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# Pre-Trial Discovery Designed to Prepare for Dispositive Motions, Settlements, or Trials



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## CLE PRESENTATION

## PRE-TRIAL DISCOVERY DESIGNED TO PREPARE FOR DISPOSITIVE MOTIONS, SETTLEMENTS OR TRIALS

### I. Pre-trial Strategizing: Discovery, Preservation, Exhibits

A. Discovery

1. The writer's favorite law professor used to like to say, as to modern pretrial discovery: "The whistle is bigger than the engine", i.e., discovery, which used to be a small or non-existent part of litigation, has now become bigger than the litigation itself.

2. Purposes for discovery - in no particular order.

   a. Preparation for Trial.

   b. Hoping to obtain admissions or other evidence that would support, or if necessary, defend against, a Motion for Summary Judgment.

   c. Evaluating your case for possible settlement.

   d. Related to all of the above, evaluating the strength of your witnesses and of the opposing party's witnesses, as well as the strength or weakness of the evidence on both sides.

   e. Preventing surprise, at trial, to either you or your client(s) or both.

   f. Obtaining materials that would help you with motions other than summary judgment, for example, motions *in limine,* motions to join a necessary party, or to make third-party claims, i.e., bring additional parties into the case.

3. Forms of Discovery.

   a. The type of case, and the facts and applicable law of your case, will determine which forms of discovery to take, and which ones will be Most important in your case.

   b. Almost without exception, in every case, you will make a demand for documents from the other side.

i. The purpose of doing so is pursuant to all the reasons for doing pre-trial discovery, such as to prepare for trial or motions or to evaluate your case for settlement.

ii. Sometimes (not often enough), the documents produced will include a "smoking gun", something that you are not expecting, but that will be particularly helpful in establishing your case or, if you are representing the defendant, defending against the plaintiff's case.

iii. As would be true in all aspects of discovery, because of the liberal discovery rules, you are not limited to demanding documents that would be admissible at trial; you can also demand documents that, while not admissible themselves, could lead you to documents or other evidence which would be admissible at trial.

iv. You should err on the side of broad discovery demands which, if complied with, would give you a large number of documents which will be consistent with all of the goals of discovery.

v. If the other side does not produce documents which you expect that they must have in their possession and control, or you are otherwise dissatisfied with what is produced, be aggressive in demanding the rest of the documents to which you are entitled and, if necessary, be ready to make the appropriate motion to the Court.

vi. As for document requests which you receive, while you have an ethical obligation to produce all responsive documents in the possession or control of you or your client, except for those documents which are privileged, you are not required to produce documents that were not requested.

vii. Consistent with the previous advice, most of the time the only basis you will have for refusing discovery, and you must be ready to justify it, is if one of the privileges apply, such as attorney/client, Fifth Amendment right not to incriminate yourself, and a handful of other privileges.

c. In an appropriate case, you can demand and be entitled to medical records which are relevant to the prosecution or defense of the case.

i. While certain medical records may not be discoverable, if not relevant to the case, if the other party has put their medical condition as a basis of their claim or defense, then you are entitled to the relevant medical records.

ii. If necessary, the opposing party will have to sign the necessary medical waivers so that you can obtain those medical records, to comply with HIPPA.

iii. In appropriate cases, particularly personal injury or medical malpractice, the other side, which almost always is going to be an insurance company, is entitled to an "IME", which is an "Independent Medical Examination", even though it will be conducted by a physician or physicians who is being paid by the insurance company to, whenever possible, either downplay the extent of the plaintiff's injuries, or, determine and report that the injuries being sued for were either a pre-existing condition, or were caused by someone or something other than your client.

iv. With the appropriate certification, medical records, as well as other records (for example, educational records), can be certified and admitted into evidence, without having to call a witness with personal knowledge of those records.

4. Depositions

a. The most common depositions will be party depositions.

i. Those depositions serve multiple purposes and benefits.

ii. You may be fortunate enough to obtain admissions from the party witness that will be useful in motion practice and the trial, particularly since testimony from a party witness is an admission that you can use at trial, and as will be discussed in another point in these materials, does not run a foul of the hearsay evidence rule.

iii. Party witness depositions are also useful not only for all the other purposes of discovery, but particularly to evaluate or determine how strong a witness the opposing party or parties would be at trial.

iv. Among other things, a party deposition may well give you materials which will be useful in cross-examining the opposing party at trial and, in some situations, determining that you will call the opposing party as a witness on your case.

