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Practical Discovery Strategy

By Vincent DiCarlo

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I. INTRODUCTION.

The details of discovery are different in each jurisdiction, but the basic methods of discovery are similar enough that, without becoming bogged down in minutiae, we can discuss a practical discovery strategy that will help you to do effective and appropriate strategy with a minimum of wasted effort, to determine when enough is enough, and to use your discovery effectively at trial.

II. THE PURPOSES OF DISCOVERY.

The main purposes of discovery are to find evidence, avoid surprises, narrow the issues, perpetuate testimony, obtain testimony from outside the state, and permit the recovery of certain costs and fees. By doing these things, discovery will help you prepare for trial or dispositive motions, force your opponent to come to grips with any weaknesses in his case, and facilitate settlement. If, in each of your cases, you keep the goals of your discovery firmly in mind, you will be better able to decide which discovery you need and which would be unnecessary or harmful.

A. Obtaining Evidence and Avoiding Surprises.

The most obvious purpose of discovery is to help you to find evidence. In some cases, such as product liability cases, your opponent or some other uncooperative party may have the documents or other evidence that you need to establish crucial elements of your claims or defenses. In all cases, you need to know the evidence upon which your opponent will be relying to establish his claims or defenses. In either case, discovery can be essential to your preparation.

B. Narrowing the Issues.

Often, the pleadings are not much help in determining what facts or issues are really in dispute. This is especially true where the language of a complaint is largely conclusory or where a general denial has been filed that contains a laundry list of every affirmative defense ever invented, with no consideration given to whether a given defense has anything at all to do with the case. Properly framed discovery can help you to cut through the boilerplate to find out what your opponent really intends to rely upon and to eliminate the need to meet contentions that will not be relied upon at trial. This true of all aspects of the case, including your opponent's proof of damages.

C. Perpetuating Testimony and Evidence.

Evidence can disappear. People die, forget, or move out of the jurisdiction, documents are misplaced or disposed of, and physical evidence is lost or suffers alterations that make it useless. The loss of evidence is less of a problem, now that delay reduction programs are reducing the amount of time that it takes to try or resolve most cases, but it is still a problem that can require serious thought.

If you are afraid that a witness may become unavailable before trial, you can perpetuate his testimony by taking his deposition, either orally or upon written questions. If the witness later disappears, leaves the state, forgets, or becomes otherwise unavailable, the record of his answers, if properly authenticated, will be admissible. This is an exception to the hearsay rule, and is available only where all the parties to the action have had a fair opportunity to question the witness. Mere declarations or other forms of recorded statement do not enjoy this exception, so you must take a noticed deposition if you want to be able to use the statements at trial in the event that the witness becomes unavailable.

An early request to inspect documents or other things can also preserve your evidence. Once you make such a request, a party who disposes of the evidence you have requested faces an increased risk of terminating, issue, or preclusion sanctions because he will not be able to claim that the documents were disposed of in the regular course of business without knowledge that they constituted evidence in your case. Neutral nonparties, such as telephone companies, police departments, brokerage firms, and others sometimes keep certain very useful records (e.g., tape recordings of telephone calls) for a very short time, so that if you are not prompt with your subpoena, your evidence may be lost forever.

Early inspection of real evidence may allow you to memorialize its condition or perform tests before it is too late. For example, it won't do your accident investigator much good to inspect a car after it has been through the crusher. In this sort of situation, if you had the opportunity to inspect but failed to do so you will be out of luck.

D. Obtain Testimony from Outside the State.

When a witness is located outside the state, the only way to compel him to testify is to take his noticed deposition where he lives pursuant to the procedures of the other state. If you do so, California will permit you to use that deposition at trial just as if it was live testimony. When you do this, or in any case where you take a deposition to preserve evidence, you should consider recording the deposition on videotape. Juries, and judges, are very impatient of extended readings from transcripts. If you do decide to tape the deposition, you must follow the procedures in C.C.P. § 2025(l).

