

Table of Contents

CHAPTER 1. INTRODUCTION

- § 1:1 Importance of pretrial discovery
- § 1:2 Need to improve attorneys' discovery skills
- § 1:3 Preview of analysis of pretrial discovery

CHAPTER 2. STRATEGIC PLANNING

- § 2:1 Introduction
- § 2:2 Need for strategic planning of pretrial discovery
- § 2:3 —Scope of permissible discovery—Relevance and proportion
- § 2:4 —Necessity for selective discovery
- § 2:5 Step-by-step process of strategic discovery planning
- § 2:6 —Potential theories
- § 2:7 —Identification of client's priorities
- § 2:8 —Isolation of compatible theories
- § 2:9 ——Identification of essential legal elements
- § 2:10 —The types and quantity of information needed to generate the necessary evidence
- § 2:11 —Identification of sources (persons and entities) of necessary information
- § 2:12 —Choice of discovery devices suitable for probing sources
- § 2:13 —Choice of discovery devices for probing sources—
 Informal devices
 - Personal, face-to-face interviews
 - Telephone and teleconferencing interviews
 - Interviews by private investigator
 - Requests for information from entities
 - Internet search
- § 2:19 —Formal devices
 - Depositions on oral examination
 - Depositions on written interrogatories
 - Interrogatories
 - Requests for production from parties
 - Subpoenas duces tecum for non-parties
 - Physical and mental examinations
 - Requests for admission
 - Lawsuits
- § 2:28 —Illustrative choice of discovery devices
- § 2:29 —Affordability of effective devices—Maximum expenditure and minimum budget

- § 2:30 —Optimal sequence for using devices—The two tracks
- § 2:31 —Timetable including parameters and spacing
- § 2:32 —Scheduling order
- § 2:33 Subsequent modification of strategic discovery plan
- § 2:34 Use of computers in developing and modifying strategic plan
- § 2:35 Strategic planning checklist

CHAPTER 3. DISCOVERY TACTICS IN THE PLEADING STAGE

- § 3:1 In general
- § 3:2 Opening pleadings
- § 3:3 Responsive pleadings
- § 3:4 Stays of discovery

CHAPTER 4. INFORMAL DISCOVERY

- § 4:1 In general
- § 4:2 Exchanges of information with other attorneys
- § 4:3 Obtaining information by joining litigation groups
- § 4:4 In-person interviews by attorney
- § 4:5 —Conducting interview
- § 4:6 Telephonic or teleconferencing interview by attorney
- § 4:7 Reducing witness's oral statements to writing
- § 4:8 —Witnesses who refuse to be recorded
- § 4:9 —Your client or friendly witnesses legally identified with client
- § 4:10 —Other friendly witnesses
- § 4:11 —Neutral or hostile witnesses willing to give written statement
- § 4:12 Collecting documents from client
- § 4:13 Visiting scene of underlying events
- § 4:14 Using private investigators
- § 4:15 Requests for information—Government agencies
- § 4:16 —Physicians or hospitals
- § 4:17 —Other entities

CHAPTER 5. MANDATORY PREDISCOVERY DISCLOSURE

- § 5:1 In general
- § 5:2 The law: The original 1993 amendments to Federal Rule 26 and the current version of the Rule
- § 5:3 The law: The 1993 amendments to Federal Rule 26—Initial phase of mandatory disclosure
- § 5:4 —Middle phase of mandatory expert disclosure
- § 5:5 —Final phase of mandatory pretrial disclosure

TABLE OF CONTENTS

- § 5:6 Duty to supplement mandatory disclosures; rebuttal reports
- § 5:7 Opt-outs from the 1993 amendments
- § 5:8 Expanded mandatory predisclosure disclosure
- § 5:9 State law
- § 5:10 The tactics
- § 5:11 —Tactics for party seeking disclosure
- § 5:12 —Tactics for party making disclosure
- § 5:13 The controversy over the attorney's role in drafting required expert reports

CHAPTER 6. TACTICS FOR DEPOSING ATTORNEY

- § 6:1 In general
- § 6:2 Basic planning for depositions
- § 6:3 —Whether to depose particular witness
- § 6:4 —Purposes to pursue
- § 6:5 —Place
- § 6:6 —Time
- § 6:7 —Who to have in attendance
- § 6:8 —Recording methods
- § 6:9 ——Telephone
- § 6:10 ——Videotape and remote depositions
- § 6:11 ——Satellite depositions
- § 6:12 Internet depositions
- § 6:13 Scheduling depositions
- § 6:14 —Phase No. 1: Coordinating with principals on your side of case
- § 6:15 —Phase No. 2: Coordinating with neutral and opposing principals
- § 6:16 ——Exclusively informal arrangements
- § 6:17 ——Informal arrangements followed by formal service
- § 6:18 ——Formal service without prior informal agreement
- § 6:19 ——Formal meet and conferral requirements
- § 6:20 Drafting notes for deposition
- § 6:21 —Step No. 1: Choosing format for notes
- § 6:22 —Step No. 2: Determining substantive content of notes
- § 6:23 ——Introductory amenities
- § 6:24 ——Stipulations
- § 6:25 ——Deponent's background
- § 6:26 ——Facts relating to historical merits and impeachment
- § 6:27 ——Concluding remarks
- § 6:28 —Step No. 3: Deciding upon sequence of topics in notes
- § 6:29 ——Gross sequence of topics