v. Related to the previous point, depositions, particularly of opposing party, "locks in" their testimony, so that presumably they will be unable to "change their story" at trial, unless they have a very good explanation for doing so.

vi. Consistent with other purposes of discovery, not only will party depositions assist you in evaluating your case for settlement, but may also make the other side realize, upon listening to their own party witness' testimony, that they have vulnerabilities which may incentivize them to try to reach a settlement with you.

vii. Also consistent with the other forms of discovery, party witnesses may well point you in the direction of other witnesses who have key evidence to give at trial, and who should also be deposed. For example, an appropriate question when a witness says he or she does not know the answer, would be to then ask : "Who would know that information?".

b. Non-party depositions

i. In some cases, non-party witnesses, for example, a witness to an accident in a personal injury case, may be even more valuable than the deposition of a party witness.

ii. As with party witnesses, you are "locking-in" that witnesses' testimony.

iii. You are not only locking in their testimony if they testify differently at trial but, if they are unavailable for trial (for example, if they die, or leave the jurisdiction and cannot be found), you would be allowed to read into evidence any portion of that non-party witnesses' deposition that you wanted, while, at the same time, opposing counsel could also read portions of the non-party witness' deposition into the record.

iv. As with party depositions, a non-party witness, even as to facts or information that they do not know, may well tell you who would know that information (so you can depose them), or where you could find documentary or other evidence that could be used at the trial or in motion practice in your case.

c. Depositions of Experts

   i. New York rarely allows you to depose an expert witness of either side.

   ii. If you are in a jurisdiction other than New York (for example, New Jersey), you may be allowed to take the expert's deposition.

   iii. If you have the opportunity to do so, in most cases it will be particularly worthwhile to take the expert witnesses' deposition, so that you will be able to evaluate that witnesses' testimony, and prepare for cross-examination, as well as to prepare your own expert.

5. Written Interrogatories.

   a. In many cases, you will decide that it is better to just go to party depositions, rather than spend the time and money of doing interrogatories.

   b. One of the obvious drawbacks of interrogatories is that, realistically, the answers to those interrogatives will be drafted by the opposing attorney, even though they will be signed and have been notarized by the other party.

   c. On the other hand, especially in a "low budget case", and especially if there is a relatively small amount of money involved or at issue in the case, it may well be economically beneficial to take interrogatories in lieu of depositions.

   d. Somewhat contrary to the above advice, you may determine, in certain cases, that even though you are going to take depositions, it would be helpful for you in preparing for those depositions if you served interrogatories, and received the answers before the deposition, in order to better prepare you for taking the other party's deposition.

e. As with other discovery devices, answers to interrogatories can be used at trial, in motion practice, and in evaluating the strength of both your case and the opposing side's case.

6. Demand for Bill of Particulars

   a. Technically, a demand for a bill of particulars is not a discovery device, but instead is considered an expansion of the complaint or the counter-claim.

   b. The response to a demand for a bill of particulars, which is called a bill of particulars, should serve all of the other purposes of pre-trial discovery, plus give you more insight into the allegations of the other side.

   c. In New York, if you serve a demand for a bill of particulars in a personal injury case, then you are not allowed, except with court permission, to also serve written interrogatories.

7. Subpoenas

   a. The most common subpoenas will be upon a non-party for documents, such as bank or brokerage records ,or medical or educational records

   b. As discussed previously, certain types of documents produced, particularly medical or educational records, can be certified so that they will be admissible in motion practice and at the trial, without having to call an employee or custodian of those records as a witness.

   c. The other type of subpoenas will be to take the deposition of a non-party witness.

      i. As a result of the change of the law in New York a few decades ago, you no longer need court permission to take a non-party deposition; you can draft, sign and serve an "attorney's subpoena". If the non-party or the opposing party wants to quash the subpoena, they are the ones who have to make an affirmative motion to ask the court to do so.

d. Often, when you seek to take a non-party deposition, you will also want that witness to produce documents before or at the deposition. That is called a *subpoena duces tecum.*

e. Documents produced and testimony given as a result of a subpoena serves all the other purposes of pre-trial discovery ,such as preparing for trial or motion practice, and evaluating the strength of your case and the opposing party's case.

f. If a non-party witness is deposed, and of course, you will make certain that the deposition transcript is later signed and notarized as noted previously, if that witness is unavailable for trial if, for example, the witness had died or has left the jurisdiction and cannot be subpoenaed for trial, you can read into the record those parts of the non-party witness' deposition that you want to use, while opposing counsel will be able to do the same.

