



Self-discovery

Answering discovery helps one gain greater appreciation of the case



Cooper

BY MILES B. COOPER

The lawyer looked at the incoming mail. Happy happy, joy joy. The defense sent an enormous pile of discovery with the Answer. Contention interrogatories, requests for admission, production... a lot of questions. Time to craft a response plan.

Before the pile arrives - the questionnaire

We know that pile will arrive. There's a tool that can make its arrival easier. A confidential client questionnaire that follows the form interrogatories. Provide this to the client at the beginning of the case, preferably in an electronic format if the client has that capacity. This is a good time to get the medical releases signed and order the medical records before filing. This way one sees any issues well before the defense (and whether the client is correctly remembering past medical issues).

It's here!

The pile arrives. First thing: look at the calendar. When is the material due relative to the month ahead? Discovery requires a lot of staged work - 35 days pass quickly. Best to ask for an additional two weeks right off the bat if needed. This is where being kind helps. If this is the opening salvo, it can be a good opportunity to call the defense, introduce yourself, and ask if there's any immediate informal discovery that might be helpful to properly evaluate (meaning value) the case. And then, ask for the extension.

Next, provide the discovery to the client, with a note that the questionnaire answers will be used to fill in the information. Why does the client need to get the discovery itself if one has the answers in the questionnaire? Because the client will be asked at deposition about whether the client has ever seen the discovery.

Then build the response templates. If one has staff, the staff typically does this. It includes putting the requests in for easy reference when reading the answers. There's an easy way and a hard way to do this. The easy way: ask the defense for the Word versions, with a promise to return the favor. The hard way: use optical character recognition from the scanned documents (harder yet: type them). If the material is OCR'd, proofread carefully. Frequently l's become I's, O's become O's, and so forth. There can be minute OCR issues that dramatically change a question.

Data transfer and rendering

Once the responses are built it is time to transfer the data from the questionnaire. No staff? Lucky dog - a chance to be incredibly familiar with the file. That granular knowledge can be powerful later.

Even if one has an army, there comes a time when the trial lawyer has to review the material to make sure it will not bite the

client in the behind at trial. Start by reviewing the file. Pay particular attention to material from the client, any investigation, and the medical records. Then go through the responses to add or modify the initial responses as necessary. No matter how good the initial draft is, it must be read through the lens of a skeptical juror.

Objection, poetry recitation!

Which brings us to the profligate use of objections. Thematically, we approach trial with the idea that we want jurors to have all the information they need to evaluate the case. That means avoiding objections in trial as much as possible. That avoidance strategy goes out the window if discovery responses are read in trial with three paragraphs of objections before a non-answer. Use objections sparingly.

And don't be a typo a-hole. Yes, the defense's discovery will have typos (yours will too, don't worry). Perhaps they forgot an additional discovery declaration. Refusing to answer just leads to more discovery. If one can figure out what was meant, answer it with an introduction to the response stating, "plaintiff understands 2037 to be 2017 and answers it with this understanding." Do this whether the defense would do it for you. This is an opportunity to bring them up, not sleaze oneself down.

Opportunities present themselves...

Getting hip-deep into the file is a great opportunity to prepare one's own discovery pile. The defense usually sends the discovery pile with the Answer. If one has not already sent out discovery, the file familiarity is a great time to be proactive.

Verified

Leave enough time for the client to review the answers, approve them, and return the signed verification. If one gets pinched, ask for an additional day or two from the defense specifically for this. When serving the discovery (and anything else for that matter), consider emailing as well as mail even when there is no email service agreement. It removes any argument that the responses weren't sent.

Outro

Six weeks later, the discovery responses went out, along with a significant proactive discovery package. The case was well on its way down the litigation path to trial - and trial dates bring resolutions. One way or another.

Miles B. Cooper is a partner at Emison Hullverson LLP. He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).