

Don't delay learning about discovery

Those engaging in civil litigation for the first time should do their homework

When the economy slows, lawyers know that transactional work decreases and litigation increases. With fewer profitable deals available, businesses may focus on extracting additional value from past deals through litigation. People engaging in litigation for the first time, however, will find it is governed by court rules and statutes with which they may not be familiar.



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One such aspect is discovery, a collection of rules that governs how a party can obtain information relating to the case. Discovery is a big part of litigation, but is seldom dramatic enough to be shown on television shows about lawyers. Here is a primer on the four most common methods of discovery in civil litigation.

1. Requests for production. Any party (A) to a lawsuit is entitled to ask any other party (B) to produce documents in B's possession relating to the issues in dispute. Generally, party B must respond within 30 days.

Document production used to be relatively straightforward; a party could simply identify the drawers and boxes containing relevant documents and make those documents available for the requesting party to review and copy. In recent years, document production has become complicated because many business documents are not generated or stored in paper form. Financial data may exist primarily in electronic databases and be only partially reflected in printed reports. E-mails and text messages may be stored on servers, personal computers, backup disks and cell phones, where they mix with documents having no connection to the lawsuit. Sorting out the electronic documents that are properly responsive to a request for production can be a laborious and expensive process.

2. Requests for admissions. A request for admission is a specialized form of written question that asks the responding party to "admit or deny" that a certain fact is true. Generally, the responding party must answer in writing within 30 days. Failure to respond is treated as an admission of the facts stated, so attention to the deadline for response is critical.

3. Depositions. Any party to a lawsuit is entitled to require other parties to appear and respond under oath to questions about facts relevant to the lawsuit. The questions and answers are recorded by a court reporter and often recorded on video as well. If a witness' testimony at trial is inconsistent with his or her testimony at the deposition, the deposition record may be

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used to show inconsistency. Thus, a deposition allows one party to find out what information a witness has and of "locking the witness in" under oath to a particular statement of the facts.

Depositions are not limited to the parties to the lawsuit. Nonparties may be required to appear, answer questions, and even produce documents in a deposition. The rules even allow a party to a lawsuit in one state to require a nonparty witness in another state to attend a deposition and give testimony under oath.

4. Interrogatories. Most state and federal courts have rules allowing interrogatories, which are written questions from one party to another to request factual information. Interrogatories are commonly used to discover the names and addresses of witnesses who have information about a case and to identify the nature and location of relevant documents. Interrogatories and requests for production are often combined. Thus, an interrogatory may ask the responding party to "identify all documents" showing how much that party paid for a particular piece of land, and an accompanying request for production may ask that "all documents identified" in the response to the interrogatory be produced.

Oregon is unusual in not having a rule permitting interrogatories. Oregon lawyers compensate for this by making particularized requests for production and by taking advantage of the rule that allows any party to submit written questions to the witness at a deposition.

Each of the foregoing discovery methods has limits. Persons subject to discovery requests are entitled to protect commercially sensitive data such as trade secrets and pricing information. They may also protect privileged communications with legal counsel and (to some extent) communications with other expert advisers. These protections are often raised as objections to discovery requests.

The law relating to discovery is relatively complex and, as noted above, involves various deadlines. Preparing and responding to discovery is a technical area of the law for which advice of legal counsel can be quite valuable.

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