The Inelegant Art of Scorched Earth Discovery

By Alex Craigie

"Believe it or not, the composition and layout of some of my images fall precisely — to a hundredth of a second — within the Golden Ratio!"
-Henri Cartier-Bresson

"I love the smell of napalm in the morning."
-Lt. Col. Kilgore, *Apocalypse Now*

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It is interesting how rudimentary lessons in one discipline often translate well to another, such as to the litigator's craft. We have at our disposal a wide arsenal with which to conduct discovery, the core activity of building a case or developing a defense.

When I was a young man, my father, a professional cinematographer, taught me the basics of photography. We worked in black and white. He had two cameras: a gracefully aging twin-lens Rolleiflex and a vintage Nikon viewfinder. I attempted portraits of our Great Dane, architectural studies of our house, and still life compositions of houseplants. We even built a first-rate darkroom in our basement. Though he could at times be a complicated, difficult man, I hold fond memories of the time spent with my father learning photography.

I vividly recall his early counsel against recklessly burning through film in the gamble that I might get a single decent shot. "Any idiot can snap a hundred pictures," he would say, but a good cameraman takes his time, measures the exposure, and composes the shot.

Yet, just as "any idiot" with a camera and a motor drive (that relic which advanced film at alarming speeds) could snap off a hundred shots in a single minute in order to get just one good photograph, any lawyer deserving that "I"-word label can recklessly avail himself of hundreds of interrogatories, requests for admissions and document requests in the vain search for a single useful item of evidence.

Now, if that single item of evidence wins the case or appreciably improves a client's bargaining position, it could be worth it, but only if the evidentiary value is not outweighed by the time, corresponding expense, and potential heartache of the ruthless search. But, like a reckless shutterbug who fails to appreciate the beauty of celluloid economy, it seems that many lawyers lack the experience, wisdom or restraint to recognize when the wasted time and expense of "scorched earth" style discovery will vastly outweigh any benefits.

As a young grunt toiling at an insurance defense firm, I was often tasked with preparing written discovery, a job I took seriously. California litigators are familiar with the limit of 35 special interrogatories and 35 requests for admission permitted under Code of Civil Procedure sections 2030.030 and 2033.03. But, let's face it, if you're a second-year associate bent on absolutely annihilating the other side, 35 interrogatories is not enough, not nearly enough.

Fortunately, for eager young would-be Ninja assassin litigators, the Code of Civil Procedure allows us to serve an essentially unlimited number of interrogatories and requests for admission, provided we include a

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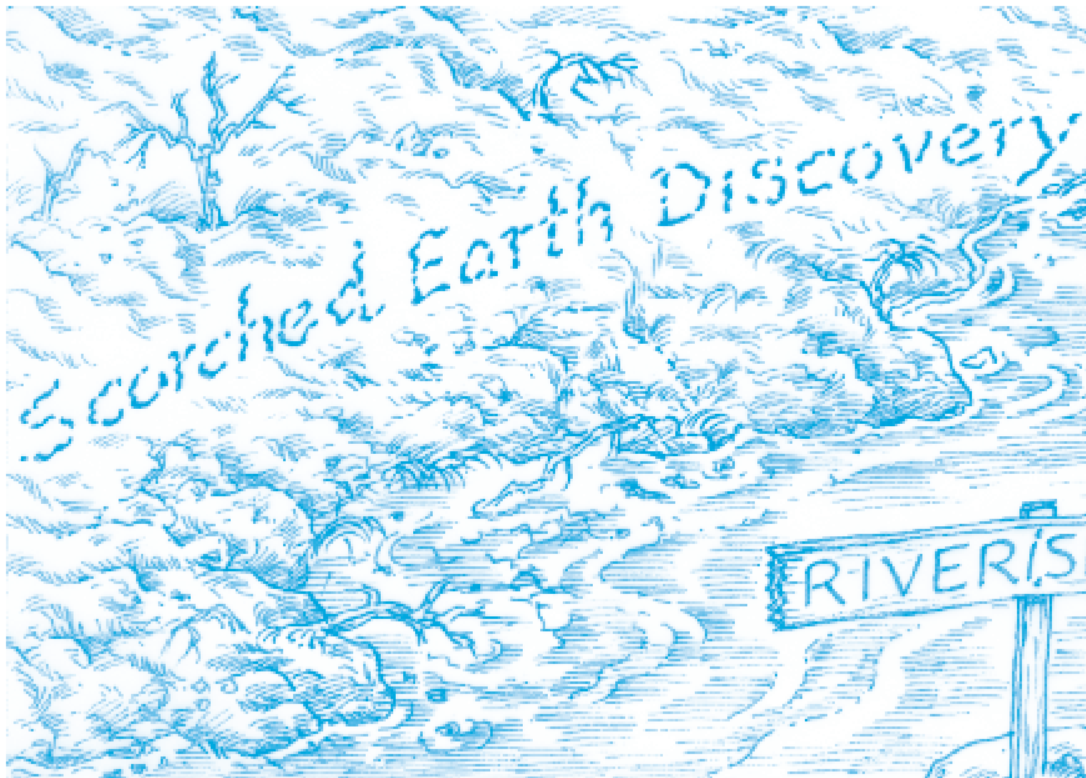
declaration affirming the extra discovery is "warranted" based on the "complexity or the quantity of the existing and potential issues in the case," the "financial burden on a party entailed in conducting the discovery by oral deposition," or propounding burdensome written discovery makes sense because it affords a responder "the opportunity to conduct an inquiry, investigation, or search of files or records to supply the information sought." (Code Civ. Proc., §§ 2030.050, 2033.050.) Of course, my 135 handcrafted, "wait 'til they have to answer these babies," special interrogatories were always "warranted." Why? Because I swore in a declaration that they were. Quod erat demonstrandum.



