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# Discovery Lessons Your Mother Should Have Taught You

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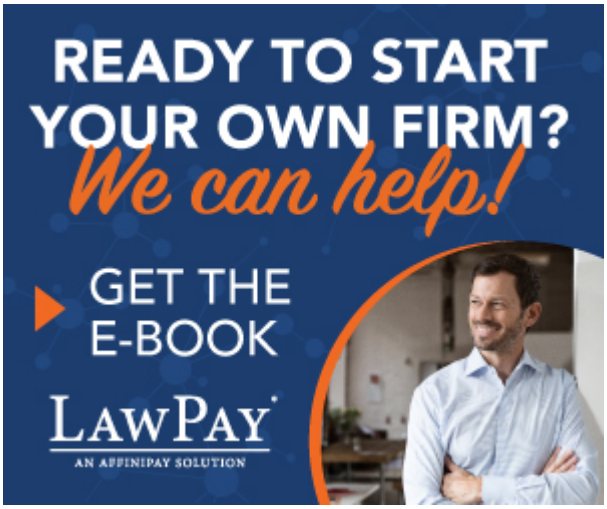
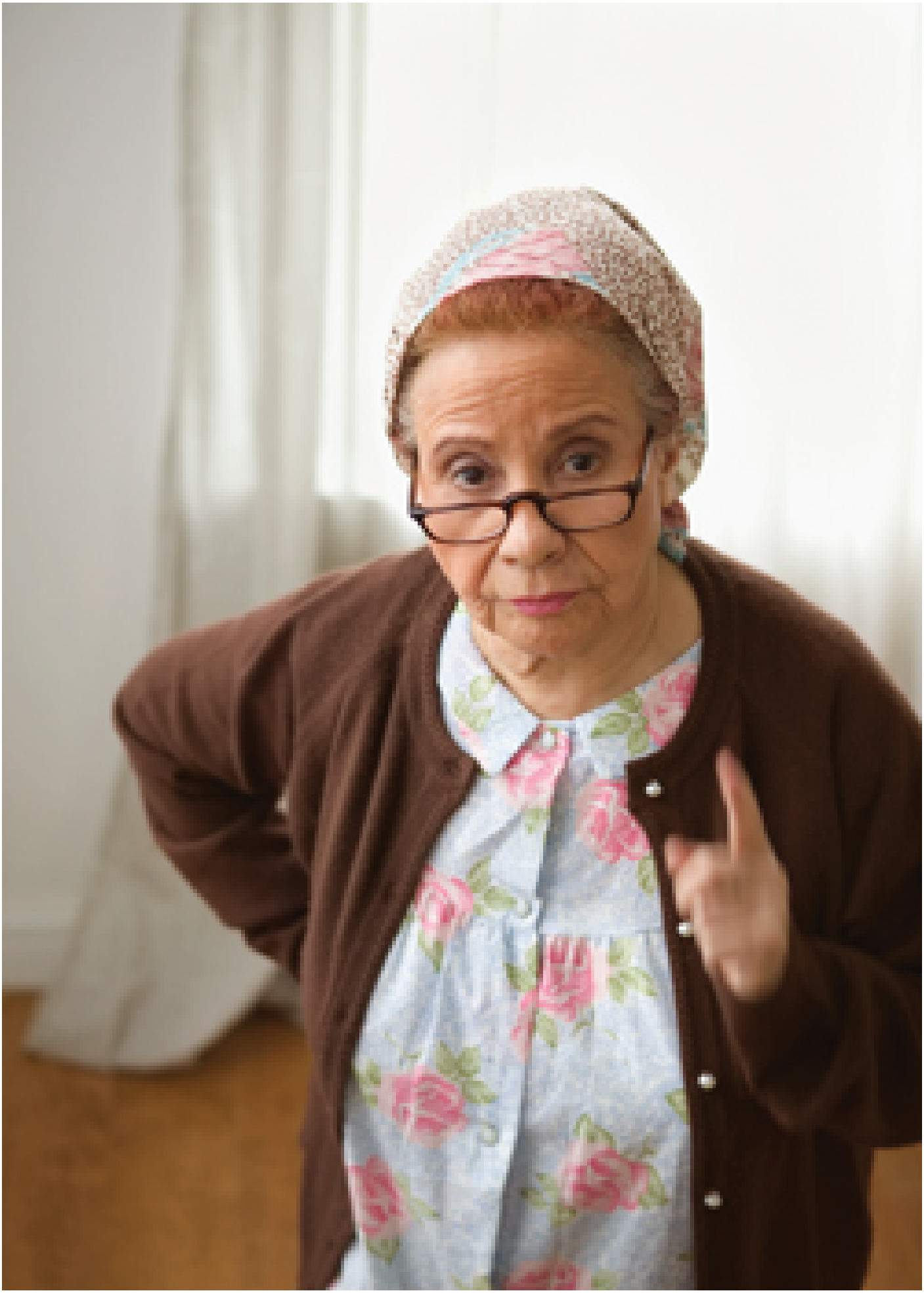
Take it from me. The most important things about discovery you learned in kindergarten, if you hadn't already learned them from your mother.




