Effective Discovery: Techniques and Strategies That Work

By Peter T. Hoffman and Stuart M. Israel, published by National Institute for Trial Advocacy (2017), softcover, 377 pages, $95
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Reviewed by Ryan J. L. Fantuzzi

Imagine that as a 1L, you aced Civil Procedure because you mastered the minimum contacts analysis from *International Shoe*. In your second and third years, you coasted through classes the likes of Harvard's Feminisms and Pornography, c. 1975–1995 and Cornell's Harry Potter and the Law. Now, a few years later, you find that the practice of law is nothing like law school. Personal jurisdiction issues arise about as often as questions about the International Statute of Wizarding Secrecy.

What are you to do when a senior partner sends you an email ordering you to "prep a memo w/ lists of interrogs, rtps, and dep questions that you think should be included"? Aren't there rules about this stuff? You would be well served if you had a copy of *Effective Discovery: Techniques and Strategies That Work* on your office bookshelf.

Although the humor sprinkled throughout *Effective Discovery* makes it enjoyable to read—as enjoyable as reading about discovery can be—it is not intended to be read cover to cover.

The intended reader is the busy practitioner (both novice and expert) who wants practical advice about discovery rules and techniques. The organization of the book—with thematic chapters and frequent full-sentence headings—assists impatient readers. Litigators will have no trouble finding what they are looking for: the mechanics of paper discovery and the art of drafting and responding.

The authors emphasize that every stage of discovery presents advocacy opportunities:

> With every discovery response—and for that matter, with every discovery inquiry—identify your objectives, make sure your responses and inquiries serve your objectives, and take advantage of all appropriate opportunities for advocacy. You are an advocate, and advocacy is what you do. (p 218)

In other words, press every advantage within the bounds of the law.

Effective Discovery is chock-full of useful advocacy advice. For example, the authors recommend drafting a proposed Rule 26(f) discovery conference report and discovery plan and circulating it to the other side, whether you represent the plaintiff or the defendant. A joint report and plan provides the writer with the drafter's advantage: it frames the issues and influences the "timing and agenda of the conference as well as the ultimate form and content of the parties' Rule 26(f)(3) report." (p 14)

Hoffman and Israel also suggest viewing the Rule 26(f) conference as a chance to learn and influence: "Every encounter with the other side is an opportunity—to advocate, to investigate, and to discover what the other side is thinking and why." (p 42) Lawyers like to hear the sounds of their own voices—we are paid to write and speak—so most of the time, your opposing counsel will tell you their views of the facts and the law. If you ask, say the authors, you might learn something important at no cost.

The majority of the 11 chapters are divided by paper discovery device (e.g., interrogatories, requests for production and inspection, physical and mental examinations, etc.). Each chapter is further divided into four broad categories: the rules of the device, the strengths and weaknesses of the device, tips on drafting the device, and tips on responding to the device.

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For illustration, the strengths of requests to admit are that there is no limit in number and they are inexpensive. As Hoffman and Israel explain, "[Y]ou can draft requests in your basement, in your bathrobe." (p 222)

In the penultimate chapter, the authors explain how electronic filing has eliminated the need for "breakneck drives to the courthouse to meet the 5:00 p.m. filing deadline" and replaced them with filing at 11:59 p.m. from "the computer in your basement while wearing your pajamas." (pp 237–238) The authors must frequently work in sleepwear. The chapter discusses electronically stored information (ESI)—metadata, litigation holds, and other e-discovery matters. The appendices include the "Maryland Protocols,"[1] the Seventh Circuit Program,[2] and the Sedona Principles.[3]

The tips on drafting and responding to devices are where *Effective Discovery* shines. The authors offer a step-by-step guide for each device. For example, for production requests:

> Step One: Precisely Identify Your Objectives
>
> Step Two: Specify the Documents Sought by "Item or Category of Items"
>
> Step Three: Use a Funnel Approach—From the General to the Specific or From the Specific to the General
>
> Step Four: Include Requests for Things that Might Exist
>
> Step Five: Check the Local Rules
>
> Step Six: Specify a Reasonable Time, Place, and Manner for the Inspection and Related Acts (pp 154–157)

Each step is accompanied by analysis and advice. This cookbook approach makes it easy for readers to find exactly what they are looking for, whether the precise subsection of a rule or advice on drafting.

