

Three Key Tips for Drafting Strong Discovery Requests

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The discovery phase of a case is critically important. Navigating a case appropriately through the discovery stage can lead to achieving favorable settlement terms, disposing of the case by summary judgment, or prevailing at trial. Thoughtfully crafting discovery requests is one of many tactics that maximize the chances for success. Keep these three points in mind when preparing discovery requests.

Tailor the requests to the claims and defenses.

Consider the elements for each claim and then the elements for each defense when drafting the requests. If the requests cover each element in an individualized manner, the door opens to potentially disposing of the case at the summary judgment stage. This approach leads to the parties exchanging relevant documents and information and allows them to digest each other's theory of the case, minimizing the chances for a surprise at trial. Further, when both sides disclose documents and information, they also end up revealing the strengths and weaknesses of their respective claims or defenses. By identifying those strengths and weaknesses, the parties can more readily identify the components of the case, where they have leverage, and become more likely to come to a settlement (which saves the parties valuable time and resources).

Pursue potential evidence to use to impeach witnesses' credibility and to flesh out the theory of the case.

Once you have your theory of the case, discovery is the time to further develop that theory by bringing out the context of the case. No case should take place in a vacuum. Typically, parties have ample evidence the other side can use (e.g., at trial) to illustrate the theory of the case. In a breach of contract case, for instance, it may be helpful to request documents or information about other contracts the party held at the time or the benefits that a party obtained when it breached the contract. In response to the request, you may receive a document that shows *why* the party breached the contract — a helpful piece of context that you can use at trial to better tell your client's story and diminish the other party's credibility. Although each case is factually distinct, there are always pieces of evidence that can be used for these purposes, which may make the difference in persuading a judge or jury.

Include requests for information and documents where the adversary's lack of a response is useful.

Requesting documents and information from the other side that directly relate to the claims and defenses in the case is a great starting point. Adding requests with an eye toward the adversary not providing a response can also be very useful at trial. The lack of a response narrows the universe of evidence that the parties can present at trial, providing you with a more predictable trial and an ability to identify the weak points of your adversary's case. It also provides the opportunity to flesh out the testimony you wish to elicit from the other side as to the lack of evidence. This can be particularly powerful when you cross-examine the other side's witness and have that witness testify — in response to a string of questions from you — that they do not have evidence touching on a number of aspects pertaining to the case. Those moments during trial are not only good theater but also highly persuasive.

