A Quick Guide to “Discovery” in U.S. Courts

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What is “discovery?”

- In the U.S. “discovery” refers to both the process and the tools used in a lawsuit to discover the facts and, in theory, the truth. It is the means by which the parties to the lawsuit gather information that they will then use to persuade a judge and jury to rule in their favor.
- Discovery is by party request and usually without judicial intervention. Each party requests that the other provide information using specific tools described in this paper. The judge becomes involved only when there are disputes about what is being requested.

Why should European lawyers care?

- Any company that sells goods or services in the United States, even if it only sells on the internet and has no office in the U.S., may be subject to a U.S. lawsuit.
- In a global economy it isn't hard for goods and services sold outside the U.S. to end up in the U.S.
- The law concerning when a foreign company can be sued or cannot be sued in the U.S. is complex, but sometimes a U.S. Court will permit discovery *before* it decides whether the foreign company should be in the case at all.
- So even a lawyer whose clients have no U.S. office may be called on to give early advice on a lawsuit filed in the U.S.

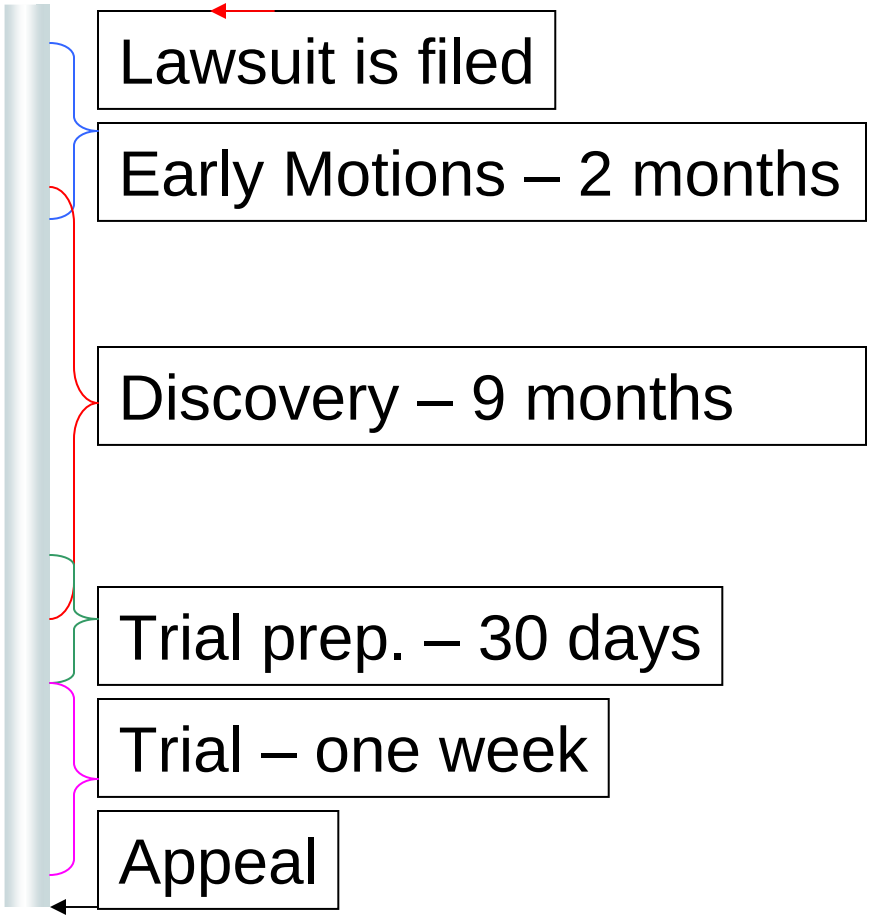
What can be discovered?

- The parties to a lawsuit can use discovery tools to gather information if:
  - The information is relevant or
  - The information is reasonably likely to to help the party find something relevant.
- “Relevant” means information that has “any tendency to make the existence of any fact that is of consequence more probable or less probable.” (Federal Rule of Evidence 401)
- And “reasonably likely” allows gathering information that is not relevant, but might point to information that is relevant.
- Information that meets these criteria is said to be “discoverable,” meaning it can be obtained through discovery.

