# How to Win Without a Lawyer

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Discovery


Finding Facts that Lead to Admissible Evidence

The magic key to winning lawsuits is discovery!

Without discovery, there's no hope of winning.

Discovery is how you find facts that lead to the admissible evidence you need to prove the ultimate facts you alleged in your pleadings.

That's how you win: Discover *more admissible evidence* than your opponent, and put your "preponderance of admissible evidence" in the record.

Discovery is called discovery because you use it to discover facts.

Use it to fill blanks in the court record.

You can actually win your case during the discovery phase of litigation!

Yes. You can win *before* trial, if you use discovery wisely.

Use it to find facts leading to admissible evidence that tends to prove the essential elements in *your* pleadings and facts leading to admissible evidence that tends to disprove the essential elements of your opponent's pleadings.

That's how you win!

Discovery is usually a bitter battle where liars are un-masked, those who try to "hide the ball" are foiled, and the groundwork of proof is laid to win your case *before* trial (as you *should* be able to do, if you do what this course teaches).

Know your options.

Discovery can be used to:

- Find what your opponent has in the way of evidence.
- Force your opponent to admit facts and law helpful to your cause.
- Require your opponent to produce all sorts of documents and things.
- Obtain testimony, documents, and tangible evidence from non-parties.

Discovery may be obtained in civil cases using these five tools:

1. Requests for Admissions
2. Requests for Production
3. Interrogatories

4. Depositions
5. Subpoenas and other Court Orders

How to use each of these tactically and strategically is explained below.

By clever use of your five discovery tools, you can find *any* fact reasonably calculated to lead to admissible evidence that tends to:

- Prove the ultimate facts alleged in your pleadings.
- Dis-prove the ultimate facts alleged in your opponent's pleadings.

Winning requires nothing more than this:

- Pleadings that allege all essential facts.
- Discovery that finds facts leading to admissible evidence.
- Motions that force the court to enter orders favoring your case.

The *most* important thing you *must* learn from this class is this:

**The rules allow you to discover *any* fact "reasonably calculated to lead to the discovery of admissible evidence".**

Information you seek *need NOT be admissible in court!*

Do NOT let *anyone* abuse you about this.

Your opponents and their lawyers will try to escape discovery of facts they want to hide by complaining to the court, "Objection. Information sought is not admissible!"

Doesn't have to be!

Expect your opponents and their lawyers to play dirty tricks like this and be prepared to resist by citing the rule and controlling appellate cases that explain what is "reasonably calculated to lead to the discovery of admissible evidence".

During discovery, facts you seek do NOT have to be "admissible" in court ... *so long as they are "reasonably calculated to lead to the discovery of admissible evidence".*

Quoting directly from Rule 26 of the Federal Rules of Civil Procedure (controlling in all federal courts and generally followed by all state courts) "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

Due process includes your right to discovery, and your right to discovery is NOT limited to "admissible evidence".

This is where you absolutely must do your homework.

There's no point spending time and money to find evidence that won't:

- Tend to prove the ultimate facts alleged in your pleadings *OR*
- Tend to dis-prove the ultimate facts alleged in your opponent's pleadings.

Nothing else matters!

So!

Planning for discovery begins with listing those ultimate facts - the ones you alleged in *your* pleadings and the ones your opponent alleged in *his* pleadings.

Make this list!

This will be your map for discovery success!

Your list will keep you from chasing proverbial rabbits that waste time and energy better spent *winning* your case.

Any "evidence" that doesn't tend to prove or disprove a material fact is, well, it really *isn't evidence at all!*

Evidence, by definition, is anything that *tends to prove or disprove a material fact*.

If it doesn't tend to prove or disprove a material fact, it isn't evidence, because it is inadmissible!

Fact information about a person, place, or thing cannot be "evidence" unless it has some bearing on a disputed issue, i.e., something that needs *proof!*

It may clearly be "information", but it isn't "evidence" unless it tends to prove or disprove a fact that's in controversy, i.e., a "material fact".

The best you can say about information unrelated to a dispute is that the information is only "evidence of itself", i.e., evidence that the information exists!

If information proves nothing but itself, what good is it?

None whatever!

Others haphazardly use the term "evidence".

*You and I won't!*

We will use the term carefully, precisely, effectively - so we can defeat those who use words like "evidence" carelessly.

"Evidence is information that tends to prove or disprove a material fact."

Everything else is a waste of time, serving only to take you off the right path, confusing *genuine* issues, muddying the evidential waters, and dragging the court's attention away from the *only* thing that can resolve your word war: EVIDENCE.

So, make that list!

List the *essential* ultimate facts alleged by the pleadings, those facts alleged in the pleadings that tend to establish the *essential elements* of both parties' respective positions.

