

HOW TO GET THE MOST FROM A DISCOVERY COUNSEL

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This is the third in a three-part series about the critical role of discovery counsel on a successful litigation team. In Part I, we discussed the qualifications of discovery counsel and the risks of proceeding without one. Part II explored ethical considerations informing the importance of the role. In this article we conclude by explaining how clients can reap the greatest benefit from their discovery counsel engagements.

Early Retention is Key

To maximize the benefit of these engagements, qualified discovery counsel should be retained as early as possible—before litigation is filed—to help develop a response strategy. At the latest, discovery counsel should be retained at the onset of a case.

Proactive engagement allows the lawyer to deliver the most value. Some problems, such as the remediation of historical archives and backup tapes, can be solved relatively easily before a lawsuit is active, but they become intractable once the case is underway. Moreover, the biggest risk of sanctions arises from misdirection and tactical errors in the early part of the discovery process, when key documents and data are being identified and preserved.

Initial scoping of custodians and data repositories at the beginning of a case also impacts costs throughout the

proceedings, and is an area where experienced discovery counsel can provide tremendous value. Forthcoming changes to Rule 37(e) of the Federal Rules of Civil Procedure, for example, will limit the availability of harsh sanctions for non-preservation of data if certain requirements are met. Dedicated discovery counsel, qualified to choose the right data to preserve and to weed out what is safe to ignore, will be able to achieve even more benefits under the new rule.

Additionally, discovery counsel engaged early can help establish budget expectations and install reliable systems for tracking and documenting the effort. Discovery counsel involved in the case from the onset can also help get the most important documents to matter counsel faster, which can help establish the narrative of a case. An early advantage in understanding the facts yields significant strategic benefits for the trial team.

Responsibility for Discovery Materials

Clients should make their discovery counsel expressly responsible for overseeing the integrity of the client's data throughout the discovery process—from identification and preservation through review and production, and ending with deletion or return to the client when the case is done. This clearly defined portfolio

enhances accountability and vests one lawyer with a fiduciary duty to protect the client's vulnerable information assets across the entire lifecycle of the case.

Discovery counsel who receive clear authority to protect the integrity of their clients' evidentiary materials can reasonably insert themselves at any point in the process to ensure these are handled appropriately. They are empowered to partner with trial counsel to decide questions about the scope of collections and parameters of responsiveness, and they can justly intervene to avoid overreach, to prevent data assets from being compromised and to ensure these are securely stored and reliably tracked at all times. This arrangement is particularly advantageous from a privacy and data-security standpoint. It centralizes accountability and facilitates data handling in a manner appropriate to the materials' sensitivity and consistent with the client's tolerance for risk.

Clear authority to protect the information assets also places discovery counsel on solid ground to negotiate and confirm appropriate protective orders and Federal Rule of Evidence 502(d) orders are in place, and to make sure all of a client's data are destroyed or returned when the case concludes. The attorney vested with this authority can also rightfully review or edit discovery responses and objections—particularly as they relate to the handling of electronic data or overlap with the discovery attorney's efforts in prior cases. This oversight allows the case team to focus on the facts that matter and not get bogged down in the process of extracting and protecting them.

Discovery Planning, Strategy and Budgets

Discovery counsel and the litigation team should share responsibility for determining which electronic documents will be collected, reviewed and produced. Generally speaking, and especially if engaged on a continuing basis, discovery counsel will have a different perspective than matter counsel focused on winning a single case. The interplay between the two roles is valuable. These lawyers should consult early on to establish advantageous, defensible and cost-effective discovery protocols, which could then be presented to the client for approval.

There are myriad ways to manage discovery. There are different tools and technologies to employ, varying approaches to gathering data, numerous methodologies to target responsive materials and to filter out the less important. These tactical decisions directly impact the bottom line of a case, as well as the client's ability to successfully prosecute or defend its claims. Discovery counsel who is familiar with current best practices should be invited to provide insights and guidance before these (often costly) efforts get underway.

Attorneys who practice in the discovery arena are also accustomed to establishing and operating within budgets. The discovery process consumes a large portion of the overall legal spend, but it is often more repeatable and predictable than other aspects of litigation. As such, discovery counsel can often help a litigation team determine appropriate cost estimates, and help them avoid unexpected cost overruns, unpleasant surprises and expensive mistakes.