In discovery, excess is normal

- Because the parties can gather information that is not relevant if it will help them find relevant information they often gather far more than can or will ever be presented to the Court.
- For example, in a recent business related lawsuit the parties between them produced to each other more than 30,000 pages of documents. Only around 150 pages were presented to the Court during the trial of the case.
- In the same case the parties took testimony from 12 witnesses and produced 7,200 pages of transcripts. Only around 20 pages of this testimony was presented to the Court, and only 4 of the witnesses testified at the trial.
- There are strategies to deal with this (discussed below) but to a certain extent this is an unavoidable consequence of the system.

Where discovery fits in the progress of a lawsuit



- This chart shows the six basic steps in a typical lawsuit in the United States. These steps are the same in both state and federal courts. Discovery takes the longest and is usually the most expensive step.
- There are many possible complications, overlaps, and items that may come up out of sequence, but
- Once the trial starts, no more discovery is allowed. The evidence available on the first day of trial is all the parties will have a chance to use.
- Times shown are typical for a case taking one year to go to trial. When cases take longer it is because the discovery period is longer

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How the right to trial by jury has influenced discovery

- For most civil disputes in the United States either party can demand trial by jury. In such a trial between six and twelve ordinary citizens act as a jury to decide the facts of the case. The judge then decides the legal consequences of those facts.

Jury trials give discovery a hard cutoff date

- Because jurors cannot be expected to meet and hear evidence more than once, trials have a fixed starting date, and continue over consecutive days or weeks. The trial concludes with a decision by the jury, which is then dismissed.
- Because the trial takes place over consecutive days, all the evidence must be gathered before the trial begins. Because the jury is dismissed at the end of the trial no new evidence can be offered after that time (with rare exceptions).
- It is common for trials to be postponed while the parties gather evidence, but once the trial starts it is almost never interrupted.

Jury trials make presentation of facts to the judge less important

- The judge in a jury trial decides what evidence the jury can see (or cannot see), but he does not decide what is true or false, or which evidence is reliable and which is doubtful. There are specific rules intended to minimize the judge's ability to influence what the jury thinks about the evidence.
- Because the judge does not decide what is true and what is false there is little reason for the judge to spend time before or during the trial analyzing the evidence. Judges tend to have a "hands off" approach to discovery as a result.
- Even when the parties decide not to have a jury, there is no mechanism for the judge to evaluate evidence before trial – he or she probably won't really think about the merits of the lawsuit until the trial begins.

Jury trials result in broad discovery.

- Since evaluation of the evidence is postponed until trial begins it is difficult for the judge to know whether any particular kind of evidence is important in advance. As a result, the parties are given a lot of freedom in gathering information and usually gather much more than will ever be used at trial. Only rarely will the judge significantly limit discovery by the parties.
- In keeping with the “hands off” approach by the courts the parties are given the power to summon witnesses and demand that third parties produce information with very little judicial supervision.

Discovery tools

- Automatic Disclosures – the federal courts and many states require disclosure of basic information on request or automatically.
- Interrogatories – these are written questions to the opposing party that must be answered in writing and under oath.
- Requests for admission – these are written statements of fact that the opposing party must admit or deny.
- Requests for production – these are written requests to look at and copy documents or, in some cases, land or or a thing.
- Request for medical examination – in cases involving an injury the defendant may request that an independent doctor examine the injured person.
- Depositions – this is an oral interrogation of a witness who is under oath and whose testimony is recorded verbatim.
- Deposition on written questions – this is an interrogation of a witness who is read questions but answers orally rather than in writing.

