

Written Discovery

Guidelines for obtaining evidence, protecting your client, and following the (new) rules

Discovery Requests

- Facts
- Witnesses
- Documents
- Admissions

Combined Discovery Package

- Universal Definitions & Instructions
- Requests for Admissions
- Interrogatories
 - (Connect with RFA denials)
- Document Requests

Go-To Request

Identify all facts, witnesses, and documents relating to [allegation].

Requests for Admissions

- Binding effect
- No limits
- Establish authenticity
- Cover hearsay issues
- Recover fees/expenses if prove truth

Model Discovery Requests

- Is your response to each RFA served herewith an unqualified admission? If not, for each response that is not an unqualified admission, state the facts upon which you base your response and identify witnesses and documents supporting your response.
- State the basis for your contention that John Doe signed the Agreement, and identify all facts, witnesses, and documents relating to such basis and contention.

Discovery Responses

- Head off motions to compel
- Avoid evidence exclusion on nondisclosure grounds
- Provide detail where helpful for encouraging settlement

Model Response – Rule 33(d)

In accordance with Federal Rule of Civil Procedure 33(d), the answer to this interrogatory may be derived from inspection of [specific business records].

Rule 34 Amendments

| | Old Rule | New Rule (with 2015 Amendment) |
|-------------|--|---|
| 34(b)(2)(B) | For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [an objection] to the request, including the reasons. | For each item or category, the response must either state that inspection and related activities will be permitted as requested or state <u>with specificity the grounds for objecting</u> to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. <u>The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.</u> |
| 34(b)(2)(C) | An objection to part of a request must specific the part and permit inspection of the rest. | <u>An objection must state whether any responsive materials are being withheld on the basis of that objection.</u> An objection to part of a request must specify the part and permit inspection of the rest. |

Adapted from <http://www.law360.com/articles/654798/digging-through-the-new-federal-rules-of-civil-procedure>

Model Objection – Rule 34(b)(2)

Defendant objects to Document Request No. 3 to the extent that it requests documents created prior to 2011. Such documents are not relevant and not reasonably calculated to lead to the discovery of admissible evidence because Plaintiff did not begin transacting with Defendant until 2011 and facts prior to that year have no bearing on the violation alleged in the Complaint. Defendant will therefore produce only responsive documents created after 2010.

Be Specific in Objections

- General objections disfavored. See, e.g., D.D.C., W.D.N.Y., and C.D. Cal.
- “When faced with general objections, the applicability of which to specific document requests is not explained further, this Court will not raise objections for the responding party, but instead will overrule the responding party's objections on those grounds.”

D.L. v. District of Columbia (D.D.C. 2008)

Depositions on Written Questions

- Governed by Rule 31
- Service of documents and timing
 - Notice of deponent's identity; direct exam questions
 - Cross exam questions (14 days)
 - Re-direct questions (7 days)
 - Re-cross questions (7 days)
- All questions delivered to the officer taking the deposition

Depositions on Written Questions

Upsides

- Deponent location is inconvenient
- Deponent has minimal information
- Spontaneity is not important

Depositions on Written Questions

Downsides

- Convoluted process
- Must reveal questions/strategy in advance
- Delay by cross, re-direct, re-cross written questions

Final Thoughts

- Be specific in requests/responses/objections
- Take advantage of RFAs
- Be aware of new rules
- Look to local rules for model discovery requests
- Don't waste requests on things you are entitled to
- Remember informal discovery