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Where in the World is Beth King?

Discovery:
An itty-bitty primer for Litigation Challenged Paralegals

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If you are a litigation paralegal, then don't bother reading the rest of this article because if you are unfamiliar with the definitions of the following, you probably need to go back to school!

If, on the other hand, you are in any specialty BUT litigation, it may behoove you to get familiar with the following terminology. What are those guys over there in the litigation department doing anyway? What do they mean when they say..... I'm sure you have most likely wondered what your colleagues were talking about a hundred times but were afraid to ask.

Now, we're bringing you this basic primer for paralegals who want to talk the talk but don't need to walk the walk. You'll be a hit around the water cooler. OK, maybe that's an exaggeration. However, at the very minimum, you'll at least know what it is that you're saying "no" to when Old Mr. Sampson comes to you looking for extra help.

What is "discovery"?

Discovery refers to the efforts by each party to a lawsuit, through their attorneys, to obtain relevant information through a variety of measures. Some of these measures include interrogatories, requests for production of documents and requests for admissions. As paralegals, legal assistants or other litigation support personnel, we can have hands-on experience with discovery through either on the job training or a variety of educational opportunities. Your role in the discovery process may vary greatly depending on your position. You may draft requests to other parties, reviewing information obtained through those requests and preparing draft responses to requests directed to your party.

What is the purpose of discovery?

Realistically, the primary goal of discovery is to avoid surprises, but it serves other purposes. It helps parties identify and narrow issues, uncover new facts, and preserves information and evidence. Discovery assists in settlement negotiations by exposing strengths and weaknesses of the claims and providing information for a more informed evaluation of the case. Discovery can identify negative witnesses and effectively impeach witnesses. Be careful what you wish for, discovery is a double edged sword.

What can you ask for in discovery?

You can ask about any matter which is not privileged and is relevant to the subject matter involved in the claim. The information does not have to be admissible at trial if it may lead to information that is admissible. Some examples of things you may want to "discover" include information about potential witnesses, information to prove someone is lying, opinions held by experts, information on how a business is run or documents relating to the dispute. Examples of some things you cannot discover include confidential conversations such as those between a lawyer and their client, information which has no relevance to the lawsuit or

the attorneys opinion work product (such as notes, strategic memos, etc).

Interrogatories

A set of Interrogatories are simply written questions directed to a party individually, which must be responded to in writing and under oath. A set of Interrogatories can only be sent to other parties in the case, they cannot be sent to the other party's witnesses. Each party can submit interrogatories to the other party asking questions about the lawsuit and issues that are contested. The answers provided can give you a preview of factual or legal claims so there is less of a chance of any surprises later on. Also, you can gain insight into additional information that may require follow-up such as potential witnesses or relevant documents. When drafting interrogatories, you should think about the information you need to advance (or win) your case that the other party may know. Choose wisely - generally, you are limited to asking 25-30 questions, including subparts, unless the court permits a larger number. Answers are typically due within 30 days (or 45 if served with the initial complaint). This number of days to respond and number of questions permitted may vary by jurisdiction so be sure to check your local rules. Also, if you are assisting in the preparation of interrogatory responses, remember to only answer the question you are being asked, keep your answers clear and to the point and don't attempt to be evasive or sneaky.

Request for Production

A Request for Production is a written request asking a party to turn over copies of documents within that party's possession, custody or control. Examples of documents that can be requested include drawings, charts, photographs, phone records, letters, etc. As with Interrogatories, each party can submit a Request for Production upon the other party. A Request for Production can only be sent to other parties in the case, they cannot be sent to the other party's witnesses. (There is a separate process for doing of documents that the opposing party may have that you need to prove your case. However, you should avoid making overly

a subpoena for records which can be sent to third party witnesses) When drafting a Request for Production, think about the type broad requests - copying costs can get expensive and you want to avoid encouraging a "document dump". A document dump is pretty much what it sounds like, dumping a large amount of information on the opposing party in a way that makes it very hard to handle. It usually happens with parties who aren't "playing nice" with each other and can make it almost impossible to find useful information. If you are assisting in the preparation of responses, remember to only produce the documents they are asking for and nothing more. Responses to Request for Production are typically due within 30 days (or 45 if served with the initial complaint) but be sure to check your specific court's rules to be sure.

