DISCOVERY STRATEGY

CONTROLLING TOTAL LEGAL COSTS THROUGH FOCUSED DISCOVERY AND EARLY MEDIATED SETTLEMENT

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A. OVERVIEW AND SCOPE OF OUTLINE.

On either side of the docket, effective litigation management seeks to obtain the best result at the least total cost. The amount of money saved or spent in settlement or judgment must be weighed against the total cost of litigation, which includes not only attorneys' fees, but also the cost of deposition transcripts, document production, experts, travel expenses, independent medical evaluations, document computerization, photocopying, etc. Whether a case is worth $50,000, $500,000 or $500 million dollars, counsel needs to develop a discovery strategy and a budget that is aimed at obtaining the best result at the least total cost.

The 1999 revisions to the discovery rules of the Texas Rules of Civil Procedure, which include limits on both the amount of discovery permitted and the time in which discovery may be completed, will help contain the costs of litigation. The limits created by the new rules also should cause attorneys to be more selective as to the type of discovery they choose to conduct. The new rules create an even greater need to prepare a discovery strategy and budget early and carefully.

This outline presents one approach to the development of a discovery strategy and budget designed to maximize results under the new discovery rules at the least total cost. Obviously, a discovery strategy and budget will vary from case to case, and very little specific guidance seems applicable to all cases. Nonetheless, from case to case a number of key concepts are likely to recur.

Section B of this paper outlines some of the effects the new discovery rules are likely to have on discovery strategy and budgeting. Section C presents ten key concepts that should guide discovery strategy and budgeting in most cases. The Section D presents a detailed outline of a programmatic sequence for developing an effective discovery strategy and budget.

B. DISCOVERY STRATEGY.

1. The new discovery control plan rule creates a need for early discovery planning.

Tex. R. Civ. P. 190 will change the practice of discovery in Texas Courts. Under Rule 190, cases will be assigned to one of three plans, as demonstrated by the following chart:

Plan	Application	Discovery Limits
Level 1 Rule 190.2	Cases in which all plaintiffs seek less than $50,000, except where (1) the parties agree to Level 2, or (2) the court orders a Level 3 plan.	(1) Discovery deadline of 30 days before trial. (2) Limit of 6 total hours per side to examine and cross-examine all witnesses in oral depositions. May be expanded to 10 total hours by agreement. (3) Limit of 25 interrogatories per party to each other party.
Level 2 Rule 190.3	All cases to which Level 1 and Level 3 plans do not apply.	(1) Discovery deadline of the earlier of 30 days before trial or 9 months after the first deposition or the first response to written discovery. (2) Limit of 50 total hours per side to examine and cross-examine parties on the opposing side. (3) Limit of 25 interrogatories per party to each other party.
Level 3 Rule 190.4	Cases in which a party moves for a tailored discovery plan or the court orders a plan on its own initiative.	A court-ordered plan may change the limits set in a Level 1 or Level 2 plan and must include a trial date, discovery deadline, appropriate limits on the amount of discovery, and deadlines for joining additional parties, amending pleadings, and designating expert witnesses.

Attorneys should evaluate a case as soon as possible to determine which discovery control plan applies. Rule 190.1 requires that a plaintiff allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3. Similarly, given the time limits on discovery, a defendant should decide as soon as possible whether to move for the application of a Level 3 plan, which is a court-ordered plan tailored to the circumstances of the particular suit, or to accept limits set by the plan sought by the plaintiff. An initial evaluation of liability and damages will guide the attorneys in assessing the discovery limits that are appropriate in each case.

2. New limits on discovery will require more careful consideration of the type of discovery sought and working within the limitations of a discovery plan.

In the Introduction to "A Guide to the 1999 Texas Discovery Rules Revisions" (hereafter referred to as the "Discovery Rules Guide") by Justice Nathan L. Hecht and Robert H. Pemberton, the Rules Attorney for the Texas Supreme Court, the authors stress that the rules revisions had three principal goals: (1) to impose limits on the volume of discovery in order to curb perceived abuses and reduce the cost and delay of litigation; (2) to modernize and streamline the practice of discovery by eliminating wasteful practices and improving other practices; and (3) to reorganize the rules and clarify the wording of some of the rules to "improve clarity, accessibility, and understanding."

