Learning From Trump And Bannon Discovery Strategies

By **Mathea Bulander and Monica McCarroll** (September 14, 2022)

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On July 22, a Washington, D.C., federal jury found former President Donald Trump's White House aide Steve Bannon guilty of two counts of criminal contempt of Congress for failing to comply with a subpoena issued by the U.S. House Select Committee on the January 6 Attack.

Just a few months prior, on April 25, New York Supreme Court Judge Arthur Engoron entered an order holding Bannon's former boss, the former president, in civil contempt of court in the special proceeding brought by New York Attorney General Letitia James for failing to produce documents in violation of a previous court order.

Bannon and Trump each resisted a valid subpoena and fought ferociously against producing any information, but when faced with the consequences of their respective failures to respond, Bannon doubled down while Trump pivoted.

This pivot from a refusal to produce — and accepting the consequences — to an active engagement to abate the conflict reflects a pragmatic approach to discovery dispute management that includes strategic affirmative responses or disclosures of information.

A pragmatic approach may help limit the scope of the discovery sought and also may decrease the likelihood of severe sanctions that can result when parties fail to comply with valid requests and orders.

This article discusses how Trump's shift in his discovery strategy appears to have helped him avoid Bannon's fate, then shows how litigants can use pragmatic discovery strategies to mitigate or avoid severe sanctions in the first instance — turning the focus of the courtroom spotlight away from discovery noncompliance and toward the merits of the case.

Criminal vs. Civil Contempt

Bannon was convicted of wholly and willfully failing to respond in any way to a congressional subpoena. He offered a single defense to the criminal charges against him — namely, that his actions are not contumacious but fall within legal exceptions to contempt.

The jury rejected that defense and found him guilty of two counts of criminal contempt. He is facing up to one year in prison for each count, plus up to $100,000 in fines. Bannon's defense team has indicated that he plans to appeal.

Criminal contempt charges like those faced by Bannon are not confined to willful defiance of congressional subpoenas or court orders; they also can arise from failures to follow court rules or satisfy civil discovery requirements.

Indeed, former Jones Day partner Raymond McKeeve was recently found guilty of criminal contempt by the London High Court for directing the destruction of information relevant to a civil dispute. As McKeeve and Bannon learned, punishment for criminal contempt is unconditional. Neither man can now say or do anything to change or purge that punishment

— although Bannon almost certainly will appeal the verdict itself.

Like Bannon, Trump initially resisted the discovery sought by the New York Office of the Attorney General's civil subpoena when he filed a motion to quash. When the court denied the motion and ordered him to respond, Trump asserted objections, but he still refused to produce any documents.

This failure to produce documents led the attorney general's office to move for Trump to be held in contempt. Trump was unable to provide any valid defense for his lack of compliance, which led the court to find him in civil contempt and impose a $10,000 a day fine until he complied with the court's prior order.[1]

After 11 days, Trump changed his strategy, producing at least some of the documents requested and submitting affidavits from his attorney and seven high-ranking members of the Trump Organization regarding the company's record retention policies.[2]

He also paid $110,000 in fines, which the court ordered would remain in escrow pending appeal. Having received some, but not all, of the information sought by the subpoena and ordered by the court, the attorney general's office agreed that these efforts were sufficient to purge the contempt. The court lifted the contempt order on June 29.[3] Trump is appealing the finding of contempt.[4]

Civil Contempt vs. Other Remedies

As Trump learned the hard way, civil contempt arises when a party refuses to do a commanded act.[5] It is a common law sanction that allows a court to enforce its own orders and rules. It can arise in various circumstances, but when applied to discovery disputes, the remedies often mirror the more familiar remedies fashioned when parties violate Federal Rule of Civil Procedure 37.

Rule 37(b)(2)(A) applies specifically to violations of a discovery order including an order issued under Rule 26(f), 35 or 37(a). The sanctions outlined under Rule 37 range from staying the proceeding, to making evidentiary findings, striking pleadings, dismissing the action in whole or part, entering a default judgment or treating the action as contempt of court.

A court's general authority to enforce its orders using its contempt powers extends to any orders, it is not limited to discovery orders like Rule 37. In situations like Trump's, where a court directs a party to share information but does not enter a specific discovery order pursuant to the rules, the remedy of contempt is always available.

Civil contempt is not a tool that courts use lightly, and some jurisdictions require that it be proved by the heightened burden of clear and convincing evidence.[6] The U.S. Supreme Court has said as recently as 2019 in Taggart v. Lorenzen that

> Civil contempt "should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." ... This standard reflects the fact that civil contempt is a "severe remedy," and that principles of "basic fairness requir[e] that those enjoined receive explicit notice" of "what conduct is outlawed" before being held in civil contempt.[7]

Unlike criminal contempt, judgment for civil contempt is conditional, as evidenced by Trump's case: He was ordered to pay daily fines until he complied with the prior court

order.[8]

Limited Defenses to Civil Contempt

Once the attorney general's office made a prima facie showing that Trump failed to comply with the court's prior order, Trump had limited defenses available. He could assert that he was unable to comply, i.e., impossibility,[9] that the order was impermissibly vague, that his objections substantially complied with the order or other mitigating circumstances.

