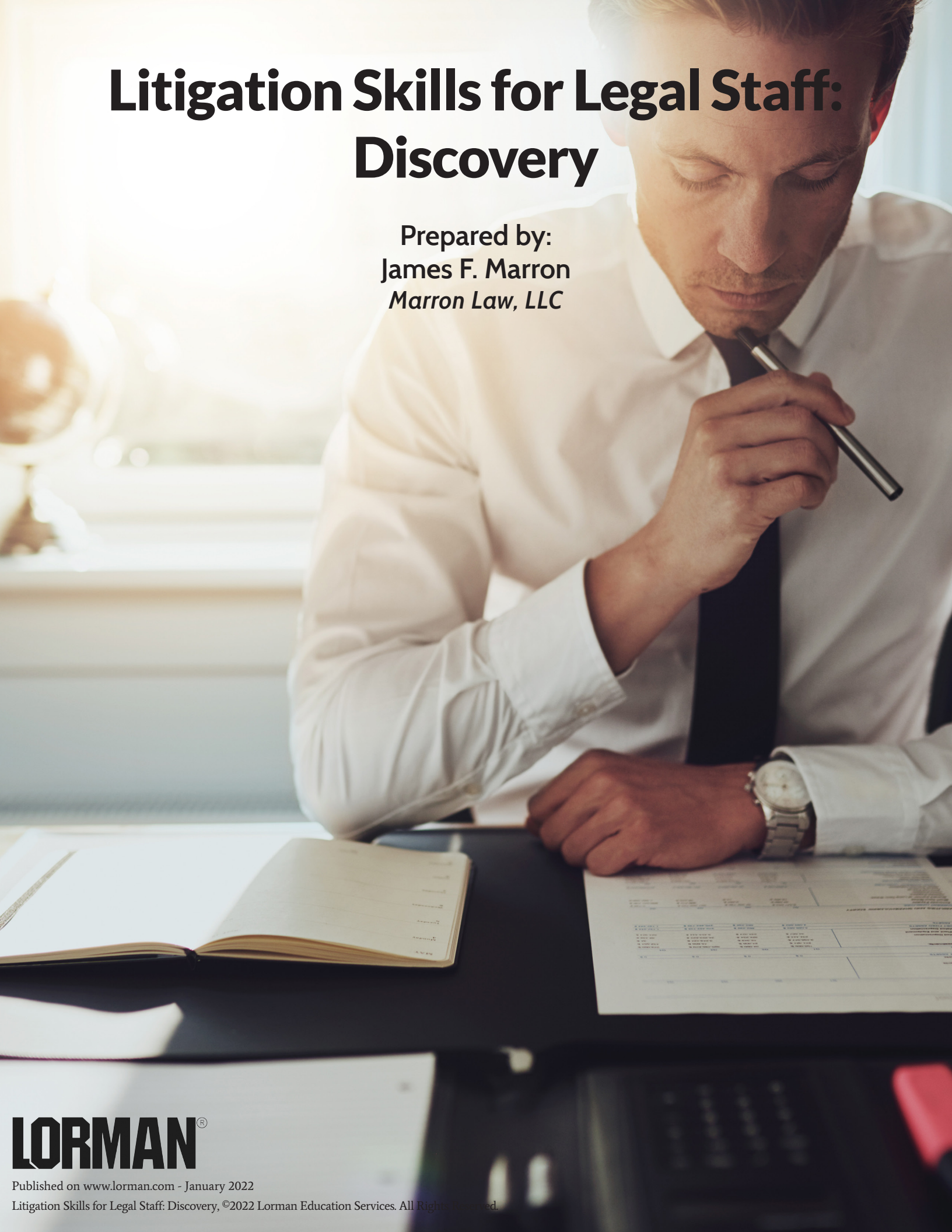


Litigation Skills for Legal Staff: Discovery

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Discovery

Discovery is the process by which litigants find out as much as possible about the opponent's case, gather facts, obtain documents, identify and speak to witnesses, and select exhibits. A secondary purpose is to obtain information about the personality, appearance, motivation, and other characteristics of the opposing party and his or her counsel to evaluate their effectiveness at trial.

The scope of discovery is extremely broad and does not depend upon whether the information sought will actually be admissible. In Oregon, ORCP 36 permits discovery of photographs, employment information, tax returns, medical and psychological records and reports, witness statements, and insurance policies. The only limitation to Oregon state court discovery is that a party cannot obtain expert discovery or information protected by the attorney-client and/or attorney work product privileges. The prohibition on expert discovery means that the identity and opinions of an opposing expert cannot be discovered prior to trial. The attorney-client privilege protects anything evidencing communications between an attorney and client while work product protects materials generated or obtained by a lawyer in anticipation of litigation.