- § 6:30 — Placement of impeaching facts
- § 6:31 — Step No. 4: Preparing final draft of notes
- § 6:32 — Entries for your questions
- § 6:33 — Entries for anticipated objections
- § 6:34 Conferring before hearing
- § 6:35 Conducting deposition hearing
- § 6:36 — Physical layout of deposition room
- § 6:37 — Attorney's role at hearing
- § 6:38 — Court reporter's role
- § 6:39 — Spectator's role
- § 6:40 — Deponent's role
- § 6:41 — Opposing attorney's role
- § 6:42 — Private conferences with deponent
- § 6:43 — Objections to questions
- § 6:44 — Instructions not to answer question
- § 6:45 — Cross-examination of deponent
- § 6:46 — Descriptions of deposing attorney's conduct on the record
- § 6:47 Follow-up after hearing
- § 6:48 — Preparation of transcript
- § 6:49 — Review of transcript

CHAPTER 7. DEPOSITION TACTICS FOR OPPOSING ATTORNEY

- § 7:1 In general
- § 7:2 Preclusion of deposition
- § 7:3 — Legal basis
- § 7:4 — Tactical reasons
- § 7:5 — Motion drafting
- § 7:6 Protective orders changing conditions of deposition
- § 7:7 Whether to attend hearing
- § 7:8 Preparation
- § 7:9 — Selection of deponent
- § 7:10 — Preconference letter
- § 7:11 — Acquisition of deponent's statement
- § 7:12 — Predeposition conference with deponent
- § 7:13 — Administrative arrangements for conference
- § 7:14 — Agenda for conference
- § 7:15 — Interim between conference and start of deposition
- § 7:16 Attendance at hearing
- § 7:17 — Monitoring principals' demeanor
- § 7:18 Stipulations
- § 7:19 Clarifying questions
- § 7:20 Objections
- § 7:21 — Legal right
- § 7:22 — Tactical advisability

TABLE OF CONTENTS

- § 7:23 —Phrasing objections
- § 7:24 Instruction not to answer
- § 7:25 Supervision of deponent
- § 7:26 Cross-examination of deponent
- § 7:27 Conference with deponent
- § 7:28 Discussions “off the record”
- § 7:29 Premature termination of hearing
- § 7:30 Conclusion of hearing
- § 7:31 Action after hearing
- § 7:32 Replacement of witnesses
- § 7:33 Settlement negotiations
- § 7:34 Suppression of transcript
- § 7:35 Preparation of transcript
- § 7:36 Resumption of questioning
- § 7:37 Discovery of perjury by the deponent

CHAPTER 8. INTERROGATORIES

- § 8:1 In general

I. TACTICS FOR ATTORNEY SERVING INTERROGATORIES

- § 8:2 Mandatory disclosure of “core” information—Court-ordered interrogatories
- § 8:3 Inclusion of all interrogatories in one set
- § 8:4 Drafting interrogatories
- § 8:5 —Canned interrogatories
- § 8:6 —Title
- § 8:7 —Identification of addressee(s)
- § 8:8 —Preface
- § 8:9 —Instructions
- § 8:10 —Definitions
- § 8:11 Compliance with general legal writing norms
- § 8:12 Court rules and standing orders
- § 8:13 Content of body of interrogatories
- § 8:14 —Source interrogatories
- § 8:15 —Substantive interrogatories
- § 8:16 —Contention interrogatories
- § 8:17 Conclusion
- § 8:18 Signature
- § 8:19 Certificate of service
- § 8:20 Expert review of draft
- § 8:21 Service
- § 8:22 Extension of time for opponent to answer
- § 8:23 Reaction to opponent’s response to your interrogatories
- § 8:24 Motion to strike all or part of opponent’s response
- § 8:25 Motion to compel

