University of Denver Digital Commons @ DU

Sturm College of Law: Faculty Scholarship

University of Denver Sturm College of Law

2017

Skills & Values: Discovery Practice

David I.C. Thomson University of Denver, david.thomson@du.edu

Follow this and additional works at: https://digitalcommons.du.edu/law_facpub

Part of the Evidence Commons, Legal Education Commons, and the Litigation Commons

Recommended Citation

David I.C. Thomson, Skills & Values: Discovery Practice (3rd ed. 2017).

This Book is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Sturm College of Law: Faculty Scholarship by an authorized administrator of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

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.

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.

	ontents
Table of C	Uniternes
Table of C	
	Managing the Process with Judges and Clicats
Chapter One:	Planning for Discovery 1
Overview	·····
	99. A.S. 1. de marie 1. al. 1799 anno 2. al 199. a
Chapter Two:	Initial Disclosures 5
Overniour	
	nitial Disclosures Include?
Rule 26.	
When mus	st Initial Disclosures be Provided?
	to Draft Initial Disclosures 8
	thically disclose?
Drafting .	
Exercise .	
Chapter Three	: Interrogatories 13
What are I	Interrogatories? 13
FRCP 33. 1	Interrogatories to Parties 13
	erve Interrogatories 14
Structure of	of Interrogatories 15
Strategy a	nd Goals
Lixromorgo	Determining the Need for an Expert.
Exercise .	Answers to Interrogatories
	E
Chapter Four: Overview.	92/01/02/3
Chapter Four: Overview. FRCP 33.1	Interrogatories to Parties
Chapter Four: Overview. FRCP 33. J Format	22 Interrogatories to Parties
Chapter Four: Overview. FRCP 33.1 Format Strategy in	Interrogatories to Parties
Chapter Four: Overview. FRCP 33.1 Format Strategy in Exercise .	Interrogatories to Parties
Chapter Four: Overview. FRCP 33.1 Format Strategy in	Interrogatories to Parties
Chapter Four: Overview. FRCP 33. J Format Strategy in Exercise . Chapter Five:	Interrogatories to Parties
Chapter Four: Overview. FRCP 33.1 Format Strategy in Exercise . Chapter Five: Overview.	Interrogatories to Parties
Chapter Four: Overview. FRCP 33. J Format Strategy in Exercise . Chapter Five: Overview. Componer	Interrogatories to Parties