g. As to subpoenaed documents or deposition witnesses, the opposing party, who presumably does not represent that non-party witness (although the attorney could be retained to do so), is extremely limited if they try objecting to the production of documents or questions asked of that non-party witness.

h. A non-party witness can also be subpoenaed to testify at the trial of your case:

   i. You can use an attorney's subpoena. However, if the witness fails to appear, it is not a contempt of court, since you signing a subpoena is not the equivalent of violating a court Order.

ii. For that reason, either in lieu of an attorney subpoena or, if the witness fails to appear for a deposition or trial in response to an attorney's subpoena, you can have the judge So Order the subpoena, so then it does have the force of a court Order, meaning that if the witness fails to comply, they could be arrested and forced to comply, and held in contempt.

8. Income Tax Returns

a. Income tax returns are particularly relevant to divorce and Family Court cases that involve any type of support, as well as related issues, such as who is the "monied spouse", for such purposes as awards of attorneys fees.

b. Income tax returns are also relevant and discoverable in any cases claiming lost income, particularly in cases where the plaintiff alleges that as a result of the accident he or she lost earnings, either temporarily or permanently.

c. The one problem, at least theoretically, is that just by receiving a produced copy of an income tax return does not necessarily establish that that is the income tax return that was filed.

i. In those cases when you have any doubt whatsoever that the produced copy of the tax return is not a copy of the income tax return that was actually filed, you can require the other party to sign a form provided by the IRS, whereby the IRS will give you a photocopy of the actual tax return that was filed.

ii. Quick aside, when the author of these materials has exercised that right, in his experience, the copies of the income tax returns provided by the IRS were the same as the ones provided by the other party in discovery.

d. Somewhat related to the prior point, if a party produces an income tax return, you can hold them to the contents of that income tax return, in motion practice, or at trial, unless they can establish that after producing a copy of the income tax return, they filed an amended income tax return; of course, you would then demand immediate production of the amended income tax return.

B. Preservation

1. Preservation is more an obligation on the party and attorney who are producing or will have to produce documents, than on the person seeking discovery.

2. Even if the other side has not sent you a demand that you preserve all documents relevant to their dispute, if it becomes obvious, even before litigation is filed, that it is likely that litigation will ensue, you must put a "litigation hold" on all relevant documents.

3. Nevertheless, as soon as you become aware that you may be in litigation with another party, it behooves you to send to the opposing party, or if an attorney has appeared for them, or has been representing them in connection with the dispute, to their attorney, a "litigation hold" on them, so that they will be obligated to preserve all relevant documents.

4. Spoliation

a. If either side fails to either preserve documents that are relevant to the case, and even worse, deliberately destroy them, then there will likely be a claim of Spoliation.

b. In order for there to be spoliation, the party or attorney who has possession of the documents has to have known, or should have known, that litigation was imminent, and that those documents would be relevant or discoverable.

c. If the Court finds spoliation, there are several remedies that the Court can exercise in order to punish the spoliator or to "level the playing field".

i. In an extreme case, where the documents which have not been retained, or have been destroyed, are crucial for the opposing party, the Court can and will dismiss the Complaint (if it was the plaintiff or their attorneys who were guilty of spoliation), or strike the Answer and award a Default Judgment to the plaintiff, if it is the defendant and its attorneys who are guilty of spoliation.

ii. In the more typical case, the Court will not dismiss a Complaint or strike an Answer, but may preclude the offending party from attempting to prove certain aspects of its case, because as a result of its spoliation, it has made it difficult or impossible for the other side to oppose on that issue.

iii. Even if the court does not take any drastic action against the spoliator, the spoliator must understand that, even without a Court Order, if the spoliating party, at the time production is demanded, claims that the document or the documents doesn't exist , or has been lost or destroyed (at a time when the party that did so had no reason to know that the documents would be relevant to the litigation), the party who claims that the demanded documents have been lost or destroyed or are non-existent, cannot "suddenly" find those documents and try to use them at trial; they will be precluded from doing so.

iv. In less extreme cases, the Court may just give an instruction to the jury (or in a bench trial, in effect, give it to itself), that the jury should assume that because the party either failed to preserve or actually destroyed a relevant document, that had they not done so, that document would be unfavorable to their case, and the jury (or the judge if it is a bench trial), should assume that the lost or destroyed document would have been detrimental to the case of the spoliator, and take that into account in rendering its verdict or award.