We will then "prove" our own and "disprove" our opponent's *essential* ultimate facts.

Nothing else matters!

Discovery comes in two flavors: written and spoken.

Written discovery includes:

- Pleadings
- Requests for Admissions
- Requests for Production
- Interrogatories
- Subpoenas for Documents and Tangible Evidence

Spoken discovery includes:

- Depositions
- Live Testimony at Hearings
- Live Testimony at Trial

Right off we see critical differences between the two:

- Written requests can be carefully planned and incisively worded to get just what you want.
- Spoken requests can be planned somewhat but, in the heat of questioning a party or witness, with opposing counsel making objections and citing case law, with the judge (at hearings and trial)

interrupting for one reason or another, and with the party or witness throwing curve-balls back at you instead of giving you straight answers, results are rarely as precise and useful as those you get with written discovery requests.

Written discovery requests can be served on the other party at any time and require the opposing party to answer in writing under oath ... typically within a set number of days.

The beautiful part of written discovery requests is that they can get at precisely the information you need.

At depositions rabbit trails are many, while truly useful questions and answers are few.

By asking carefully-worded questions in writing, demanding admissions, and requesting that the other side produce documents and tangible things in support of your case, you put your opponent in a position from which the rules require him to respond faithfully, honestly, and completely.

Once your opponent answers in writing he cannot retract. He might complain he didn't understand a spoken question asked at a deposition, but that complaint won't get him far if the question was carefully written and he had a week or more to answer faithfully.

Many lawsuits are won through clever use of written discovery requests alone.

The best time to take depositions is after you know what your case is all about and what your opponents' position is on the issues by *first using written discovery*. Once you find out what your opponent is up to, by clever use of written discovery tools, you can ask the right questions and get valuable information at a deposition.

Otherwise, you are wasting time and energy on a fishing expedition.

In most jurisdictions, you are permitted to depose people once only, so it only makes sense to know as much as you can about your opponent's position *before* you schedule depositions.

Knowing how to use discovery wisely is the key to winning every kind of case: foreclosure, credit card debt, collection, family law, fraud, slander, etc.

In ever case, the key to winning is using discovery wisely.

This is your most powerful written discovery tool.

Use it to embarrass your opponents.

Make them admit things that will help your case.

Make them admit *anything* "reasonably calculated to lead to the discovery of admissible evidence".

Force the other side to tell the truth … so you can win.

Force your opponent to admit each element of your case ... facts and law.

Get tough. Dig deep. Make him show what he's got!

If he does not respond in good faith, you can move the court for an order finding facts admitted for all purposes *against his will.* If he will not respond as the rules require, move the court to deem your requests admitted by default. In some cases you may even succeed in having his pleadings stricken and his case dismissed!

This is part of your due process right.

Review what was taught about the Complaint and getting a responsive Answer as your first discovery tool.

Then, using requests for admissions force the other side to poke holes in their own case.

Attach copies of documents to your requests, and force your opponent to admit they are true and correct copies or that a signature thereon is his!

Force him to admit details.

Force admission of the facts and law you must prove to win.

If you're the good guy who's supposed to win according to principles of justice and fair play, there's nothing the bad guy can do but comply with the rules and *help you win*.

Each item for which an admission is requested should appear in separately numbered paragraphs (as you learned before in drafting pleadings).

Each numbered paragraph should be written as a single sentence, the same way you learned to draft pleadings in an earlier class:

- SINGLE SUBJECT
- SINGLE VERB
- MINIMUM ADVERBS AND ADJECTIVES

Each numbered paragraph is a separate statement, not a question or request.

A request for admissions begins with the preamble saying, "Admit or deny each of the following numbered statements of fact and law:"

A good preamble will include direct quotes from the rule itself, so the other side is on notice what the law requires (and what will happen if he does not respond to each numbered paragraph in accordance with the rules).

Admissions

In some jurisdictions, failure to admit or deny within the time allowed is deemed an admission. For example, if the time allowed to answer a request for admissions is 30 days in your jurisdiction, but the other side fails to respond within the time allowed by the rule, the court may rule (upon your motion, of course) that all items are admitted.

If any items are objected to without explanation and the court finds the objections objectionable, the court may deem those items admitted.

The responding party is required to either admit, deny, or give a good faith explanation why he can neither admit or deny.

There are no excuses.

The rule applies to both sides in every case.

If you write your admission items carefully, it will be impossible for the other party to object in good faith.

All that's needed are simple statements of the facts and law you need to prove so you can win.

Put each statement you wish admitted as a single sentence in a separate numbered paragraph.

- SINGLE SUBJECT
- SINGLE VERB
- MINIMUM ADVERBS AND ADJECTIVES

If the other side refuses to admit all your numbered items, they will surely admit some of them, and you have that much less to prove later.

