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Surprise attacks discouraged - Civil litigation basics - by Michael Brangwynne

December 20, 2019 - Front Section

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This is the second installment in a series about the basics of the civil litigation process. If you are interested in reading the first installment, it is available on Fletcher Tilton's website under the Knowledge Library where you will also find numerous excellent articles on litigation avoidance. This particular series is for those who are beyond the point of avoidance and find themselves preparing to navigate the often-treacherous waters of a civil action.

Discovery Generally: Certain examples from pop culture–such as Mona Lisa DeVito being called as an 11th hour expert witness in the classic film My Cousin Vinny, and saving the day with her testimony about the availability of rear wheel positraction and the '64 Buick Skylark – might lead some to believe that surprise witnesses and trial by ambush remain acceptable practices in our courts of law. In the real world, by the time of trial, all parties to a civil dispute should know exactly what evidence they can expect the other parties to offer at trial. This is thanks to modern discovery practice.

As the United States Supreme Court has said, discovery and pre-trial procedures are in place to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." The basic premise of discovery is that the parties to a lawsuit must disclose to one another evidence that is relevant to the dispute, and that is not protected by a recognized privilege that would justify withholding the evidence. Permissible discovery takes several different forms.

Written Discovery: The two most common forms of written discovery are Interrogatories and Requests for the Production of Documents.

Interrogatories allow all parties to a civil lawsuit to serve on each other party questions that must be answered under oath. For example, if we consider a lawsuit by a property owner against a general contractor for defective work, the plaintiff-owner might include in his Interrogatories to the

defendant-contractor a request that he describe in detail all work that he performed on the property, or list all subcontractors that he hired to assist with the agreed-upon work. The contractor will have the same opportunity to send the owner Interrogatories that must be answered under oath.

Requests for the Production of Documents are precisely what their name implies – requests by one party to another that he produce for inspection and copying any documents of a certain description in his possession, custody or control. For example, our contractor-defendant would likely request of the plaintiff-owner all photographs in his possession showing the allegedly defective work.

It is important to note that the term “document” has an extremely broad definition and does not just refer to pieces of paper. Indeed, a party will be required to produce emails, text messages, electronic files and even physical items for the other party to inspect. For this reason, it is common in a construction defect dispute for the parties to arrange for a site inspection that will provide an opportunity for all involved to inspect, document and photograph the condition of the property and the allegedly defective work.

Relevant documents can also be requested of individuals or entities that are not a party to the lawsuit by way of a subpoena.

Depositions: Once written discovery has been exchanged between the parties, it is typical for each party to a lawsuit to be deposed. In addition to the parties, individuals or entities that are not a party to the lawsuit can also be subpoenaed to appear for a deposition. The deponent must appear on an agreed-upon date, usually at the law office of the attorney requesting the deposition, to provide testimony, under oath, as to his knowledge of the facts relevant to the dispute. In addition to the parties’ and the deponent’s lawyers, a stenographer will be present to create a transcript of the deposition testimony for later use. This gives the parties the opportunity to hear live testimony from potential trial witnesses, weigh the witnesses’ credibility and ask questions in follow-up to written discovery.

After written discovery and depositions are completed, the parties are nearing the completion of discovery and should have a strong understanding of each other’s claims and evidence. Depending on the nature of the case, there may be one final category of evidence that must be investigated through the discovery process – and which brings us full circle to Ms. DeVito’s testimony mentioned above: the parties must exchange information regarding their intended expert witnesses.

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