple times. *See In Re: COVID-19 Pandemic Emergency Response*, Admin. Or. No. 6 (Ala. Apr. 30, 2020), https://tinyurl.com/yd8ukwru; *Second Order Extending Declaration of Statewide Judicial Emergency* (Ga. May 11, 2020), https://tinyurl.com/y7r895hn; *Order of the Chief Justice of the Supreme Court of North Carolina* (N.C. May 21, 2020), https://tinyurl.com/ybthr5kj; *Operation of the Trial Courts During the Coronavirus Emergency*, Order No. 2020-04-22-01 (S.C. Apr. 22, 2020), https://tinyurl.com/yaecuwq4; *Order Modifying Suspension of In-Person Court Proceedings and Further Extension of Deadlines*, Amended Or. No. ADM2020-00428 (Tenn. Apr. 24, 2020), https://tinyurl.com/ybcnaweq; *In Re: Fifth Order Modifying and Extending Declaration of Judicial Emergency in Response to COVID-19 Emergency* (Va. June 1, 2020), https://tinyurl.com/yak5n62u.

5. Mark Walsh, *Outbreaks of Disease Have Shuttered the Supreme Court Going Back More Than 2 Centuries,* ABA J. (Mar. 19, 2020), https://www.abajournal.com/web/article/outbreaks-have-shuttered-the-supreme-court-going-back-more-than-two-centuries.
6. Diane P. Wood, *The Bedrock of Individual Rights in Times of Natural Disaster*, 51 How. L. J. 747, 750 (2008) (citing Am. Bar Ass'n, *Rule of Law in Times of Major Disaster* (2007), https://tinyurl.com/y7174ms7).
7. *See Cache La Poudre Feeds LLC v. Land O'Lakes Farmland Feed, LLC*, 244 F.R.D. 614, 626 (D. Colo. 2007).
8. *See* Model R. Prof'l Conduct R. 1.3, cmt. 1 (Am. Bar Ass'n 1983) ("A lawyer must also act with . . . zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.").
9. *See* R. 1.3.
10. *See* Model R. Prof'l Conduct R. 3.4 (Am. Bar Ass'n 1983).
11. *See* R. 3.4, cmt. 1.
12. Motion for Protective Order, *Joyner v. NHC Healthcare/Greenville, LLC*, Nos. 2019-CP-23-02184 and -02185 (S.C. Cir. Ct. May 1, 2020), https://tinyurl.com/ycwzrpvf.
13. Plaintiff's Reply to Defendants' Motion for Protective Order, *Joyner v. NHC Healthcare/Greenville, LLC*, Nos. 2019-CP-23-02184 and -02185 (S.C. Cir. Ct. May 7, 2020), https://tinyurl.com/y8xp3p5u.
14. *See* Fed. R. Civ. P. 26(g)(1).
15. *See* Fed. R. Civ. P. 26(g)(3).
16. *Beach Mart, Inc. v. L&L Wings, Inc.*, 302 F.R.D. 396, 405 (E.D.N.C. 2014); *see also Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305 (E.D. Pa. 1996).
17. *Bratka v. Anheuser-Busch Co.*, 164 F.R.D. 448, 461 (S.D. Ohio 1995); *see also Sun River Energy Inc. v. Nelson*, 800 F.3d 1219, 1229 (10th Cir. 2015) (cannot abdicate duty of oversight even to in-house counsel).
18. *See A PDX Pro. Co. v. Dish Network Serv., LLC*, 311 F.R.D. 642, 643, 653 (D. Colo. 2015).
19. *See Williams v. BASF Catalysts LLC*, 765 F.3d 306, 318–19 (3d Cir. 2014).
20. *Bratka,* 164 F.R.D. at 460–61.
21. *Id.* at 461.
22. *Id.*
23. *See* Fed. R. Civ. P. 37(a)(4).
24. *See Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 362 (D. Md. 2008).
25. *See* Fed. R. Civ. P. 26(e).
26. *See Rodgers v. Beechcraft Corp.*, 2017 WL 465474 (N.D. Okla. Feb. 3, 2017).
27. *See* Fed. R. Civ. P. 26, Advisory Comm. Note (2015 Amendment); *see also Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181, 190 (D.D.C. 1998) (citing *Pulsecard, Inc. v. Discover Card Servs. Inc.*, 168 F.R.D. 295, 303 (D. Kan. 1996)).
28. *See* Fed. R. Civ. P. 37 (a)(1).
29. *See Wash. State Phys. Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1079 (Wash. 1993); *see also Venator v. Interstate Res., Inc.*, 2016 WL 1574090 (S.D. Ga. Apr. 15, 2016); Fed. R. Civ. P. 26(g)(3).
30. *See id.*
31. *See Taylor v. Mentor Worldwide LLC*, 940 F.3d 582, 602–03 (11th Cir. 2019).
32. *See S2 Automation LLC v. Micron Tech.*, 2012 WL 3656454 (D.N.M. Aug. 9, 2012).
33. *Ruiz-Bueno v. Scott*, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013).
34. *See* Fed. R. Civ. P. 37(a)(5)(A).
35. *See* Fed. R. Civ. P. 37(b)(2).