NBI SEMINAR—LITIGATING CASES START TO FINISH IN SOUTH CAROLINA
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DISCOVERY, DEPOSITIONS AND EVIDENCE RULES: REAL WORLD APPLICATIONS

Prepared by: Marcus Angelo Manos
Shareholder (also admitted in NC and DC)
Maynard Nexsen PC
Post Office Drawer 2426
Columbia, South Carolina 29202
(803) 253-8275
MManos@maynardnexsen.com

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The attached materials are for educational purposes only and do not constitute legal advice. In the event of a legal issue related to these subjects, the reader should not rely on these materials or the presentation but consult an attorney and receive advice based on the facts of the reader's situation.

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Introduction

Discovery and how each side conducts it often governs the outcome of a case. One obvious reason--discovery limits what can be used as evidence at trial. But civil cases, depending upon case type, result in voluntary settlement by the parties in between 66 and 90% of all cases.[1] Thus the settlement is the way the vast majority of your cases will end, no matter the civil litigation practice area. T. Eisenberg, C. Lanvers, "What is the Settlement Rate and Why Should We Care?," Cornell Law Faculty Publications, 2009, paper 203 http://scholarship.law.cornell.edu/facpub/203

Some cases will settle post-trial, on appeal, or after remand from an appeal. Only a few settlements occur at these stages. The vast majority of settlement occur during the post-pleading, discovery stage of a case. Settlements come from direct negotiations between the lawyers handling the matter of from mediation. In both instance, the client's decision on whether to settle and for how much comes largely from the facts learned in discovery preceding the settlement date.

You will not be an effective litigator if you cannot effectively use the discover tools. You need to develop a discovery plan after your initial discussion regarding the case with your client. You also need an issues list of the issues in the case and a set of trial themes that you will use to communicate the case to the fact finder. These will be fluid documents at the beginning. Issues will turn out to be uncontested or unimportant. Theme will change to reflect the evidence discovered. You must, however, have a cut-off time in mind for when the documents will be finalized to guide the preparation of the dispositive motion and trial phases of the case.[2]

Developments in discovery will guide the settlement calculous. When that calculous fails to find a solution, the products of discover will determine if a dispositive motion should succeed. The few cases still around after those two decision points, will see discovery shape the evidence that may be used at trial. In short, trial lawyers whose teams do not do a thorough effective job of planning and executed discovery are not effective litigators or trial lawyers.

[1] This DOES NOT mean the remaining cases are tried. Included in the group of cases not settled are those dismissed for lack of prosecution, where defendants are held in default, and those disposed of by dispositive motions. The percentage of civil cases tried by case type varies from 18.5% to 5%.

[2] Even after that point a major shift may require modifications, but that is often a sign that discovery was not conducted thoroughly at the front end of the case.

Finally, discovery is not a game or a place to be “cleverer” than the other lawyer. The obligations in the rules should be followed. Sanctions can include dismissal of a case or striking of an answer. *See Davis v. Parkview Apt. L.P.*, 409 S.C. 266, 762 S.E.2d 535 (2014).

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About the Author

Born in Charlotte, NC in 1960, Marcus Angelo ("Marc") Manos graduated with a B.A. in history form the University of Virginia in 1982, an M.A. in history from the University of South Carolina in1985, and a J.D., Order of the Coif, from the University of Virginia in 1988. Since 1986, as a summer clerk, then an associate and later a member/shareholder Marc practiced law with Maynard Nexsen PC and its predecessors (Nexsen Pruet, LLC and Nexsen, Pruet, Jacobs & Pollard). Marc practices in the Complex Litigation Practice Group with cases in all forms of IP litigation and some advising regarding licensing work, unfair trade practices litigation, technology project and ownership litigation, partnership and shareholder disputes including officer/director disloyalty, public utility litigation and regulatory practice, securities litigation and regulatory investigations, class actions, business valuation cases (including valuation of IP, condemnation, and divorces involving business interests), state government contracts procurement and litigation, and the defense of financial/lending institutions. Marc is Martindale-Hubbell AV rated and ranked by Chambers and Partners in Commercial Litigation.

Marc has tried cases throughout South Carolina and North Carolina, in the Southern District of New York, the District of Colorado, the Northern District of Illinois, the Southern District of Georgia, and elsewhere. Marc is admitted to the South Carolina, North Carolina, District of Columbia bars and the United States District Courts for South Carolina, Eastern North Carolina, Middle North Carolina, Western North Carolina and the District of Columbia. Marc is also admitted to the Courts of Appeal for the Fourth, Sixth and Federal Circuits and the Supreme Court of the United States.