C. Exhibits

1. The discovery that we have been talking about should result in your obtaining documents that you can use as Exhibits in motion practice or at the trial of the case.
2. By producing those documents yourself to the other side, thereby not trying to hide them and showing that they are in your custody or control, you will be able to use documents that you produce as exhibits in motion practice and at trial.
3. While, because of the modern broad discovery rules, you can seek discovery as to documents which would not be, in and of themselves, admissible (for example, if they would be barred by the hearsay rule), they are still discoverable if they could lead you to admissible evidence, i.e., if they could lead you to, among other things, documents that would be admissible in motion practice or at trial.
4. In fact, when you are doing your discovery, and even though the trial may be months or years away, you still should be seeking documents that can be used as exhibits in the litigation.
5. In fact, as part of your pre-trial discovery, you should be pressing for production of documents which can or may be usable as exhibits in the litigation.

III Authentication of Social Media, Texts, Emails: Changing Problems and Solutions

A. Background

1. Nearly half of the 7.7 billion people in the world are on social media, and each of those users has an average of 8 different accounts.

2. The rate is even higher in the U.S., with around 70% of the population active on social media for an average of 2 hours every day. That is why it is no surprise that more and more social media evidence is showing up more frequently in litigation.

B. Various Contexts in which social media, texts, and emails are relevant.

1. The ways that these forms of communication come up and can be used in litigations is virtually endless.

2. Among the areas where it frequently comes up and is used are in matrimonial cases.

a. Probably the most important example is when someone, who is in the process of getting divorced, puts online on Facebook or one of the other social media, information or boasts about how well he or she is doing financially, or how luxurious they are living, such as taking fabulous and expensive vacations, at the same time as they are "pleading poverty" in their divorce case.

b. Consistent with the previous example, there are numerous cases, bankruptcy and others, where the financial condition of the individual is at issue, yet they foolishly go online boasting about how well they are doing financially, or how luxuriously they are living, at the same time as they are swearing in the Bankruptcy Court, or to judgment creditors and others, that they are insolvent.

c. Also in the family law area, both in divorce and in Family Court, there are often issues involving custody and visitation of minor children. Nevertheless, people often go on social media and boast about illicit relationships or multiple simultaneous relationships, at the same time as they are trying to portray themselves as responsible faithful individuals, who can be trusted with the care of their minor children.

3. Emails and Texts

   a. Somewhat different from social media, emails and text messages are communications between individuals which may be directly relevant to the issues involved in a litigation.

      i. As with letters, handwritten notes, and other writings, what is written in emails or text messages may be helpful, if not crucial, in proving that the sender made certain statements which they are now trying to disavow or avoid in the litigation, or that they received written notice or information which they are now contending that they never knew.

C. Authentification of Social Media

1. Social media is somewhat different from text and emails since these are "blanket communications" from the sender to all of his followers or friends on Facebook and other social media.

2. As stated above, a litigant frequently foolishly and inexplicably, makes statements, shows photographs, or otherwise transmits information "to the world", contrary to their position and possibly sworn statements in an ongoing litigation.

3. While any litigator will tell you that you rarely find a "smoking gun" in produced documents, you may well receive your "smoking gun" on social media, provided that you can prove that the person you are litigating against is the same person who published or communicated that social media post.

4. With the above in mind, it is frequently an evidence question in a litigation whether you can prove that the same person who published the relevant

social media message is the same person with whom you are currently in litigation.

5. Fortunately, for the attorney who is attempting to put into evidence posts from social media, most courts have "set the bar very low" to get that post into evidence, leaving it to the trier of fact (the jury in a jury case) to determine whether, in fact, the party involved in the litigation is the one who made the post and, if so, the relevance to that post to the litigation.

6. Ways to prove that your opposing party is the one who made the relevant social media post.

    a. As with several aspects of litigation, there are numerous ways that you may be able to establish that your opposing party is the one who made the post on social media.

    b. Perhaps the most obvious, of course, it will not always work, is to confront that party, either at a deposition or on the witness stand, with that social media post, with the hope that they will acknowledge that they were the author of that post.

    c. Failing that, there are several other ways to establish that your opponent is the one who made the social media post.

        i. As with most aspects of introducing evidence, there are several methods to establish that the person against whom you are litigating is the author of the post, despite his or her denial thereof in the litigation.

        ii. It is becoming more and more common to use experts who will be able to testify, from their knowledge and experience, that they have determined that the social media post involved was, indeed, posted by your opposing party.

        iii. There are various forms of circumstantial evidence that can be used in proving that your opponent was the author of the relevant social media post.