Disclosures

- Rule 26 of the Federal Rules of Civil Procedure is a typical "disclosure" rule. Each party must provide the other party with:
  - The name and address of possible witnesses and a description of what information the witness has. This includes hired expert witnesses.
  - Copies or descriptions of any documents the party expects to use at trial
  - A calculation of any damages claimed, and the documents that support the calculation
  - Any insurance agreement that might cover the claims in the case.
- This information must be provided early in the lawsuit, usually before other kinds of discovery begin. It was intended to reduce discovery requests, but has not succeeded.

Interrogatories

- Interrogatories are written questions that are answered in writing under oath.
- Because it is easy to ask questions that may be very hard to answer most states and federal courts limit the number of interrogatories. Federal Courts limit the number to 25.
- Interrogatories are typically used to gather information that is well defined such as the date of a meeting or the work history of a witness.
- Interrogatories cannot be used to get a summary of the case. It is not proper to ask: “List all the facts, documents and witnesses that support your claim.”

Requests for Admissions

- A request for admission is a request that a particular statement be admitted or denied. For example: “Admit that you did not make the January 15, 2010 payment on time” or “Admit that Exhibit 1 is an accurate copy of the contract between the parties.”
- The purpose of these requests is to learn which facts are really in dispute so that no one will waste time on facts that are agreed.
- There is generally no limit to the number of requests for admissions because they are easier to answer than to write and are therefore harder to abuse.

Requests for Production

- These are requests to examine and copy documents or tangible objects. They are responsible for most of the expense of discovery because it is so easy to ask for materials that may be difficult to find and produce, and that may be difficult to read and analyze once they are obtained.
- For example, a request might be: “Produce all letters and emails to or from any employee of XYZ Corp. that directly or indirectly refers to the contract between the Plaintiff and Defendant.” It is easy to see that for a significant contract of a large business this could mean thousands of emails and letters sent by dozens of employees.

Request for medical examination

- This is rarely used in business disputes, but is quite common in cases based on a physical injury to the plaintiff.
- Unlike other discovery requests, this kind of request must be approved in advance by the Court.

Oral Depositions

- An oral deposition is simply an interrogation of a witness done prior to trial and without any judge supervising. The questions and answers are usually transcribed by a court reporter, that is, a stenographer authorized by the courts to prepare official transcripts. They may be audio taped or video taped as well. It is very common to have both a court reporter and a videographer.
- Most courts limit the number of depositions any one party can take or limit the time for depositions. In Texas, for example, a party can take as many depositions as it desires but can only spend 50 hours doing so. In Federal Courts the parties can only take 10 depositions and each is limited to a single 7 hour day.
- The deposition process is the subject of another paper by this author that will be distributed through the EAK. Depositions are not the most expensive part of discovery, but they are the most annoying to the parties and among the most likely to result in disputes.

Deposition on Written Questions

- In a deposition on written questions the witness appears before a court reporter and orally answers questions submitted in writing by the parties. None of the lawyers are required to be present.
- This procedure is generally used today only for routine matters. For example, a witness who is needed to authenticate medical records may be examined on written questions simply to testify that the records are authentic, which saves the parties money because the lawyers do not need to be present. Because a deposition can be used at trial instead of the live appearance of the witness it spares the witness a trip to Court as well.
- This is a discovery relic of days when travel was more expensive and difficult and so it could make sense to mail questions to the witness rather than have the lawyers or witness travel. A deposition was required (rather than a simple written statement) because of the constitutional requirement that every party have a chance to "confront" the witness, in this case by submitting a counter set of written questions.

Discovery Sanctions

- Failure to follow the various rules concerning discovery can result in various punishments from the Court. The usual penalties, in order of severity, are:
  - An order to pay the costs incurred by the other party to get the discovery
  - An order to pay an additional amount of money as a penalty
  - An order that a witness be jailed or taken in custody (if the witness refused to participate in a deposition)
  - An order limiting the evidence at trial because the party did not provide it during discovery
  - An order that certain facts be taken as true or false for the lawsuit because evidence was not produced.
  - An order granting judgment in favor of the other party without a trial (the so called “death penalty” sanction).