C

TABLE OF CONTENTS

Overview. 2 Solutions. 2 E-mail 2 Managing the Process with Judges and Clients. 2 Conclusion 4 Exercise 4 Overview. 4 Overview. 4 Overview. 4 Drafting Responses and Producing Documents 5 Exercise 5 Chapter Eight: Motion to Compel Production. Overview. 5 Rule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy - Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Testimony 6 PRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Overview. 6 Legal Basis for Expert Testimony 6 Preparation of Expert Disclosure 6 Preparation of Expert Disclosure 6	Chapter	Six: eDiscovery
The Problem of eDiscovery 2 Solutions. 2 Hanaging the Process with Judges and Clients. 2 Managing the Process with Judges and Clients. 2 Conclusion 4 Exercise 4 Overview. 4 Strategy. 4 Drafting Responses and Producing Documents 5 Exercise 5 Chapter Eight: Motion to Compel Production. Overview. 5 Rule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy - Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Chapter Nine: Expert Witness Disclosure Overview. 6 Legal Basis for Expert Testimony 6 Preparation of Expert Disclosure of Expert Testimony. 6 Preparation of Expert Disclosure 6	Ove	erview
Solutions. 2 Managing the Process with Judges and Clients. 2 Conclusion 4 Exercise 4 Chapter Seven: Answers to Document Requests. 4 Overview. 4 Strategy. 4 Drafting Responses and Producing Documents 5 Exercise 5 Chapter Eight: Motion to Compel Production. 5 Chapter Eight: Motion to Compel Production. 5 Chapter Eight: Motion to Compel Production. 5 Overview. 5 5 Rule 37 - Help!!! 5 5 Strategy - Should I File? 5 5 Drafting the Motion 6 6 Conclusion 6 6 Chapter Nine: Expert Witness Disclosure 6 Chapter Nine: Expert Testimony 6 Legal Basis for Expert Testimony 6 6 Overview. 6 6 Drafting the Need for an Expert 6 6 Preparation of Expert Disclosure 6 Preparation of Expert Disc	Ine	Problem of eDiscovery
E-mail. 4 Managing the Process with Judges and Clients. 4 Conclusion 4 Exercise 4 hapter Seven: Answers to Document Requests. 4 Overview. 4 Drafting Responses and Producing Documents 5 Exercise 5 hapter Eight: Motion to Compel Production. 5 Nule 37 – Help!!! 5 Rule 37 – Help!!! 5 Rule 37 – Should I File? 5 Drafting the Motion 6 Conclusion 6 Matter Seven: 6 Matter Seven: 6 Nule 37 - Help!!! 5 Rule 37 - Help!!! 5 Rule 37 - Souty to Confer. 5 Strategy – Should I File? 5 Drafting the Motion 6 Conclusion 6 Matter Seven: 6 Determine: Expert Witness Disclosure Overview. 6 Legal Basis for Expert Testimony 6 Preparation of Expert Disclosure 6 Preparation of Exper	Soli	utions
Managing the Process with Judges and Clients. 4 Conclusion 4 Exercise 4 Overview. 4 Overview. 4 Drafting Responses and Producing Documents 5 Exercise 5 hapter Eight: Motion to Compel Production. Overview. 5 Rule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy – Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Mapter Nine: Expert Witness Disclosure Overview. 6 Legal Basis for Expert Testimony 6 Preparation of Expert Disclosure 6 Preparation of Expert Disclosure 6	E-n	1211
Conclusion 4 Exercise 4 Overview. 4 Strategy. 4 Drafting Responses and Producing Documents 5 Exercise 5 Dapter Eight: Motion to Compel Production. 5 Nule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy - Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Testimony 6 Preparation of Expert Disclosure 6 Preparation of Expert Disclosure 6	Mar	naging the Process with Judges and Clients.
hapter Seven: Answers to Document Requests. 4 Overview. 4 Strategy. 4 Drafting Responses and Producing Documents 5 Exercise 5 hapter Eight: Motion to Compel Production. 5 Network 5 Nule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy - Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Witness Disclosure 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Preparation of Expert Disclosure 6	Con	
hapter Seven: Answers to Document Requests. 4 Overview. 4 Strategy. 4 Drafting Responses and Producing Documents 5 Exercise 5 napter Eight: Motion to Compel Production. 5 Overview. 5 Rule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy – Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Witness Disclosure 6 Verview. 6 Legal Basis for Expert Testimony 6 Preparation of Expert Disclosure 6	Exe	rcise
Overview. 4 Strategy. 4 Drafting Responses and Producing Documents 5 Exercise 5 napter Eight: Motion to Compel Production. 5 Nule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy – Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Witness Disclosure 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Determining the Need for an Expert. 6 Preparation of Expert Disclosure 6		
Surategy	Ove	A A A A A A A A A A A A A A A A A A A
Dratting Responses and Producing Documents 5 Exercise 5 hapter Eight: Motion to Compel Production. 5 Overview. 5 Rule 37 – Help!!! 5 Rule 37's Duty to Confer. 5 Strategy – Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Determining the Need for an Expert. 6 Preparation of Expert Disclosure 6	Stra	itegy 47
Exercise 5 hapter Eight: Motion to Compel Production. 5 Overview. 5 Rule 37 – Help!!! 5 Rule 37's Duty to Confer. 5 Strategy – Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 60 Determining the Need for an Expert. 60 Preparation of Expert Disclosure 60	Dra	fting Responses and Producing Documents
Depter Eight: Motion to Compel Production. 5 Overview. 5 Rule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy – Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Witness Disclosure 6 Verview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Determining the Need for an Expert. 6 Preparation of Expert Disclosure 6	Exe	rcise
Overview. 5 Rule 37 – Help!!! 5 Rule 37's Duty to Confer. 5 Strategy – Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Determining the Need for an Expert. 6 Preparation of Expert Disclosure 6		53
Overview. 5 Rule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy - Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Determining the Need for an Expert. 6 Preparation of Expert Disclosure 6	anter	Fight: Motion to Comment Day is a
Rule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy - Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Determining the Need for an Expert. 6 Preparation of Expert Disclosure 6	marches	5
Rule 37 - Help!!! 5 Rule 37's Duty to Confer. 5 Strategy - Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Determining the Need for an Expert. 6 Preparation of Expert Disclosure 6	Ove	rview
Attle 57's Duty to Confer. 5 Strategy – Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Determining the Need for an Expert. 6 Preparation of Expert Disclosure 6	Rule	- 37 - Help!!!
Strategy – Should I File? 5 Drafting the Motion 6 Conclusion 6 Exercise 6 apter Nine: Expert Witness Disclosure 6 Overview 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony 6 Determining the Need for an Expert 6 Preparation of Expert Disclosure 6	nun	57's Duty to Confer
Oraring the Motion 66 Conclusion 66 Exercise 66 apter Nine: Expert Witness Disclosure 61 Overview 61 Legal Basis for Expert Testimony 62 FRCP 26(a)(2) - Disclosure of Expert Testimony 60 Determining the Need for an Expert 64 Preparation of Expert Disclosure 64	oua	regy - Should I File?
Exercise 6 apter Nine: Expert Witness Disclosure 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 60 Determining the Need for an Expert. 60 Preparation of Expert Disclosure 60	Dia	cing the Motion
apter Nine: Expert Witness Disclosure 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 60 Determining the Need for an Expert. 60 Preparation of Expert Disclosure 60	COIL	Clusion
apter Nine: Expert Witness Disclosure 6 Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Determining the Need for an Expert. 6 Preparation of Expert Disclosure 6	Exer	cise
Overview. 6 Legal Basis for Expert Testimony 6 FRCP 26(a)(2) - Disclosure of Expert Testimony. 6 Determining the Need for an Expert. 6 Preparation of Expert Disclosure 6		
FRCP 26(a)(2) - Disclosure of Expert Testimony. 60 Determining the Need for an Expert. 60 Preparation of Expert Disclosure 60		A STATE OF A
FRCP 26(a)(2) - Disclosure of Expert Testimony. 60 Determining the Need for an Expert. 60 Preparation of Expert Disclosure 60	Over	view
Determining the Need for an Expert	Legu	Basis IOI Expert Lestimony 65
Preparation of Expert Disclosure		20(a)(2) - DISCIOSIITE of Expert Testimony 66
- Paradon of Expert Disclosuro		finding ule Need for an Expert 67
E	P	and on of Expert Disclosure
Exercise	Exer	cise
apter Ten: Depositions of Fact and Expert	ahrer I	- opositions of ract and Expert
	A CARAGE	witnesses
	Over	
Overview	Strat	egv
Preparation	Ques	tions
Questions	Conc	lusion
Exercise		
75		

