

Discovery & Depositions

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Words of Wisdom

- ❖ “The Federal Rules of Civil Procedure do not contemplate cooperation, they only comprehend compulsion.” --Late Hon. John M. Mason

“The Rules of the Road” Approach

- Rick Friedman

A Good Rule is One That is...

- ❖ Easy to explain
- ❖ Indisputable by Defendant
- ❖ Important enough to increase likelihood of jury verdict in your client's favor

Examples of Rules

- ❖ Car Dealers should disclose any significant steering defects that they know of in a used vehicle to a prospective buyer.
- ❖ Real estate agents should not give out information about their clients that would hurt them.
- ❖ Business should not be looking at someone's credit reports without a legitimate business need.
- ❖ Banks should not charge interest rates which are higher than legally permitted.

Interrogatories

- ❖ Essentially “Twenty Questions”
- ❖ Tell, explain, describe
- ❖ Goal is to get into corporate operation
- ❖ Understand how they get their business
- ❖ How they do their business
- ❖ What they say happened with consumer
- ❖ Legal and factual basis for defenses
- ❖ Testimonial inconsistencies

Requests for Documents

- ❖ Training and Instruction Manuals
- ❖ Compliance Materials
- ❖ Employee Files
- ❖ Reports of Incident
- ❖ Prior Lawsuits
- ❖ Consumer Correspondence
- ❖ Audio Recordings
- ❖ Internal System Account Notes
- ❖ 30 Days to Respond

Requests for Admission

- ❖ Goal is to narrow issues of fact
- ❖ Laser guided
- ❖ Nail them down
- ❖ 30 Day To Respond
- ❖ ****Failure to Timely Deny is Deemed an Admission****

Requests for Statements

- ❖ Usually non-productive
- ❖ Generally statement materials covered by litigation privilege, but not always
- ❖ Attorney Work Product
- ❖ Attorney Client Privilege
- ❖ Account notes are not protected
- ❖ 30 Days to Respond

Rule 34 On Site Inspections

- ❖ Excellent way of understanding process
- ❖ Good to combine with Defendant's depositions
- ❖ Invasive
- ❖ Should be done in off-business hours
- ❖ Expect Heavy Objections
- ❖ Identify nearby employees / coworkers
- ❖ Identify computer systems and manuals
- ❖ Identify methods of doing tasks
- ❖ Layout of supervisory personnel and work area

Expert Witnesses

- ❖ Very useful but can be expensive
- ❖ Essential for cases claiming loss of employment, etc.
- ❖ Good way to intimidate the defense because they will have to counteract
- ❖ Adds credibility to client's claims to have former industry person state that particular conduct was violative or outside acceptable limits of conduct
- ❖ May assist you in directing your discovery efforts

Subpoenas

- ❖ Very powerful tool
- ❖ Used to get info / documents / testimony from Third-Parties
- ❖ May be quashed by motion if unduly burdensome
- ❖ Good for independent confirmation of facts
- ❖ Party serving subpoena may be ordered to reimburse for costs

Subpoena Logistics

- ❖ Issued by attorney under authority as officer of the court
- ❖ Served by Process Server
- ❖ Can be satisfied by production of documents or things
- ❖ Witness appearance fee of \$40 per day plus mileage to location
- ❖ State court practices are somewhat different

Depositions

Purposes of a Deposition (1 of 2)

- ❖ Evaluate Defendant and its collectors
- ❖ Evaluate strength of claims
- ❖ Communicate with individuals directly
- ❖ Evaluate appearance, credibility, consistency
- ❖ Evaluate defense counsel
- ❖ Assess basis and motives for defense

Purposes of a Deposition (2 of 2)

- ❖ Summary Judgment Potential
- ❖ Costs, aggravation, nerves, intimidation
- ❖ Admissions
- ❖ Impeachment
- ❖ Strongly Consider Videotape
- ❖ Opportunity to Settle
- ❖ Preserve evidence for later use

Preparing For Depositions (1 of 2)

- ❖ Know local rules of jurisdiction where taken deposition
- ❖ Know deposition etiquette rules
- ❖ Issue subpoenas if necessary
- ❖ Read and review all discovery produced beforehand
- ❖ Mark exhibits and have sufficient copies of all docs
- ❖ Have an outline of basic questions ready to go
- ❖ Explore topical areas thoroughly

Preparing For Depositions (2 of 2)

- ❖ Be flexible in your questioning patterns
- ❖ Don't let the deponent off the hook, ever
- ❖ Make all travel arrangements (taxis, maps, hotel)
- ❖ Arrange for local law firm to host depositions or hotel conference room
- ❖ Arrange for court reporter
- ❖ Have a backup plan in place in the event of obstructions or no-shows
- ❖ Always, always, stay on the record

Making Objections at Depositions

- ❖ Make objections brief and on the record
- ❖ No speaking objections
- ❖ Use as a device to bookmark deposition material
- ❖ Use to breakup a “juggernaut” by opposing counsel
- ❖ Deponent must answer or seek a protective order except as to privileged matters
- ❖ Objections as to form are waived unless raised at time of the deposition
- ❖ Deponent has a right to read and sign for 30 days

Pretrial Use of Depositions

- ❖ Motion Practice
- ❖ Summary Judgment Motion
- ❖ Punitive Damages Motions under Minn. Stat. Sec. 549.191

Use of Depositions at Trial

- ❖ Refresh Recollection
- ❖ Impeach prior testimony
- ❖ Show that witness is a liar
- ❖ Show inconsistency in testimonies
- ❖ Only impeach when there is a clear distinction between trial testimony and deposition testimony
- ❖ Dramatic Effect

Prep For Client's Deposition (1 of 2)

- ❖ Meet with deponent several days before
- ❖ Show a deposition training video
- ❖ Have them re-read the Complaint and any discovery responses
- ❖ Give them your business card (again)
- ❖ One person at a time speaks, under oath, answers recorded forever
- ❖ Explain process of taking breaks
- ❖ Review the purposes of taking a deposition
- ❖ Counsel with them about responding with short answers
- ❖ Do ½ hour of mock deposition with them

Prep For Client's Deposition (2 of 2)

- ❖ Tell them to always tell the truth
- ❖ Tell them to remain silent until you've completed your objection and then only answer after you have instructed
- ❖ Agree on breaks
- ❖ If practical, drive to deposition location with them
- ❖ Remember 100-mile / 7-hour Rules

Discovery Remedies

Motions to Compel

- ❖ Document every effort at getting discovery
- ❖ Be reasonable in what you seek to discover
- ❖ Be prepared to show exactly how the request is reasonably calculated to lead to admissible evidence
- ❖ Give them every opportunity to comply
- ❖ Be reasonable in your fee requests if you must bring a motion
- ❖ Never withhold anything from them unless it is protected by privilege

Protective Orders

- ❖ Useful in getting what you want
- ❖ Dangerous because of potential for violating them inadvertently because things have to be kept secret
- ❖ May violate public policy or your own sense of justice
- ❖ May be unnecessary
- ❖ Court may not grant them anyway
- ❖ Usually only for trade secrets and other confidential matters
- ❖ Be aware of Invasion of Privacy Tort, FCRA, GLBA, and HIPAA implications

Question and Answer
