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My first trial: Long discovery avoids surprises in the courtroom

While it sometimes seems that discovery will never end, all of that information can add to your sense of preparedness for the trial

By Clare Capaccioli Velasquez

In November 2015, a case I was involved in from start to finish finally went to trial. Before this case, I had been lucky to work on many cases that settled, including the PG&E San Bruno Fire cases, but participating in a trial was a whole different challenge. Because I was a third-year attorney, my participation in this case was both the most exciting thing to ever happen to me, and the most overwhelming.

I've never been a fan of surprises, and my biggest worry as we began preparing for trial, was that I would be overwhelmed by an unexpected surprise in the courtroom. In hopes of avoiding as many surprises as possible, in the months before trial I prepared. I read countless articles on trial techniques, reviewed transcripts and worked hard to eliminate "ums" and "oks" from my vocabulary. I was so tense and nervous on the first day of trial that I actually fell out of my chair at counsels' table. I was surprised to discover however, that on each of the 11 days after that, I felt calmer and more relaxed than the previous day.

Discovery really does reduce surprises

Now that I'm on the other side of the trial and fully caught up on sleep, I've had a chance to think long and hard about how I was able to feel so calm during what was supposed to be one of the more stressful events in my career. I realized that my most important preparation was completed long before the trial

started and had nothing to do with lectures and articles. Because I had been forced to confront all possible unwelcome surprises through series of aggravating and lengthy discovery disputes, there were actually none left to confront at the trial. Although it shouldn't have been news to me, as one of the aims of the Civil Discovery Act is to eliminate surprise, I had always seen discovery as a tedious and burdensome chore. Now, I've changed my tune.

When we first filed the complaint, I had no idea that everything in discovery would be a trying test of my patience and sanity. By the time the case went to trial, over two years after it had been filed, it felt like there couldn't possibly be any discovery method or motion we hadn't tried or responded to. While the amount of discovery and the mind-numbing details about this case could fill a library, there are some more useful and effective discovery tools that helped me achieve calm during my first trial, and that I will try to remind myself of the next time I find myself frustrated by lengthy discovery dispute or uncooperative opposing counsel.

Start with the basics

Because I was new, it was difficult to know where to begin with discovery, and what was going to be important. I started with subpoenas to financial institutions and medical providers. Upon review of those documents, the time frame became clear and I was able to tell where more information would be needed.

For example, where medical records noted communications with the interested party during a key time period, I was able to tailor the Special Interrogatories and Document Requests for more information.

Where financial records showed a series of suspicions transactions, I asked specifically about what precisely they were for, and where the money was spent, crucial details in this case. Not only did this make responding to boilerplate objections like "overbroad" and "reasonably calculated to lead to the discovery of admissible evidence" much easier, it also gave me a head start in terms of memorizing important dates as I prepared for trial.

Follow-up

After Special Interrogatories, Form Interrogatories, Document Requests, and Requests for Admissions went out, and multiple deadlines passed without reply, it became clear that this wasn't going to be easy. Before each deadline, I sent an email making clear when the production or responses were expected. After each passed, I detailed what information was still needed and gave a time frame for responding to avoid a motion to compel.

In the process of detailing exactly what was missing from each response, I became very familiar with the scope of the relevant information. The delaying tactics seemed to be purposeful attempts to conceal unfavorable information so by following through quickly, I learned early where to expect resistance from opposing counsel. Where there was resistance, I was able to hone in and target subsequent interrogatories, leading to better evidence and a stronger case.

Be flexible

After two requests for extensions were granted, we proposed a rolling production simply to get the process going. We learned that opposing counsel was having difficulty gaining cooperation from their client, who was struggling with locating documents and a rolling production would be more workable for their client. While the idea of piecemeal production was unwelcome, it was better than shutting the opposing party down and allowed us to get started on document review sooner.

Don't give up

After several months of extensions and piecemeal productions, and meeting and conferring, it started to feel like maybe it wasn't worth the frustration to get those financial documents or possibly relevant phone logs. We continued to press for responses but found other ways to get the information. For example, when the request for phone logs was ignored, we requested the phone itself and were able to get the phone imaged, making the document production from the opposing party unnecessary. The phone had more than simply phone logs, and ended up being a treasure trove for trial.

Adapt: There's always a way

Opposing counsel was fickle with production and responses, and commonly produced portions of communications: an email referencing an attachment, but missing the attachment, or a response to an email, but not the initial email. We kept asking for the information, and even filed motions to compel, but we continued to encounter resistance. We subpoenaed the documents from third parties, who were much more cooperative, and timely.

Know when not to back down

Opposing counsel sent a deposition notice to our minor client who had experienced the traumatic events at the age of 10. I was immediately uncomfortable with the idea and quickly reviewed the law. I was dismayed to find that there is no prohibition where a child may know probative information, and it seemed like it would be difficult to prevent the deposition from going forward. I was about to deliver the bad news to the client, when my supervising attorney said: "Absolutely not, we'll find a way to stop them." It came at a busy and hectic time, in the midst of a Motion for Summary Adjudication, and making a motion to quash on unsteady legal ground was not something that I was confident or interested in tackling. However, we obtained declarations from the child's therapist and the motion to quash was granted. The client was happy, and we knew that a whole area of the case would be off limits at trial.

Be clear with your client

One of the more difficult things to do, after a long week of negotiating depositions schedules with opposing counsel, is to be patient with your client when they drop a bag full of new documents and photos on your desk, ten days after the deadline you gave them, and five days after a massive production has gone out the door.

After one such visit from my client I learned my lesson, and then gave detailed and exhaustive instructions about how they must provide all documents, even those indirectly related to the issues at hand. It was also useful to be clear about what form the documents should be in; for example, while copying and pasting a thousand emails into a Word document seems an unworkable nightmare, it actually helped with authentication of those emails at trial because I knew exactly where they came from.

Additionally, as difficult as it was at the time, I am happy I did not lose my temper because having a good relationship with the client made them much more cooperative, and made working with them for the next two years much more pleasant.

Motion in limine

After serving supplemental requests to coincide with the discovery cut-off we drafted what is now my favorite motion in limine: to prevent the introduction of evidence not disclosed or produced in discovery. When it was granted, we were able to rest easily, knowing we wouldn't be blind-sided with new information at trial.

Concluding thoughts

As I write this we are still awaiting a decision. I can confidently say however, the preparation that served me best was the long discovery battle in the two years leading up to the trial. And whatever the result, at least I now have the tools to take on the next trial, and avoid dreaded surprises.

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