- § 8:26 Supplemental interrogatories
- § 8:27 Pretrial rulings

II. TACTICS FOR ATTORNEY RESPONDING TO INTERROGATORIES

- § 8:28 Review and interpretation
- § 8:29 Client and expert review
- § 8:30 How to respond to interrogatories
- § 8:31 —Option No. 1: Ignore interrogatories
- § 8:32 —Option No. 2: Informal contact with opposing attorney
- § 8:33 —Option No. 3: Motion for extension
- § 8:34 —Option No. 4: Objections
- § 8:35 ——Legal grounds
- § 8:36 ——Tactical advisability
- § 8:37 ——Techniques
- § 8:38 —Option No. 5: Records furnished in lieu of answers
- § 8:39 —Option No. 6: Partial answers
- § 8:40 —Option No. 7: Complete answers
- § 8:41 ——Style
- § 8:42 ——Substance
- § 8:43 —Option No. 8: Answer adding favorable information
- § 8:44 Finalization of interrogatory answers
- § 8:45 Supplemental answers
- § 8:46 Motion to compel

CHAPTER 9. PRODUCTION REQUESTS

- § 9:1 Introduction
- § 9:2 Mandatory disclosure of “core” information—Court-ordered requests for production
- § 9:3 Tactics for attorney seeking production
- § 9:4 —Which documents and objects to request
- § 9:5 —Choosing source
- § 9:6 —The opponent’s duty of preservation
- § 9:7 ——Letters notifying the opponent of the duty to preserve
- § 9:8 ——Court order prohibiting destruction of documents
- § 9:9 —Production request versus alternative discovery means
- § 9:10 ——Option No. 1: Inducing client or witness to demand their statement from opposing attorney
- § 9:11 ——Option No. 2: Obtaining documents from attorneys who have litigated similar cases
- § 9:12 ——Option No. 3: Exchange of documents with opposing attorney
- § 9:13 ——Option No. 4: Meet and confer about electronically stored information (ESI)

TABLE OF CONTENTS

§ 9:14	— — Option No. 5: Creation of documents depository
§ 9:15	— — Option No. 6: Subpoena duces tecum served on opposing party
§ 9:16	— — Option No. 7: Subpoena duces tecum served on nonparty
§ 9:17	— — Option No. 8: Petition for disclosure of grand jury material
§ 9:18	— Planning production request
§ 9:19	— — Prefatory discovery
§ 9:20	— — Site and time for production
§ 9:21	— — Request for acts other than simple production, inspection, and copying
§ 9:22	— — — Tests
§ 9:23	— — — Entry upon party's land
§ 9:24	— Drafting request
§ 9:25	— Evaluation of opposition's response to request
§ 9:26	— Negative response; deciding whether to move to compel
§ 9:27	— — Motion to compel
§ 9:28	— Affirmative response
§ 9:29	— — Opposition's production of privileged material
§ 9:30	— — Initial inspection
§ 9:31	— — Subsequent indexing
§ 9:32	— — Reviewing documents to identify production misconduct
§ 9:33	— — Further discovery to determine whether misconduct has occurred
§ 9:34	— — Informal meetings to resolve dispute over production
§ 9:35	— — Motion to compel or for sanctions
§ 9:36	Tactics for attorney receiving production request
§ 9:37	— Preventative techniques
§ 9:38	— — Creation of data map of the client's information, including information maintained in a cloud
§ 9:39	— — Promulgation of general litigation hold procedures
§ 9:40	— Construing document request
§ 9:41	— Implementing litigation hold
§ 9:42	— Compilation of documents
§ 9:43	— Possible responses to request
§ 9:44	— — Option No. 1: Negotiations with opposition
§ 9:45	— — Option No. 2: Request for more time to respond
§ 9:46	— — Option No. 3: Protective order
§ 9:47	— — Option No. 4: Objections
§ 9:48	— — Option 4: Objections—The requested information is not reasonably accessible
§ 9:49	— — Option No. 5: Production
§ 9:50	— — — Deleting metadata

CHAPTER 10. PHYSICAL AND MENTAL EXAMINATIONS

- § 10:1 In general
- § 10:2 Tactics for attorney seeking examination
- § 10:3 —Determining whether examination permitted
- § 10:4 —Deciding whether examination necessary or advisable
- § 10:5 —Choosing time and place for examination
- § 10:6 —Selecting expert to advise on and conduct examination
- § 10:7 —Contracting with expert
- § 10:8 —Initial consultation with expert
- § 10:9 —Seeking stipulation to examination
- § 10:10 —Moving for order for examination
- § 10:11 —Presenting oral argument on motion
- § 10:12 —Drafting the court order
- § 10:13 —Preparing expert to conduct examination
- § 10:14 —Conducting examination
- § 10:15 —Drafting and amending report
- § 10:16 —Seeking reexamination
- § 10:17 —Requesting sanctions
- § 10:18 Tactics for examinee's attorney
- § 10:19 —Contacting expert
- § 10:20 —Receiving request for stipulation to examination
- § 10:21 —Consulting with examinee and your expert about request
- § 10:22 —Deciding how to respond to opposing attorney's request
- § 10:23 —Contacting opposing attorney
- § 10:24 —Resisting opposing attorney's motion for examination
- § 10:25 —Notifying examinee of stipulated or ordered examination
- § 10:26 —Conferring with opposing examiner before examination
- § 10:27 —Conferring with examinee before examination
- § 10:28 —Aiding examinee during examination
- § 10:29 —Debriefing examinee after examination
- § 10:30 —Other post-examination steps
- § 10:31 —Preparation of report
- § 10:32 —Report prepared by opposing examiner
- § 10:33 —Retesting examinee
- § 10:34 —Suppression of report and testimony by opposing expert
- § 10:35 Deposing the examiner
- § 10:36 Calling the examiner as a witness at trial