Some of Marc's professional affiliations include the ABA (Litigation, Intellectual Property and Torts and Insurance Practice sections), South Carolina Bar (Torts and Insurance Practice, Trial and Appellate Advocacy and Government Law sections), Carolina Patent, Trademark and Copyright Law Association, Defense Research Institute, and Litigation Counsel of America.

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INITIAL CASE ACTIONS

As soon as you receive a file you need to take immediate steps to organize the case and begin preparation. Interview your client contact to get the facts of the case and its nature. Be sure to ask your contact to develop a list of persons involved in the case, including third parties. Also ask for the location, method of storage and person in charge (custodian) of hard copy documents and electronic data that touches on the case. Discuss a suspension of document/data destruction/overwrite policies and develop a notice to go out. This includes a litigation hold for individual cell phones, computers and tablets if they are used for anything related to the case and issues raised in the pleadings.

Ask your client contact to give you the most relevant documents/data and tell you who the two or three most important persons are to interview. This information will allow you to set up an issues list and a discovery plan. Depending on the scope of the case (lots of data/documents, many witnesses, out-of-state source, amount of money) you may want to have the second chair lawyer and the lead paralegal with you as you conduct these initial meetings.

DISCOVERY TOOLS OTHER THAN DEPOSITIONS

1. General Tips

When you send written discovery use Instructions and Definitions to make clear the scope of your requests and the receiving party's duties under the rules. You really don't have to repeat what's in the rules, but if you do and make it specific to the matter your opponent will have much more work in resisting a motion to compel or for sanctions.

When responding to discovery, there is no such thing as a general objection. All you are really doing is making a place holder for issue that might come later. All I ever put in the General Objections are claims of privilege and that further investigation may require amendment or supplementation.

Objections must be specific. A claim of undue burden should be established by affidavit or declaration actually describing the burden and estimating its costs. A claim for need of protective order should be set out in detail as to why production without one is harmful. A claim for outside the scope of discovery likewise must be in detail. All objections should be made to a specific interrogatory or request and developed according to what is being asked for. Objections based on privilege must

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be specifically presented or included in a log so that the other party and the court can understand the basis and the material being withheld.

Remember the scope of discovery differs from state to federal cases. In state court, the request must be limited to matters relevant to the claims or defenses of any party in the case. It is not limited to admissible evidence so long as calculated to lead to the discovery of admissible evidence. S.C.R. Civ. P. 26(b).

In federal court the same standard applies, but there is now a proportionality inquiry. Fed. R. Civ. P. 26(b). The expense and burden of the discovery must be justifiable as proportional to the needs of the case. The factors considered are "…the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

2. **Uses of Interrogatories**-

At the beginning of a case, interrogatories are useful for identifying persons with factual knowledge, custodians of documents/data, and the types of systems and retrieval software the opposing party uses to store electronic information. As a defendant you need to ask about damages calculations and amounts. As a plaintiff you need to ask about insurance coverage over the entire time period relevant to the case.

Sometimes early in the case but more often after the early stages of discovery, use contention interrogatories to understand the scope and basis of the opposing case. Contention interrogatories often lead to contentious motions practice. An interrogatory that seeks a party's position on a pure matter of law is objectionable. However, an interrogatory asking for the facts that apply to the law (i.e. what facts support your allegations x breached the contract) are allowed. Know the difference.

"Contention interrogatories ...serve an important purpose in helping to discover facts supporting the theories of the parties" and to "narrow and sharpen the issues thereby confining discovery and simplifying trial preparation." *Woods v. DeAngelo Marine Exhaust, Inc.*, 692 F.3d 1272, 1280 (Fed. Cir. 2012) A court may delay the answering of contention interrogatories until the end of discovery to reduce undue burden. *U.S. v. Berkeley Hearlab, Inc.*, No. 9:14-cv-00230-RMG, 2017 WL

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1167330, *2 (D.S.C. April 3, 2017); *Par Pharm., Inc. v. TWi Pharm., Inc.*, No. CCB-11-2466, 2012 WL 12548935, *1 (D. Md. Oct. 4, 2012). **Practice Note:** Courts

Differences between State and Federal Practice:

- In state court Rule 33 provides for seven standard interrogatories written in the rule. If you case involves an amount in controversy over $25,000, a declaratory judgment, an injunction, or is in Family Court you may use up to an additional 43 interrogatories. The court may grant more interrogatories in either circumstance for good cause show.
- In a federal case you have an initial discovery tool. Initial disclosures under Rule 26(a)(1) require an early exchange of:
  - Identity of person likely to have factual knowledge related to the case;
  - Copies or a description by category of all documents, data or tangible things the answering party plans to use in support of its case at that point in the litigation;
  - Computation of damages claimed and supporting documents/data produced
  - Insurance agreements that might cover the alleged damages
- In federal court you also have specified pre-trial disclosures under Rule 26(a)(3). Note that many of these items are tracked in the state pretrial brief Rule 16(c) and pretrial calendar Rule 16(d) optional rules.
- In state court you use interrogatories to identify experts, the topics they testify about and what they have received from counsel to review and otherwise review and any work they have done. In federal court you DO NOT ask these interrogatories about testifying experts. Instead you rely on Rule 26(a)(2) disclosures. You look foolish if you ask the interrogatories as well.