In order to meet the above goals, trial courts are expected to assume a greater role in managing the discovery phase of litigation, and litigants are expected to confine their discovery requests to the subject matter of the case. Rule 192.4, captioned "Limitations on Scope of Discovery," provides that

> the discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that: (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or (b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in litigation, and the importance of the proposed discovery in resolving the issues.

Emphasis added. Further, comment 1 to Rule 192 provides that "[w]hile the scope of discovery is quite broad, it is nevertheless confined by the subject matter of the case and reasonable expectations of obtaining information that will aid resolution of the dispute. The rule must be read and applied in that context. *See In re American Optical Corp*. 988 S.W.2d 711 (Tex. 1998) (per curiam); *K-Mart v. Sanderson*, 937 S.W.2d 429 (Tex. 1996) (per curiam); *Dillard Dept. Stores v. Hall*, 909 S.W.2d 491 (Tex. 1995) (per curiam); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995) (per curiam); *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989)."

The new discovery rules will significantly limit discovery practice in Texas courts. In the past, the number of depositions and the length of deposition examination were limited only where the parties agreed to limits or the court ordered them. Now the number of depositions is limited by Rule 190 discovery control plans. Rule 199.5 places a limit of six hours on examination of each witness by each side. The total time of examination for each party in all depositions is limited by the Rule 190 discovery control plans. Rule 190 also will limit the number of interrogatories that may be requested.

These new limits should pressure attorneys to plan and prepare for discovery more carefully. With only a limited number of depositions, each side should consider carefully the persons who should be deposed. With limited examination time, attorneys should prepare carefully for depositions so that the limited time available for examination is used wisely.

3. Parties should consider the potential efficiencies of bifurcating or staging discovery in a complex case.

Parties may attempt to limit the volume of discovery by seeking a bifurcation or phasing of discovery. The Texas Supreme Court in *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999), citing new Rule 190.4 (b) (2), acknowledged that "courts may limit discovery pending resolution of threshold issues like venue, jurisdiction, forum non conveniens, and official immunity." Emphasis added.

The defendants in *Alford* claimed they were entitled, as a matter of law, to an order bifurcating class and merits discovery. The court found that bifurcation was not justified because the class and merits issues were "intertwined" and also because defendants failed to "support their complaints of burdensomeness and harassment without anything more than general allegations. Without some more detailed explanation and proof, Relators have simply not met the basic requirements for limiting the scope of discovery under the rules of civil procedure. *See* TEX. R. CIV. P. 192.4, 192.6." *Id*. at 184 (emphasis added). Further, comment 7 to Rule 192 provides that "A court abuses its discretion in unreasonably restricting a party's access to information through discovery." (emphasis added). Trial and appellate courts in the future probably will be required to draw lines between reasonable and unreasonable restrictions on a party's access to information, depending on the nature of the case.

Based on the *Alford* case, in order to obtain an order limiting the scope of discovery, a party probably must show: (1) that it is possible to separate issues subject to discovery and issues on which discovery should be delayed; (2) that the burden of going forward with discovery on certain issues is not warranted by the nature of the particular case; and (3) that it is reasonable to restrict a party's access to information because of the facts and circumstances of the case and the nature of the claims or defenses asserted. For example, it may be possible to delay discovery on liability issues if a threshold jurisdiction issue has been raised, as long as the jurisdiction issue is not "intertwined" with the liability issue. It may also be more appropriate to submit a specific discovery order "directly addressing the amount and nature of discovery needed" than to seek the entry of a "blanket bifurcation order." *Id.* at 184.

