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From Discovery to Recovery: A Litigator's Toolbox

By Dennis J. Nolan and Jorge R. Aviles

Properly gathering and synthesizing facts is critical to winning a case. Ultimately, most cases are decided by which side's version of disputed factual issues the jury (or judge) believes is true, rather than by some interpretation of the law. Therefore, it is critical to spend significant time obtaining information that will lead to admissible evidence supporting your position and refuting the other side's contentions.

A wide variety of formal and informal discovery devices are available to help obtain relevant facts. The strategic deployment of these devices is essential in outlining the key issues of any lawsuit, in assessing its merits and potential downsides, and in developing winning trial strategies. Clever litigants know the tactical advantages of when and how to use different fact-gathering devices, while keeping in mind cost and efficiency. What follows is a nonexclusive list of various fact-gathering devices and procedures.

Written Demands for Information

Formal fact gathering, or discovery undertaken once litigation commences, comes in various

forms. One commonly used discovery method is interrogatories. Usually employed at the early stages of the litigation cycle, interrogatories allow a party to demand their adversary answer certain questions, in writing and under oath. To be successful, however, interrogatories must be carefully and narrowly worded to elicit definite, relevant answers, and to likewise avoid leaving any loopholes that would allow for clever, elusive answers. Interrogatories are often helpful in trying to narrow the scope of relevant issues, and in assessing the preliminary contentions that will be deployed by an opposing party. They also can be used at trial to challenge a party who later changes his/her story. Responses to interrogatories, though, are often evasive and long on legalese, but short on information.

One of the most used — and, unfortunately, abused — methods of obtaining discovery is by submitting requests for production. Requests for production are usually used to gather pertinent documents, such as contracts, employment files, or medical or billing records. However, this device can also be used to inspect

Dennis J. Nolan, a shareholder in Anderson Kill's New York office and chair of the firm's Bankruptcy and Restructuring Group, concentrates his practice in bankruptcy and restructuring and insurance recovery. Mr. Nolan has extensive experience representing debtors, creditors' committees and unsecured creditors in complex chapter 11 reorganizations. In many cases, his practice sits at the nexus of bankruptcy and insurance, as insurance is often a key asset in bankruptcy. dnolan@andersonkill.com | 212-278-1659

Jorge R. Aviles is an attorney in Anderson Kill's New York office, where he concentrates his practice in corporate and commercial litigation and insurance recovery, exclusively on behalf of policyholders. javiles@andersonkill.com | 212-278-1180

physical objects or property. Modern-day document discovery almost always implicates electronically stored information, such as emails, text messages, videos and spreadsheets. Given the rapid advent of information technology and the speedy, cheap ways that information can be exchanged and subsequently stored, the volume of electronic data possessed by any given litigant, particularly businesses, can be astronomical. As such, requests for production targeted toward the electronic discovery of information should always be proportionally tailored to the scope of claims at hand, to the relative import of the litigation, and to the monetary amounts at issue. Email and social media are fertile ground for harvesting important facts, as individuals continue to treat the medium quite casually without regard for the idea that their off-handed remarks will come back to haunt them in a litigation.

Requests to admit are an often overlooked discovery device, but are a powerful tool in litigation. One party seeks the other party's admission, under oath, that certain facts are true or certain documents are genuine, thus narrowing the issues that need to be proved at trial. Rather than obtain information, requests to admit set issues at rest by compelling admission of things that cannot reasonably be controverted. Well-crafted requests can be used to probe for weaknesses, to nail down a critical fact, or to lock in unclear testimony at a deposition. Requests to admit can thus be an effective way to save the parties' time and money, and can provide a tactical advantage.

Going Live: Depositions and Interviews

Despite the ability to get answers and documents from the other side through the tools outlined above, another quintessential component of the discovery process is live pre-trial witness examinations under oath, also known as depositions. Depositions, which regularly follow the receipt of relevant answers to interrogatories and the production of documents responsive to discovery demands, are perhaps the only way parties can obtain spontaneous responses and information from the key individuals involved in a dispute, and be used for, among other things, im-

peachment purposes at trial. Additionally, depositions allow the parties to make personal "gut" observations and, in doing so, to craft eventual strategies for questioning and handling of a witness on the stand at trial. While essential to many litigations, depositions are also often time-consuming and, accordingly, can be costly. Hence, for any deposition to be successful, it is imperative that attorneys prepare well in advance by reviewing all of the relevant documents and information, and by developing a plan on how to go about gathering the requisite information from the deponent. Many cases are resolved before trial based on the performance — positively or negatively — of a witness at deposition.

Another way of obtaining relevant — and often utterly surprising — information is by interviewing willing non-parties who have knowledge of the facts and disputes at issue. Frequently, non-parties can be the source of new information previously unknown to the parties, or can present new and unique theories of the disputes. Non-parties can also point to different sources of information and provide previously overlooked insight into already-known facts. In addition, the information obtained from non-parties can be compared against the testimony obtained during depositions and the documents and interrogatory answers received. Importantly, the testimony of non-parties might help parties "glue" documents and information that were previously thought to be unrelated. Often, it is useful to get the testimony of non-parties in the form of sworn affidavits, which can then be properly introduced for evidentiary purposes at trial. Non-parties can be used to retain an element of surprise, as they are often employed post-deposition or at trial as rebuttal witnesses to contradict an opposing party that has locked in their testimony.

While very case specific, consulting experts are often another immensely valuable resource to help fill in a case's holes by analyzing the factual allegations and available information. In particularly sophisticated matters, such as complex financial transactions, experts (e.g., forensic accountants) are regularly able to identify, deconstruct and explain dense documents and concepts so fact-finders have a clearer understanding of the issues.

In addition, experts can:

- Identify important pieces of documents that show violations of rules or statutes.
 - Establish causation.
 - Provide damage calculations.
 - Fill in gaps and inadequacies in a party's story.
 - Assist in spotting and preventing potential pitfalls in arguments
 - Suggest new approaches to outline a winning trial strategy.
- Examining an opponent's history and behavior patterns to help predict how that party will react.
 - Reviewing electronic evidence to recover files an opponent thought he or she deleted.

Going Outside: Research and Investigation

Apart from formal discovery, fact gathering can be highly effective in an informal setting. The proper and limited use of private investigators can also be of great importance in mining sources of information, developing facts, and leveraging your position. Depending on the case, private investigators might be particularly useful in:

- Locating witnesses who might be in possession of critical documents or information.
- Uncovering opposing witness or party backgrounds, or key sources and intelligence to use during negotiations or at cross-examination.
- Searching for assets that have been transferred or that may ultimately be used to satisfy a judgment.

Armed with this information, a litigant can make a proper cost and risk benefit analysis of the case at hand, or leverage your position and develop efficient and creative ways to best your adversary.

Finally, a search of publicly available information often reveals a wealth of possibly relevant information, including *inter alia*, criminal records, prior lawsuits, and other legal and governmental records. Some government information, while not immediately accessible, can also be obtained through a Freedom of Information Act (FOIA) request. Nowadays, many federal agencies allow for the submission of these requests online.

Every case requires a different approach based on its facts and claims, and, consequently, applying the right combination of fact-gathering devices is vital to all litigations. The tools outlined above are some but definitely not all of the available ways a litigant can obtain the relevant information necessary to craft a winning litigation strategy. ▲

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