E. How Much Discovery Is Enough?

"How much discovery is enough?" is a question that cannot be answered in the abstract. The dangers and opportunities in each case will be different, as will your client's preferences, tolerance for risk, and ability to pay for discovery. Certain forms of discovery can be dispensed with or reduced in some cases. Where this is possible, it can considerably reduce the expense of the litigation. For example, if you are reasonably confident that a cooperative witness will be available or that you could use substitute proof if he is not, consider taking a written statement instead of a deposition. In a simple case that will turn on a conflict in the testimony, you can sometimes even dispense with the deposition of the opposing party if you have gotten satisfactory responses to your interrogatories and other discovery.

On the other hand, some cases require more extensive discovery. I recommend that you develop a discovery plan in

each case after consulting with your client. If you and your client decide to forego arguably useful discovery to save expense or for other reasons, you should document your disclosure of the risks involved and his instructions in a confirming letter to the client.

III. RESPONDING TO DISCOVERY.

Responding to discovery is fraught with danger, and great care is required to avoid coming to grief.

The first thing to remember is that if the written response to discovery is not made timely, any objections you may have to the discovery in question, including claims of privilege, may be waived. While an extension of time to "respond" includes and extension of time to object, in some jurisdictions an extension of time to "answer" interrogatories or to "produce" documents may not, so be careful.

The second thing to remember about responses to discovery is that, if you or your client have some fact or evidence in your possession that is favorable to your case, and you fail to produce it in response to a proper request, you may be precluded from using it at trial, so you must be sure that your responses reflect all the information that you have or can reasonably obtain.

The third thing to remember is that, if your client mistakenly makes a damaging answer in response to a question in a deposition, an interrogatory, or request for admissions, a motion for summary judgment is based on it, and you oppose the motion with a declaration seeking to explain or correct the mistake, the explanation or correction may be disregarded.

The fourth thing to keep in mind is that your client probably does not understand either the importance of careful responses to discovery requests or the language that is usually used to make them. Accordingly, it is very dangerous just to send document requests or interrogatories to your client with instructions to send you copies of the responsive documents or his answers. If this is all you do, you are asking for trouble.

A. Responses to Requests for Documents.

In my opinion, the preferred method to respond to a document request is for you first to analyze the requests. Then, you ask your client to send you copies of everything that is even remotely related either to the requests or the case in general. When you have reviewed these documents, selected the ones that are responsive, noted the ones that are not responsive but are significant, and removed and logged the ones that are privileged, you should press your client for additional documents or categories of documents that may have been missed. You should be at least as thorough in this regard as your adversary will be at any later depositions. When you have reviewed and categorized the inevitable additional documents, the responsive documents, including the privileged ones, are serially stamped and the privileged documents are pulled out and kept in a separate file.

Ideally, only now that you have prepared the documents for production do you draft the written response to the document request. If you draft the written response first, you will not be able adequately to claim applicable privileges and will not know when you can safely omit to make objections to requests where you will not be harmed by agreeing to make a complete response. Few things in litigation are more embarrassing than failing to make a valid objection to the production of a smoking gun.

Finally, you produce copies the documents, together with your log of privileged documents. While you may be entitled in some jurisdictions to charge a statutory fee for making copies requested by your opponent, I generally don't ask for them unless the request was unreasonable or my opponent has been asking for sim1. W fees.

B. Answers to Interrogatories.

You should begin to prepare to respond to interrogatories as soon as you know there is going to be a lawsuit. Because your answers must be based upon all the information that your client has or can obtain with reasonable effort, it is not safe to postpone your investigation of your case until after you have responded to the interrogatories, even though you make the standard disclaimer in your response.

As soon as you receive the interrogatories, you should send a copy of them to everyone who may have any knowledge relating to the case, with instructions to put their answers in writing as soon as possible and well before the deadline for a response. After you review the responses, you should talk to all the witnesses to make sure that they are not overlooking any information that may be relevant to the answers, especially information that may be helpful in establishing one of your claims or defenses. If you haven't already done so, you should examine all the relevant documents and other evidence in your possession or control now.

