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- Home
- Business Law
- Litigation
- Real Estate
- Practice Management
- Young Lawyers
- ESTATE PLANNING

- Download
- About GP|Solo
- Feedback

LITIGATION

Civility: A Rational Approach to Combat Discovery Abuse

By Jeffrey S. Becker

One of the most frustrating, and often painstaking, chapters of litigation is discovery. It is during this time that we as attorneys attempt to uncover every shred of evidence to defeat our adversary's case while contemporaneously trying to safeguard information that could undermine our own client's position. It is while walking this tightrope that many attorneys neglect to pay heed to their local rules of civil procedure, ethical guidelines, and most importantly, the golden rule: do unto others as you would have them do onto you. As a result, production requests are often bombarded with thousands of irrelevant pages to sift through, or alternatively, result in production of a single document.

• Past Issues

Similarly, interrogatories are countered with more frivolous objections than they are substantive answers, and depositions frequently turn into shouting matches. Thus, at the end of the day, we as attorneys often find ourselves standing before a judge seeking resolution of our disputes in the same way squabbling children cry to their parents after a petty fight. It is for this reason that we, as learned counselors of law, should take preliminary steps to counter abuses of discovery civilly before running to a judge. The following roadmap may assist you in resolving discovery disputes amicably, and if unsuccessful, will create a record that may improve your success on any discovery-related motions.

Outline Your Concerns

When attorneys receive utterly unresponsive discovery production, their first inclination often is to *write* something—usually an angry or threatening letter to opposing counsel or a motion to compel. This initial reaction is half appropriate; if you are unsatisfied with an adversary's discovery response, the first thing you should do is pull out a piece of paper and write down everything you believe is deficient with that response. Do not filter yourself. Get your frustrations onto a notepad or computer screen, but do not send it to opposing counsel or the court. This exercise is just for you, and will help collect and organize your thoughts so that you can adequately articulate your issues to opposing counsel. You should also rank the importance of each category of information sought from your adversary and the likelihood that, should a motion to compel become necessary, your request for that information would be successful.

Pick Up a Phone and Call

Before sending a letter or email to opposing counsel, pick up the telephone and call him in an attempt to work through your issues. This type of communication allows your opponent to explain "in person" why he responded to your discovery the way he did. It may clear up an innocent misunderstanding, or simply give both of you an opportunity to talk through your issues and reach an agreement on how to rectify the issue. Attempting to resolve discovery disputes with an actual conversation is much more effective than simply writing a letter. An attorney who receives a letter likely will respond in kind, thereby fostering a "letter writing campaign" whereby neither attorney actually speaks to the other until frustrations have elevated and any hope of swift resolution is lost. It is for this reason that most jurisdictions mandate that some conference take place between attorneys concerning discovery disputes before a motion to compel may be pursued. Even if no such rule exists in your jurisdiction, you should consider starting with a phone call.

Create a Paper Trail

Of course, not every discovery dispute can be resolved with a simple phone call. For this reason, you should always follow up your telephone conversation with a letter confirming the substance of your discussion. Should your conversation with counsel be successful, iterate in your letter what you and counsel agreed to, setting deadlines for future compliance or production. If your conversation with counsel was unfruitful, explain in your letter exactly what issues you believe continue to exist, but do so with a respectful and reasonable tone. Always assume a judge will eventually read this letter attached to a motion of some sort. You do not want a judge's first impression of you to be that of an unreasonable, angry, or threatening attorney. Rather, your letter should articulate your position in such a way that the judge will see that you attempted to work through your issues with counsel in a reasonable manner before bringing the issue before the court.

Follow Up

If a deadline presented in your initial letter to counsel passes without response, you should immediately follow up with a subsequent letter to counsel indicating that you attempted to resolve your discovery issues reasonably through both a personal conversation and written correspondence, both to no avail. Explain that it is your belief discovery disputes such as this one should be rectifiable without court intervention, and that you request once more that counsel attempt to work reasonably with you in resolving this issue. Reiterate your concerns, again in a respectful manner, and set a final deadline by which you expect counsel to address your concerns in writing. This follow-up letter serves two very important purposes. First, it hopefully will encourage opposing counsel to communicate with you so as to avoid ending up on the wrong side of a motion to compel. To the extent this does not happen, this letter also completes a paper trail evidencing your attempt to thrice resolve discovery issues in a reasonable manner.

Write a Reasonable Motion

Although the above information is meant to assist you in combating discovery abuse without judicial intervention, it also is suggested with an eye towards an eventual motion to compel. Should it become necessary to file such a motion, make sure that you present not only the legal basis for your requested relief, but also establish that you have been overtly reasonable in attempting to resolve your dispute. Attach your letters to the motion as exhibits that highlight your

numerous attempts to work with opposing counsel. Reread your initial brainstorming notes and reassess what information you need produced the most. Remember, just because you may be entitled to certain information does not mean that you should ask the court to compel its production. It is often more effective to compel production only of the information you truly need rather than throwing the kitchen sink before a judge. The court will appreciate this fact, which may result in a more favorable ruling.

By its nature, litigation is an adversarial process. Discovery, however, is a two-way street. Find ways to resolve disputes in a civil manner before resulting to heated letters or motions. You will hopefully find that taking the high road is more effective than the alternative.

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