

Standard 7.11-4 on Discovery

STANDARD 7.11-4 ON DISCOVERY

STANDARD

The practitioner should use both formal and informal discovery when appropriate to obtain necessary information in a timely manner and useful format.

COMMENTARY

Both formal and informal discovery are essential tools for fact-finding and should be routinely used in litigated cases, unless there is a specific reason not to do so, such as when there are no disputed facts or when the only issues in the case are interpretations of law.

As part of a successful litigation strategy, a practitioner should include a discovery plan that identifies: the facts and information that need to be obtained in order to effectively litigate the case; from whom the facts and information are most likely to be available; and what is the least costly but still effective method to obtain the necessary facts and information. Practitioners should be aware of the evolving law governing discovery of computer databases, e-mails and other electronically stored information that may be pertinent to the client's case.

In all instances, the practitioner should target discovery both to preserve the provider's resources and to assure that formal discovery requests are defensible in the event they are challenged by the adversary or the practitioner is forced to make a motion to compel in order to get the adversary to respond to the discovery request. The practitioner should establish a tentative time frame for pursuing discovery. Generally, discovery should be undertaken as soon as possible to assure that all pertinent facts and information are obtained well in advance of trial. However, there may be situations where, for strategic reasons, it is appropriate to delay, such as to maximize the possibility of settlement or to avoid premature disclosure of litigation strategy.

Practitioners must be knowledgeable about the rules of procedure and should be well-versed in their local variations and applications. They should be fully aware of how their planned discovery comports with the requirements of court rules. In some jurisdictions it may be the local custom and practice to relax strict compliance with formal rules regarding discovery. If adherence to a more relaxed standard does not prejudice a client's interests, the practitioner may follow local custom or practice. However, if the practitioner determines that an adversary is taking advantage of the local custom or practice to avoid responding to a legitimate request for discovery, the practitioner should insist on strict compliance with all pertinent rules.

Some information is more readily obtained through informal investigation than through formal discovery. There are some disadvantages to formal discovery that limit its effectiveness in obtaining facts. Unless very carefully drawn, formal discovery can yield indirect or deliberately misleading answers. It can also be time-consuming and expensive. If information is not specifically sought, it will generally not be volunteered. On the other hand, the practitioner can take advantage of the casual interchange that may take place during informal investigation to elicit unexpected and helpful disclosures. These disclosures may be useful in settlement negotiations. If important facts or information are obtained through informal investigation that

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may later be disputed, the practitioner should also seek to confirm those facts and information through formal discovery to enhance their utilization at trial.

Informal discovery as well as interrogatories and requests for admissions are relatively inexpensive tools, but they may not be adequate to uncover the information needed to establish all facts that are in dispute. Nevertheless, they may be helpful in isolating those areas where it may be necessary to depose a witness, reducing the overall cost of a deposition. In some situations, it may be adequate and far less costly to simply record or videotape depositions rather than utilizing a stenographer. If the practitioner intends to use the depositions at trial, a videotaped deposition may be the most cost-effective and useful form of recording. Practitioners should be alert to technological advances that allow more cost efficient ways to conduct discovery.

When appropriate, the practitioner should use form motions and other documents appropriate to discovery, as well as model interrogatories and requests for admission that have been developed in cases with recurring issues. The discovery documents that the practitioner has developed should be stored electronically for easy retrieval and adaptation by other practitioners.

As a general matter, document discovery and written interrogatories should precede depositions. Formal discovery can be used to obtain facts and information as well as documents that an adversary or witness would not voluntarily disclose. Because information is supplied under oath, an adversary or witness can be pinned down to a particular version of the facts, and later deviations in testimony can be impeached by the prior sworn statements. Formal discovery can create a more permanent and official record and, in specific circumstances, may be directly admissible as evidence.

Prior to taking a deposition, the practitioner should be fully prepared. The practitioner should decide in advance what purpose the deposition is to serve, including obtaining information, locking in a story or obtaining admissions. The practitioner should also determine if there are areas of inquiry that, based on pleadings or documents, should not be covered.

The practitioner should also decide whether it is more useful to “try the case in the deposition” in order to obtain a more favorable settlement, or to save arguments or issues for trial because the case is not likely to settle. In particularly complex cases, or where the practitioner has limited experience in conducting discovery, it may be useful to associate experienced counsel, either from the provider’s staff or an outside attorney, to assist with the discovery.

Once a deposition is undertaken, the practitioner should be prepared to elicit unambiguous responses to questions that are posed. Information that is obtained should be thoroughly and thoughtfully analyzed. Follow-up should be considered to clarify ambiguities and to pursue new avenues of inquiry that were opened by the questioning. Depositions require the practitioner to be skilled in the oral examination of witnesses and to have the capacity to conduct immediate follow-up questioning.

Prior to defending a client’s deposition, the practitioner should fully prepare the client for what is likely to occur at the deposition. During the deposition, the practitioner should seek to protect the client’s interests by use of appropriate objections that are permitted under the governing

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rules. The practitioner should make strategic decisions regarding whether to question the client during the deposition, including whether to clarify any perceived misstatements or ambiguities in the client's testimony made during the adversary's examination.

The practitioner should also prepare witnesses for the client for depositions to which they may be subjected. When preparing for a deposition of a witness who is not a client, the practitioner needs to bear in mind that anything said during such preparation is not covered by the attorney-client privilege and may be subject to discovery.

The practitioner should be prompt and straightforward in responding to an adversary's discovery requests. Answers should be honest and responsive, but the practitioner should make every effort to prevent inadvertent disclosures and admissions that could be damaging to the client's interests.