When you are confident that you know about all the significant evidence in your control, you are ready to draft answers to the interrogatories. The form of the responses required will depend on the rules of your forum.

If the answer to an interrogatory would require the making of a compilation of information contained in written records under some rules you have the option of declining to make the compilation, identifying the documents, and offering them to your opponent for inspection and copying. However, doing so may be the same as a statement under oath that the records exist, that they contain the information sought, and that no other responsive information is available to the responding party. See, e.g., Deyo v. Kilbourne, supra, 84 Cal.App.3d at 784, 149 Cal.Rptr. at 510. Because of the effort necessary to verify that the records contain the information needed, because your opponent might discover something else useful if he actually makes the effort to analyze the documents you supply, and because an your opponent's independent analysis of the records may result in another, and less favorable, result than your own, I recommend that, unless the burden of compiling the records is truly great, you generally elect to answer rather than offer the documents.

C. Defending Depositions.

To explain the theory and practice of defending depositions would require more time than we have, but we note here some of the main points.

A natural deponent has no duty to gather information in preparation for a deposition and normally should not do so. If the witness uses any documents, including privileged ones, to prepare to testify, they will have to be turned over to opposing counsel. Evid. Code § 771. The witness should confine himself to the following responses:

1. A concise answer to the question, in the form of a "yes" or "no" if possible, without explanations.

2. "I don't know."

3. "I don't remember."

4. "I'm not sure I understand your question."

5. "I'd like to take a break now."

You should not ask any questions to bring out any new matter, including explanations, unless the explanation is necessary to avoid leaving a mistaken or affirmatively misleading answer on the record.

You should object to questions that are not in the proper form, since failure to so object will waive them if your opponent later offers the transcript in evidence. You should not object based upon the lack of foundational questions. This objection, like other substantive ones, is automatically preserved, and there is no point in helping your opponent out of a potential trap.

You should instruct the witness not to answer only when a question is put the answer to which would compromise a privilege or right to privacy.

D. Responding to Other Discovery Requests.

What has been said with respect to the need for care in responding to interrogatories is even more important with respect to responses like admissions and bills of particulars, which are, as has been noted, binding and cannot be

amended without leave of court. In addition, since, as has been noted, failing to admit a fact without an adequate basis can subject your client to liability for your opponent's costs and attorney's fees, it is important to be as careful about refusing to admit a fact as about admitting one.

IV. DISCOVERY IN A TYPICAL CASE.

A. The First Round.

Counsel should consider preparation and service of each of the following to obtain general background information and the basic contentions of the opposition's case.

1. Form Interrogatories.

2. Special Interrogatories.

3. Requests For Admission.

4. Document Requests.

B. Depositions.

1. Choosing Your Targets.

One of counsel's primary considerations in determining who to depose should be the cost of such deposition versus the benefits expected from the witnesses testimony. It is also important to consider and determine the most effective order of witnesses for taking depositions. Particularly in a large, complex case, counsel should consider taking the depositions of a few preliminary witnesses before proceeding to take the depositions of key witnesses.

2. Alternatives To Oral Depositions.

a. Statements.

The benefit of taking a statement rather than a deposition is that the opposition will not know that the statement has been taken at least until certain discovery is conducted. The taking of the statement is also, in most instances, less expensive than taking a deposition. A prior written statement, sworn or unsworn, can generally be used to cross examine a witness who testifies differently than the statement and, in most jurisdictions, may be received in evidence as a prior inconsistent statement. It is therefore helpful to establish the testimony of witnesses whose recollection, for one reason or another, may tend to become more damaging as trial approaches. It can also be helpful as a preliminary to a deposition where a helpful witness may attempt to change his story once he is summoned to a formal proceeding. However, because such a statement, unlike the transcript of a properly noticed deposition or subject to another exception to the hearsay rule, is not generally admissible where the witness is not present at trial.

b. Deposition By Written Questions.