Request for Admissions

A Request for Admissions is a written request asking another party to admit the truth of a specific fact. A Request for Admissions can only be sent to other parties in the case, they cannot be sent to the other party's witnesses. The answers are binding at trial, but can be withdrawn with the court's permission. When responding to a Request for Admissions, a party may admit or deny the truth of the alleged fact. The party may also admit in part and deny in part the truth of the alleged fact. Finally, the party may also state that they do not have the knowledge or information required to make a determination regarding the truth of the alleged fact. When drafting a Request for Admissions, you need to figure out what facts you need to win your case. Keep each request simple, clear and related to a single fact. Also, avoid wasting time by asking the other party to admit something so controversial or damaging that you know they will not admit it. If you are assisting in the preparation of responses to admissions, be brief and to the point and make sure that you consider the consequences of your answer. If you fail to respond to a Request for Admis missions are typically due within 30 days (or 45 if served with the initial complaint) but be sure to check your specific court's rules to be sure.

How do I know what questions to ask?

The nice thing about discovery is it has generally been done before. There isn't usually a need to recreate the wheel here. You may be able to review prior discovery requests in similar cases that your firm has handled to get some ideas to work from. Also, there are numerous form books which will provide an almost endless supply of sample questions organized by type of claim. Your firm may already have books of this type available for you, or you can Google things like "model interrogatories" or "sample requests for production".

What are the rules?

It is critical that you check the rules in your local jurisdiction. Rules relating to discovery in your case may come from State or Federal Rules of Civil Procedure, local court rules, standing orders or pre-trial discovery orders. One of the most critical things to learn is the deadline for requests and the deadlines to respond. Depending upon the organization of your firm, your involvement with discovery can vary widely. Even if you are not the person responsible for calendaring in your firm, it benefits you to stay on top of these things and not solely rely on others. You don't want to be the one letting your attorney know that the deadline to respond to a Request for Admissions has passed without response. Bad things can happen when you fail to respond timely to discovery.

Can we object?

Absolutely! Basically, an objection is a refusal to answer a question or a request for a good reason. There are some basic objections which you may be able to use. For example, you do not have to answer questions or requests if they are completely unrelated to the claim, you may have a relevance objection. If questions are unreasonably broad, require you to use an inconvenient or expensive method to obtain the information, or are too time consuming, you may have an objection for unreasonable or unduly burdensome requests. If a question or request seeks privileged information, you do not have to and should not provide it to the other party. The two main types of privilege are Attorney-Client and Work-Product. Attorney-Client Privilege deals with the communications between an attorney and a client for the purposes of seeking legal advice and Work-Product Privilege deals with information prepared by an attorney in preparation for litigation. If you accidentally turn over privileged information to the other side, or share part of that information with another person, you may waive your claim of privilege.

Is that all?

While this article has focused on three of the most common types of discovery, there are many other discovery tools in your arsenal. Each case is different and each case may require different methods of discovery. In the end, we are non-lawyers and the final responses and objections ultimately fall to the attorney. However, a paralegal with a strong grasp of discovery is a valuable team member.

Linda McGrath-Cruz received her Bachelor's Degree in Legal Studies from Barry University. She obtained her Advanced Paralegal Certification from the National Association of Legal Assistants, Inc. with a focus on Discovery and Trial Practice. Linda is a litigation paralegal at the Miami office of Arnstein & Lehr LLP and is a Florida Registered Paralegal. She is also a member of the Dade County Bar Association and is the Chair of their FRP Committee (2011-2012).