If you know a denial is fraudulently given, get mileage out of the

other side's law-breaking practice by using other discovery tools to prove your opponent lied in his response to your requests for admissions. Then you are well on your way to a quick and favorable judgment!

Denials must be specific, i.e., they must speak straight to the matter and not beat around the bush.

Objections must be explained in detail.

If you don't get the response you believe good faith requires, move the court for an order to compel good faith responses or to deem the items admitted. Set your motion for hearing and go to court to tell the judge what's going on and why the court should force the other side to tell the truth. This is very effective.

For example, suppose you're the defendant. The other side has sued a half-dozen other people recently with the same claims for damages. You aren't liable, of course. You're one of the good guys. The opponent is looking for some easy money by pulling wool over the judge's eyes. His complaint is a collection of fabrications and exaggerations designed to ruin your reputation and extract from you an unfair sum of money. By examining the court file, you find the same plaintiff harassed others in the recent past, making similar claims. Get the clerk to give you *certified* copies from other case this out-of-control, unlawfully litigious plaintiff has recently filed. (Certified copies from the clerk are admissible over all objections.) Get the plaintiff to admit he is plaintiff in other cases and that the damages he seeks in those cases is similar to the damages he claims in your case. You thereby eliminate the necessity of being required to prove he has filed the same complaints against others.

One paragraph in a request for admissions.

The other side can be required to admit facts and law for you.

The other side's admissions become a permanent part of the court file and can be relied on at trial without further proof or testimony whatsoever.

Use this tool!

In a real case here in Florida the plaintiff claimed she suffered physical injuries when she was touched on the shoulder by a workman installing carpet in her home. The complaint demanded compensation for medical expenses, costs of hospitalization, lost wages, rehabilitation expenses, and similar outrageous damages ... for being *touched on the shoulder!* The complaint even sought money for her husband's loss of his wife's consortium. (That word means, well, ... er, that means … ahem.) Well, as it turned out, this same lady and her husband made an almost identical claim two years earlier when they were in a traffic accident, alleging "loss of consortium". By using requests for admissions, I was able to require the plaintiff to admit she did not, in fact, suffer any physical injuries at all! There was never any hospital visit. She lost no wages whatever. And, ... well, uhh ... I never did get to dig into her consortium claim, because she dropped her case before I could dig further.

The case never went to trial.

Admissions and other discovery techniques explained in this course ended the lawsuit long before my client was required to foot the horrible expense and risk the dreadful uncertainty of trial by jury.

The case was bogus from the get-go.

By using discovery I forced plaintiff to admit that facts alleged in her

complaint simply were not true!

The complaint was false and known to be false when it was filed.

Requests for admissions can put the other side's case in the light it deserves.

Use them to drag truth out into the sunshine where your opponents' dark secrets can be "discovered"!

## Request for Admissions

A request for admissions is very simple to write.

It's similar to a complaint. It alleges facts the responding party must admit or deny.

Used carefully, a request for admissions can prove your case without more.

Any fact a party admits in response is deemed admitted for all purposes.

**IN THE THIRTIETH JUDICIAL CIRCUIT COURT**
**IN AND FOR SUNSHINE COUNTY, FLORIDA**

Case No. 2012-123
Judge Benchpounder

PETER PLAINTIFF,
Plaintiff,

v.

DANNY DEFENDANT,
Defendant.

_____/

**REQUEST FOR ADMISSIONS**

PLAINTIFF Peter Plaintiff requests Defendant Danny Defendant to admit the truth of the following statements of fact:

1. You were employed by Plaintiff to deliver grapefruit.

2. You were allowed to use Plaintiff's grapefruit delivery truck.

3. On 17 May 2012 you signed a document in the presence of Plaintiff who also signed the document in your presence.

4. You received $3,000 from Plaintiff on 17 May 2012.

RESPECTFULLY SUBMITTED this ___ day of _____ 2012.

_____

Peter Plaintiff, Plaintiff

[ Certificate of Service ]

And when you wish to force your opponent to admit some certain law or rule of court or the authenticity of documents (e.g., contracts, phone bills, canceled checks, etc.) and other things (e.g., photographs, recordings, video footage, X-rays, etc.) or even the nature or condition of things (e.g., blown-out tire that caused an accident, digital watch that stopped at a particular moment in time, a broken tail light, etc.) you can use a request for admissions to do this also ... *if the law or facts you are trying to discover in this way is "reasonably calculated to lead to the discovery of evidence that will be admissible in your case".*

**IN THE THIRTIETH JUDICIAL CIRCUIT COURT**
**IN AND FOR SUNSHINE COUNTY, FLORIDA**

Case No. 2012-123

Judge Benchpounder

PETER PLAINTIFF,
Plaintiff,

v.

