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Skills & Values: Discovery Practice

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Skills & Values: Discovery Practice

Publication Statement

The attached chapter is from the 2nd edition (2010). The newest edition is published by Carolina Academic Press, <https://cap-press.com/books/isbn/9781531008178/Skills-and-Values-Discovery-Practice-Third-Edition>. Copyright is held by the author. User is responsible for all copyright compliance.

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Chapter 1

PLANNING FOR DISCOVERY

OVERVIEW

One of the most important steps in a new or impending litigation is to prepare a plan. Most legal cases begin with a client interview, which focuses on the client's situation, needs, and desired outcome. After a period typically spent in factual investigation and legal research, the attorney will counsel the client on the best available options to achieve the client's goals. If litigation is determined to be the best option, then it is time to develop a plan for it. In this phase, the attorney has an obligation to explain to the client the most likely course of the litigation, and to review its costs and benefits. This is not possible unless a litigation plan has already been prepared.

A litigation plan starts with identifying potential claims and defenses, which naturally requires some legal research. It is wise at this stage to also conduct some factual investigation, such as reviewing any available documents and conducting third party witness interviews (if available). These steps lead to the preparation of a complaint (or answer if a complaint has been filed against the client). Once the complaint and answer have been filed, it is time to plan the discovery phase of the litigation.

As will be clear in the next chapter, the first stage of discovery is the preparation of initial disclosures, so the process of preparing what must be disclosed at this stage of the litigation comes first. After that, the focus is on what information is not known and which must be obtained in discovery for the case to be ready for trial (or settlement negotiations). Further, the plan should be as specific as possible about which discovery instrument will be used to obtain which information. Thus, the plan should categorize the information needed by the best tool to obtain that information: Interrogatories (Chapter 3), Document Requests (Chapter 5), Expert Witnesses (Chapter 9), Depositions (Chapter 10), and Requests to Admit (Chapter 11). Today, many clients ask their attorneys to estimate the cost of the discovery phase of litigation, so after the plan is prepared a spreadsheet with estimates of hours to be worked by specific attorneys and paralegals (including their respective billing rates) will be required.

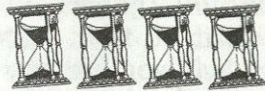
Because cases in the discovery phase rarely go smoothly, it would be wise for the plan to include time spent filing (or responding to) Motions to Compel (Chapter 8) and handling any discovery disputes short of actually filing a motion. Because most litigations end in settlement, it should also set aside time for the negotiating and drafting of a settlement agreement.

Making predictions about how the case will progress through the discovery phase is an inherently inexact process, but with experience and practice, this can be done with some level of confidence. It is wise for an attorney to counsel his or her client on the unpredictable nature of discovery. In addition, the relative success or failure of each phase of the discovery process - as well as the nature of what is discovered - will determine the most appropriate next step in the litigation (which may be different from the original plan). Therefore, the litigation plan is a living document, and should be updated throughout the litigation, and reviewed with the client periodically.

It is also at this early stage that setting up a process for collecting and using the information obtained in discovery is important. While many offices still use paper files, law offices increasingly rely on electronic tools to keep track of the myriad details in a litigation. One of the best of these, CaseMap, is made available by Lexis for free to all law professors and their students. It is recommended that the student using this text use CaseMap to categorize and track the information they obtain using the discovery documents during the course. CaseMap may be obtained through a link located at <http://www.lexisnexis.com/lawschool> or at <http://www.casesoft.com>.

EXERCISE: Prepare a litigation plan, including a chart listing information you already know that you will need to obtain in discovery, based on the simulated problem information you have been provided. Use that chart to prepare a spreadsheet detailing estimated costs for the discovery phase of the litigation. Also, prepare a brief memo to the file explaining the decisions you made and strategy you implemented in preparing your litigation plan.

ESTIMATED TIME FOR COMPLETING THIS EXERCISE: One to two hours.



LEVEL OF DIFFICULTY: Moderate



AS YOU PREPARE THIS ASSIGNMENT, CONSIDER THE FOLLOWING:

Have you conducted initial legal research on the nature of the matter in dispute?

Have you identified the claims and defenses in your litigation?

Have you prepared a chart of information needed in discovery?

Does the plan categorize needed information by the discovery mechanism you will use to obtain that information?

Have you prepared a spreadsheet, including hourly rates of attorneys and paralegals who will work on the litigation, so as to provide a reasonable estimate of the cost of discovery to your client?

Have you included some estimate of the cost of discovery disputes that might arise?

Have you created the initial CaseMap file for the litigation, containing the basic information you have learned about your case to this point?

ONLINE: In the online portion of the book, you will find an example chart of Information needed in Discovery, as well as an example spreadsheet for developing cost estimates. There is also an example CaseMap file, and links to download a trial copy of CaseMap to your computer.