The following highlights some of the most commonly used tools of discovery.

A. Document Discovery

(1) Requests for Production. Any document and any other data compilations from which information can be obtained, and translated, if necessary, through detection devices into a usable form (like computer files that can be printed out) can be obtained from a party by issuing a request for the production of documents in accordance with ORCP 43. Any party may serve a request on another party that sets out the items that the requesting party desires to inspect either by individual item or by category and describe each item and category with reasonable particularity.

The request must specify a reasonable time, place, and manner for making the inspection and performing the related acts. In Oregon, most requests ask that documents be made available within 30 days unless the request is made at the outset of litigation. When a request is issued at or about the same time as a complaint is filed a request cannot require production prior to 45 days after service of the summons, unless the court specifies a shorter time.

The party that receives service of a request must comply with the request unless that party objects to the request, with a statement of reasons for each objection before the time specified in the request.

(2) Subpoena. As discussed above, requests for production of documents are issued to parties to obtain documents within their possession. ORCP 43. Subpoenas are issued to non-parties to obtain their documents. ORCP 55. A subpoena is an order directed to a person that may require the production of books, papers, documents, or tangible things and permit inspection

at a particular time and place. A document subpoena (“subpoena duces tecum”) can be joined with a command to appear at trial or hearing or at deposition or may be issued separately. In the event that a subpoena duces tecum is issued without commanding an appearance, the subpoena must be served first upon each party at least 7 days before the subpoena is served on the person required to produce documents. Thereafter, the subpoena cannot require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period. ORCP 55C. In sum, it will take 21 days to obtain documents from a non-party if that is all you want to obtain (i.e. 7 day advance copy of the subpoena to adverse counsel + 14 days after service).

B. Requests for Admission

Requests for admissions must be served on the parties and filed with the court. ORCP 9A, C. For service on a party’s lawyer to be effective, the answering party’s lawyer must represent that party at the time of service. The total number of requests cannot exceed 30 unless the court permits more for good cause shown after the proposed additional requests have been filed. ORCP 45F. For purposes of this limitation, each request is counted separately regardless of how the requests are grouped, combined, or arranged and regardless of whether it is subsidiary to, incidental to, dependent on, or included within another request.

A written response must be served within 30 days after service of the request unless the court orders a shorter or longer time. As is the case with

requests for production, a defendant cannot be required to serve answers or objections before the expiration of 45 days after being served with the summons and complaint, unless the court shortens the time. ORCP 45B. Failure to file a timely response results in an automatic admission of the matters contained in the request. ORCP 45B. The answering party may admit, deny, admit in part and deny in part, or object to the request, or it may state that the matter can be neither admitted nor denied. ORCP 45B. Requests for admission are sometimes issued to create a right to attorney fees incurred in proving any matter that was denied. ORCP 46C.

C. Interrogatories

Interrogatories are written questions sent to a party to answer. FRCP 33. Such written questions are not permitted in Oregon state court. Rather, these are used only in federal court but it is helpful to understand what they are as some requests for production are interrogatories to which a lawyer should object.

D. Depositions

Depositions are used extensively in Oregon. After service of summons or appearance of the defendant any party may take the testimony of any person, including a party, by deposition upon oral examination. Depositions are usually arranged for in advance by agreement of counsel and then confirmed with a letter or email. Normally, the deposition is located at the office of the attorney for the person to be deposed and the party asking for the deposition normally arranges for the court reporter in advance to be there. Testimony is taken before a court reporter and a transcript is prepared. The resulting transcript will show

the questions, answers and any objections made to the questions being asked. Some objections are waived at trial if not asserted.

Once the transcript is prepared, most litigators prepare summaries of the transcript or utilize apps like TranscriptPad to create issue specific transcripts for use at a hearing or trial. Deposition summaries should highlight relevant testimony concerning the claims and defenses asserted in the case as well as any background testimony that can be used for impeachment purposes at trial.

E. Experts

An expert may be required in a case involving an issue that cannot be fully understood by the average juror without expert assistance. The identity and opinion of an expert witness are not discoverable in state court until the expert testifies. Upon testifying at trial the expert's file is subject to discovery and is routinely asked for by opposing counsel before conducting cross-examination. Consequently, it is imperative to avoid sending any communication to an expert that could hurt your case (i.e. "we are hiring you to say we win").

Experts can be found by name sometimes in published opinions, personal inquiries to other counsel practicing in the area, inquiries on email listserv, online, professional literature, professional organizations, colleges and universities, client contacts, and businesses providing expert referral services. Sometimes fact witnesses can double as expert witnesses (i.e. in-house engineers involved in a faulty construction project).

F. Witnesses

A fact witness is someone whose senses (i.e. hearing, sight, smell etc.) can explain what happened.



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