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Informal Discovery: Simple Strategies for Cost-Effective Litigation

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Today more than ever, clients are justifiably concerned with managing their legal expenses. Obtaining impressive results at a reasonable cost has long been a fundamental objective of litigation, but a renewed focus on innovative discovery tools may provide even more value for our budget-conscious clients. Informal discovery, *i.e.*, uncovering factual information obtainable without a formal request to opposing counsel or an authorization from the opposing party, is a valuable precursor to formal discovery because: (1) it does not hinge on (sometimes difficult to obtain) cooperation from your opposition, where expensive and time-consuming discovery disputes may result; (2) it can be conducted at virtually any point after the potential for litigation arises, unconstrained by formal discovery schedules; and (3) it could swiftly reveal the proverbial "smoking gun" in your case, all with the assistance of an associate or paralegal, utilizing free or low-cost search tools.

Prompt investigation into the facts of your case and its key players could ultimately provide the game-changing edge in settlement negotiations or trial. Informal discovery alone may not replace the need for interrogatories, document requests, subpoenas or depositions –unless you discover something so significant that it alters the entire course of the case. In contemplating the appropriate methods of informal discovery for your case, keep the following in mind:

- The scope of informal discovery can be vast, limited only by your own creativity, time and budget. Don't forget that informal discovery should help to preserve the client's budget, not ruin it. Keep abreast of new informal discovery methods and rely on your favorites to obtain the information you need. Then feel comfortable in leaving the many other potential stones of informal discovery unturned.
- The internet is a crucial component of informal discovery. It is likely that your opposing counsel, judge, jurors and witnesses can navigate the internet, so someone on your legal team must as well. Not all information on the internet can be used as direct evidence at trial, but it may lead you to admissible evidence and create significant opportunities for cross-examination and impeachment.
- Take the high road and act within the bounds of your state's laws, ethical rules and your own moral values in conducting informal discovery. Follow your gut, know your own limits, and consider hiring a professional if a need arises to engage in more sophisticated fact investigation.

Examples of Internet-Based Search Methods

Online Court Dockets

Many states offer online docket searches of every circuit and appellate court in the state. Other states offer docket searches by county, district or circuit, while Pacer offers access to federal ECF dockets. Search online court dockets for the key players in your case – including state and federal courts in the locales where any business entities operate, where the claim arose, and where key witnesses reside. The following are examples of docket searches yielding facts that altered the entire course of the case:

- In a commercial case involving the valuation of a privately-held company, the opposing side claimed the company was worth huge sums. However, the principal of the company previously testified in his divorce action that the company was worthless, revealed after initially searching the local court docket.

- In a probate case involving a claim to an inheritance by a distant heir, the heir's entitlement was based on, among other things, a purported close relationship with the decedent. However, the heir had previously alleged in another adversarial court action that the decedent owed him thousands of dollars for mismanaging his own parents' estate, as established by a federal court docket.
- In a medical malpractice case alleging wrongful death, the decedent's purported widow was the named plaintiff and served as the representative of the decedent's estate. However, the decedent's "widow" had legally divorced him years before the alleged malpractice occurred, as evidenced by a local court docket.

Secretary of State Websites

Conducting a search on the appropriate secretary of state's website will confirm whether corporate parties are properly registered and in good standing. Although this is helpful information for drafting a complaint or answer, it could be a dispositive issue in your case on jurisdictional or other grounds. For example, in Kansas an oft-forgotten statute (K.S.A. 17-7307) prohibits foreign corporations from filing suit in state court if that company fails to comply with the secretary of state's registration provisions. A cursory review of the secretary of state's database has provided the evidence necessary for this author to invoke this registration provision in a motion to dismiss – promptly resulting in the plaintiff's voluntary dismissal of the case.

Social Networking Sites

Social networking sites such as Facebook and MySpace are burgeoning repositories of personal information, potentially about your own case's fact witnesses. It is astounding how many members of these sites use poor judgment in filtering what personal information to make publicly available. Particularly in personal injury or employment cases, you may find that a party's updates about their social life (and photographs or video documenting those activities) could be critical to the veracity of their allegations in the lawsuit. Even if the witness is astute enough to restrict his or her information and photos so that strangers (*i.e.*, you) cannot readily obtain information from the site, merely verifying whether the witness is a member of such site can confirm that he or she is an avid technology user, likely to have electronically stored information that can be obtained during formal discovery. Case law is rapidly evolving regarding the appropriateness of searching social networking sites to use as evidence in litigation, so be sure to conduct any searches within the boundaries of your own jurisdiction's ethical rules.

Fee-Based Searches

Finding the location of a witness and obtaining detailed information about him or her is as easy as running a fee-based internet search. For \$20 or less, services such as Accurint (www.Accurint.com) can provide extensive publicly-available data about a person. Dun & Bradstreet reports are excellent methods of obtaining financial data about companies and your law firm may already have a subscription for its services. www.dnb.com/us. Customer service representatives at some fee-based services, such as Westlaw (www.westlaw.com) Lexis (www.lexis.com) are skillfully trained to help you develop an appropriate search for their fact-investigation databases. Check with your firm's Westlaw or Lexis representative to determine what searches are included with your firm's subscription and, if not included, what the additional cost of the searches will be.

Examples of Traditional Informal Discovery

Witness Interviews

If your paralegal is the defense bar's next Erin Brockovich, train him or her on proper lay witness interview skills, keeping in mind your state's ethical and evidentiary rules. (As you might suspect, witnesses may be more candid and develop a rapport with your paralegal than they would with you anyway.) Witness interviews can be more efficient and cost effective in obtaining information than a deposition because no costly court reporter is present and no opposing counsel interrupts your questions with objections. Witness interviews not only help determine the basic facts, but also identify whose testimony is worthy of preservation in a deposition or who may be an effective witness as a story-teller at trial.

Government Records

Securities and Exchange Commission filings are available for free at www.sec.gov/edgar.shtml. Depending on your case, a FOIA request may yield useful information from a governmental division or agency. The Reporters Committee for Freedom of the Press offers a state-by-state survey regarding access to government records at <http://www.rcfp.org/ogg/index.php>.

Conversations with Opposing Counsel

If your opposing counsel has been identified either through a demand letter or initial pleadings, pick up the phone and introduce yourself to him or her. Professional courtesy goes a long way, and if you simply ask a question along the lines of "Can you give me a little background about the dispute between our clients," you may find that a productive conversation ensues where you can obtain more details to assist in your informal or formal discovery efforts. If you believe an informal exchange of key documents may be beneficial, ask for them during this conversation, keeping in mind that opposing counsel may expect reciprocation.

Conclusion

In today's budget-tightening litigation environment, familiarity with cost-effective discovery tools is invaluable. Not every case may have the proverbial smoking gun just waiting for you to uncover it with informal discovery. But once you successfully experience the impact informal discovery can have on the outcome of a case, you will be convinced of its value – and your client's litigation budget may thank you.

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