Supplemental responses: Whether your opponent include language regarding the written discovery being continuing and requiring timely supplemental answers, the rule sin state and federal court both require this. You should put into your discovery plan check points for updating your answers to written discovery and to demand same from opposing counsel. Fed. R. Civ. P. 26(e)(1)(A); S.C.R. Civ. P. 26(e). Failure to supplement may result in the material being excluded at trial. Fed. R. Civ. P. 37(c)(1). In deciding whether or not to exclude the evidence the court will consider (a) the surprise to the party; (b) ability to cure that surprise: (c) the disruption to the trial process of allowing the evidence/cure; (d) the importance of the evidence; and (e) the non-producing party's reason for failing to comply. *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 190 (4th Cir. 2017); *Precision Fabrics Grp., Inc. v. Tietex Int'l, Ltd.*, 297 F. Supp. 3d 547, 555-57 (D.S.C. 2018).

2. Documents, Data, Photographs and Tangible Items.

You use Rule 34 requests for production when seeking these from a party. You use Rule 45 document subpoenas to seek them from non-parties. When a subpoena seeks documents, inspection of premises, electronically stored information or tangible things it must be served on all the parties to the action. In state court at least ten days prior to the date the subpoenaed party is to respond. S.C.R. Civ. P. 45(a)(4). In federal court notice must be served on the parties to the case before the subpoena is served on the party required to produce. Fed. R. Civ. P. 45(a)(4).

NOTE: It is a best practice in any case involving significant electronically stored data ("ESI") to meet and confer about the means of production, the tools and formats to be used. A search term list should be proposed and agreed to if possible. If not, seek judicial intervention early—this can become a serious time drag on a case. Each rule allows the party seeking to discovery to specify the formats to be used in producing ESI, but the responding party can object if unreasonably burdensome.

Neither state nor federal courts let a party demand seizure and duplication of machines and storage media as a first resort. You must build a record for why the normal method of one party requests and the other party searches for and then produces the information. You cannot just assert the other party may not produce as it should under the rules.

If you can show items missing from a production that you have from other sources or your client, items that cannot reasonably be searched or would have to be searched many different ways, or a previous example of destroyed or deleted evidence, then you can request to have an expert directly review hard drives, data storage devices, tablets and cell phones and directly mirror the devices. Always offer to use a strict confidentiality/protective order when making such a request. It is highly intrusive.

There are three different ways you extract relevant information from electronic devices. The most common is searching a database of data produced by a party with a specific search tool. The second is to actually search the devices and storage media holding the data. This can involve many places and require a plan for how to take the device out of service during the search and retrieval operations. The least common is to clone the devices onto your own machines and media and have the clones available for searching as needed. This is very intrusive and requires an

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expert who can demonstrate the ability to clone the data and guarantee that it cannot be changes or manipulated on the cloned source. The second and third methods are more time consuming and much more expensive.

Interrogatories and methods of retrieving document/ESI should usually be done early in the discovery period. There can be tactical reasons to do depositions early, but a court will not give you an opportunity to take a second deposition just because you had not asked for the documents and information you needed to make it an effective deposition. You will only get the "second bite of the apple" if you show extraordinary circumstances such as no reasonable inquiry would have uncovered the material at the earlier stage or your opponent failed to produce it.

3. Requests to Admit.

Rule 36 requests to admit force a party to admit or deny statements of fact or of fact applied to law before trial. Often they are used toward the end of the discovery period in order to narrow contested issues and to be used for dispositive motions. Just because this is the normal usage, do not think creatively. When there is a very strong case for an established fact early in the case, forcing the other party to face it and actually admit or deny may help move settlement forward.

I am attaching form sets of interrogatories, requests to produce, requests to admit, and subpoena requests that will help you in drafting case specific versions. Always double check these as rules change!

DEPOSITIONS

Do not agree to "the usual stipulations" or any similar statement at the beginning of a deposition. No one knows what they are. If you are taking deposition, simply state it is being taken pursuant to the [relevant jurisdiction] Rules of Civil Procedure.