In Chapter 5, the authors warn lawyers against using interrogatories that seek subjective information or interpretation. For example, asking to "describe the accident referred to in complaint paragraph 7" could allow the opponent to weasel out of the question (e.g., "Defendant's car hit plaintiff's truck"), or worse, to provide legal and factual conclusions from his partisan perspective (e.g. "[D]espite the clear, dry, and sunny conditions, and despite the light traffic, the defendant drove her car negligently and with great force hit plaintiff's truck, doing extensive property damage and causing the plaintiff serious personal injury, psychological trauma, and emotional distress.") Yikes! Even careful drafting of interrogatories that request a narrative will not prevent the opposing side from "adding heat, but no light." (pp 102–103)

Careful drafting to prevent the other side from evading an answer is hard work. The authors advocate specificity. Don't ask, "Were you drinking before the car collision?" because the opposing party can honestly answer a simple "yes" with limited utility to you. The defendant had consumed hundreds of alcoholic drinks years *before* the collision, or the defendant drank *water* before the collision. Both answers are technically true. To get the answer you're looking for, try: "State whether you drank any alcoholic beverage at any time during the 12-hour period preceding the collision. If so, identify each alcoholic beverage you drank, and for each, specify the quantity, where you drank the beverage, and what time." (pp 115–116)

The authors stress advocacy when answering interrogatories and requests to admit as well. While they defend the "when in doubt, deny" rule for responding to admission requests, they also suggest volunteering information in responding to requests and interrogatories when doing so assists your client. For example, if asked whether your plaintiff corporation made any effort to mitigate damages between June 2012 and November 2013, you could honestly answer "no." The answer is clear and true but misleading out of context, and it squanders an advocacy opportunity. Instead, the authors suggest writing:

> No. [The plaintiff] did not and could not do anything to mitigate…because it did not know of the breach during that period….[Immediately after learning about the breach, the plaintiff] made serious and extensive mitigation efforts. Despite those efforts, [the plaintiff] was unable to avoid the considerable damages caused by [defendant's] breach. (pp 129–130)

When answering interrogatories and requests to admit, follow the rules but provide context, reasons, information, and explanation to advocate for your client.

The focus of *Effective Discovery* is paper discovery. It touches on depositions, as any discovery book must, but each author has written a book on depositions.[4] This book is for the lawyer who wants an efficient and practical guide to discovery in general and, in particular, to the framework of investigation and discovery, preparing for discovery, initial disclosures, interrogatories, document requests, inspections and physical and mental examinations, subpoenas, admission requests, ESI, resisting and compelling discovery, and responding to discovery misconduct.

In the book's preface, the authors include Ambrose Bierce's often-quoted definition of "litigation" from *The Devil's Dictionary*: a machine which you go into as a pig and come out of as a sausage. *Effective Discovery* is like a sausage fest with plenty of tasty meats to try, but without the risk of food poisoning—and you can enjoy it in your bathrobe. ■

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ENDNOTES

1. *Effective Discovery*, Appendix B: "Suggested Protocol for Discovery of Electronically Stored Information (The "Maryland Protocols") from the District Court for the District of Maryland."
2. *Effective Discovery*, Appendix C: "Seventh Circuit Electronic Discovery Committee Principles Relating to the Discovery of Electronically Stored Information."
3. *Effective Discovery*, Appendix D: "The Sedona Principles (Second Edition 2007): Addressing Electronic Document Production."
4. See Israel, *Taking and Defending Depositions, Second Ed* (American Law Institute, 2017) and Hoffman & Malone, *The Effective Deposition: Techniques and Strategies that Work, Fifth Ed* (National Institute for Trial Advocacy, 2018).