

10 TIPS AND TACTICS TO APPROACH DISCOVERY

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PRELIMINARY MATTERS

- The first five tips and tactics are going to focus on how you can help your client streamline the discovery process and avoid sanctions.
- The final five tips and tactics focus on how you can use discovery to streamline your claims or defenses, generating admissible facts that support your case.
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PRELIMINARY MATTERS



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TIP 1: DISCOVERY STARTS WITH THE ENGAGEMENT LETTER

The beginning of the engagement is a prime opportunity to do two things:

- Obtain a copy of your client's hard copy and electronic document retention policies;
- Identify where your client keeps and stores information: cloud, desktop, social media, smart phone; and
- Receive written confirmation that your client received and understood the importance of a legal hold.
 - For individuals: that the client will back up and will not delete, erase, take down or remove any information.
 - For non-individuals: identify the person or persons responsible for maintenance of hard copy and electronic files and confirmation that those persons received a copy of the litigation hold and that they understood that they should back up and not delete, erase, take down or remove any information.

**This may be impractical for large companies, unless the company operates with a central IT department.



TIP 1 CONTINUED: WHAT'S THE BASIS

We are all familiar with the Seminole case on this issue:

Scentsy Inc. v. B.R. Chase LLC, 2012 WL 4523112 at *8 (D. Idaho Oct. 2, 2012)

- In that case, Chief Judge Winmill opined as to the adequacy of litigation holds providing “[g]enerally not deleting documents, and orally requesting certain employees to preserve relevant documents concurrently with filing a lawsuit, is completely inadequate. It is very risky—to such an extent that it borders on recklessness.”
- As lawyers, we should do everything we can to be sure that our clients communicate written hold notices. Helping your client identify who should receive a copy and how to prevent spoliation is key.

TIP 2: USE GENERAL DISCOVERY QUESTIONS TO GATHER INFORMATION ABOUT YOUR CLIENT

- Consider using Your or Your Firm's general discovery (as modified, i.e. employment, contract, tort) during your initial interview[s] with your client.
- This accomplishes two goals: First, it assists you in your fact finding role. Second, when the other side serves you with discovery (which they will do), you will already have drafted your general responses, allowing you and your client to focus on any specific discovery requests.

TIP 3: RESOLVE PRIVILEGE ISSUES UP FRONT WITH OPPOSING COUNSEL

Meet early with opposing counsel to discuss a protocol as to how to handle / establish privilege. E.g.

- *Can the parties agree on a date when the defendant could reasonably anticipate litigation;*
- *Can the parties agree on the identify of the parties who would be covered by the work product privilege;*
- *Can the parties agree that communications that post-date the agreed upon date need not be logged on a privilege log;*
- *What information does opposing counsel deem sufficient for purposes of a privilege log; and*
- *What about privileged communications with retained experts? Does counsel require a privilege log?*

Make sure to document any agreement in writing.

TIP 4: RESOLVE ESI ISSUES UP FRONT WITH OPPOSING COUNSEL

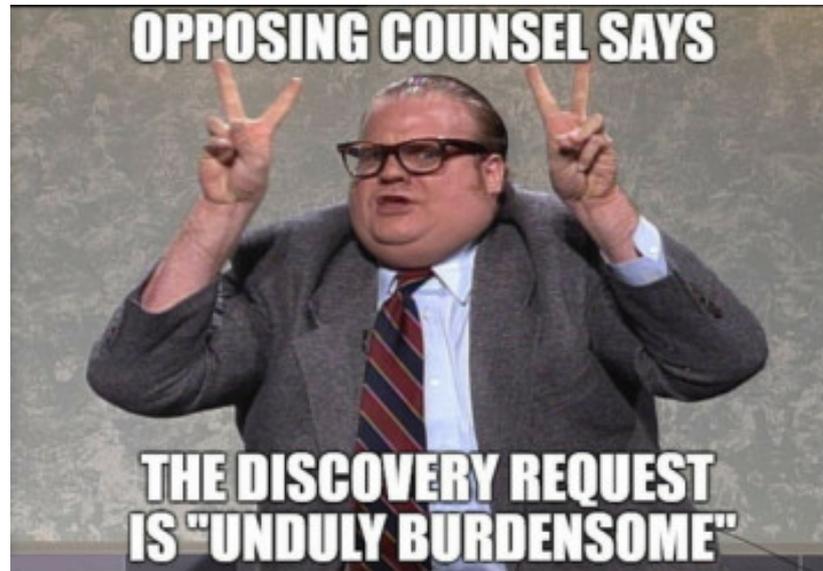
- Using the information that you gathered as part of your engagement letter, you should have your client's document retention policy (if any) and an understanding of the universe of potential ESI documents.
- Before the first discovery conference or scheduling conference you should attempt to negotiate an ESI protocol with opposing counsel.
 - Discuss what issues are actually in dispute necessitating discovery;
 - Describe the specific networks, servers and local hard drives where discoverable information may be stored;
 - Confirm the litigation hold but explain to your clients document retention / destruction policy and any hardships that may exist if your client is required to maintain all information, no matter how relevant; and
 - Discuss what categories of potentially discoverable information should be preserved.
- If you cannot reach resolution with opposing counsel, consider requesting a Court order to limit or expand ESI.