DANNY DEFENDANT,
Defendant.

_____/

**REQUEST FOR ADMISSIONS**

PLAINTIFF Peter Plaintiff requests Defendant Danny Defendant to admit the truth of the following statements of fact:

1. The document attached as Exhibit A accurately states Rule 1.370 of the Florida Rules of Civil Procedure.

2. The document attached as Exhibit B accurately states the entire contents of a written contract dated 17 May 2012 and signed by you.

RESPECTFULLY SUBMITTED this ___ day of _____ 2016.

_____
Peter Plaintiff, Plaintiff

[ Certificate of Service ]

This discovery tool allows you to require the other side to produce documents and things for inspection.

It could be a notebook, a cancelled check, an automobile … anything relevant to the outcome of your case.

They *must* produce.

If they don't produce, you can move the court to strike their

pleadings, dismiss their case, or have them held in contempt of court (if you follow the precise step-by-step procedures set out elsewhere in this course.)

Every civil jurisdiction in the United States gives litigants the right to obtain production of documents and other tangible things by serving the other side with a written request for production.

Like other discovery tools, a request for production can seek things that might not be admissible at trial ... so long as their discovery before trial is "reasonably calculated to lead to the discovery of admissible evidence", i.e., evidence that could be used at trial. Even though a document or thing may not be admissible later on, you nonetheless have the right to demand its production if it will help you discover things that *will* be admissible.

This is a very powerful tool for getting at the truth.

Use it!

For example, rather than use one of your limited interrogatories to discover a party's date of birth by asking a direct question in an interrogatory, request production of their birth certificate, drivers license, or some other document that will provide the necessary information.

Rather than using a valuable interrogatory to ask what were the terms of a certain written contract, request production of the contract itself.

In jurisdictions where interrogatories are limited in number, this is an essential tactic.

If you are involved in a lawsuit arising from an automobile accident, for example, and the other side is claiming physical injuries,

hospitalization expenses, lost wages, and such like damages, request production of their medical records, invoices of health care providers, cancelled checks paid to health care providers, payroll records, and any other document or thing that might reasonably lead to discovery of evidence of actual losses.

If they cannot produce cancelled checks, invoices, or other records of their alleged physical injuries, you win.

Yes. It *is* that simple.

Requests for production may be served more than once in many jurisdictions. You're not limited to just one bite at the apple.

Often production of one thing leads to the need to require production of other things you may learn about only after the first production.

Most civil jurisdictions permit multiple requests for production so that litigants have a fair and open opportunity to build their case for trial long before the trial date comes around.

Indeed, part of the purpose for pre-trial discovery stated in the official rules is to narrow issues and promote settlement.

By getting the "goods" on the other side, you usually can encourage a reasonable settlement so both sides are spared the expense and possible surprise that too often results from full-blown trials.

Those who refuse to obtain production of all documents and things needed to prove their case are only contributing to their potential for loss at trial.

You have the right to obtain discovery of documents and things through requests for production. Use that right to build your case on a solid foundation *before* you go to trial.

When a requested production is *not* produced, the proper procedure is to file a motion to compel production. Set your motion for hearing. Explain to the court how the document or thing requested is either admissible as evidence at trial or will assist you to discover evidence that *will* be admissible at trial.

Unless a document or thing requested is totally unrelated to your case, the court should grant your motion and give the other side a limited amount of additional time to comply with your request.

See the material on compelling discovery for further details on how to get your way when the other side refuses to comply with rules of discovery.

Requests for production may seek any documents or things admissible or likely to lead to discovery of admissible evidence:

- contracts,
- agreements,
- death certificates,
- court papers from another case,
- receipts,
- cancelled checks
- ... any document at all.

As for things, there is no limit other than the necessity that the thing requested is either admissible evidence as it stands or will assist you to discover admissible evidence.

Anything within the rule is fair game.

The other side *must* produce according to the rules.

Just remember when you're writing your requests to be *specific*.

Be as precise as possible in your description of the documents and things you wish to be produced.

If possible, describe the document or thing in terms of the issues of the lawsuit, i.e., making it clear in your request not only what the document or thing is but also how it relates to the case.

Be exact.

Pin the other side down.

Don't leave any squirming room.

Bracket dates, places, people involved, and so forth so as to prevent the all-too frequent objection, "Overbroad, vague, etc."

Don't be overbroad or vague.

Pin precisely what you want.

Then make certain you get it.

Use requests for production to build the facts of your case and make your winning record in the court file *before* trial. It makes no sense to wait until trial to obtain documents and things you can obtain *before* trial.

Use requests for production to get *all* the documents and things you need to win your case ... *before* trial.

