

A. The Discovery Process - Overview

“Discovery” is not a singular part of the litigation process – it encompasses a number of distinct elements, including document collection, document review, document production, discovery tracking and indexing, privilege review and depositions. Second only to trial, it is typically the most chaotic and expensive part of the litigation, particularly in a complex litigation, because these elements, which each require specialized planning and strategy, unfold simultaneously, or at least with significant overlap.

The intricacies involved in keeping track of all the moving parts are often under appreciated, if not completely overlooked. Such neglect is costly. Attorneys waste too much time re-reviewing stacks of dense, badly written document requests each time a question about discovery arises. Attorney teams have to repeat costly and disruptive visits to the client’s facility for document collection because of poor preparation. Document reviewers too focused on getting documents out the door fail to capture and record information readily available to them that could be used to save considerable time later in the process. Produced documents are not adequately tracked making it more difficult to respond to alleged deficiencies in production. Responses to offensive discovery are poorly tracked leading to duplicative requests and undetected failures to respond. Documents are inadequately indexed making it time consuming to locate pertinent documents when needed. Privilege review is too often done by attorneys insufficiently sensitive to privilege and work product issues resulting in accidental disclosure of privileged material. Witness kits for deposition are inadequately prepared making it difficult to properly prepare for depositions. Witnesses are unevenly prepared for the deposition process resulting in uneven deposition performances. Lastly, lengthy deposition transcripts pile up undigested, rendering much of the key output of the discovery process inaccessible as a practical matter.

However, by approaching the individual elements in a manner that considers each of their respective characteristics and making planning and strategic decisions concerning discovery flexibly from the outset of the litigation, the discovery process can be made manageable, allowing important and necessary information to more readily find its way to the lawyers making day-to-day strategic decisions. When the discovery process is approached in such a thoughtful and organized manner, the foundation of the entire case is put firmly into place as all of the various elements of discovery become seamless, permitting Outside Counsel to focus on legal strategy.

By approaching discovery in the manner described in this chapter, Outside Counsel will obtain the building blocks necessary to effectively manage the discovery process by providing Core Team members with the information they need to:

- Readily understand what is being requested by each party without having to repeatedly review stacks of formal written requests;