TIP 5: LOG AND SUPPLEMENT DISCOVERY AT THE SAME TIME EACH MONTH

- Rule 26 of both the Idaho Civil Rules and Federal Rules requires a party to timely supplement discovery.
- The sanction for failing to supplement can result in exclusion of key evidence.
- How you can stay on top of it:
 - Create a separate subfolder (physical or electronic) where you keep copies of any communications from clients relaying discoverable information.
 - For documents, document the date received, sender and format.
 - Schedule (or have someone schedule) calendar appointments every two weeks (or if more critical every week) to review, bates number and produce any new information received.

TIPS FOR OFFENSIVE DISCOVERY



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TIP 6: AVOID THE OVERUSE OF GENERIC INTERROGATORIES

- Idaho Rule of Civil Procedure 33(a) (“Unless otherwise stipulated or ordered by the court for good cause . . . A party may serve on any other party no more than 40 written interrogatories, including all discrete subparts.”)
- Federal Rule of Civil Procedure 33(a)(1) (a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.)
- Don’t waste interrogatories on information that your adversary is required to provide you pursuant to the Court’s scheduling order, unless there is some reason you need the information sooner.

TIP 7: MAXIMIZE STRATEGIC USE OF REQUESTS FOR ADMISSION

- Requests for Admission are a powerful discovery tool.
- There is no limit in either the Idaho Rules or the Federal Rules concerning a limit on the number of RFAs you issue, but they are subject to general principles to avoid abuse.
- Requests for Admission should seek admission as to a single fact (but should build on each other). E.g.
 - Admit Exhibit A is a true copy of the contract.
 - Admit Exhibit A is a correct copy of the contract.
 - Admit you signed Exhibit A.
 - Admit you read Exhibit A before you signed it.
 - Admit you understood Exhibit A before you signed it.

TIP 8: TURN FACTUAL STATEMENTS INTO REQUESTS FOR ADMISSION

A tip from the Trial Practice Tips Blog (Illinois): Turn factual statements made in an answer to interrogatory (minus objections) into separate requests for admission in order to streamline admissible undisputed facts for dispositive motions and trial.

TIP 9: UTILIZE YOUR INTERROGATORIES AND REQUESTS FOR PRODUCTION TO SUPPORT YOUR REQUESTS FOR ADMISSION

Interrogatory: If your response to Request for Admission No. 1 was anything other than an unqualified admit, explain the basis for your denial or qualified admission.

Request: If your response to Request for Admission No. 1 was anything other than an unqualified admit, produce every document that supports your denial or qualified admission.

TIP 10: SEND PERIODIC REQUESTS FOR OPPOSING COUNSEL TO SUPPLEMENT DISCOVERY

I.R.C.P. 26(e)

In General. A party who has responded to an interrogatory, request for production, or request for admission, which response was complete when made, is under no duty to supplement the response to include information subsequently acquired, except:

- (A) in a timely manner if the party learns that in some material respect the disclosure or response was incorrect when made or, if correct when made, is no longer true and a failure to amend the response is in substance a knowing concealment;
- (B) a party is under a duty to supplement in a timely manner the identity and location of persons having knowledge of discoverable matters; and
- C) by agreement of the parties; upon timely submission of discovery requests for supplementation; or by order of the court.

**Sending timely requests to opposing counsel ensures that You have the information You need to conduct Your discovery, including depositions.

THE END



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QUESTIONS?

THANK YOU!

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