## Request for Production

A request for production is similar in form to a request for admissions but, rather than asking the responding party to admit, it asks the responding party to produce documents and things.

A typical request for production follows:

**IN THE THIRTIETH JUDICIAL CIRCUIT COURT**
**IN AND FOR SUNSHINE COUNTY, FLORIDA**

Case No. 2012-123
Judge Benchpounder

PETER PLAINTIFF,
Plaintiff,

v.

DANNY DEFENDANT,
Defendant.

_____/

**REQUEST FOR PRODUCTION**

PLAINTIFF Peter Plaintiff requests Defendant Danny Defendant to produce for inspection and copying the originals of the following documents and things at the offices of Plaintiff or such other place as the parties may hereafter agree.

1. All corporate records of Grapefruit Delivery Corporation.

2. All records of money or other consideration received by you for sale or delivery of grapefruit from 17 May 2012 to the present, including but not limited to invoices and bank statements.

RESPECTFULLY SUBMITTED this ___ day of _____ 2012.

_____
Peter Plaintiff, Plaintiff

[ Certificate of Service ]

A very powerful and economical way to get at the truth is written questions called interrogatories.

Don't let the long word mislead you.

Interrogatories are nothing more than direct questions written out and served on the other side, questions that must be answered under oath, usually within a set time period.

To gain the court's approval, questions must be reasonably written to get at facts relevant to the case at hand.

You cannot ask in a breach of contract case, for example, "When did you stop beating your wife?" Such questions are outside the scope of lawful discovery.

Interrogatories should be designed to get facts relevant to the case.

Interrogatories can be in the form of direct questions, e.g., "How long have you lived at your present residence address?", or they may be in the form of commands, e.g., "Identify all persons having any knowledge whatsoever of the facts alleged in your complaint."

In some jurisdictions there's a limit to the number of interrogatories you can use. (Check your local rules.) If that's the case in your jurisdiction, it may be a good idea to discover all you can about the other side's case by requests for admissions and requests for production *before* using your valuable, limited number of interrogatories.

Since you may be allowed to depose witnesses once only, it's good practice to learn all you can *before* taking depositions by first using written discovery requests so you'll know what questions to ask when you finally depose the other side. Use requests for admissions and requests for production to discover all the facts you can, then

use a few interrogatories to fill in the blanks, *before* taking depositions. If your jurisdiction limits use of interrogatories, save a few questions for *after* depositions so you can use your remaining interrogatories to get last-minute information from the other side before going to trial.

Make interrogatories meaningful.

Get to the point.

Be direct.

Use simple language.

Ask questions that will help you win your case.

Don't waste your interrogatories.

Many young lawyers use interrogatories to get information they could better obtain by requests for admissions or requests for production of documents and things. If you wish to identify your opponent, for example, you could use an interrogatory to ask his name, or you could request production of that person's birth certificate, drivers license, or similar documents that will give you the information you need.

If you wish to establish that the other party was at a particular place at a particular time, you could request him to admit he was there or request copies of hotel or restaurant receipts for that time period, instead of using a valuable interrogatory to ask him where he was.

Pin the other side down.

Be exact.

Make your winning record *before* trial.

Many inexperienced lawyers use interrogatories to discover

information meaningless to the case at hand. For example, an interrogatory commonly-used by beginning lawyers commands the other side to "Identify all persons assisting you to answer these interrogatories." In most lawsuits it doesn't matter who assisted with the answers, since the party himself must sign and swear to his responses. It makes no sense to waste valuable interrogatories to discover useless information?

Give the other side no weasel room.

Pin him down.

Write your interrogatories carefully and use them sparingly if your jurisdiction limits interrogatories to a maximum number.

Save a few until just before trial to close any remaining gaps in your discovery and perfect your winning record.

If requests for admissions and requests for production are not limited in your jurisdiction, use admissions and production to get all the facts you can *before* using interrogatories.

Don't dissipate your discovery powers.

If you use discovery wisely (and have a winnable case) you should be able to win *before* trial through settlement or summary judgment [Covered thoroughly with forms in another class in this course.]

## Interrogatories

Interrogatories are simply written questions that must be answered under oath in writing.

Interrogatories can narrow issues of fact *before* taking depositions. This gives you an advantage over those who take depositions before they know what a case is about or what valuable testimony a witness

may be able to offer.

When drafting interrogatories, ask your questions in such a way that only one answer (i.e., the answer you want) is possible.

The following is an example.

**IN THE THIRTIETH JUDICIAL CIRCUIT COURT**
**IN AND FOR SUNSHINE COUNTY, FLORIDA**

Case No. 2012-123
Judge Benchpounder

PETER PLAINTIFF,
Plaintiff,

v.

DANNY DEFENDANT,
Defendant.

