It is my honor to assist The Professional Education Group in bringing Irving Younger’s presentations on trial advocacy to a new generation of lawyers. The following chapter covers discovery. In this seminar Professor Younger challenges us to think about why we use certain discovery devices and how to use them effectively. He tells us that we should keep in mind the goal we are attempting to achieve when we use the discovery process. Everything he says in that regard is just as valid today as it was when he recorded this seminar in 1986.

Of course, we’ve changed some of the discovery rules in the time since 1986 because, quite frankly, we are always changing the discovery rules. So there have been several changes to Rules 26 to 37 of the Federal Rules of Civil Procedure. Also, keep in mind that every time the Federal Rules of Civil Procedure are changed, some of the states adopt some of those changes and some of the states do not adopt those changes. Therefore, if you are litigating a case in state court, you are going to want to make reference to the state discovery rules to determine what the status of those rules is and what your discovery options are.

We will focus on the federal rules, as Professor Younger does. I will not mention in this preview every single change in Rules 26 to 37, i.e., the discovery rules of the Federal Rules of Civil Procedure. But I do want to mention changes in those discovery provisions that Professor Younger mentions in the seminar that you are about to see. We will take them in the order that Professor Younger will mention them.

First, the scope of discovery language in Rule 26(b) was changed so that the rule now says that we are allowed to discover unprivileged matters “relevant to any party’s claim or defense.” With regard to the timing of discovery
issues that Professor Younger discusses—i.e., who gets to do discovery first and whether both parties are allowed to conduct simultaneous discovery—there have been a couple of pretty significant changes. In 1993 the automatic disclosure provisions of Rule 26(a) were added to the Federal Rules of Civil Procedure so that now, as you know if you litigate federal cases, you have an obligation to provide certain information even before your opponent issues a discovery request. Rule 26(d) has also been amended to provide that in most cases there is a moratorium on discovery until the initial automatic disclosure period is complete.

Professor Younger mentions that depositions, while a very valuable discovery device, have the disadvantage of being a very time-consuming discovery device. There has been a change in the Federal Rules that is significant with regard to the consumption of time. Rule 30(d)(1) now provides a time limit of one day of seven hours and, of course, provides that that time limit can be extended by a court order or by a stipulation between the parties.

With regard to expert witnesses, there has been a significant expansion of the discovery beyond that which existed before 1993 with the standard expert witness interrogatory and the response to that interrogatory. After 1993’s adoption of the automatic disclosure provisions, we are now required in civil cases to identify individuals who will present expert testimony at trial. Also, under Rule 26(a)(2) those expert witnesses, in most instances, are required to file a report that includes a notation of the data or other information considered by the witness in forming her opinions.

Professor Younger also discusses protective orders. For the current law regarding protective orders, refer to subsections (b)(2) and (c) of Rule 26. With regard to discovery conferences, Rule 26(f) now usually requires the opposing parties to meet to attempt to identify whether this is a case that can be settled and to set a discovery schedule early in the discovery process.

Professor Younger notes that, at the time of his presentation, several courts were adopting limits on the numbers of interrogatories. Now, Rule 33(a) has been amended to provide a standard limit to the number of interrogatories of 25, “including all discreet subparts.” That limit applies in the absence of a written stipulation of the parties or a court order to the contrary. The insurance information that Professor Younger suggests that we attempt to acquire through interrogatories is now part of that automatically disclosed information under Rule 26(a)(1)(A). Finally, the option to produce business records in response to an interrogatory is now found in Rule 33(d).
IRVING YOUNGER: Well, the subject, ladies and gentlemen, is discovery. And whenever one talks about discovery, it is important to know the viewpoint of the person doing the talking. And so I’d better begin by telling you what mine is. Now, you’re all familiar with the phenomenon of the litigating lawyer. That is the lawyer who undertakes to represent clients in litigation business, but always sublimely confident that no lawsuit handled by that lawyer will ever go to trial. There will be a settlement or some other disposition short of a trial. And for that lawyer, I think it’s fair to say, discovery is the objective. Discovery is what the enterprise is all about because that lawyer, at least in my experience and as I have observed the phenomenon, will engage in discovery virtually in a mindless manner, taking depositions of everybody on the landscape simply for the sake of taking those depositions, serving interrogatories, conducting discovery and inspection. Every once in a while, simply for a change of pace, making a motion or two, to the end that ultimately the other side has had enough, throws in the towel, and the case will be settled.

Well, that’s the litigating lawyer. More power to him or her, but that’s not yours truly. Yours truly, ladies and gentlemen, regards himself as a trial lawyer and for a trial lawyer, the objective is the actual trial of the lawsuit, be it state, federal, civil, criminal, protracted and complicated, or fairly short and relatively simple. The trial is the end and everything else is a means calculated to achieve that end or to make the end occur in a more efficient and aesthetically satisfactory way. From the viewpoint of a trial lawyer then, which I now trust is clear, is my viewpoint, discovery is not something to be engaged in automatically or unthinkingly. Discovery is a means to achieving an objective. And so as with everything else, you first must know your objective and then you can calculate the means to see whether the means is reasonably likely to achieve the objective that you have in mind. Well, there is the viewpoint. Let me leave it at that. I trust it will be reasonably clear, albeit implicit, in everything else that I have to say in the course of the day.