Lower courts have recognized that intent, good or bad, is simply not an element of proving civil contempt. In 1980 in Jim Walter Resources Inc. v. International Union, United Mineworkers, the U.S. Court of Appeals for the Fifth Circuit said, "Intent is not an issue. '(I)n civil contempt proceedings the question is not one of intent but whether the alleged contemnors have complied with the court's order.'"[10]

The Supreme Court explained in Taggart v. Lorenzen that "a party's 'record of continuing and persistent violations,' and 'persistent contumacy' justified placing 'the burden of any uncertainty in the decree ... on [the] shoulders' of the party who violated the court order... On the flip side of the coin, a party's good faith, even where it does not bar civil contempt, may help to determine an appropriate sanction."[11]

Good faith is not a defense to determining whether contempt has occurred, but a factor the court may consider when tailoring sanctions.[12]

Trump's primary defense to the allegations of contempt was impossibility though he did not use those exact words. He attempted to explain an inability to comply with the prior order that was not self-induced but rather reflected good faith efforts, as other courts considering contempt have required litigants to explain "categorically and in detail"[13] how they "made diligent ... efforts to comply."[14]

Specifically, Trump argued that the documents sought by the office of the attorney general either didn't exist or were in the possession of the Trump Organization. This defense predictably failed when he was unable to offer anything in support beyond counsel's advocacy.[14]

Ambiguity is another possible defense to civil contempt, which requires a violation of a definite and specific order. In 2000 in Imageware Inc. v. U.S. West Communication,[15] the U.S. Court of Appeals, Eighth Circuit said, "No one should be held in contempt for violating an ambiguous order ... A contempt should be clear and certain."[16]

Ambiguity is a question of law, so if a party is confused by an order, or otherwise does not understand what is required by the order, his best remedy is to obey while seeking immediate clarification from the court.[17] Given the simple and direct language used in Judge Engoron's initial order,[18] this defense was not really available to Trump.

Additional defenses to civil contempt that Trump seems to have relied upon, although again, not explicitly, include substantial compliance or showing mitigating circumstances to justify why the court should not exercise its contempt power.[19]

These defenses often prove illusory, as even an earnest misinterpretation of a clear order can lead to a finding of civil contempt.[20] As with an impossibility defense, a party asserting substantial compliance must be prepared to put on evidence that demonstrates his reasonable and timely efforts to comply that simply fell short.

This evidentiary requirement is why civil contempt motions often are extensively briefed and why courts may hold lengthy hearings with testimony from fact and expert witnesses before rendering judgment.[21] While Judge Engoron held a hearing on the attorney general office's motion, Trump's counsel apparently put on no witnesses and offered no evidence.[22]

Given the lack of admissible evidence offered to refute the office of the attorney general's detailed assertions and support his defenses, it once again was predictable that those defenses failed and the court found Trump in civil contempt for violating the court's prior order.

Trump may have planned to produce the requested information but simply ran out of time, or he may have planned to produce nothing all along but regrouped after the contempt ruling. It is impossible to know if Trump was advised to produce the documents and affidavits requested once the court denied his motion to quash but rejected that advice in favor of his continued refusal to produce anything.

It also is impossible to know whether the office of the attorney general would have been satisfied if Trump instead had followed that theoretical advice and produced the same documents and affidavits in the first instance or would have pushed for more.

It appears, however, that the strategic decision to produce documents and affidavits was instrumental in helping him avoid further sanctions. The documents and sworn testimony provided by Trump after the contempt finding were sufficient to persuade the office of the attorney general that he had satisfied the subpoena and cured his contempt.

His pivot from refusing to produce anything to producing at least some of the information sought appears to have helped him avoid an escalation of the dispute that could have led to an indictment for criminal contempt like that issued against his former aide.

When one examines the few defenses available to Trump — or any litigant facing civil contempt — in the face of noncompliance with a valid order, a pragmatic approach to discovery that includes affirmative responses or disclosures is often the most logical and least damaging strategy.

But Trump did not adopt this pragmatic approach until he was first found in contempt.

Avoiding or Mitigating Contempt Sanctions Through a Pragmatic Approach to Discovery Disputes

Trump's case, especially when compared with Bannon's, illustrates that a pragmatic approach to discovery disputes may help mitigate or avoid the most severe sanctions.

A pragmatic approach to discovery disputes can take multiple forms, including strategic cooperation, tactical disclosure, specific objections, thoughtful productions, proffers of alternate information or other methodical approaches to responding to requests for information in any form they are made.