_____/

**INTERROGATORIES**

PLAINTIFF Peter Plaintiff propounds the following interrogatories to Defendant Danny Defendant.

1. List the names, addresses, and telephone numbers (if known) of all customers to whom you sold or delivered grapefruit from 17 May 2012 until the present, listing also the gross revenues received from each such customer.

2. List the names, addresses, and telephone numbers (if known) of all persons having any knowledge of your sales of grapefruit from 17 May 2012 through the present.

3. List the names, addresses, and telephone numbers (if known) of

all persons you intend to call as witnesses at trial in your defense.

4. List the names, addresses, and telephone numbers (if known) of all persons holding shares in Grapefruit Delivery Corporation at any time from 17 May 2012 to present.

RESPECTFULLY SUBMITTED this ___ day of _____ 2012.

_____

Peter Plaintiff, Plaintiff

[ Certificate of Service ]

Note the use of specific dates to pin down answers, instead of giving wiggle-room to object!

Depositions are proceedings where parties examine and cross-examine each other and witnesses under oath in the presence of a notary or stenographer.

Every word spoken at the deposition can be printed as a deposition transcript (if needed).

The deposition transcript can then be filed with the court clerk *before* trial to prevent parties and witnesses from later changing their stories.

It's always good to know what the other side and each of the witnesses is going to say *before* going to trial and putting them on the stand.

If they tell a different tale in court, you have a deposition transcript of their prior *sworn* statement to wave in their face.

"Were you lying then, or are you lying *now*?"

The most important point to note about depositions is that they are best used *after* you've learned enough about the case to ask the best questions.

Don't take your depositions until you know enough about the case to do a thorough job of questioning the deponent. In most jurisdictions you only get one bite at the deposition apple. You cannot depose someone again and again. You may only get one chance.

So, if you don't yet know what your opponent's case is all about, how will you know what questions to ask at a deposition?

Lazy lawyers (or lawyers whose clients cannot afford to pay them to do the job right) hurry to take depositions (because, frankly, it's easier to sit at a deposition and fire questions at someone than it is to sit alone in your office writing well-crafted requests for admissions, requests for production, and interrogatories.

*Effective* lawyers do not rush to deposition!

*Effective* lawyers get all the data they can using *written* discovery and only after studying all they can learn by interviewing witnesses informally and going over responses to written discovery requests, set witnesses and parties down for depositions where they can ask questions that will matter at trial – gluing people to their sworn statements under oath at deposition!

Do your homework *before* taking depositions.

Gather all the information you can by first using written discovery tools like requests for admissions, written interrogatories, and requests for production. Know in advance what a deponent is going to say *before* you begin asking him questions at a deposition.

Some lazy lawyers use depositions as a "fishing expedition",

searching for facts they could have discovered *before* deposition. They ramble and waste precious time ... time for which the attorneys and court stenographer must be paid. The more they ramble, the longer the transcript becomes. More transcript pages means more money out of the clients' pockets. They have little or no idea what the deponents know. They try to use premature depositions to find out, when they could use depositions only to pin a party or witness to what they want for testimony at trial.

Remember: Discovery is aimed at getting facts on the record.

The more facts you get on the record the better your chances of winning.

If you learn what a deponent knows *before* you depose him, you can ask the right questions and pin him down.

Once he testifies at deposition, he'll have a hard time changing his story at trial.

If you do discovery well, your case may not go to trial. You may be able to settle or get summary judgment on the basis that there are no disputed issues of fact relevant to the outcome.

Discovery alone can settle cases.

Please take note that there is nothing you can ask a witness at trial that you cannot ask the same witness *before* trial.

Depositions and written discovery tools give you an opportunity to pre-try your case, to know what will come out at trial (if the case doesn't sooner settle).

There is no testimony you can get out at trial that you cannot get on the record before trial.

Pin your witnesses down.

Depose them.

But! Do not depose them until you know what questions to ask and have all the documents and things you need to show them while you do the asking!

Be prepared.

Good lawyers know what they're going to ask a deponent before they arrive for a deposition. Some write out their questions. Others make an outline of points to be touched upon.

Only the most inexperienced or careless lawyers show up for deposition unprepared.

If you have no idea what to ask a deponent, you aren't ready to depose.

It may not be necessary to write out in advance every single question you intend to ask, however it is downright foolish not to have at least an outline of points you want to get to and the documents and things about which you intend to ask questions.

Don't be pushed around by the other side during depositions. There are only a few things that are "out of bounds" at depositions. Don't be bamboozled by intimidating lawyers. In most jurisdictions, protocols for examining and cross-examining deponents at depositions are looser than at trial where rules of evidence are strictly enforced. If the other side begins to object to every question you ask, request a conference with the other side outside the room, away from the deponent's hearing. Ask what the point of the objections is.

