

Effective Discovery

Do's & Don'ts of Written Discovery, Depositions, and
Motions

Tuesday, August 12, 2014

Written Discovery

- Share the Acknowledgement and Order with the opposing party the same day you receive it.
 - Why? Deadlines.

Written Discovery

- Be specific *and* general.

Written Discovery

- Complainants: Seek comparative evidence, including ROI's.

Written Discovery

- Agencies: Seek information on damages.

Written Discovery

- Know your “parts and subparts” rules.

Written Discovery

- Try to resolve discovery disputes informally.

Written Discovery

- File motions to compel on time even if your opposition has promised to produce.

Depositions

- Count backwards from Motion for Summary Judgment.
 - Expect 10 business days for transcripts to be available.

Depositions

- Notify your adversary of witness unavailability or retirement. Failure to do so may result in sanctions.

Depositions

- Consider bifurcating the damages depositions (e.g. physicians).

Depositions

- Prep your witnesses – watch a movie!
 - Amazon: “Preparing for Your Deposition”

Depositions

- Prep yourself – why are you taking this deposition? What must you accomplish?
 - Discovering information;
 - Gathering admissions;
 - Preserving testimony;
 - Anticipating and preparing for summary judgment.

Depositions

- Outline the information you are seeking – *not* the questions.
 - What are the ANSWERS you're looking for?
 - Scripts will likely be your enemy.

Depositions

- Prep your documents.
 - Bring the ROI.
 - How many copies?
 - Organize your exhibits.
 - Identify and enter exhibits into the record.

Depositions

- The court reporter is your friend.

Depositions

- Set the tone and give instructions.

Depositions

- Cover the basics in your opening questions:
 - Non verbal answers are not allowed: “ uh-huh”. Do you understand?
 - Are you on any medications?
 - If you don't understand a question, ask me to clarify or restate. Do you understand?
 - If you remember something during the deposition that relates to an earlier response, be sure to bring it up. Ok?
 - Have you been deposed before? (Go further only if it was an EEO Case).
 - How have you prepared for today's deposition?
 - What documents have you reviewed?
 - Did you bring any documents with you today?

Depositions

- Be precise – you’re talking to a blank piece of paper.
 - Don’t point without identifying the thing you’re pointing to.
 - Don’t refer to an exhibit without identifying the exhibit.
 - Avoid “he”, “she”, “it”, “they”.

Depositions

- Describe non-verbal events on the record. When there is a long pause, note it in the record. When it's very long, mention how long. “Ok, sir, you've just been the one page email for ten minutes. I'm asking again, why did you say “xxxx” in the email?”

Depositions

- When *your* witness strays and rambles, bring her back on point. When *their* witness strays and rambles, listen.

Depositions

- When you get the answer you need, stop that line of questions and move on.

Depositions

- Behave professionally.
 - DO say “hello” to opposing counsel and the witness and shake his/her hand.
 - Do NOT throw papers, binders, binder clips, ROIs across the table.
 - Do NOT throw personal insults across the table.
 - Do NOT touch your opposing counsel or the witness (except for the handshake).
 - Do NOT order the court reporter to change a witness’s testimony without a signed errata sheet.
 - Do NOT threaten the court reporter in an effort to make them change testimony. (Change the testimony or my firm/agency will never use you again).
 - Do NOT direct your witness not to answer. (but there are exceptions)

Depositions

- Object – sparingly and only when appropriate.
 - Attorney-client privilege
 - Compound question
 - Misstates Prior Testimony/The Record
 - Vague/Confusing
 - Calls for speculation
 - Argumentative
 - Relevance – typically not a valid objection
 - Hearsay – not appropriate objection
 - Assumes facts not in evidence – NOT an appropriate objections
 - Calls for a legal conclusion

Depositions

- Respond to objections appropriately. Usually: “Your objection is noted. Mr. Witness, you may still answer the question.”

Depositions

- Abusive Attorneys?
 - Describe the conduct on the record.
 - Warn that you and your witness/client will leave if the conduct continues.
 - Leave if necessary, but make sure the record is clear and that *you* were the reasonable party.

Depositions

- Bring the AJ's phone number. If necessary, do a spontaneous motion to compel by telephone.

Depositions

- After the deposition:
 - Never Waive Signature.
 - Read the transcript.
 - Make your witness read the transcript.
 - Learn from the transcript.
 - File an errata sheet.

Motions

- Typically, confer with counsel first. Maybe it can be a Joint Motion or an Unopposed Motion.

Motions

- Advocate for your client. Sway the AJ.
- Do spontaneous oral motions to educate and gauge your AJ.

Motions

- Make the AJ's job easy!
 - Include a Proposed Order with signature line
 - When seeking a rescheduling, offer specific dates/times

Motions

- Motion to Amend/Modify/Clarify Claims –
 - include a summary of the claims as *you* want them to be.

Motions

- Motion to Compel:
 - Include The Discovery Pleadings;
 - Consider grouping the evidence/topics.

Motions

- Motion to Compel at Deposition –
 - Clarify on the record before making the call.

Motions

- **Motion for Sanctions:**
 - Use sparingly and only when appropriate;
 - Give the AJ ammunition;
 - Find similar cases on point;
 - Possible bases for sanctions: failure to investigate; failure to conduct adequate investigation; failure to cooperate in depositions/discovery; destruction of evidence; attorney failure to recuse when a witness.

Motions

- Motion for Summary Judgment
 - What are the goals?
 - Risk – benefit analysis
 - Kitchen sink vs. surgical assault
 - Know the legal standards: To survive summary judgment, the non-moving party must present sufficient evidence from which a reasonable fact finder could infer that the non-moving party should win. Neither party has a burden to prove anything at the SJ phase.