4. Parties are required to tailor discovery to fit the particular needs of the case.

The Texas Supreme Court in *American Optical, K-Mart v. Sanderson, Dillard Dept. Stores v. Hall, Texaco, Inc. v. Sanderson,* and *Loftin v. Martin* has indicated that discovery requests must be reasonably tailored to the needs of the particular case. Therefore, proponents of discovery under the new rules should be especially wary of making overbroad, unduly burdensome, and/or "unreasonable" discovery requests and should focus their requests on the specific needs of the case.

Further, litigants should be well aware that new Rule 191.3 provides that all discovery requests must be signed by the party or an attorney, and the signature of the party or the attorney constitutes a certification that the discovery request: (1) is consistent with the rules of civil procedure and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) has a good faith factual basis; (3) is not interposed for any improper

purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Parties must also recognize that the discovery sought should be proportional to the needs of the case and should plan their discovery strategy and budget accordingly. Rule 190 introduces the concept of "reasonable limits" on the volume of discovery. According to the Discovery Rules Guide, Rule 190 "is intended both to compel parties to carefully consider the need for discovery before seeking it and to encourage courts to actively monitor discovery to reduce unnecessary cost and delay."

Rule 192.4, modeled on Fed. R. Civ. P. 26 (b) (2), gives a trial court power to limit the otherwise permissible scope of discovery if it determines, on motion or its own initiative and on reasonable notice, that the discovery sought is unreasonably cumulative or duplicative, is obtainable from some other source that is more convenient, less burdensome, or less expensive, or that the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. However, as noted in the Discovery Rules Guide: "This limitation, however, is to be applied in a manner consistent with the broader policies underlying the 1999 discovery rules amendments— to prevent unwarranted delay and expense, not to unreasonably restrict a party's access to information through discovery. Rule 192, comment 7."

There are a few recent Texas cases concerning the proper limits of discovery. As discussed in the Discovery Rules Guide,

> The general standard governing the permissible subject matter of discovery under the former rules is unchanged: a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the case, including inadmissible matters, so long as the request is reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 192.3(a). This standard, however, should be read and applied consistent with the Court's recent jurisprudence concerning scope of discovery under the former rules. Rule 193, comment 1 (incorporating *In re American Optical* Corp., *K-Mart v. Sanderson*, *Dillard Department Stores v. Hall*, *Texaco v. Sanderson*, and *Loftin v. Martin*).

(emphasis added). Given that Rule 192.4 is modeled on Fed. R. Civ. P. 26, Texas courts may also look to federal precedent in determining when and how to limit the volume of discovery being sought. Unfortunately, but predictably, as Wright, Miller, and Marcus note in their treatise, "the reported cases are of extremely limited value for other cases. The decisions are, quite properly, extremely particularistic. A specific request for discovery is measured by the court against the background of a specific case. What may be relevant, and subject to discovery, in one case of a certain type may be irrelevant in another seemingly-similar case." Federal Practice and Procedure, 2d ed. 1994, § 2009, p. 124.

Given how case specific the new "proportionality" discovery rules are, practitioners will be well advised to prepare as detailed a record as possible for appellate review. The preparation of such a record, including specific objections to specific discovery requests, affidavits if possible, pleadings, and other materials, may make all the difference on appeal. For example, the majority in *Alford* criticize the defendants for failing to make specific burdensomeness objections and for failing to submit a detailed pre-certification discovery plan.

C. TEN KEY CONCEPTS IN DEVELOPING AN EFFECTIVE DISCOVERY STRATEGY AND BUDGET.

In developing an effective discovery strategy and budget in light of the new discovery rules, several key concepts repeatedly surface as key factors. These factors guide the lawyer in both formulating and implementing the discovery strategy and budget.

1. Evaluate the case as early as possible and make it the basis for your discovery strategy and budget.

Both the defendant and the plaintiff need to evaluate the case as early as possible for their own set of reasons. Defendants need to evaluate the case early in order to:

1. set reserves;

2. determine the strengths and the weaknesses of the liability case, as well as the nature and the extent of the damages;

3. apprize the client on the potential verdict range and settlement value;

4. determine their discovery strategy (significantly different discovery strategies may be appropriate for a $50,000 case, a $500,000 case, and a $5 million dollar case);

5. determine whether to seek to modify the discovery control plan to which the case is assigned under Rule 190;

6. develop a case management budget; and

7. develop a settlement strategy.

