

# Functions of the Discovery Process

- Narrow the issues
  - After investigation, you can more easily determine which avenues to pursue in the case
- Obtain evidence for trial
- Hear your opponent's strategy and theory of the case
- Identify and locate witnesses and learn what they will say before trial
- Learn the extent of the damages suffered by the plaintiff
- Gather information to impeach unfriendly witnesses
- Determine whether to settle by analyzing the strengths and weaknesses of your case and your opponent's

# The Deposition

- This is generally an oral contemporaneous examination of any witness or party.
- To set up the deposition, you need to:
  - Prepare a notice of deposition that explains:
    - The name of the case (caption, title, etc.)
    - The person to be deposed
    - The place and time of the deposition
  - The notice must be sent to the party to be deposed and to the other parties involved in the case
  - If you want the other party to bring documents, state what documents you want in the notice
- The notice can come with a subpoena to produce documents as well

# Preparing for the Deposition

- The office of the deposing attorney should:
  - Prepare an available conference room
  - Prepare videotaping equipment for the deposition
  - Hire a stenographer who will compose a transcript of the proceeding
    - This is important because the deponent will be asked to review and sign the transcript. Also, in some cases, the record from the deposition can be used at trial.
- All parties and their attorneys have the right to be at the deposition
- The witness also may bring an attorney
- Make sure to keep records of all objections raised by any attorney at the deposition for later resolution, if necessary

# Interrogatories

- These can only be issued to parties to the case
- This is the manner in which you present questions to the other party officially (not personally)
- They are often used to determine your opponent's theory of the case
- Use the standard form of the court, if applicable, and make sure to observe some courts' limits on the usage of this device
- Interrogatories need only be served on the opponent, but copies and copies of the answers must be sent to all parties to the case.

# Requests for Production

- The federal and many states' rules allow parties to request almost any documentation relevant to the case (and not privileged) during discovery.
- A subpoena that requests documents is a subpoena duces tecum.
- This can be used only against a party
- Sending photocopies is fine- no need for the original
- If the object cannot easily be copied, one can make it available to inspection by the other party
- Documents can be submitted via fax or email where applicable

# Requests for Admission

- This is a request submitted of the other party that, if granted, relieves you from having to prove the issue. It can include:
  - An admission of facts that occurred
    - This is often called a “stipulation”
    - The state of the law as it applies to certain facts in the case
    - That certain documents are genuine
- Make sure to draft these as specifically as possible!
  - If you’re sloppy and put in compound questions or questions that are too broad, the other party will simply deny it if any part of your question is contested

# Other Discovery Documents

- Request for Physical or Mental Examination
  - This can only be forced on a party or someone under the control of a party
  - You need a good reason why you need this to force the other party to comply
  - Very often, you'll need a court order to get this
- Authorization
  - You very often must secure from your own client (or friendly witness) a letter authorizing you access to records such as:
    - Doctor and hospital records
    - Tax records
    - Employment records

# Fee Contract

- Every representation of a significant size (i.e., generating a fee of more than a couple of thousand dollars) should have a written fee agreement and it is good practice to have one even for smaller representations.
- This must include:
  - Identification of the client and attorney
  - The purpose and extent of the representation
  - How the client will be charge; e.g.,
    - By the job
    - By the hour
    - On a contingency fee basis
  - Many states require the client to be notified of the right to contest the fee or arbitration in the event of a fee dispute.