Know what you want. The first step of any discovery exercise is—considering as much as you know at the time about the claims and defenses—to put some quality time into figuring out what you want to know. I can't count the number of times I have received "form" discovery requests and read them with a mixture of puzzlement and astonishment. All too often, initial discovery requests ask a bucketful of questions that have absolutely nothing to do with the actual issues in the case. Especially in jurisdictions in which the number of interrogatories is limited, you can't afford to waste a single word on anything you don't really *need*. I always start with the elements of the claims and defenses and ask questions that relate only to facts needed to establish them.

Ask "why?" Pretrial discovery, properly accomplished, involves extreme care, minimal waste, constant weighing of the potential costs and benefits of anticipated discovery, and effective use of the fruits of discovery in dispositive motions and at trial.



Of course, the general purposes of discovery are to uncover evidence, avoid surprises, narrow the issues, lock in key testimony, and—on occasion—permit recovery of certain costs and fees where appropriate. It is important, however, to look beneath the surface of discovery and decide which activities you truly need to engage in to develop your case and which activities may be unnecessary, wasteful, or even damaging to your claims or defenses. If you pay attention to these few tips, your discovery should serve you in good stead for dispositive motions and trial. You should also find discovery to be a useful tool to understand fully the strengths and weaknesses of each party's case, which may move both sides toward the often more efficient and less expensive result of pretrial settlement.

Follow the rules. After contemplation, the most important thing to remember is to review carefully the local rules, along with any standing orders issued by the presiding judge. Do this in *every* case before you begin discovery. It will keep you on your toes when dealing with local opposing counsel if that is an issue, and you may even find more streamlined local discovery rules intended to make the process more straightforward and efficient.

Hide and seek. The primary purpose of discovery is to allow both sides to learn the evidence that best supports or most detracts from the claims and defenses. In some circumstances, your opponent or some other uncooperative party (or nonparty) certainly has the documents or other evidence that are essential for you to establish the elements of your claims or defenses. Carefully crafting each interrogatory or request for admission is the only way to avoid time-wasting objections and discovery motions. Moreover, it is critical to find out what evidence your opponent intends to use to establish its claims or defenses so that you can fully understand the entire case and make an objective assessment of it.

Pay attention. Often the pleadings are insufficient to allow you to know exactly what facts and issues are really in dispute. This is especially true when the language of a complaint is largely conclusory, in which case a *Twombly/Iqbal* motion may be appropriate, or where a defendant's general denial contains a laundry list of every imaginable affirmative defense without consideration of whether any particular defense may actually apply to your case. Properly formulated discovery will help you assess which contentions are merely foolishness and which contentions your opponent actually will rely on to address real issues in the case.

**Take care of your stuff.** Evidence vanishes. People disappear. People forget. Witnesses move from the jurisdiction. Documents may be misplaced or (even purposely) destroyed. Physical evidence may be lost or deteriorate to the point that it becomes useless. Loss of evidence presents difficult quandaries for attorneys and their clients.

To preserve evidence you need from your opponent, early requests to inspect documents or other materials are especially important. Once you make a formal request, the opposing party has an affirmative responsibility to preserve the documents and materials at issue. Your early request should limit your opponent's ability to claim that important documents or materials were inadvertently disposed of or lost in the regular course of business despite pending litigation. Early requests may even set up a spoliation claim if your opponent fails to preserve what appears to be benign information that later proves important.