(1) If the post is, for example, a website or Facebook or other type of social media, there maybe proof that the author of the social media post replied to responses or comments regarding the post, which responses could only have been made, or likely were made, by your litigation adversary.

D. Text Messages

1. Text messages present problems different from authenticating email and social media.
2. Apropos to that, litigants who have received text messages sometimes complain or argue that the sender of the text message deliberately sent the communication via text message, rather than email, since it may be harder to verify and to reproduce for purposes of offering into evidence.
3. Apropos to the previous comment, courts will usually accept a photograph of a text message, to be offered into evidence, provided that certain conditions are present.
   a. The person who took the photograph, who presumably would be the person on the witness stand offering that text message as an exhibit, can honestly say, from their personal knowledge, that they not only took the photograph, but that this photograph accurately reflects the text message that was photographed, and that the witness confirm that he or she maintained custody of that photograph until it is offered into evidence, and that it has not been altered or otherwise changed since the time that they took that photograph.
   b. The next issue is authenticating that text message, i.e., proving that your adversary is the one who sent that text message.
      i. As with other aspects of internet and telephone transmissions, the sender can be proved by circumstantial evidence.

ii. Probably the best circumstantial evidence of the sender is the telephone number associated with that text message, provided that the witness can testify or verify, from his or her own personal knowledge, that that is the telephone number of the purported sender of the text message.

iii. Another way of proving the sender, through circumstantial evidence, is that the information or type of communication is consistent with the knowledge of that sender, or the way he or she speaks or writes.

iv. Still another form of circumstantial evidence, probably stronger than the previous, is if the sender of the text message responded to the recipient of the text message, again, in a way consistent with the knowledge or manner of communicating of that sender.

E. Authentication of emails

1. As you may have inferred, it should be easier to put emails into evidence than texts messages, since with text messages, you usually have to rely on a photograph of the text message and then establish not only the origin of the text message, but that the photograph accurately reflects what was there and that the photograph has not been altered since then.

2. Another advantage of emails is that in modern discovery, it is likely that in response to a request for documents, opposing counsel will produce numerous, sometimes hundreds, thousands, and in some cases more than that, of emails.

3. If the emails were sent or received by the opposing party, and were produced by your adversary in discovery, there should be little issue in having them introduced into evidence, at least as to authenticity.

a. Of course, the email will still have to otherwise be admissible, such as it would have to be relevant, and not violation of a rule of evidence, especially the Hearsay Rule.

b. It may be more challenging if an email or emails produced were not offered or received by opposing party but, for example, they came into possession to the opposing party in some other way, such as if they were copied on an email sent by someone else.

i. If produced of emails were not authored by your client or an opposing party is relevant, if not important, to the outcome of your case, you will have to use other methods (assuming opposing counsel objects to its admission) before you are able to put it into evidence.

4. Ways to authenticate emails in order to put them into evidence.

a. As with most types of modern communications covered by this part of the materials, there are innumerable ways that you may be able to authenticate an email and put it into evidence.

b. Perhaps the most obvious example, and consistent with much of the above, is if an opposing party acknowledges that he or she received or sent that email to a non-party to the litigation.

c. Failing that, there are several methods, which essentially are circumstantial evidence, to authenticate and put emails into evidence.

i. Similar to establishing a text message through the phone number from which the text message was sent, the email address of the sender should be a good indication of the author.

ii. However, in order to use the previous form of identification, i.e., the email address of the sender, the witness with whom you are trying to authenticate the email and put it into evidence must know, through his or her personal knowledge, that that is the email address of the purported sender of the email.

iii. Also similar to social media and text messages, if the knowledge reflected in the email or the style of communicating is consistent with what the sender knew and how he or she writes and speaks, and the witness on the stand can so identify those characteristics with the purported sender, that is still more evidence, or circumstantial evidence, that the sender is whom you say it is.

iv. Also consistent with text messages and social media, if the email is part of a string including responses from the sender, that may provide further circumstantial evidence that the author or sender of the email is whom you say it is.

d. As with social media and text messages, the courts have almost uniformly "set the bar very low" for admissibility of emails, usually leaving it to the trier of fact (jury if it is a jury trial or the judge if it is a bench trial), to make the final determination of whether the purported author or recipient is whom the party proffering the email as evidence says it is.

e. Also as with social medai and text messages, in a difficult case, and if the amount involved warrants it and your client can afford it, there are experts who could, based upon their knowledge and experience, determine the identity of the sender and receiver of an email.