**HOW LAWYERS GET EVIDENCE**

**BY: WILLIAM G. MORRIS, ESQ.**

An underlying concept in the American justice system is that both sides in a lawsuit will know everything there is to know about a case before it goes to trial. Movies make that process look like behind-the-scenes investigation, private investigators and secret meetings. In reality, most of the information acquired by the attorneys in a lawsuit is provided by the parties and through a process known as discovery.

Discovery is exactly what it sounds like. The attorneys for the parties try to find out everything they can about the case so they are prepared to present the evidence most favorable to their side and attack or defend evidence which is not favorable. If each attorney has a thorough understanding of the case and knowledge of the facts (as claimed by each party or witness), in theory all of the important evidence will be presented. That will allow the judge and jury to decide what facts are “true” for that particular case and the judge can then apply the law to those facts.

How do the attorneys gather information? Information can be obtained from a party to the lawsuit by simple request. Parties must provide requested information that is not protected by privilege or relevancy. A non-party is not under the same requirement, so a subpoena may be needed to get information from a non-party. A subpoena is an order from the court that the non-party provide information requested by the attorney. Failure to comply with the subpoena can subject the non-party to court sanctions.

The simplest discovery tool in an attorney’s toolbox is a request for production of documents. The attorney prepares a list of documents or descriptions of document types which the attorney wants produced. The request is served on the opposing attorney and the opposing attorney has 30 days within which to agree to produce the requested documents or to object. The attorney can raise objections on various grounds including attorney-client privilege, relevance, undue burden and even privacy. If an objection is served in lieu of documents, the requesting attorney can schedule a hearing at which the judge will decide if any objections are valid.

The attorneys can follow a similar procedure to request documents by subpoena from a non-party. There is a simplified procedure to obtain documents only, without opportunity to ask questions of the non-party, by providing notice of intent to subpoena the documents only. If no objection is filed to the notice, the attorney can serve a subpoena on the non-party but must provide copies of any documents produced if requested by opposing counsel.

An attorney can also ask the other party to answer questions known as interrogatories. To avoid abuse, the Florida Supreme Court limits interrogatories without permission from the judge in the case to a maximum of 30, including all subparts. The interrogatories are sent to opposing counsel and are to be answered under oath. In most cases, the answers are due within 30 days.

The attorney for a party usually writes the answers, which makes interrogatories less than maximally useful. They are best used for obtaining relatively simple information such as the names and addresses of witnesses, and description of documents which might be available or itemization of damages claimed by plaintiff. Interrogatories not only provide information, they also can be used to impeach testimony if a party later testifies differently than the party’s answers to interrogatories.

A party can also serve the opponent with a request for admissions, in which the opponent is requested to admit certain facts. Without permission from the court, a party is limited to 30 requests for admission in any other party. A request for admissions can be used to simplify issues in a lawsuit. It is also used by some attorneys to try and trap the opponent. If a request for admissions is not denied within 30 days, the matters in the request are deemed admitted.

Compiling documents and answers to written questions is not a substitute for asking a party or another witness questions in person, asking them to explain documents and explore what a witness will say at trial. Attorneys usually try to speak to witnesses informally and, if needed, get the witness to sign a statement reciting what the witness tells the sole witness cannot easily change his or her story. That cannot be done with a party as an attorney is barred from speaking directly with a party represented by an attorney it is often difficult with a non-party because of unwillingness to cooperate.

An attorney can ask a party or a non-party question at a deposition scheduled by the attorney. A party must appear at a deposition upon request, albeit the date and time must be coordinated. A non-party is generally subpoenaed to appear. The attorney scheduling the deposition will arrange for a court reporter. The court reporter swears in the witness and records the questions and answers just as at trial. An attorney can request the questions and answers be transcribed and that can be used at trial to impeach a witness who changes his or her story. Depositions can also be used if the witness is unavailable, at which time the attorney can read the deposition into the record.

Discovery in a lawsuit is not unlimited. There are many protections available to limit the scope of discovery to issues which are truly relevant or which will potentially lead to evidence useful at trial. Attorney-client privilege is one such protected area. Information prepared in connection with the lawsuit, known as work product, is another. If requested discovery is particularly burdensome or seeks information which is confidential and not strictly relevant (i.e. financials of a party) the responding party will likely also be protected. The protection is invoked by objection and ultimately decided by a judge if the requesting party wants the information bad enough to ask the judge to rule on the objection.

The discovery process often moves in a herky-jerky fashion, with requests, objections and hearings. When someone fails to cooperate, the attorney can file a motion to compel cooperation if the information requested is important. The discovery process is subject to abuse in some cases, but is designed to make sure that each party gets all of the information needed to fully present the case at trial. If discovery is pursued correctly, a case will be well prepared for trial.

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