Deposition on icarten questions is normally used when three factors are present: (1) the deponent is a friendly or neutral witness; (2) the information sought is of a limited and specific nature; and (3) the expense of examining the witness orally is prohibitive or disproportionate to the amount at issue in the litigation. A deposition on oral examination is generally favored because it allows counsel to evaluate the deponent's demeanor as a witness.

3. The Corporate Deposition.

Under most discovery rules, an organization such as a corporation, partnership, association, or governmental agency may be deposed by questioning its officers, directors, managing agents, employees or other agents. This kind of deposition requires that a party noticing or subpoenaing the deposition of an organization specify the subject matter on which questions will be asked. The deponent then designates and produces at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to

the extent of any information known or reasonably available to it.

One drawback of taking a corporate deposition is that it allows counsel for the corporation to control this aspect of the case. The organization representative whom opposing counsel selects may not know all the answers to the questions asked. Opposing counsel may claim that the statement of the matters on which questions were to be asked was ambiguous or that the questions asked go beyond the scope of the description. Opposing counsel will more than likely select a representative of the organization who will do little harm to the organization's position in the lawsuit. It is best for counsel who desires to notice the deposition of an organization to discover the identities of the appropriate organization representatives through the use of other discovery devices including but not limited to interrogatories, requests for production, and other depositions. Once this information is discovered, counsel can depose these individuals as he or she sees fit.

4. Records Of Depositions.

Once counsel receives the deposition transcript, he or she must make a choice as to whether to have the deposition testimony summarized or indexed. I have never found a deposition transcript made by someone else to be useful to me in a lawsuit, and the availability of text indexing software makes digesting depositions, in my opinion, a waste of time and money in most cases.

C. Follow-Up To Depositions, Additional Document Requests And Special Interrogatories.

Counsel should carefully review the deposition testimony and make a determination of whether additional documents should be requested for production and whether there are additional special interrogatories which should be prepared to follow-up on the testimony elicited.

D. Discovery From Experts.

Specific rules in each forum specify procedures for identification of expert witnesses, production and exchange of discoverable reports and writings, and depositions of these various experts. This procedure is quite specific and technical. Counsel should review the rules in his jurisdiction in detail.

V. USING YOUR DISCOVERY AT TRIAL.

You will be using your discovery indirectly throughout your preparation for trial to determine what evidence you need to produce at trial and to help you to locate that evidence. In addition, there are ways to use your discovery directly at trial. In this regard, it is important to make sure that all the responses you have received are in proper form. In particular, make sure that you have signed verifications by the proper persons for each piece of discovery.

A. Documents.

Here the most common mistake is to assume that you can automatically use the copies of documents produced by your opponent in discovery. This is not true. In may jurisdictions, in the absence of a stipulation you must serve your opponents with a notice requiring them to produce at trial the originals of any documents that you intend to offer and that are in their possession. Only if they fail to do so can you safely rely on the usual statutory exception to the best evidence rule.

In addition, you need to consider how you will authenticate each document. Usually the written response provided with the documents is not sufficient. Unless you can authenticate the document through one of your witnesses, you have gotten an appropriate stipulation, or you have sufficient foundational admissions from your opponent, you may have to subpoena either a custodian of records or other authenticating witness to appear with the originals or admissible copies at trial. Otherwise, if a bona fide question about authenticity is raised by your opponent, it could ruin your day.

B. Responses to Interrogatories and Depositions of a Party.

Since these are admissions by your opponent, they can generally be used either to impeach him or as evidence of their

truth, regardless of whether they are incompetent, impermissibly express an opinion, or comprise otherwise inadmissible hearsay.

C. Other Depositions.

Depositions of a nonparty may be used in the same ways as any other prior statement to impeach or accredit a witness. In addition, if the witness is unavailable at trial, relevant and material portions of the record of such depositions, if they were properly noticed, are generally admissible as independent evidence.

D. Requests for Admissions and Bills of Particulars.

In some jurisdictions, these are conclusive on the matters covered by them. When you prepare your jury instructions, you should be sure to ask that the jury be instructed accordingly.

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