Know the official rules by heart and have a copy of the rules with

you!

If the other side abuses the rules by interrupting with objections you believe are improper under the rules, terminate the deposition and immediately file a motion with the court for a ruling before resuming the deposition.

If you continue a deposition deprived of your right to get what you want because of the other side's unruly and unlawful objections, you may not get another chance.

Know the rules.

If you are represented by a lawyer, make certain your lawyer does not allow the other side to interrupt without good cause.

Depositions are powerful tools ... rightly used.

They can also be horrible wastes of time and money.

Preparation and determination to get what you have a right to put on the record are essential to success.

Be very precise in your questions.

Use simple sentences.

Keep your questions simple and to the point.

Allow no weasel room for a deponent to give half-answers or evasive responses. If a deponent begins to weasel, pin him down. If you can catch him in a lie, you may gain valuable ground in your lawsuit that otherwise would be missed.

Be as polite as you can without being pushed around or otherwise abused.

You have a right to ask questions aimed at getting to relevant facts

in your case. The deponent has a duty to answer truthfully, candidly, and in good faith.

Do your best to be nice, but don't lose your case because you were afraid to insist on valid answers.

Whatever a witness says at deposition can be used against that witness if he changes his story at trial. This is called impeaching a witness, i.e., demonstrating to the court that a witness has no sense of honesty, that his testimony is not reliable. If a witness is asked a question at trial and gives an answer different from the answer he gave at deposition, you can wave the deposition transcript in his face on the witness stand and ask, "Were you lying at the deposition, or are you lying now?"

This has a decided effect on judge and jury.

The right to depose witnesses under oath before trial is very powerful.

Use it wisely.

Be prepared.

Get to the point.

Don't let the other side evade your questions or push you around with unfounded objections or questions beyond the scope of discovery.

**IN THE THIRTIETH JUDICIAL CIRCUIT COURT**
**IN AND FOR SUNSHINE COUNTY, FLORIDA**

Case No. 2012-123
Judge Benchpounder

PETER PLAINTIFF,

Plaintiff,

v.

DANNY DEFENDANT,
Defendant.

_____/

**NOTICE OF TAKING DEPOSITION**

YOU ARE HEREBY NOTIFIED that the undersigned will take the deposition of Peter Plaintiff at the offices of Esquire Deposition Services, 515 North Flagler Drive, West Palm Beach, Florida 33401 (800-330-6952) at 9:30 a.m. on 12 June 2012.

This deposition is for discovery and for use at hearings and at trial.

TIME RESERVED is six (6) hours.

GOVERN YOURSELVES ACCORDINGLY.

_____

Danny Defendant, Defendant

[Certificate of Service ]

Here's power you didn't know you had.

The power of court orders!

Subpoenas are just a fancy name for a special court order commanding a non-party to appear for trial, hearing, or deposition ... or to turn over papers and things listed in the subpoena.

Other court orders are as widely varied as your imagination.

For example, I once obtained a court order commanding the Sheriff to send one of his deputies with me to remove customers and employees from a pharmacy then putting padlocks on all the doors.

By this tactic I was able to secure the pharmacy's customer prescription lists and show the court how the employees were violating terms of my client's contract with them. It was kinda scary as I recall. The deputy was a big, burly fellow armed with pistol, handcuffs, and one of those giant 5-cell flashlights one might use to beat someone severely over the head.

We got no guff from the employee.

Everyone left, and the place was locked up tight ... just as I wanted.

Discovery power? You bet!

When you're the "good guy" in court, you have more power than you might ever imagine.

That's what's so great about our legal system. It may have a few flaws here and there, but it works beautifully *most of the time* ... and it's your power to win.

With subpoenas and other miscellaneous court orders you can actually have people picked up in handcuffs and locked behind bars if they refuse to obey. I've done it with deposition witnesses who refused to answer my questions after being ordered by the court to do so.

Judges are 800 pound gorillas in a black robe!

Only foolish persons willingly disobey court orders.

Once a court acquires jurisdiction over a person (because he elected to become a plaintiff by filing a lawsuit or was unlucky enough to have a lawsuit filed against him), that person has rights and powers he didn't have before ... rights and powers called due process and The Rule of Law.

You lose a bit of freedom by coming under the court's jurisdiction in a lawsuit, but at the same time you acquire amazing rights you did not have before!

Among these is the right to exercise your subpoena power or to obtain court orders directing others to assist you to put truth on the public record, bringing evidence favorable to your cause (so good guys win, as they always should).

Subpoena power is a formidable weapon truth has against liars.

With subpoena power and other court orders you can obtain bank records, require the President of the United States to appear for questioning, or command the local school board to explain its curriculum policies.

