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Discovery process

Developing and drafting discovery before filing suit



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The lawyer typed while the expert rattled off a laundry list of “like-to-haves” in the case. The lawyer had reached out to the expert shortly after undertaking representation. The goal was to develop a discovery plan well before filing suit. The lawyer would then be able to get the information the expert needed, hopefully setting the case up for resolution or a successful verdict.

Ready, fire, aim!

Many lawyers file a Complaint, wait for the Answer (which usually arrives with a slew of defense discovery), and then they draft and send out discovery. They attempt to fit this into an already challenging schedule. In that situation, other priorities frequently arise. It becomes easy to push that drafting and serving out one more day. A day or two won't make a difference, right? The discovery eventually gets sent out a few weeks, or sometimes a few months, later.

Sound familiar? A few deadline calendaring modifications can make all the difference in the approach. When taking a new case, make an initial assessment. Will there be any attempts at pre-litigation resolution? If so, how much time will that take? How much time will be needed to investigate the incident and prepare for litigation? Using these two considerations, select a due date for filing the Complaint. Perhaps that deadline will be three months out to allow one to investigate, plan, and obtain medical records in advance of filing.

Once the internal Complaint filing date is determined, have a standardized due date list that an administrative assistant can use to work backward from that date. Draft Complaint due 15 days before filing. Draft discovery due 30 days before filing. Sunshine Act requests, if appropriate, sent out 60 days before filing. Discovery plan completed 60 days before filing. Retain and consult experts needed to develop a discovery plan 75 days before filing. Strategic brainstorm conference (more on this later) 80 days before filing. Baking these deadlines into every new case will give one the initiative against the defense instead of living in reaction. The messaging is also important: We're here, we're prepared, and we'll be driving this case toward verdict or settlement on our terms. With the deadlines now calendared, how does one plan to plan?

Strategic brainstorm conference

Consider scheduling a strategic brainstorm conference shortly after taking a case. The goal here is to bring together creative minds to figure out how to drive the case forward and what one needs to succeed. The invitees can be team members, other lawyers in the office, or colleagues. If it is in person, use a white board. If it is a video conference, share the screen so a note taker can write down all the suggested ideas and people

can see them. Topics to consider include what documents will be needed, what experts, what person most knowledgeable categories, what witnesses, whether any of the material can be obtained via Sunshine Act, if an early focus group is useful, and so forth.

At the session's conclusion, everyone should know who is responsible for day-to-day case prosecution. That prosecutor is then responsible for turning the brainstorm notes into a draft discovery plan. The draft discovery plan then gets circulated to those within the firm who attended the session for any final feedback.

Experts, the Sunshine Act, and drafting discovery

One cannot know what materials an expert will need before retaining and talking to the expert. Immediately after the strategic brainstorm conference, retain the expert(s) and set calls with any experts deemed necessary. Have a similar brainstorm session with the experts about what they need. Then add their wish lists into the discovery plan.

Next comes Sunshine Act requests. Sometimes these can be done simultaneously to expert retention, other times one will need specific expert input first. For example, one knows an accident reconstructionist will want traffic light timing cards, intersection striping diagrams, and as-builts from the traffic engineering department for a disputed liability intersection crash. An expert may have other suggestions for what may be publicly available, for example a roadwork bid contract.

Draft and refine

Finally, draft the discovery and the Complaint. There can be a temptation to get the discovery 90% of the way there. Resist the temptation and make sure all that needs to happen is for it to be dated and inked before it gets served. That way it simply goes out on the first possible date it can get served. Eliminating friction within the system reduces the little delays that over the course of a case can accumulate into big ones.

Outro

Back to our lawyer and expert. The lawyer finished up the call, added the notes into the discovery plan, and circulated it to the team. The plan was coming together, and the lawyer looked forward to the litigation ahead.

Miles B. Cooper is a partner at Emison Cooper & Cooper 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). This column celebrates ten years of his delivering Back Story content every month (but one) and is his 120th column.