xiv

TABLE OF CONTENTS

Chap	oter Eleven: Requests for Admission	. 79
	Overview	79
	Goals and Strategy	70
	Drafting	80
	Exercise	81
	the second important strate in a second second second second	
Chap	oter Twelve: Answers to Requests for Admission	. 83
	Overview	82
	Rule 36. Requests for Admission	03
	Goals and Strategy.	03
	Exercise	04
Chap	oter Thirteen: Motion in Limine	. 89
	Overview.	80
	When Should You Use a Motion in Limine?	00
	Conclusion	
	Exercise	
	therease ments and conductive shirts are watered to an	95
Cha	oter Fourteen: Settlement	. 95
	Overview	95
	Preparation and Strategy	
	Conclusion	
	Exercise	
		Distant
App	endix	105
. In In .	and a period in the production is not a considered where the second	alling

the second second will be used to all an entitle structuration. Thus be obtained and the used to all an entitle subtraction. Thus all obtained and the used to all an entitle subtraction. Thus all obtained and the record of the all an entitle subtraction to the basis of the second structures (Chapter 1). Depositions (Chapter 10) all and the second structures (Chapter 1). Depositions (Chapter 10) all and the second structures (Chapter 1). To be many chapter ess the second structure the next of the discovery phase of literation, we obtain the program of a spreadsheet will be cases of literation, we obtain the program of a spreadsheet will be cases of literation to be be possible appenders and paralegas (recording their respective to be possible appendered and paralegas (recording their respective to be possible appendered and paralegas (recording their respective to be will be considered.

Source cases in the uncovery phase rando control by it would be followed a plan to the level give spent filing for an poading (1). Motivato Constant (Chapter A, and handling any docurry dispute short of an which filing a motivat. Receive most bigoticate and in settlement, it then it does the set aside more for the negotiation and fourfiling of the themeni and the set aside more for the negotiation and fourfiling of the themeni and the set

XV

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. 2

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.

Alter and the next chapter, the first stage of discovery is the be dischared as in the next chapter, so the process of preparing what musbe dischared as the stage of the litigation comes first farts that, the focus is a whole one case to be ready for trial (or settlement negotiain discovery in a case to be ready for trial (or settlement negotiadiscovery in a case in the used to obtain which information. Thus, discovery manual responded be as specific as possible about which discovery manual responded be as specific as possible about which discovery manual response the information needed by the best tool to obtain that he resonate the information needed by the best tool to (Chapter b). Depositions (Chapter 1), Today, many clearly ask thei attorneds to account (Chapter 1), Today, many clearly ask thei attorneds to account (Chapter 1), Today, many clearly ask thei ciff the manual of the cost of the discovery phase of thigation, so where the manues of the presidence (Chapter 10). Depositions (Chapter 10) attorneds to account (Chapter 1), Today, many clearly ask thei attorneds to account a spreadaboet with estimates of bours to b with the manual of the presence of the discovery phase of thigation, so billing the manual of the top one of the discovery phase of thigation as attorneds to a spreadaboet with estimates of bours to b

Securities is such the discovery phase rarely go smoothly. It works in wise for the plint to molade tune spont filing (or responding to) Median to balance (Charles 8) and handling any discovery disputes short of actually of my anomatan. Usause most lifigations and in settlement, if should also set relate one for the negotiating and drafting of a settlement with my discovery related the tor the negotiating and drafting of a settlement with my discovery related the tor the negotiating and drafting of a settlement **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 spread-sheet for developing cost estimates. There is also an example CaseMap file, and links to download a trial copy of CaseMap to your computer.