Vendor Selection and Engagements

Discovery counsel should be called upon to assist with vendor selection and engagements. There are countless service providers available in the marketplace. Selecting and managing these resources, including the technology they deploy, can have a significant impact on the outcome and costs of both the discovery process and the case.

Negotiating the best prices and terms with service providers requires experience and the ability to objectively compare proposals that often have dramatically different pricing structures and benefits. Choosing the most suitable providers and evaluating toolsets to match the requirements of a case require familiarity with the marketplace and the types of outcomes that can be achieved. These might not be priorities for a group of trial attorneys primarily focused on winning a particular case, but they are qualifications that discovery counsel can be expected to possess.

Ongoing Oversight

As a case unfolds, the role of discovery counsel will likely shift. The lawyer's involvement will be more active at the very beginning, fading out after data has been preserved, and then re-engaging when it is time for pre-trial conferences or to commence processing and review. Discovery counsel can achieve streamlined workflows and defensible results by managing discovery providers involved in collecting, processing and reviewing data at the onset of these steps. Then, once the workflows have been established, the supervising discovery attorney can often take a step back again, allowing less

expensive, subordinate attorneys and consultants to take over.

Nevertheless, discovery counsel should remain in a supervisory role throughout, and should be kept regularly informed about the review and production progress and any decision points along the way. To avoid distractions or unnecessary alarm, vendor problems and other mishaps that come up during document collections, processing and review should be escalated through discovery counsel for resolution, before they get to trial counsel or the client. Discovery counsel should also determine what kinds of testing and validation will be used to approve the final production, and should participate in client updates from time to time.

Continuous Improvement

The benefits of working with discovery counsel can be greatly enhanced by using the same well-qualified lawyer from case to case. Normally, there is hardly any knowledge transfer from one trial team to another. For most organizations, each matter occurs in a black box, and the discovery efforts from prior proceedings are invisible to the attorneys litigating the present case.

Clients who engage discovery counsel across multiple matters achieve much greater transparency and control over discovery and its costs. This arrangement helps avoid needless repetition, improves the handling of sensitive company data and helps

clients effectively balance risks and costs. Having steady representation for the discovery process facilitates repurposing attorney work product and provides a mechanism to obtain progressively increased savings and strategic benefits over time. This is why many large organizations are bringing the discovery counsel role in-house—assigning someone in the legal department with full-time responsibility over legal project management and discovery oversight in every case.

Consistent representation from one matter to the next avoids ad hoc approaches, which can quickly go wrong and impact defensibility. Having the same discovery counsel from one case to another bolsters credibility and mitigates the risk of results that could adversely impact a client's litigation profile. Additionally, retaining the same discovery counsel across multiple matters allows the lawyer to grow familiar with a client's IT systems and practices, circumventing what can be a steep learning curve for newly retained counsel and thereby reducing unnecessary interruptions for the IT team. Discovery counsel can then serve as a resource for the IT department, rather than a burden and distraction. The lawyer's understanding of IT infrastructure can also be leveraged to support information governance objectives.

Measuring Success

The success of discovery counsel will not be based solely on the outcome of a case in the way that the success

of trial counsel is often measured. Instead, discovery counsel should be judged on whether they have helped the clients meet their discovery obligations in a manner that is cost-effective, minimally disruptive, defensible if challenged and that furthers the long-term objectives of the clients and the strategic goals of the case teams.

The efforts of discovery counsel also can be evaluated by the trial attorneys at the conclusion of the case. Candid reviews and criticism will provide insights to the client about how to manage the relationship between trial counsel and discovery counsel going forward (a new challenge). Self-assessments by discovery counsel also can be implemented to illuminate aspects of the relationship that could be improved or enhanced to further the client's best interests.

Conclusion

In the same way that a general litigator might need to call an ERISA lawyer to explain a workplace retirement plan, the call to discovery counsel is becoming essential to competent representation. Given the nexus of technology and law, and the ever-present focus on managing costs, the discovery process is a function that calls for effective legal oversight and competent supervision. Whether a client imbeds its discovery counsel in-house or works with an outside attorney, it is an essential role that should be filled by a specialist.