Plaintiff's counsel needs to understand the case as quickly as possible in order to:

1. determine the strengths and weaknesses of plaintiff's liability theories;

2. determine the strengths and weaknesses of the defendant's defenses;

3. determine whether other parties should be joined (before the statute of limitations runs);

4. determine how much hard damages the client has (medicals, lost wages, etc.);

5. begin evaluation of soft damages (pain and suffering, loss of consortium, loss of support, etc.);

6. determine discovery strategy (again varying, depending on amount in controversy);

7. determine the type of discovery control plan that the plaintiff desires so that the plaintiff may allege the applicable plan as required by Rule 190.1;

8. apprize the client of potential verdict range and potential settlement value; and

9. develop a settlement strategy.

By immediately undertaking as thorough an initial investigation as possible concerning the liability and damage issues, the parties can achieve valuable competitive advantages, such as the following:

1. Information obtained through the attorney's initial investigation, as opposed to subsequent lengthy depositions and endless document productions, can be as good or better and certainly will be less expensively obtained.

2. Fresh evidence is better evidence. A lawsuit may not be filed until many months after the accident occurs, and the evidence might become cold, stale, or even disappear. An early and thorough investigation will probably generate more, better, and fresher information. Early investigation may also provide a general direction for future discovery and investigation.

3. Witnesses may be more willing to talk candidly before litigation has turned to depositions and before opposing counsel has suggested that witnesses refuse to talk;

4. The first party to interview a witness may create a favorable first impression and even instill a loyalty between that witness and the party; and

5. A case that can be initially evaluated on an informed and educated basis may be a case that can be settled more quickly. An early settlement normally will be in the interest of all parties.

The common interests of defendants and plaintiffs in obtaining an early evaluation of the case cannot be overemphasized. Because both sides have a common interest in determining the strengths and weaknesses of the liability case and the extent of the damage exposure, the opportunity to save costs exists on both sides. Plaintiffs want to settle early in order to save expenses and save time. Investing that time and money in other good cases improves their overall profitability. Defendants want to settle early in order to save expenses, such as attorneys' fees and disbursement costs, as well as to limit future contingent liabilities. Recognizing this common interest in the early evaluation of the case should serve as the basis for pursuing many cost-saving opportunities such as informal discovery, cooperative discovery, and alternative dispute resolution.

Only after the case has been initially evaluated for its liability strengths and weaknesses and its damage exposure can the client decide whether the case is likely to be settled or tried. Once the client is able to form a meaningful opinion as to whether the case should be settled or tried, a discovery strategy can then be developed by the attorney and client.

For example, if the client concludes that this is a $50,000 case that should be settled as quickly as possible, a discovery strategy that would cost $40,000 would make no sense. At the other extreme, if the client concludes that this is a $5 million dollar case that will have to be tried, extensive and expensive discovery may be required.

Even if the ultimate question of whether to settle the case or try the case cannot be answered satisfactorily at an early point, the process of evaluating the case early will at least help to determine what discovery and what budget is required in order to answer the settlement versus trial question as quickly as possible.

2. Conduct as much informal discovery as practical.

The advantages of informal discovery must be considered as a key component in any discovery strategy. If the early evaluation of the case is a prime goal, a phone call to plaintiff's counsel to enlist their cooperation and assistance is a key strategy. For the price of just a phone call and a letter, the defendant may be able to quickly obtain key information on which to base an initial evaluation of the case and its potential exposure.

Informal discovery will become even more valuable in light of the discovery limits created by the new discovery rules. Given the limited number and duration of depositions, attorneys should view informal discovery as an opportunity to gather information to determine which witnesses should be deposed and for how long. Given the limited number of interrogatories, attorneys should use informal requests for information as a means to gather information and to determine which interrogatories will be necessary.