Neutral nonparties, including banks, telephone companies, police departments, and brokerage firms, sometimes keep very useful records (e.g., tape recordings of telephone calls, security or surveillance videos) for a very short time. Failure to subpoena records promptly may result in your evidence being lost forever.

Early inspection of physical evidence allows you to memorialize its condition or perform tests before it is too late. For example, an accident investigator cannot inspect a car after it has been repaired or reduced to scrap metal. If you have the opportunity to inspect but fail to do so, you may lose key evidence and be left with no recourse.

If you are concerned that a witness may become unavailable before trial, you can perpetuate the witness's testimony by taking a deposition, either orally or through written questions. If the witness later becomes unavailable or just plain uncooperative, the record of the witness's responses to deposition questions (so long as any documents referenced are properly authenticated) should be admissible at trial under the rules of evidence and the civil rules. However, the testimony can be introduced only if all the parties have had a fair opportunity to question the witness. Mere declarations or other forms of recorded statements may not be admissible. Thus, you should consider noticing a troublesome witness's deposition as a trial deposition. Then approach the deposition as if you were questioning the witness in open court in front of the judge and jury. Be sure to attempt to keep your opponent's objections to a minimum by avoiding leading questions on direct examination.

Read the directions. When a witness is located outside the jurisdiction, the only way to compel testimony is to take a noticed deposition in the jurisdiction in which the witness resides, pursuant to the other jurisdiction's procedural rules. Most jurisdictions will permit use of the deposition at trial owing to the witness's unavailability—but only if the deposition is properly conducted.

In a case where you take a deposition to preserve evidence, videotaping the deposition—although expensive—may best serve your purposes. Juries and judges seem to be naturally less interested when "substitutes" read extensively from transcripts. Further, transcripts always fail to show when a witness hesitates for such a long time that the testimony appears to be fabricated, and transcripts cannot convey tone of voice or the nuances in the testimony. "I'm sorry?" in a written transcript does not necessarily translate to "Would you repeat what you just said, please? I missed it." Instead, it may look like an apology for an error or—worse—an admission. If you do choose to videotape your deposition, draft your deposition notice to include notice of videotaping.

Know when to stop. "How much discovery is enough?" is a question that can't be answered. The opportunities and possible pitfalls in each case are different, as are your client's preferences, risk tolerance, and willingness or ability to pay for discovery. In certain cases your discovery strategy can be revised—some activities dispensed with it altogether. For example, if you are reasonably confident that a cooperative witness will testify on your client's behalf, consider obtaining an initial written statement or affidavit instead of noticing a deposition. If it's attached to a motion or opposition, rest assured, the opposing side will depose the witness and you will still have the opportunity to question, just on the other guy's nickel.

In a case that turns on conflicting testimony, you may even consider dispensing with the depositions of certain parties if you are confident that you have received satisfactory responses to interrogatories or if a party's discovery responses firmly establish a particular point or fail to preserve a defense.

On the other hand, some cases require huge investments of time and money in discovery. A detailed strategy and discovery plan—constructed with your client's goals and budget in mind—must be developed and continuously revised in every such matter you handle. If you and your client decide to forgo arguably useful discovery to save expense or for other reasons, be sure to document the risks involved and the client's decisions. Do so in letter form and retain a copy for your file. In other words, CYA.

**Answer the question.** Responding to discovery can be a dangerous enterprise. Take great care in preparing your answers to interrogatories, which in most jurisdictions must be verified under oath by your client. Failing to consider carefully the precise wording of interrogatory responses can lead to disaster.

Responses must be timely. If you fail to respond to written discovery requests by the applicable deadline, objections and claims of privilege may be waived. Even worse, if you fail to timely respond to requests for admissions, the requests may be deemed admitted. In that case you could be done for.

Failure to disclose some fact or to produce some evidence favorable to your case may preclude you from using it at trial. Therefore, be sure that your discovery responses reflect all the information that you and your client have or can reasonably obtain to support your claims or defenses.

