

Developing A Discovery Plan For Litigation

© Frederic M. Douglas 2010. All Rights Reserved.

(A) Determine and Review Litigation Objectives

What does the client want? Recover physical property? Avoid incarceration? Get a jackpot of gold at the end of a rainbow? Revenge? Teach someone a lesson? Whatever the objectives, you need to consider whether you support the client's objectives (check your bank account balance) and how you can plan discovery to help your client realize the litigation goals.

(B) Review Jury Instructions

Start at the end. You must prepare for trial, even though the odds are against going to trial. If you prepare to win at trial and plan as if you are going to trial, you will improve the odds of prevailing such that a settlement will be obtained to your client's benefit.

(C) Develop Theory of Case

This is what guides your execution of your plan. The theory might have to be modified or even thrown out and exchanged along the way.

(D) Analyze Opponents' Case

Look at things from the opponent's perspective. What do you think could be their goal(s)? When are they likely to give up? What facts do they need to prove? What key rulings do they need? Understanding your opponent may be difficult, but vital.

(E) Outline Key Points of Contention

What key issues do you need to prove? What key issues does the opponent need to prove? What are the respective weaknesses? Are there pending cases that might influence the outcome of these key issues? What facts do you need to improve your position on these key points?

(F) Review Local Rules

Local rules can significantly influence the outcome of your case and how discovery proceeds. Some courts specify that discovery is suspended when a motion to dismiss is pending. Some courts have detailed procedures for filing motions to compel, with sanctions for not complying.

(G) Prepare Checklist of Closing Arguments for Trial

Your goal is to win at trial. What are you going to argue at trial? You need to support your arguments with facts, so plan on getting the facts (e.g., admissions, documents, data) that support your intended arguments.

(H) Determine Damages

If you don't know where you're going, any road will take you there. How much money can you expect to obtain for your client? How much money can you expect your client to be forced to pay? In other words, what is on the line? Get a damages expert early in the game. You need to understand if the potential damages amounts are in line with your client's objectives. Also, you need to tailor your discovery towards supporting your client's damages position.

(I) Determine Litigation Strategy Objectives

Does the client want to obtain a preliminary injunction? Is the goal set for a quick settlement? Does your client want a case-killing summary judgment? The strategy employed will likely dictate what type of discovery is needed and the timing of discovery tools.

(J) Prepare Litigation Budget

Your client needs to soberly address litigation costs, especially attorney fees. The litigation can crumble to pieces if the litigation runs longer than the client's financial resources. A comparison among the potential damages, the client's resources, and the potential litigation cost should heavily influence the conduct of litigation, including the discovery plan.

(K) determine timing of implementation of strategy (early MSJ? Early trial?)

Major milestones of litigation need diligent preparation. Plans should be made for employing discovery tools well in advance of the planned milestones. Discovery should focus on the issues needed for a milestone. Naturally, one needs to err on the side of expecting the opponent not complying with discovery such that a motion to compel, with the long, drawn-out process, should be resolved before major milestones. For example, if key facts are needed to support a planned motion for summary judgment, you need to secure that evidence before filing the relevant motion.

(L) cost/benefit weighing of discovery methods (e.g., find good vendors)

Discovery vendors, such as court reporting companies, can be cost effective or unnecessarily exhaust your time, patience, and funds. Often, you may know of good vendors and vendors to avoid. If not, ask a colleague. Choosing just any court reporting company can make a significant difference in your discovery expenses.

If you plan on videotaping depositions, the cost can skyrocket. A videotape of a deponent may help tell a story, such as displaying the witness's credibility (or lack thereof), to support the extra expense. However, excess expenses do add up and should be limited.

Frederic M. Douglas

fdouglas@cox.net

freddouglas.wordpress.com