Subpoenas are orders by which *you* command the world to help you win.

Subpoenas can command anyone at all to do pretty much anything you wish them to do, so long as legitimate discovery is your goal, i.e., so long as it's reasonably likely you can thereby obtain knowledge that may lead to evidence that will be admissible at trial.

Court orders are issued by a judge, of course, either upon the motion of a party or upon the court's own instigation.

Court orders can command anyone to do anything.

So long as getting truth on public record is the goal, a court can command anyone to do anything necessary to see that the record is complete *before* trial.

Otherwise how would any of us ever find justice?

For example, suppose you wish to examine your neighbor's barn to

discover evidence you need to prevail at trial. If your neighbor is an adverse party in the lawsuit, you can bet he's not going to let you go snooping around his barn.

Even if your neighbor is not a party to the lawsuit, it isn't likely he will permit you to climb around his expensive equipment or put yourself in danger for which he may be uninsured. You'll need a court order.

Fortunately, if you can show the court you genuinely need to look around the neighbor's barn for evidence relevant to your case or facts that are "reasonably calculated to lead to admissible evidence", you'll get the order.

You may have to carry out your inspection under the supervision of an officer of the court (e.g., a sheriff's deputy) however the court will issue an order permitting you to do the inspection, if you satisfy the the judge that the facts you seek are "reasonably calculated to lead to the discovery of admissible evidence".

Necessity and reasonableness are the factors considered by the court when called upon to issue such discovery orders.

So long as your goal is to discover facts "reasonably calculated to lead to admissible evidence", the court should issue any orders reasonably necessary for you to discover those facts.

Other court orders enforcing your discovery rights include orders directing medical examinations, psychological evaluation, or virtually anything reasonably calculated to lead to discovery of admissible evidence.

Subject to local rules, subpoenas can be issued by attorneys of record or by the clerk of court upon application of any party to the suit.

The force of every subpoena is found in its opening words: "YOU ARE COMMANDED".

We're talking about real power here.

Subpoena power.

Power rightfully yours to use.

Use it!

Subpoenas can command persons to appear for questioning, either at depositions or at hearings or trial before the court.

Subpoenas can also command persons to produce documents and other things specified in the subpoena.

In most cases subpoenas should be formally served on the person they command, i.e., they should be personally delivered into that person's possession by an authorized process server who can provide the court with a disinterested affidavit attesting that delivery was made on such-and-such a date.

Effective service triggers the power.

Don't let adversaries stonewall you.

Use *all* your discovery tools.

Get truth on the public record.

1. Use admissions to pry into statements of fact, opinions of fact, and the application of law to fact.
2. Use production to require your adversaries to bring in documents and other tangible evidence favorable to your cause.
3. Use interrogatories to demand answers to critical questions that must be answered under oath under penalties of perjury.

4. Use depositions to mop-up in your information warfare, digging for those special points you may have missed with your initial written search for discovery of evidence, impeaching your adversary if possible.
5. Use the court's power and your own subpoena power to close every loophole and get ready for trial.

   Consult your local rules for how to issue and serve subpoenas in your jurisdiction. In some jurisdictions, attorneys (as officers of the court) may issue subpoenas, however it's usually not possible for non-lawyers to issue subpoenas. The clerk of court, however, can issue subpoenas in most jurisdictions if you present the proper paperwork. Again, consult the local rules for more details.

   Once a judge orders a thing to be done, failure to comply comprises contempt of court and may be punished by severe fines and jail terms.

   Discovery is how you win lawsuits.

   First of all, your pleadings must be solid. If you already studied the class on pleadings, you know some discovery can be done at the outset using pleadings alone.

   Next you use your three written discovery tools.

   Then, if needed, you use depositions, supoenas, and court orders to get the rest of what you need to win.

   Discovery *proves the* ultimate facts alleged in your pleadings and *disproves* the ultimate facts alleged in your opponent's pleadings.

   Your own pleadings are a waste of ink if you cannot *prove* the ultimate facts you allege.

On the other hand, if you effectively *plead* all ultimate facts needed to establish all essential elements of your cause(s) of action as plaintiff or your affirmative defense(s) as defendant, then if you use your discovery tools effectively to put into the court record the greater weight of admissible evidence in support of your alleged ultimate facts (i.e., more than your opponent has offered in support of *his* alleged ultimate facts) *you win!*

I told you this was easy!

MICHELLE GOMEZ: Your subscription expires October 26, 2020

Take this quiz to see how much you still need to learn.

Some items may seem like "trick questions", but there is only *one* correct answer to each.

Remember: Reading *carefully* is essential to success in court.

Take this and all quizzes as many times as you wish.

However, to be properly prepared for your battles in court, go back over the classes until you get at least a "B" on every quiz.

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