

It's All in the Documents

In many cases, the truth lies in the documents. I do a lot of NH cases and often, cases are won in the documents. I don't know about you, but I have noticed that my opponents aren't always forthright in their discovery responses. And sometimes they even try to evade the truth. Am I the only one with that experience? Anyone else been there. There is a way to take control. It's called a deposition. It's why we are here this week.

This is Donald Davidson of New Brunswick NJ at a NJ Bar association NH CLE program on March 6, 2004. Note he says this information is usually given at DRI seminars.

Rule 34: Document Production

Rule 34 is what governs the production, inspection and copying of DOCUMENTS. And that's the key. You can do a RFP but often, we get objections, partial documents or even none at all. Rule 34 is very powerful as it allows DOCUMENT depositions, where people have to swear under oath. Most states have the equivalent rules to the FRCP.

There is a different approach

This is about problem solving. The problem is, we want the documents and the defense won't give them to us. The peanuts are the documents. So how do we get the documents? Well, like the chimp, we have discovered a solution.

The Death Star

The 34, 30(b)(6) and 30(b)(2) document deposition has been dubbed The DEATH STAR deposition, as it is all encompassing and if done correctly, can destroy the defense

Rule 30(b)(2): Witness Brings the Documents

This requires the defendant, or any party, to produce documents in their possession, custody and control at a deposition. Not by mail, not by the lawyer, but the defendant or defendant's representative.

Rule 34 Governs the Schedule of Documents

The schedule of documents is a list of documents that you want produced. They can be anything: policies, procedures, training manuals, videos, electronic records, you are only limited by your imagination.

Who do you depose?

This is a very important decision, who to depose. Often we don't get to pick the person. Instead, the defendant often chooses who the deponent is. So, what control do we have over that person? Well, we look at Rule 30(b)(6), and Jerry has already

talked about it. But I need to discuss it a bit, as it ties into the DEATH STAR deposition.

30(b)(6): Depositions by Designation

Whoever is produced, whatever is said, it is binding on the defendant. In this case, the defendant can be a corporation, a partnership, an association, a governmental agency. Whatever the entity, they are required to produce the person or persons most knowledgeable as to the "matters on which examination is requested." That's the key: persons. It's not limited to one. If there one person is most knowledgeable about one topic and another is most knowledgeable about another, they must both be produced.

30(b)(6): Depositions by Designation

Witness designation: the defendant is required to designate and fully prepare the person or persons most knowledgeable concerning the designated matters of inquiry.

How do we put it all together?

The notice of deposition is how we bring all this together

"Documents Witness" Deposition Notice a/k/a The Death Star

The goal is to identify the records and documents you need. This isn't a substantive deposition. It's a deposition to get documents or, in the alternative, set up a motion to compel when they don't bring the right ones or the right people.

So, what does the defense do in response?

Shenanigan 1: The check is in the mail. The 30(B)(2) notice establishes deadlines. A date certain for the depo. Have to give at least 30 days notice for the depo and the assembly of the documents, but you set a date certain. It's important, as any objections need to be done within 30 days of the date of the notice.

Shenanigan 2: The partial response. You get some, maybe most, but not all of the documents. And what's missing? What you really want. Sometimes you get boxfuls of paper and you have to wade thru it all and what you really are looking for isn't there. McDonalds KY case example.

Produce the harmless stuff, object and withhold the good stuff. Privilege, work product, peer review, you have heard it all. Can they do that?

Shenanigan 3: We can't find the documents. Well, did you look?

Shenanigan 4: That's all I know!

Well, there is a duty to be prepared for the deposition.

Organizational not personal knowledge

Its not the person with the most knowledge, its all information known by the corporation, entity that the notice is directed to.

Step 2:

What Have You Done to Prepare?

What have you done? Who have you talked to? Where did you look? What documents have you looked at? Who could you have talked to? Where else could you have looked? Is there anyone else who has knowledge of the documents requested?

Step 3:

What Documents Exist?

Have you brought all the documents found? Was anything removed, withdrawn from what you found? Were copies found in other locations? Are there electronic documents that have not been produced? Has anyone told you not to bring certain documents? Describe all the documents you have produced?

Step 4:

What Did You Do to Look?

Where did you look? Where else could you have looked? Who did you talk to? Who else could you have talked to?

Step 5:

Mark the documents as exhibits

Mark all the documents as separate exhibits

Step 7:

Make sure you continue the deposition. "This deposition is continued so that the defendant can:

1. Produce the appropriate documents
2. Produce the appropriate witnesses
3. So the court can rule on motions to compel

Don't Ever Give Up

Remember the first video I showed, the DRI guy. They expect us to give up, they expect us not to ask, they expect us to basically be lazy.

Be relentless. There is an American icon, someone who is the classic example of never giving up. Any ideas?

Come on, any ideas? Be Wile E. Coyote, don't ever give

