

Litigators Lounge: Understanding Discovery in Commercial Litigation

Niall McMillan: [00:00:00] Welcome back to Litigators Lounge devoted to intricacies of commercial litigation with Offit Kurman's commercial litigators. I'm Niall McMillan and I'm joined here with my partner Anders Sleight. Anders, how are you doing today?

Anders Sleight: Niall, I'm well. Thanks for inviting me in.

Niall McMillan: Glad to have you here.

I wanted to ask you about discovery, in general. Can you give us a good overview of what a discovery process looks like in a civil case?

Anders Sleight: Sure. Absolutely. People always wonder, how does litigation go generally in the civil or commercial context. How do I get the evidence that I need in order to prove my case, in order to defend against the allegations that are being asserted against me? We've touched on depositions before, which is of course a great tool to be used, but not every case is appropriate for deposition, whether for dollar value or other reasons. So we'll talk about some other tools that you can use, such as interrogatories.

That's generally the first place to stop, those are written questions served on the [00:01:00] opposing party, which must be answered in writing and under oath. So you can set out a list of questions to identify facts, to identify witnesses that may be called by the opposing party expert witnesses, fact witnesses.

And just to generally discover what the other side's case is about, what facts they're relying upon, and what witnesses they make. Your interrogatories are gonna be your first step. Those are the written questions. The second step might be a request for production of documents.

And that's similar to interrogatories, but they're requests to produce documents that might support or disprove the other side's case. Contracts, correspondence, emails, text messages, maybe tax returns. All these sorts of categories of documents can be discovered through the request for production.

And generally any state that you're litigating in will have its own rules about the amount of written discovery requests that can be sent out. Whether it's under the

federal rules or the local state rules. So your interrogatories [00:02:00] and your request for production are gonna be some of your key initial starting points for issuing written discovery in your case to discover, what your opposing party's position is and to discover the evidence that might support your case or your defense.

Niall McMillan: And so with a discovery request, if you're being served them on you, or if you're serving them on someone else, what's the effect of if they don't include some information or some documents within their answers to the request?

Anders Sleight: Yeah I think that's a key part of the written discovery process.

If you've sent out a request and you've asked for all the documents, that may be responsive to a certain request, such as all the communications and the opposing party does not produce all those communications. In response to that request, let's say you get to the trial several months later, and a document or an email is produced or attempted to be introduced into evidence that was not provided during the discovery process, that document or that email, whatever [00:03:00] it is, can be excluded from evidence that the trial, if it was not produced during the discovery process. The idea is every party, to a civil case or a commercial case, should know the evidence that might support or refute or, bear on the allegations in the case.

So if something hasn't been produced in discovery, generally it won't come into evidence. That's why if a discovery request is sent to you, you need to comply with it. You need to respond to it unless it's objectionable or there's other reasons why you should not respond to it and you should consult with your attorney about those reasons.

But generally speaking, you need to comply with and respond to the discovery requests and produce the documents and information that's requested. Otherwise, it could be used against you just as you may choose to do the same to your adversary in the litigation process.

Niall McMillan: And just to clarify, discovery requests, those are gonna be between parties, but the deposition that would only be [00:04:00] allowed for third parties to say you have a witness who saw something, but they're not party to the case.

Is that true?

Anders Sleight: No, the depositions can be used between and among the parties themselves, and that's principally what would happen as well. You can do a deposition of a third party. That's somebody that's not a party to the case. You might need a subpoena to accompany that deposition. But between parties, you can do interrogatories, you could do document requests, you can do requests for admissions, you can do depositions. In some circumstances, there may be an allowance for a physical or a mental examination if your case allows for it or if it's relevant. And then of course you can also issue subpoenas to third parties. Third party witnesses or maybe a bank or financial institution or some other party that might have documents that would support your case or are relevant to your case.

There's a lot of tools at a party's disposal and the discovery process. It's certainly valuable and instructive. And depending on the value of your case, you might want to use [00:05:00] all or some of them depending on what you're looking for and what you need to support your case.

So don't forget about all of those other tools that can help aid out your case and bear out the evidence.

Niall McMillan: Well, thank you for that Anders. I appreciate it. Thank you for another episode of Litigators Lounge. Offit Kurman is a full service law firm with offices and litigators from coast to coast, providing litigation services regarding employment, financial services, construction, government contracting, and business dispute matters and everything in between.

Please reach out to me or Anders if you have any questions. Thank you.