

Discovery

Not a Job for Christopher Columbus

By Donald A. Glenn

The billionaire T. Boone Pickens once said, “An idiot with a plan can beat a genius without a plan.” In a divorce case, discovery is not a job for a financial explorer out to “discover the world.” Discovery is the most time-intensive and expensive phase of a family law case. It requires a lawyer and CPA working together on a focused assignment with a plan tailored to the facts of the case.

In looking back over my own cases with good outcomes, I find that effective discovery most frequently occurred when we worked with our regular referring attorneys and had adequate time to prepare. But the best work required more. In further post-game analysis, two conditions were present in our best outcomes: (1) Good communication with the attorney, and (2) a comprehensive discovery plan. Discovery is not fun or exciting, but it does deserve coordinated attention.

The discovery plan. Discovery planning requires a general plan for the entire case. A small amount of up-front planning saves time and is more likely to lead to successful discovery. The first step is to understand the players. Attorneys are like college students who have a habit of working in spurts, such as writing term papers the night before they are due. They rely on their substantial memories to manage data. CPAs are like college science nerds. We love the science project and continually tweak it until it is perfect. The client wants to win, but is concerned about balancing the costs of the case with predictable results. It is amazing that clients do not understand the relationship between costs and results in their own case. Involving clients in discovery planning helps them better understand the inevitable costs because they are generally involved from the beginning and they provide the initial sources of information.

Basic process. Developing a plan starts with issue identification. These issues relate to the legal concepts, which the attorney will define for the client and CPA. The definition will include who has the burden of proof for each issue. If your client has the burden, discovery will probably be more detailed but of the shotgun variety. If your client does not have the burden of proof, then discovery may be minimal and designed to determine if the spouse has the requisite documents to prove the case. Discovery may be postponed, minimal, or in phases if it is not desirable to have the other side begin early preparation of documents. Finally a discussion of what is necessary to prove or to rebut each issue should establish the basic case and discovery goals.

Document management. Family-law discovery often is less formal than general civil litigation. This poses problems if evidence suddenly appears at settlement conference or trial. Keeping accurate records of the discovery provided and what is missing becomes

important. Generally our first order of business is to decide who will be responsible for physical custody of the case records. In small cases, it may make sense to have copies made for both attorney and CPA. But in large, complex document-intensive cases, this is expensive and wastes the professionals' time, which may be better spent on other aspects of the case. In these cases, we use document scanning, electronic retrieval, and then share documents with counsel. This allows us to retain the records in their original state, which may be necessary if compliance with discovery is later questioned. Key to the process is a logical and simple index that facilitates quick storage and retrieval of documents.

Standard discovery documents. Family-law attorneys develop discovery templates for issues commonly encountered in their practices. Local rules may require standard interrogatories or other discovery. Lawyers have a tendency to send out standard templates as the first round of discovery, but a little customizing of the first set can pay significant dividends. It forces the team to focus on issues and seek early input from the client and other public sources, such as the Internet. On occasion, well-crafted early discovery can have the additional advantage of facilitating settlement discussions.

Business valuation. The family-law attorney and CPA should work together to formulate discovery questions. To CPAs, the most efficient method of gathering data for business valuations is a questionnaire that combines questions with a document request keyed to the answers to each question. For example "Do you lease the business or other property? If yes, answer the following questions and provide copies of all current leases." CPAs generally have standard business valuation questionnaires. CPAs' questionnaires are generally not in the same form as a demand for documents or interrogatories, but they expedite and streamline discovery if the parties will stipulate to providing information in this format, including a certification. If a party refuses this efficient approach, the attorney will have to convert the questionnaire into a format acceptable for formal discovery requests. Experienced forensic CPAs often have formal discovery requests in addition to questionnaires. If formalities are observed, the normal tendency is to prepare exhaustive discovery requests. This escalates the case, puts a large volume of documents into play, and increases costs.