The sanctions imposed on Trump and Bannon illustrate that efforts to completely bar the door to valid discovery can quickly escalate to serious sanctions. Litigants hoping to avoid the harsh fates of Bannon and Trump should consider adopting a pragmatic approach when faced with particularly challenging discovery disputes:

Capitalize on the opportunity to respond.

Stonewalling is rarely rewarded in discovery disputes.

Courts expect parties to act reasonably and in good faith, which generally means responding in some manner beyond the colloquial pound sand.

Perhaps more importantly, a strong, direct and thoughtful response can frame and narrow issues in a manner that limits opportunities for the requesting party to point to clear deficiencies.

Seize opportunities for proportional cooperation.

Responding parties should consider strategic engagement with requesting parties to try and narrow the scope of the requests or the responses. The requesting party may reframe requests within reason or accept focused responses in order to move the case forward.

Identify the facts that support your defenses.

If a responding party is confident the requested documents do not exist, or it would be too burdensome to try and find the requested documents, then it is critical to gather the facts to support those positions.

The most common reason objections about proportionality or burden are overruled is because there were no facts offered to support the position stated.

Remember that discovery is separate from the underlying merits.

Responding parties certainly can use their discovery responses or motions as an opportunity to advocate the underlying merits of the case, but should remember that discovery disputes are judged by distinct standards.

Litigants who adopt a pragmatic approach to discovery disputes understand that crafting compelling rationales to limit discovery often do not rely solely — or even predominantly — on arguing the merits of the matter.

Understand the likely penalties of your positions.

The headline-grabbing sanctions imposed on Bannon and, to a lesser extent, Trump, should help litigants understand that the consequences for failing to provide properly requested discovery can range from none all the way to jail.

Making the strategic decision to undertake a pragmatic approach to discovery disputes that incorporates some or all of the items above can help parties avoid the most severe sanctions.

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article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] People v. The Trump Organization, Inc., No. 451685/2020, Decision + Order on Motion dated April 26, 2022.

[2] June 21, 2022, Letter from Andrew S. Amer, Special Counsel with OAG to Hon. Arthur F. Engoron.

[3] People v. The Trump Organization, Inc., No. 451685/2020, Supplemental Decision + Order on Motion dated June 29, 2022

[4] People v. The Trump Organization, Inc., No. 451685/2020, Notice of Appeal to the Supreme Court of the State of New York, County of New York, dated July 6, 2022.

[5] Id.

[6] See, e.g., Olivia Y. by and through Johnson v. Barbour, 2011 WL 13353278 at *1 (S.D. Miss. May 17, 2011).

[7] Taggart v. Lorenzen, 587 U.S. ---, 139 S. Ct. 1795, 204 L.Ed.2d 129 (2019) (internal citations omitted).

[8] See n. i, supra.

[9] Ronaldo Designer Jewelry, Inc. v. Prinzo, 2018 WL 2269920, at *2 (S.D. Miss. May 17, 2018).

[10] Jim Walter Resources, Inc. v. International Union, United Mineworkers, 609 F. 2d 165 (5th Cir. 1980), quoting NLRB v. Lawley, 182 F.2d 798 (1950); see also Carmack v. Park Cities Healthcare, LLC, 2020 WL 6119320, at *1 (N.D. Tex. Oct. 16, 2020) (internal citations omitted).

[11] Taggart, supra, 139 S. Ct. at 1802 (internal citations omitted).

[12] See, e.g., Olivia Y., supra, 2011 WL 13353278 at *2.

[13] See, e.g., Ronaldo Designer Jewelry, Inc., supra, 2018 WL 2269920 at *2.

[14] See, e.g., Olivia Y., supra, 2011 WL 13353278 at *2.

[15] Travelhost, Inc. v. Blandford, 68 F.3d 958, 961 (5th Cir.1995).

[16] Imageware, Inc. v. U.S. West Communications, 219 F.3d 793, 797 (8th Cir. 2000).

[17] MedX, Inc. v. Ranger, 1992 WL 142416, *2 (June 11, 1992, E.D. La.).

[18] People v. The Trump Organization, Inc., No. 451685/2020, Order dated February 17, 2022.

[19] See, e.g., Olivia Y., supra, 2011 WL 13353278 at *2, citing United States v. Rylander, 460 U.S. 752, 757, 103 S. Ct. 1548, 1552, 75 L.Ed.2d 521 (1983); Whitfield v. Pennington, 832 F.2d 909, 914 (5th Cir. 1987).

[20] Rambo v. Morehouse Parish School Bd., 37 F. Supp. 2d 482, 486 (W.D. La. 1999).

[21] See, e.g., Olivia Y., supra; Ruiz v. McCotter, 661 F. Supp. 112, 115 (S.D. Tex. 1986); Cobell v. Babbitt, 37 F. Supp. 2d 6, 8-9 (D.C. Cir. 1999).

[22] See n. i, supra.