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USING THE RULES TO GET WHAT YOU NEED

As trial attorneys, we spend a good deal of time creating and developing trial themes and strategies. However, when it comes to undertaking discovery, we often do not spend enough time to create a strategy or methodology to obtain the information that we want and need. My suggestion is that we begin to practice discovery in the same way we practice other aspects of trial litigation strategy.

A. Purpose of Discovery

The purpose of discovery is to obtain as much information as possible. Likewise, opposing counsel will attempt to do the same.

In the federal court, the federal rules of procedure encourage the early and complete exchange of information by all sides. The purpose of this is to encourage the free exchange of information and a spirit of cooperation among counsel. This is often difficult since the litigation process is an adversarial one. However, the rules are designed so that both parties will provide to one another the information that may aid in the determination, the strengths and the weaknesses of the opponent's case. This may also lead to the early resolution of the facts as well as the case. The spirit of the discovery process, at least under the federal rules, is to aid the parties in moving towards an economical resolution of the case and/or negotiated settlement.

B. Planning Discovery

As you sit down and prepare to do discovery, you must think about the case you have and what information you seek in order to establish your case at trial. For example, if you have a premises liability case and you need to determine whether or not the owner of the property had notice of a defective condition on the premises, you know that you will be required to discover any and all information about how the owner of the property

- 1) historically maintained the property;
- 2) how the owner of the property secured the property or its condition at that time, how the owner or occupier of the property maintained the property, and how the property was maintained on the date of the accident.

In light of that, you may want to design discovery that would include interrogatories, which is particularly helpful in obtaining information involving witness and document information, as well as other facts. You may also want to include a request for production of documents to opposing counsel to obtain things such as maintenance contracts with third parties, maintenance records, incident reports and things of that nature. In addition you would, in that request for production of documents, request the opportunity to permit entry onto the land or to access the property in order to inspect the floor and/or test things such as the floor, or the lighting. You may also consider, under Rule 45 of the Federal Rules of Civil Procedure, the opportunity to obtain access to documents, things and land through a person who is not a party by use of a subpoena duces tecum.

Likewise, you may consider use of request for admissions during the course of discovery to determine the truth of ownership possession, likewise whether or not certain documents are genuine and authentic. You should consider use of this device not only for purposes of discovery, but also at time of trial to narrow issues which may be disputed without cost of expensive deposition testimony.

Finally, you would also be encouraged to consider the use of a deposition or sworn testimony by a party or witness in order to obtain information, such as how the accident occurred, and how the accident happened, to procure testimony for use at trial, but also to determine the character and also to size up the credibility of the witness. Remember, as you develop your legal theory, the elements of your case and your discovery strategy will unfold.

You may want to design a schedule of costs that you anticipate in doing discovery in order to determine whether or not you have sufficient funds or interests in light of the costs in pursuing your case. Obviously if the case is more complex, substantial discovery may be necessary in order to pursue information or to solidify information for time of trial so that the parties do not change their testimony on the stand.

In doing an analysis of discovery, you want to finalize your legal theory and what comprises the essential element of your cause of action. These elements must be identified so that you can analyze the factual requirements of your case. After doing this, you must determine where you can go in order to obtain this information or knowledge. This may include people who may have personal knowledge of the circumstances, as well as people who have expert opinions, documentary information as well as documentary evidence which might include private, governmental or corporate documents. It may be cost effective to have an investigator search this information out before spending attorney time and costs to obtain this information. Use your discovery to solidify this information.

Prepare a discovery planning chart to assist you in thinking through your discovery plan. This discovery chart could also be of some assistance to you in planning your proof at time of trial.

C. Rule 26 of the Federal Rules of Civil Procedure; Duty of Disclosure

Rule 26 of the Federal Rules of Civil Procedure defines what information is discoverable. Generally, depositions upon oral examination or written questions as well as written interrogatories are discoverable, if relevant. In addition, production of documents or things or permission to enter the land is a means of discovery as is set forth within Rule 26(b). In addition, physical and mental examination as well as requests for admissions are devices that are available for discovery under Federal Rule 26. It also defines the timing of when discovery shall occur. This is important because you must be aware of the time guidelines and constraints in the formulation of how to get the information you seek.

Disclosure is also required by Rule 26 of the Federal Rules of Civil Procedure. The rule describes three types of disclosure:

1. 26(a)(1) requires initial disclosure of information.
2. 26(a)(2) requires the parties to disclose information regarding expert testimony and expert reports in advance of trial in order to prepare opposing counsel an opportunity to prepare for trial and cross-examination at time of trial.
3. 26(a)(3) imposes on the party an additional duty to disclose evidence which may be offered at trial.

While the federal rules seem to encourage cooperation and disclosure, it is clear that as plaintiff's counsel, you must still work hard to uncover information not readily disclosed by opposing counsel.

Remember, Rule 26(e) of the Federal Rules of Civil Procedure requires that counsel supplement discovery responses. That means that, in general, counsel is required to disclose additional information in response to previous discovery requests seeking such information. While that may be the case, it is my recommendation that you always, before discovery is closed, provide to defense counsel supplemental interrogatories to reinforce this issue. While defense counsel should comply with this general duty, submission of supplemental discovery requests will reinforce their duty to supply such information. This is applicable not only to written discovery requests, but also from a party that has been deposed or supplemental requests to expert witness reports and/or other information.

D. Pre-Complaint Discovery Rule 27

Often times you do not consider obtaining information or discovery prior to trial. While the federal rules do not encourage such, do keep in mind that Rule 27 of the Federal Rules of Civil Procedure does allow counsel to engage in discovery before suit has been filed. While Rule 27 of the Federal Rules of Civil Procedure will not be permitted to obtain discovery prior to framing the complaint, it can be used to preserve testimony before the complaint is filed.

In Pennsylvania, the state civil rules of procedure do permit limited opportunity under their state rules through discovery in order to prepare one's complaint for trial since the jurisdiction is a fact based pleading jurisdiction. However, under the federal rules, you can draft a complaint that is not fact driven, proceed through discovery to obtain information that is necessary and then file an amended complaint as necessary.