I suggest another approach: three separate rounds of discovery. The first round will be a standard template of interrogatories and a streamlined document request for basic business records (our document request is a page and a half). After receipt of the first answers and documents, a preliminary work-up of the value can be performed. The initial work-up generally identifies issues requiring additional discovery. The second round focuses on issues and questions posed by the first round. These questions are customized and focused. After analyzing the second round of material, a third round may be written or incorporated in a site visit with interviews if possible. If no site visit is possible because the business spouse refuses to cooperate, you may schedule the deposition of the in-business spouse and, in large companies, other company members as well. Depositions to determine facts related to reasonable compensation, business risks, even basic ownership or control of the company are sometimes necessary. CPAs may have a list of standard deposition questions and may be helpful in mapping out topics and subjects for depositions. If your CPA does not have a standard list of deposition questions, ask your

expert to prepare a list of questions for each deposition. It can be very useful to have the CPA attend the deposition

Many cases do not require a third round of discovery. If the three-rounds method is used, it can be helpful to advise opposing counsel of the three-part process. This can head off claims of abusive discovery. One weakness of this method is that it cannot be used unless adequate time is available and counsel is willing to pressure compliance with discovery deadlines.

Separate property and tracing. With separate property claims, the party asserting separate property (separatizer) has the burden of proof. It can be a heavy burden, depending on the type of property, cash or real property, and state rules. Discovery is designed and functions differently depending on whether you are asserting or defending a separate property claim.

If asserting a separate property claim, discovery is designed to discover and obtain information and records to prove the assertion. Conduct discovery of this type as quickly as possible. Sometimes when parties separate, records are destroyed as the parties move or engage in spring cleaning. If possible, have the records removed from the residence or other location, inventoried, and stored for use by the parties. A CPA's assistance can be critical to collecting and inventorying materials and serving as custodian of records.

If defending against a separate property claim, discovery should first determine if the spouse has sufficient proof to support the claims. Separatizers typically make unsupported, and sometimes detailed, arguments of the history of their

separate property claims. Their experts sometimes reflect these unsupported arguments in professional looking schedules and analysis. All too often, a lack of inquiry lends credibility to these presentations without supporting proof. Sometimes these unsupported schedules allow settlement of significant separate property claims that could not survive the crucible of trial. Discovery should seek to establish that sufficient documents are missing and unavailable to prove some or all of the separate claims.

Investigations. Investigations are the most difficult part of discovery, particularly when fraud is present. When alerted to the possibility of discovery, the fraudsters will destroy or place out of the reach of a spouse information and documents that will prove the fraud or establish the existence of undisclosed property. To prevent alerting the fraudster, get a court order or make an ex-parte motion to initiate discovery. Serving orders may require the assistance of the sheriff or marshal. Private investigators may be required to assemble evidence justifying court issued ex-parte discovery orders.

Once initial discovery is completed, planning is required to develop the best return on the available evidence. If necessary, request additional discovery of third parties. All involved should occasionally ask whether a strong likelihood still exists that a goose really is at the end of the wild goose chase.

Protective orders. Privacy issues often are raised in response to objections to discovery requests. A common resolve results in a protective order. Protective orders generally

focus on a party's related persons or companies. There is little consideration given to their effect on the spouse's attorney or CPA. They often are so restrictive that if a spouse makes a claim against either or both of the professionals, the protective order may preclude access to proof needed in an E & O defense. An experienced expert usually can work with protective orders by returning documents to a third party to be held for a period of time. In the event of a claim, the documents would be available to the CPA (and attorney) to defend themselves. CPAs should protect themselves by specifying in the engagement letter that the client must reimburse for fees and costs associated with protective orders. CPAs do not want to take on the financial responsibility of defending against a protective order. If protected information is sought, consider requiring the CPA to provide only notice to the client. The client can then decide if enforcement of an order is appropriate. Some proposed protective orders are so onerous that they will prevent a CPA from completing an assignment with acceptable risks. Requests for unreasonable orders can usually be resolved by the court to everyone's satisfaction. If not, the CPA may decline the assignment.

Conclusion

The cost of divorce has increased over the years. Were it not for technology, divorces would be even more expensive. Family-law discovery can cover a wide range of subjects, probably more than any other area of the law. On your next case, invest an hour or two in a discussion about discovery with your client and CPA. Consider who will draft requests, who will receive copies, whether electronic storage should be used, how many requests are anticipated, and, in light of case issues, developing a written discovery plan. Plans need not be fancy, just effective. Discovery may be one promising area of family law in which a little planning can lead to better results at lower combined fees and costs for the attorney and CPA.

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