Let’s begin with the scope of discovery under the Federal Rules of Civil Procedure and their analogues in the states and essentially that
Chapter 1

means all of the states. And there’s really very little to be said about it, precisely because, unlike what you would gather from simply looking at the language of Rule 26(b)(1) of the Rules of Civil Procedure, the scope of discovery as that language has been construed by the courts is wide open. We all remember from law school, and in this instance, what we were taught in law school is quite true. You may discover anything that would be evidence at the trial or that is likely to lead to evidence, which means that so long as you’re pretty good at making arguments and showing the judge how things are connected with other things, anything is discoverable, with exceptions to be sure. Exceptions with respect to the evidentiary privileges, to work product and the like, which we will come to in due course.

But I think from the standpoint of the working lawyer the scope of discovery is an issue not worth thinking about. Discovery is wide open. Anything can be discovered, with exceptional situations, of course, where you’ve got a kind of immunity from discovery, and beyond that the working lawyer will say to himself or herself, “What is the purpose of discovery?” Granted that you can discover virtually anything that’s out there. What is the purpose of discovery? And it seems to me in reflecting on this question, ladies and gentlemen, that there are three big purposes to discovery. Now, obviously, the purpose that will be involved at any particular moment will depend upon the circumstances of the case, what stage of your discovery program you are at, and the like.

But looking at the picture as a whole, you’ve got three big purposes. And let me identify what they are. First, classically, stated most frequently, the purpose of discovery is to discover, to get information about the case and, most importantly, information that you do not already have, to find out things about this case that are not already known to you. And far be it from me to dispute the proposition that that is one of the purposes of discovery. But in my experience as a trial lawyer, that is one of the less important purposes of discovery. In my experience as a trial lawyer, more important than that purpose is the one I will mention now—a second purpose of discovery. It’s not normal to talk about this, but any lawyer who has engaged in civil litigation is aware that this
is one of the aims that you seek to accomplish when you indulge in discovery—not to find out what you don’t already know, but to find out what the other side already knows so that you are prepared to deal with it when the case is reached for trial.

So first you want to find out about the case, find out what you don’t already know. Second, you want to find out what the other side knows. And now, third, you use discovery to prepare for trial, to streamline the case, to marshal the proof, so that when finally you do try the case it goes in smoothly, efficiently, with minimum effort, and with maximum persuasiveness.

And it seems to me that under the general heading of preparing for trial there are three principal goals that you will seek to achieve. First, you will want to pin the other side down to its position. The other side has a position on any one of the issues in the case. The other side’s position is not necessarily favorable to you, but you want to be sure that it doesn’t change between now and then so that whatever you are presently told their position will be is exactly the position that you will need to attack at the time of trial. Call that pinning down or freezing the other side.

Second, you will engage in discovery so as to preserve testimony, having in mind that people die, leave the jurisdiction, or otherwise become unavailable for testimony at trial. Well, it’s now, time present. The trial will take place in time future, months or years away. Let’s take the testimony now, in such a form that we can use it at the time of trial.

And, finally, under the general heading of preparing for trial, increasingly important in these days when so much civil litigation will involve large amounts of documentary evidence. As you all know, the manipulation of documents in the courtroom is not intellectually difficult. It does not challenge the rational faculties, but it requires a certain choreography which every trial lawyer fairly quickly masters. But that choreography is very boring to a jury. There is nobody listening to me who does not know the footsteps necessary to bring it about, for example, that a document is received in evidence under the business entries or business records exception to the rule against hearsay. But to lay that
Chapter 1

particular foundation time and time again in the course of a trial is to drive a jury insane with tedium and generally it is to your disadvantage to drive a jury insane with tedium. You want to keep a jury just as entertained as you possibly can in the course of a trial. Granted, that’s difficult in most civil lawsuits, but for heaven sakes, don’t make it harder than it has to be. And it’s harder than it has to be when you go through this choreography involving documents in front of the jury. Most of it can be finessed and it can be finessed by adept use of discovery. So under the general heading of preparation for trial, in addition to pinning down or freezing the other side, in addition to perpetuating testimony that may otherwise become unavailable when the case is reached for trial, you’ve got the authentication of documents and the marshaling of the evidence generally to the end that your presentation in front of that jury be as smooth and as entertaining as you can possibly make it.

Now, no matter what the nature of the case, no discovery ought to be indulged in a haphazard or miscellaneous fashion. Just as you try a case in accordance with a plan, so you must conduct discovery in accordance with a plan. And all too many lawyers, in my experience, do not. They conduct discovery with a plan that’s nothing more focused than sort of pulling the trigger on a shotgun and hoping that the pellets hit a target out there. To continue the analogy to weapons, I think that discovery ought to be a rifle, not a shotgun, and you take careful aim at your target and you hit that target right in the bull’s eye. You can’t hit the target in the bull’s eye if you don’t know what the target is and you won’t know what the target is unless you have devised a plan for the conduct of discovery in this case.

In devising that plan, the following factors are to be considered. Now, obviously, I can’t tell you what the plan ought to be. There’s no recipe that’s going to give you the plan of discovery in the next lawsuit for which you become responsible. Everything will depend upon the circumstances of the case and the issues presented. But in working out your plan for discovery, these five factors will play a part.

First, expense. Now, for a very few lawyers that is an unimportant factor. Indeed, it’s a factor that may not need to be considered at all.