Discovery Techniques

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DISCOVERY TECHNIQUES

Discovery needs to be started as soon as possible. Some recommend preparing interrogatories and request for production when preparing the complaint. I do not use this practice as I want to craft the interrogatories around the answer and counterclaim. The client will need to assist the attorney in learning the client's business and the allegations raised in the counterclaim. By filing the discovery early, defense counsel may decide to engage in settlement conversations instead of complying with the discovery. I find that some attorneys use counterclaims to try to intimidate the creditor into dropping the complaint. By filing discovery, the creditor is showing that it intends to litigate.

Interrogatories should try to help you understand what the defendant knows. Rhode Island has a limit of 30 interrogatories and an attorney cannot use sub-parts. Under our rules, contention interrogatories are allowed. Rule 33(b) states that an interrogatory is not objectionable merely because it calls for an answer involving an opinion or contention that relates to fact or the application of law. Be careful of Rule 33(c) which allows an answering party to produce business records instead of answering specific questions. Usually, interrogatories will ask basic background information and go into fact specific questions. Remember if you ask a general question, you will either get a general answer or a pile of documents to sort out. Try to keep the interrogatory question specific and keep in mind unlike a

deposition, the witness cannot simply state- I cannot recall. Sometimes you may want a pile of documents. For example, ask all for communications, verbal and written which the defendant has had with the plaintiff. Ask questions about witnesses so you can depose them later. Ask expert witness questions and if allowed in your jurisdiction, a statement of their opinions. Make certain you ask questions about all damages claimed by the defendant. As previously discussed, ask contention interrogatories. For example, state how you claim plaintiff breached the contract.

Some questions may be better suited to a request for production. For example, produce all documents relied upon or consulted in preparing your answers to interrogatories. My state has no limitation as to how many requests can be made unlike interrogatories.

Many attorneys forget about admissions. Use admissions to have certain facts admitted. Admissions should assist you in narrowing the issues. For example:

Admission#1- Admit that defendant received goods from plaintiff.

Interrogatory 1- If your response to admission #1 is not admitted, please state all facts in which you base your response.

Request to Produce #1- If your response to admission#1 is not admitted, please produce all documents supporting your response.

When drafting admissions, only ask for the admission of a single fact. Our state rule states "the rule is not an investigative tool for ascertaining facts" It should be simple and direct.

Admissions can be useful to request that certain documents are true and accurate copies of the original. If admitted, the document will not need to be authenticated and you may not need a witness to prove the authentication of the document. For example, you may not have to take a deposition to establish authenticity and the application of a hearsay exception. If a party denies an admission which is later proven at trial, the opposing party (if denial is found to be without reasonable grounds) may be sanctioned by the Court and an award of attorney fees may be granted.

Depositions of witnesses can also be taken. A Rule 30(b)6 deposition is recommended. A Rule 30(b)6 deposition allows a party to depose a corporation or other business entity. The Defendant must designate the witness or witness that will testify at the deposition and indicate which topic they will testify upon. A witness need not have personal knowledge of the topic. In some circumstances, the witness may not be related to the company. However, the designee must testify on the topics listed in the notice and be prepared with all the information

reasonably available to the company. The designee's testimony binds the company.

In my state, a party only gets to take one Rule 30(b) 6 deposition. However, if the party being deposed is not prepared to testify on the topics, given the Court can sanction the unprepared party. The Court can impose monetary fines or pay costs and attorney fees for a second 30(b) deposition.

This type of deposition will be conducted near the end of discovery so that all topics can be included. Be prepared to carefully draft the topics to be covered at the deposition as the opponent will not allow you to conduct discovery outside the scope. My state does not limit the number of topics that can be questioned upon. The opponent can challenge the topics listed by filing a Motion to quash or a Protective Order.

The use of a 30(b)6 deposition does not preclude depositions of fact or expert witnesses. Once more a deposition notice may lead the parties to settlement discussions. Rule 30 (b)6 depositions take a lot of time and attorney fees to properly prepare. If the creditor has plead any veil piercing claims, the defendant may wish to prevent this discovery and settle.

In commercial litigation remember to ask for specific items in requests for documents. For example, ask for all emails- deleted and current- emails from a specific time frame on the subject you are inquiring about. You may need to take a

deposition first to establish more information at the deposition, you may need to ask what information is contained on the computer. You can also ask if the party deleted any emails concerning the subject being litigated. After the deposition, you will have a better idea as to what you need to request in order to get the documents needed. Without this deposition, a Judge might rule that the cost to retrieve emails that may not exist is too burdensome and costly.