TABLE OF CONTENTS

CHAPTER 11. REQUESTS FOR ADMISSIONS

- § 11:1 In general
- § 11:2 Tactics for requesting party
- § 11:3 —Whether to request admissions
- § 11:4 —When to request admissions
- § 11:5 —How to draft requests
- § 11:6 —Whether to combine with interrogatories
- § 11:7 —Transmitting requests to opponent
- § 11:8 —Challenging sufficiency of opponent's response
- § 11:9 —Resisting withdrawal or amendment of admission
- § 11:10 —Post-trial recovery of costs of proving proposition
- § 11:11 Tactics for responding party
- § 11:12 Motions in limine to bar evidence relevant to the admitted fact
- § 11:13 Tactics for responding party—Option No. 1: Complete admission
- § 11:14 —Option No. 2: Partial denial—Partial admission
- § 11:15 —Option No. 3: Outright denial
- § 11:16 —Option No. 4: Denying on basis of lack of information
- § 11:17 —Option No. 5: Objecting
- § 11:18 —Option No. 6: Negotiating for extension of time to respond
- § 11:19 —Option No. 7: Motion for enlargement of time to respond
- § 11:20 —Permission to file late response
- § 11:21 —Withdrawal or amendment of admission

CHAPTER 12. DISCOVERY LAWSUITS

- § 12:1 In general
- § 12:2 Tactics for attorney filing separate suit to obtain discovery
- § 12:3 —Bills in equity for discovery
- § 12:4 —Freedom of Information Act
- § 12:5 Tactics for attorney filing separate suit to prevent discovery
- § 12:6 —Disclosure by government
- § 12:7 —Tortious disclosure by private party
- § 12:8 Discovery intervention in pending suits

CHAPTER 13. PROTECTIVE ORDERS

- § 13:1 In general
- § 13:2 General considerations: Abusive discovery
- § 13:3 General considerations: Non-abusive discovery
- § 13:4 Tactics for moving party

- § 13:5 —Discovery abuses warranting protective orders
- § 13:6 ——Stipulation to eliminate abuse
- § 13:7 —Protective orders—Standing
- § 13:8 ——Desirability
- § 13:9 ——Motion for order
- § 13:10 Tactics for party resisting motion
- § 13:11 —Moving party's failure to satisfy burden of proof
- § 13:12 —Policy considerations
- § 13:13 —Challenging procedure
- § 13:14 Administering protective orders

CHAPTER 14. SANCTIONS

- § 14:1 In general
- § 14:2 Tactics for attorney seeking sanctions
- § 14:3 —Complying with discovery obligations
- § 14:4 Party or attorney seeking sanctions
- § 14:5 —Building a record
- § 14:6 —Advisability of filing motion
- § 14:7 ——Notice of motion
- § 14:8 ——Supporting memorandum of law
- § 14:9 ——Proper request or order
- § 14:10 —Wrongful failure to comply with request or order or initial disclosure obligations
- § 14:11 —Wrongful failure to comply with request or order—
 - The sanction sought
- § 14:12 —The 1993, 2000, and 2006 E-Amendments
- § 14:13 —The 1993 and 2000 amendments—Accompanying affidavit
- § 14:14 ——Agreeing to consent order
- § 14:15 ——Oral argument on motions
- § 14:16 ——Sanctions order
- § 14:17 ——Appeal
- § 14:18 Party or attorney resisting sanctions
- § 14:19 Tactics for attorney resisting sanctions

CHAPTER 15. OTHER PROCEDURAL DEVICES

- § 15:1 In general
- § 15:2 Summary judgment motions
- § 15:3 Status conferences
- § 15:4 —Discovery conferences
- § 15:5 ——Whether to move for conference
- § 15:6 ——Drafting motion
- § 15:7 —Combined discovery and pretrial conferences
- § 15:8 Final pretrial conferences
- § 15:9 Judgment offers

TABLE OF CONTENTS

CHAPTER 16. CONCLUSION

§ 16:1 In general

APPENDICES

APPENDIX A. State Discovery Statutes and Rules

APPENDIX B. Civil Discovery Standards

Index