**Share your toys (but don't give them away).** Stop and think when you receive a set of requests for production of documents. Analyze the requests. Ask yourself not only what your opponent is looking for but also what your opponent actually has requested. Ask your client to send you copies of everything remotely related to your claims or defenses and to your opponent's document requests. After you have closely reviewed these documents, select those that are responsive, note documents that are not clearly responsive but that may have some significance to your claims or defenses and therefore you want to produce, and remove and log any privileged documents. Then follow up with your client to confirm that nothing has been missed.

When you have reviewed and categorized the inevitable additional documents, all responsive documents, including the privileged documents, should be serially stamped for ease of reference later on. But be sure to remove the privileged documents and keep them separate from the produced documents in your file.

Only after you have collected and organized the documents for production should you begin to draft the written response to the document request. Reversing this order creates a risk that you will miss appropriate and applicable privileges or that you will fail to ascertain what objections you can safely omit because a complete response poses no danger. Finally, produce copies of the documents, together with your privilege log.

Plan ahead. It can be helpful to consider likely interrogatories during your initial evaluation of the case. Because your discovery responses should include all information your client has in its possession or can obtain with reasonable effort, it is neither wise nor safe to postpone investigation and information gathering until after discovery is underway. The often-seen response that information will be supplemented because "discovery is ongoing" ideally should not refer to your own internal investigation. To avoid ethical issues and ABA Model Rule 11 concerns, the time to figure out that your case does not have a leg to stand on should not be while you and your client are responding to the opponent's discovery.

If you have a corporate client, be sure to talk to any individuals who contributed to your client's discovery responses to make sure that they are not overlooking any information that may be relevant to the responses, especially information that may be helpful in establishing a claim or defense.

Admit your mistakes. Responses to requests for admissions are binding and typically cannot be amended without leave of the court. But denying a fact without an adequate basis to do so can subject your client to liability for your opponent's costs and attorney fees and even risk sanctions on yourself. It is more critical to be careful about refusing to admit a fact than about admitting one.

Help the needy. The key to successfully defending a deposition is preparing your client to be deposed. A deposition is not your client's day in court. It is not for purposes of venting. It is not a therapy session. It is not the venue for telling her story. Make sure that your client understands that deposing counsel is not her friend. Instruct your client that her answers should be as short and careful as possible, responding only to the specific and limited question asked. Keep in mind that if your client relies on any documents, including privileged documents, to prepare for the deposition or while testifying, those documents may have to be turned over to opposing counsel in discovery.

The sample question I always use in preparing a client to be deposed is, "Do you remember what day the planes crashed into the Twin Towers in New York City?" When your client answers, as she inevitably will, "September 11, 2001," shake your head. "Too much information," you warn. "Listen to the question again." No matter how many tries it takes, allow her to come to the realization *by herself* that the question is not "What day?" but "Do you remember?" There are only two possible correct answers to the question posed, and they are "Yes" or "No."

Listen to the question. In general, at deposition, your client should limit her answers in the following manner:

- Concisely answer all questions in "yes" or "no" form, if possible, without providing further unnecessary explanation.
- If deposing counsel asks an open-ended question or seeks further explanation, keep answers as concise as possible by providing the shortest possible truthful answer to the question.
- Responses such as, "I don't know" or "I don't remember" are perfectly acceptable and infinitely better than attempting to be responsive through guessing or speculation. A witness should never be allowed to guess or speculate about anything. Never. Ever.
- "I don't understand your question" is the *only* acceptable response to a vague, ambiguous, or poorly phrased question.

Remember that you may instruct your client not to answer a question *only* when it calls for privileged or, in certain jurisdictions, private information. Unless I absolutely must, I don't engage in "cleanup." I don't ask follow-up questions that might elicit a new fact or even to explain prior answers unless I absolutely must to avoid leaving a mistaken or misleading answer on the record.

Follow the Golden Rule. No matter what, remember to play well with others. You can never go wrong by exercising cooperation and plain old common courtesy. But be sure to make your record and stick to your guns when appropriate and necessary for your client. If discovery disputes arise and become contentious, keep in mind that the more faithfully you conduct yourself in a collected and professional manner, the better.

## Authors

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