Let me dispel you of the notion that 135 special interrogatories could have in any way been "warranted" in most of my cases because of the "complexity or the quantity of the existing and potential issues." We weren't litigating over the patent to an iPhone component or the copyright to *Coming to America*. These were typically cases about whether the design of a product hurt someone. While it's true the issues were more complicated than "What was the color of that banana you slipped on?" the universe of relevant, discoverable evidence was not infinite.

But I didn't see it that way. I marched ahead with my flurry of interrogatories. Thirty or so days later, I received pages and pages of nonsense: boilerplate objections, mostly, with the occasional substantive morsel. Few readers will be surprised to learn that I rarely — actually never — unearthed a detail with hundreds of discovery requests that I couldn't easily have learned with less than 35 interrogatories.

With interrogatories, it was not just a ques-

tion of quantity. I rarely gave any thought back then to the timing of interrogatories, particularly contention interrogatories. I did not, for example, consider that asking many of the same questions by interrogatory that I would later ask in deposition was simply creating an opportunity for my opponent to educate his client how to respond when the same questions were later asked on the record. We all know that lawyers, not clients, answer interrogatories. I have since become a bigger fan of depositions than contention interrogatories. Asking the same question twice, in two different formats, is just a waste of time and paper.

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That's not to say I didn't also occasionally overdo it with depositions. After all, I reasoned, why dispatch an investigator to interview a peripheral witness to see if she had anything important to say when I could spend thousands of my client's dollars and inconvenience everyone by putting them under oath and creating a record?

Who gains and who loses with my old "shotgun" approach? Lawyers are the only winners. Discovery is the most expensive part of a lawsuit except for trial and trial preparation. Clients don't gain since they're presumably financing the fact-finding exercise. Already clogged courts grow even more burdened with time-consuming discovery disputes. Ultimately, even lawyers lose in the long run as clients migrate to lawyers who make efficiency a priority.

Practicalities aside, however, I suggest a larger reason to temper the urge to litigate with a flamethrower, leaving the ground scorched and the parties depleted and parched. Back when my father and I toiled away with viewfinders and light meters, he wasn't so much worried about the quantity of film I would burn (though that was not completely inconsequential). Rather, his goal was to shape me into a better photographer — one who acts more like a serious artist, who plans and composes, and who takes care. As litigators practicing our craft, we should remember that we aren't paid handsomely to generate make-work. Discovery has a goal. We are trying to unearth evidence that is not only admissible but also useful. In this instance, less can yield the same or more — and better.

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