When U.S. lawsuits go abroad

- Individuals and companies outside the U.S. may nonetheless find that they are requested to provide information to parties in a U.S. lawsuit.
- A non-U.S. company that is a party to a lawsuit in the U.S. is generally subject to the full range of discovery in the particular court, at least from the standpoint of the U.S. court. However, the U.S. Supreme Court has cautioned the trial courts to be sensitive to the differing standards for discovery in other countries.
- Many countries have enacted “blocking” legislation that forbid their citizens from responding to some kinds of U.S. discovery. Not all U.S. courts respect these laws, and some U.S. Courts will impose U.S. discovery requirements on a party even if it forces that party to violate the blocking law.
- A non-U.S. company that is not a party to a lawsuit in the U.S. is subject to discovery requests only as provided in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Most of the non-U.S. signatories limit the extent of discovery that can be taken under the Convention to conform to local practice.

The importance of a proactive discovery strategy

- It is almost always more difficult and expensive for a non-U.S. business to respond to discovery than a local business simply because important witnesses and evidence are located outside the U.S.
- A non-U.S. company that finds itself in court in the U.S. should adopt a pro-active discovery strategy. Almost all Courts have a procedure for the Court to intervene to limit discovery early in the case. The non-U.S. litigant should always try to secure agreements on limited discovery from the opposing party and, if that fails, seek early relief from the Court. It is far easier to get such relief at the outset than on an ad hoc basis as unreasonable requests are made.

What to ask for

- Courts will frequently impose the following limits on discovery for foreign litigants, especially defendants:
  - Requiring that oral depositions be taken where the witness lives or works.
  - Requiring that the requesting party provide a translator for witnesses who do not speak English well.
  - Limiting discovery to comply with any blocking statute in effect.
  - Requiring that original documents be produced where they are ordinarily stored.
  - Limiting discovery to witnesses and materials in the U.S. unless there is a special need.
  - Forbidding the service of subpoenas on non-U.S. residents traveling to the U.S. on business. (A subpoena is a court order to appear for a deposition or trial.)

Spoliation

- Spoliation is the destruction of evidence needed for a lawsuit.
- Accidental spoliation is a serious problem for businesses involved in litigation because:
  - Computerized records are frequently deleted or destroyed on a regular schedule, and so may be deleted without regard to a lawsuit.
  - Evidence, especially emails, may be in the hands of many individuals, and their conduct may be hard to regulate.
  - The sanctions for spoliation are severe, giving each party a reason to claim the other side has engaged in spoliation.

The Litigation Hold

- A “litigation hold” is an instruction from the management of a company to all the employees that they should not destroy or throw away anything that might be evidence in a lawsuit.
- Issuing a litigation hold is a good way for a company to prove that it at least tried to keep any evidence from being destroyed. Sanctions for accidental destruction of evidence are less severe than for intentional destruction of evidence.
- Preparing a litigation hold requires careful thought because it must be understood by all employees from the CEO down to the janitor.
- The information most likely to be destroyed accidentally is electronic information, so a litigation hold to the IT or IS department is crucial.

Conclusion

- Juries and U.S. discovery are the most difficult parts of the U.S. legal system for clients outside of the U.S. to understand. In fact, many U.S. clients don't really understand discovery.
- Having a basic understanding of how broad U.S. discovery can be can help non-U.S. businesses avoid accidental destruction of evidence that might lead to sanctions.
- That same understanding can help decision makers properly evaluate the likely cost of litigation in the U.S., as well as understand the strategic decisions that may be involved in that litigation.

About the author

- Richard Hunt is a shareholder in the law firm of Munsch Hardt Kopf & Harr P.C. He is certified as a specialist in Civil Trial Law by the Texas Board of Legal Specialization and sits on its examining committee. He represents a wide variety of U.S. and foreign businesses in all kinds of commercial disputes. For more, see www.munsch.com or email Richard at rhunt@munsch.com. Inquiries about this presentation or any aspect of U.S. law are welcome.