There are many different types of informal discovery, some of which include:

1. an informal request for plaintiff's medical records and whatever employment and tax records the plaintiff's attorney has already obtained;

2. an informal request for a narrative regarding the accident facts and plaintiff's story of how the accident occurred;

3. an informal request for a description of plaintiff's employment history, including employers, job responsibilities, and wages;

4. an informal request for the identification of key witnesses and what those witnesses will say;

5. an informal request for prompt execution of authorizations for medical records, employment information, and tax returns; and

6. informal meetings with witnesses who are not the opposing party or within the control of the opposing party.

A personal meeting between attorneys, and even a possible meeting that includes the plaintiff and the defendant's representatives, could save considerable amounts of time and expense, and may result more quickly in a mutually acceptable settlement.

Informal discovery can focus on the key information that is of interest to both sides. Because it is in both parties' interest to have that information processed as quickly as possible, and because that information otherwise will eventually be obtained formally at far greater expense, informal discovery makes too much sense to be ignored. Additionally, by beginning the process of informal communication between the parties at the very beginning, subsequent discovery disputes over formal discovery may be diminished in frequency and severity.

3. Send initial formal discovery at an early date.

A. There is no reason to wait on standard discovery.

Most lawsuits will not be settled prior to the exchange of formal discovery. In deciding when to send formal discovery, consider the advantages of sending out that discovery at an early date.

In almost every personal injury case, there is a significant amount of basic, initial information that is going to be important. Information concerning plaintiff's medical condition, lost wages, health care providers, liability facts, and the like must eventually be obtained. There are a number of advantages to obtaining this information as early as possible, which include the following:

1. it provides a quicker handle on the basics of the case;

2. defendants do not want their attorney to slow down the parade;

3. lawyers do not want to fail to obtain the basic information for pre-trial discovery.

If the case is settled too early, and the client does not know about the facts that significantly lower the settlement value, at least the attorney had sent out the discovery. The lawyer needs to avoid the embarrassment of having his client settle too high because the lawyer did not request and obtain the necessary information to prevent an ill-advised settlement.

B. Plaintiff also has an interest in early formal discovery.

Defendant may know more about the case than the plaintiff's attorney, so obtaining early formal discovery may improve plaintiff's understanding of the strengths, weaknesses, and value of the case.

1. Plaintiff may have only heard the story from the perspective of the client and the client's friends;

2. Defendant probably spoke to lots of employees and probably has a different, if not better, knowledge of the strengths and weaknesses of the case;

3. Plaintiff also needs to know as much about the case as possible, and as quickly as possible, in order to value the case for an early and profitable settlement.

C. Early formal discovery is advisable when the discovery period is limited.

Under Rule 190, unless a case falls within a Level 1 discovery control plan or the court orders a Level 3 discovery control plan, the discovery period will be limited to nine months. The nine month discovery period begins as soon as the first written discovery is answered or the first deposition is taken. Given this limited duration, attorneys should begin formal discovery as soon as the discovery period begins. The risk of not taking formal discovery quickly is that the opportunity to take it at all may be lost. Further, since responses to discovery often lead to other discovery, it is important to begin formal discovery as quickly as possible so that follow up discovery also may be obtained within the discovery period.

4. Devote substantial attention to internal review and case assessment.

Gathering information through discovery is important, but its usefulness is a function of the internal review and evaluation made of that discovery. A number of issues should be considered in connection with that initial review and assessment.

A. Attorney-client, work product, and party communication privileges must be maintained.

Internal investigations can be kept privileged if parties pay sufficient attention to the case law and procedures for maintaining the confidentiality and privileges for that information. The client should develop procedures for maintaining the confidentiality of its internal investigation, as should the attorney. A control group could be identified within the company and distribution of internal review documents would be limited to members of that control group. The investigation should be focused on the lawsuit at hand, and all persons should note in their files and in their discussions with others that their investigation is being conducted at the request and direction of counsel toward defending the particular piece of anticipated or actual litigation.