1. Taking the Deposition.

Prepare, prepare, prepare. Well in advance of the deposition date search the document database for documents related to the deponent. Documents deponent authored and received are easy, but set search parameters to fine those that discuss the deponent or are in files related to the deponent. In today's age of email and ESI, you will likely find more documents than a team of lawyers could review in a year. This is where the document review notes from your team and use of issues lists will

allow a paralegal or junior lawyer to cut the list down to something you can manage in your preparation.

The purpose of taking a deposition of a witness for the other side is to draw out the material that may hurt your positions at trial. Once you get that information you then "put a fence around it." Using time periods, sources, reviewed, vantage point if an eye witness and other questions you limit the witness to the harmful deposition testimony. The goal is to make the witness seem unreliable if new negative information comes out at trial.

NOTE: Every single time there is a break, ask the witness if there was any discussion with the opposing lawyer. If yes, ask about it in detail.

Be polite, but be tenacious. When the witness does not answer the question asked, point it out and politely try to rephrase. Continue until you get a definite answer to the relevant question. This is not harassing the witness but tying the witness down. At the end of the deposition always ask if there is any reason the witness could not fully comprehend and testify today? Other materials witness could have reviewed. Other persons he could have talked with to refresh recollection. Prescription or over the counter drugs, alcohol or illicit drug use. This is also the time to ask about arrests or convictions for anything other than minor traffic tickets.

2. **Defending the Deposition**.

Witness preparation is vital, but not today's topic. It takes time, multiple meetings, and a solid knowledge or your opponent's case.

ALWAYS have your witness reserve the right to read and sign.

Most attorneys misunderstand the "speaking objection" rule. This change is designed to prevent a layer from testifying for a deponent. Objections to admissibility that could be made if the witness was present live at trial will be made at trial, not in the deposition. S.C.R. Civ. P. 32(b); Fed R. Civ. P. 32(b). BUT the rules giveth with one hand and take away with the other. Rule 34(d) provides that certain objections are not waived. Items like to time and place of deposition, the court reporter's qualification, notice etc. seem obvious. However, any objection to the form of the question or that could be cured at the time of the deposition is waived if not timely made.

Simply saying "I object to the form of the question" is NOT ENOUGH. You need to give a simple explanation. "I object to the form of the question [compound] [ambiguous] [not understandable]" etc. The exception goes beyond form but to what can be cured at the deposition. That includes foundation. Don't be bullied into saying nothing more than form of the question. We will talk about hearsay shortly, but a question calling for hearsay can be corrected at the deposition and I suggest you object to the form of the question and ad "calls for hearsay." Be prepared, a lot of attorneys will say that is improper narrative/coaching objection.

DEPOSITION OBJECTION CHEAT LIST

Form of Question

- Ambiguous
- Asked and Answered
- Argumentative
- Assumes Facts not in Evidence
- Compound
- Confusing/Unintelligible
- Improper Hypothetical
- Leading
- Misstates testimony or exhibit
- Requires Narrative Answer
- Vague and General

Other Issues that can be cured:

- Notice of deposition
- Qualifications of recording officer
- Authentication of exhibit
- Lack of foundation
- State of mind of another
- Calls for improper opinion
- Speculation
- Document not in evidence/not before witness

Substantive objections you lose if not made Rule 30(j)(2)

- Attorney client privilege/attorney work product
- Spousal privilege
- Priest/penitent privilege
- Patient/mental health care provider privilege
- Qualified news media privilege

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- Privilege against self-incrimination (Fifth Amendment, applicable to states Fourteenth Amendment)

Since President Trump made sure every American heard that asserting your Fifth Amendment right meant you're guilty, (can sometimes be used as an inference civilly)

"My client respectfully declines, (On the advice of my lawyer I respectfully decline), to answer on the basis of the Fifth Amendment which protects everyone, including innocent people, from the need to answer questions if the truth might be used to help create an impression they were involved in a crime they did not commit, as recognized by the US Supreme Court [in *Malloy v. Hogan*, 378 U.S. 1, 11-14 (1964)]."

If your witness is being harassed, give a warning. If it persists, shut it down. Remember you have to file the motion for protective order within the time frame specified. Same goes for examination that violates an in place court order.

When your witness seems tired, distracted or upset, take a break.

Once the witness is sworn, any conversation you have with the witness is not subject to the privilege with two exceptions. If you are discussing the possible exercise of a privilege objection, it is protected. If you're opponent does not provide or identify a document as a deposition exhibits more than two business days before the deposition begins in state court, S.C.R. Civ. P. 30(j)(8), or seven days in federal court, D.S.C. Civ. R. 30.04(H), then any discussion of that document off the record remains privileged. Always take the opportunity to stop and discuss.

