

DISCOVERY - WHY IS MY LAWSUIT TAKING SO LONG?

For those who have never been in a lawsuit before, or whose experiences with lawsuits are limited to small claims court, the process of discovery is often confusing and frustrating. This article explains the general concept of discovery, common discovery encountered in lawsuits, and why it may seem to last longer than the litigants wish.

The term “discovery” really pertains to the process by which all parties to a lawsuit learn about the claims involved and evidence another party wishes to use to support their position. For those whose understanding of what a lawsuit entails is based on what they see in the movies or on television, this may be a new concept because it is rarely addressed in those depictions. It appears from such shows that the trial occurs very quickly after a complaint is filed in court. Think about the practicality of such a situation: Would you be comfortable walking into a trial not knowing anything more than what is alleged in a complaint? If you are the defendant, you certainly want to know what the plaintiff intends to use to back up his allegations. If you are the plaintiff, you should want to know if the defendant has some evidence establishing your allegations are incorrect or some other reason why you cannot prevail.

Discovery allows these concerns to be addressed. It reflects a desire to avoid “guerrilla warfare” when it comes to trial, where a party gets an advantage because the other side does not know what his evidence is going to be. Such strategies lend themselves to sidestepping truth and fairness, which is what lawsuits are geared toward achieving.

The discovery process typically begins within a few months of the complaint being filed. Plaintiffs often wait for the defendant to file his answer to a complaint, though they are not required to do so. When the court sets a trial date, it will usually set a cut-off for discovery, which is typically two or three months before the trial. Because the trial is usually set far in the future, this typically means discovery is “open” and may be conducted for a year or more. This extended period is often necessary, as answers to the initial questions can lead to more questions.

The most common discovery tools are interrogatories and requests for production of documents. If you are a party to a lawsuit, you can expect to respond to both of these tools at some point. Interrogatories are questions, such as “what was ABC Corp.’s duty at the building on the day of the fire?” or “Provide a list of all employees with access to the company’s checking account.” Requests for production, on the other hand, ask for certain documents or “tangible things” to be given to the party requesting it. Examples would be “Produce your security tape for the day of the incident” or “Produce all medical bills and records pertaining to your injury.” There are additional written tools for discovery, such as requests for admission, where one party asks the other to admit a certain allegation or fact in an effort to narrow down the issues that are disputed in the lawsuit. If a particular location or item is important to the lawsuit, a party may request a time to inspect it. Although most discovery must be answered or otherwise responded to within thirty days, this deadline is typically difficult to meet, especially when the information has to come from a third party. As a result, extensions are usually granted, and a response

could take months to come back. The information must then be reviewed and in some instances, reveals new questions to be asked (parties are not limited to one bite at the apple when it comes to discovering information). When second requests are sent, the 30-day-plus-extensions time period starts again.

It is not uncommon for these early questions to be unanswerable at the time, such as “List all witnesses you intend to call at trial.” The party’s attorney may have no idea what witnesses will be called, so these answers are usually supplemented prior to trial. Further, the questions or requests may be objectionable for any variety of reasons. As a result, the first “answers” may not contain responses to all of the questions. The attorneys then have to discuss the objection and, if necessary, require the court to make a decision as to whether an answer must be provided.

When these initial discovery exercises are finished, the attorneys for the parties will typically want to take depositions of key witnesses. A deposition is a question-and-answer session between the attorney asking the questions and the witness. The lawyer for the other party is also present, and a court reporter is there to take down everything the lawyers or witness say. The deposition may be of the plaintiff, the defendant, a physician, an accountant, someone who saw the incident at the heart of the issue, an expert, or anyone else who will play a role in either the trial or preparing for trial. Although depositions typically last less than a day, there is no limit to how long a deposition lasts, as long as it is being conducted in good faith. Like written discovery, these depositions may reveal that more written discovery or another deposition is necessary.

As described above, the process of discovery can often take many months or longer. If parties are added to the lawsuit or if allegations change, the process is often extended to address these new concerns. The flip side for the parties to the lawsuit is that although it may not seem like anything is happening, the discovery wheels are turning and information is being gathered or analyzed. If you find yourself wanting to move your lawsuit along as fast as possible, the best thing for you to do as a party is to cooperate with the discovery process and obtain any information requested of you as quickly as possible.

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