B. Interviews of client's employees.

Counsel should identify and interview persons with knowledge of relevant facts in the employment of the client. They can tell you about the product, the work site, or the accident itself. In-house risk management people may have conducted an investigation, which should be turned over to counsel. Keep in mind that employees may leave the company, and consider the advisability of preserving their testimony in signed statements or even possibly in depositions.

C. Credibility of potential witnesses.

During investigations and interviews, counsel should focus on how credible that person would be as a witness on the stand. Is this a person the company would be proud to be associated with, or is this a person who should not be shown to the jury?

5. Make the concept of cost effectiveness govern development of a discovery strategy.

The lawyers owe it to their clients and to themselves to evaluate all discovery activities as to their cost effectiveness. The attorney who fails to be sensitive to the cost effectiveness of their discovery strategy and activities is an attorney who risks losing clients and income. Performing a simple cost-benefit analysis of every proposed discovery activity permits the attorney and the client to evaluate the likelihood of achieving various levels of benefits relative to the likely cost of that activity. That process may result in the consideration of alternative discovery strategies and their benefits relative to their costs. The entire process is likely to result in a discovery strategy that is more thought out and more agreed upon as between client and counsel.

The discipline of preparing a litigation budget that employs a cost-benefit analysis forces counsel to consider each component of the litigation process and whether any proposed activity is cost effective. Assumptions should be identified as to what course the litigation is most likely to take and what discovery activities should be undertaken to best protect the client. By focusing on the cost of each discovery activity and what benefit the client will derive from that activity, the attorney's litigation budget becomes a cost-effective discovery plan. A basic approach to preparing such a litigation budget and plan might include the following. (A more detailed outline for developing a discovery strategy and budget is provided infra at pp. 13-23.)

A. Initial Case Report.

The cost-benefit budget analysis should be undertaken as soon as possible. Based on whatever information is initially at hand, the attorney should project what is most likely to occur. The initial case report stresses:

1. the liability theories and defenses;

2. the damage exposure;

3. verdict potential; and

4. settlement value.

Next, the attorney identifies each of the activities that should be undertaken to deal with the projected progress of the case. Counsel should then outline the cost of each of those activities, including:

1. the cost of appropriate defense team staffing;

2. the cost of internal investigation;

3. the cost of formal and informal discovery;

4. the cost of expert analysis; and

5. the cost of preparing for trial.

B. The 90 day report.

Ninety days after suit is filed, counsel should assess the status of the litigation and the current validity of the discovery budget's assumptions and projections. First, changes in the attorney's assumptions and projection of how the lawsuit would proceed in the future should be noted and explained. Second, changes in the liability exposure, the damage exposure, potential verdict range, and settlement evaluation should be separately analyzed. Finally, a comparison of projected costs with actual costs, along with changes in future cost projections, should be described and justified. By focusing on changes in the budget assumptions, counsel is able to better inform the client concerning both the course and the cost of the litigation.

C. Ongoing review and reporting concerning the litigation budget.

On a monthly or quarterly basis, counsel should report on whether the litigation and budget is proceeding along the course assumed by prior case evaluations. This permits the client to note and react to changing assumptions concerning the litigation and its cost. This also results in counsel and the client continually reassessing the case in terms of liability, damages, verdict potential, and

settlement value. In almost all cases, there will be significant developments that must be noted and factored into the projections and the budgeting assumptions.

6. Develop a partnership with the business client.

In order for counsel to effectively represent their business client, they should both be riding on the same horse in the same direction. Every commercial litigation attorney secretly dreads being in fundamental disagreement with his client concerning discovery strategy; and we all recognize that is a situation that we cannot afford. Common sense thus dictates that counsel and client view their relationship as a partnership; a relationship in which both counsel and client representative evaluate the case together, develop a discovery strategy together, develop a discovery budget together, and share the fruits of success together. The partnership relationship is best suited to the early evaluation of the case, the cost-benefit analysis of proposed discovery activities, and the formulation of a mutually acceptable discovery budget.