Here is a discovery plan template that I find very useful in planning out a case.

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DISCOVERY PLAN

Client Matter No.

Date Drafted:

Date Last Revised:

Full Case Name and Number:

Legal Team Handling Case:
Lead Trial Attorney
Other Attorneys and Roles
Paralegal(s)

NOTES: In federal court, Rule 26(a)(1) disclosures add an initial production and interrogatory burden to discovery. These must include electronic information. At each step in producing and analyzing documents consider what electronic sources of information should be available. Consider in each case whether an expert on electronic information storage, retrieval and recovery is a justified expense as a consulting expert. This person can become a testifying expert if the issues become heated.

IMPORTANT REMINDER: You have a duty to supplement discovery answers in a reasonable time after the discovery of new information. Do this throughout the case! Ask you paralegal to remind you.

If a scheduling order is in place, review all our client's discovery responses 60 days prior to close of fact discovery for supplementation purposes and if the discovery period is longer than 180 days, establish other intervals for considering supplementation.

I. Identify sources of documents and electronic information.

A. Client controlled.

B. Opposing controlled.

C. Third party.

II. Select protocol for document review, abstracting, and numbering and method for searching/retrieving information

A. Number and index client documents.

B. Abstract client documents.

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C. Select protocol for key/important documents, and identify key client documents.

D. Privilege review of client documents and preparation of privilege log. THIS WILL BE A CONTINUING ISSUE WITH EACH NEW SET OF DOCUMENTS AND ELECTRONIC INFORMATION PRODUCED.

III. Initial written discovery to opposing party.

A. Interrogatories. (Generally this round should be fact seeking and for purposes of witness identification/document population identification, save contention interrogatories for later).

1. Damages information.

2. Net worth in punitive damages cases.

B. Requests to produce.

C. Consider early requests to admit.

IV. Identify persons likely to be deposed.

A. Client/friendly witnesses.

B. Opposing witnesses

C. Third party witnesses.

D. Expert witnesses. (In federal court Rule 26(a)(2)(B) means you don't need to duplicate with interrogatories, you may have to ask some if a non-specially engaged expert is listed by the other side).

NOTE: Always consider whether a friendly or neutral witness would be amenable to an interview and giving a statement under oath. This can save money but with persons outside your client (and maybe certain of your client's agents) it will be discoverable by the other side. Opponents almost always ask for such statements in the "identify the persons with knowledge of the facts of the case" interrogatory and tandem request to produce.

V. Document issues.

A. Send third party document subpoenas.

B. Review and code documents in a way that you have key parts done in advance of depositions.

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C. Prepare for each deposition by identifying documents and prior testimony relevant to witness.

D. Be sure to prepare each of your witnesses, see forms on system for preparation.

E. Are there other methods for finding documents? (FOIA, industry publications and reports, required government filings by the parties, etc.)

VI. Early depositions. Key strategy decision, should opposing parties key players be deposed early or late? What depositions need to be taken before certain key points like: preliminary relief motions, settlement discussions open, mediation, or early dispositive motions?

A. In cases involving large or difficult document/electronic information issues, be sure to depose regarding search for information, collection of information, and production of information.

VII. Remaining depositions and schedule.

NOTE: At the conclusion of each phase of depositions consider any follow up written discovery and any new witnesses identified who should be deposed.

VIII. Expert depositions. Prepare for each one by searching out prior testimony and publications well in advance. Do this for your own experts, not just opposing ones, to avoid surprises.

IX. Final written discovery.

A. Contention interrogatories, expert follow up interrogatories.

B. Requests to produce for documents, electronic information that you believe is missing from earlier production.

C. Subpoenas for any last minute third party documents populations identified in depositions.

D. Requests to admit to simplify presentation at trial and to gain foundation for documents and electronic information to be introduced.

E. Work with opposing party to stipulate to as many facts as possible that will not detract from the presentation of your case.

NOTE: At the conclusion of each stage of discovery consider need for motions to compel and supplementation of responses.

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The Power Point contains my materials on hearsay and evidentiary foundations.

CONCLUSION

The topics stated for these sections are VERY broad. In the 45-minute time periods allotted I have tried to cover practical steps to maximize discovery, the chances to get your evidence in and to keep their evidence out. I hope you find them useful and you are welcome to call or email me with questions.

Marcus Angelo Manos
Shareholder
Maynard Nexsen PC
803.253.8275
MManos@maynardnexsen.com