A true partnership between counsel and client based on trust, candor, and continuous communication is essential to developing a cost-effective litigation strategy and budget. A certain risk is inherent in any decision to limit discovery activities on the basis of cost, and both client and counsel must bear ultimate responsibility for running that risk. Similarly, a decision to undertake an expensive course of discovery runs the risk that discovery will produce only limited benefit, or even prove to be injurious to your case. If client and counsel have made discovery and budgeting decisions based on an agreed assessment of the benefits and the risks, the opportunity for second guessing the attorney is significantly reduced. Conversely, if client and counsel have not discussed and agreed on the course of discovery relative to the risks, with shared understanding of the risks, the client may blame the counsel for the high costs and/or untoward results of that discovery.

7. Frequent communication between the business client and counsel is imperative.

Throughout the process of evaluating the case, analyzing the costs and benefits of possible discovery activity, formulating a discovery strategy and budget, and then implementing that strategy within that budget and within the limits created by discovery rules, continuous communication will be required. If client and counsel are involved in a partnership in developing and implementing a discovery strategy and budget, both must be working off the same body of information. Because counsel is responsible for developing the bulk of that information, it is counsel's responsibility to supply that information to the client. Because discovery strategy and budgets tend to evolve continuously, time is of the essence and counsel must communicate on a timely basis with the client on all discovery developments that bear on the strategy and budget. Because those discovery developments may change the evaluation of the case or the assumptions on which the strategy and budget were developed, counsel should consider communicating that information on a real time basis.

Clients require time to absorb and process that information, not only personally but within their company's organizational structure. Similarly, the client representative must communicate with counsel concerning the company's evaluation of the case, the discovery strategy, and the budget. Because both client and counsel may make decisions on such disparate things as reserves or

deposition scheduling based upon one set of assumptions concerning the case, strategy, or budget, frequent communication concerning any such changes is imperative.

8. Consider ADR as soon as practicable.

Nothing saves costs like an early settlement. The sooner the case can be evaluated for purposes of its settlement value, the sooner the case can be settled and the costs of litigating concluded. Numerous ADR mechanisms have proven immensely successful in settling cases. Mediators claim a success rate of over 80% in settling cases. Moderated settlement conferences claim large success in settling cases, as well.

The biggest objection to early resolution of cases through ADR is that discovery may not be sufficiently complete to permit meaningful settlement evaluation. As clients become more determined to resolve cases more quickly, however, the greater the fallout on attorneys who are not yet sufficiently prepared through discovery to participate in an ADR.

9. Employ cost-saving devices for depositions.

Depositions are one of the most expensive aspects of discovery, and significant cost savings can be employed by counsel for both sides.

1. Set depositions by mutual agreement of the parties. So much time is lost by counsel noticing depositions on dates that are inconvenient for other parties. Substantial savings can be obtained by having secretaries or legal assistants call their counterparts to arrive at a mutually convenient date for all counsel and parties.

2. A focused deposition is a less expensive deposition. Focus in deposition examination is also critical in light of the new limits on the duration of deposition examination. In planning for a deposition, the particular significant points of the deposition should be identified, and proposed questions should focus on those issues. Associates assigned to take the depositions should be encouraged to stick to the point and to observe strict time constraints in taking the deposition.

3. Consider cost saving alternatives to depositions. Not all depositions are critical, and less important depositions can be taken at significant cost savings. Telephone depositions or depositions on written questions may accomplish a substantial part of what can be accomplished by traditional depositions.

10. Follow a logical sequence for developing your discovery strategy and budget.

Although circumstances vary, following an orderly and expeditious sequence of discovery activity, analysis, and reporting to the client will profit both the attorney and the client. Attached

is an outline of a standard discovery and case management plan for defending business litigation claims. It focuses on early evaluation of the case, prompt reporting to the client of counsel's evaluation and of subsequent developments, and a sequence of discovery that undertakes the less expensive discovery as soon as possible, while leaving more expensive discovery to later in the process of case development. When the client sees what your sequence of steps will be and sees you accomplishing those steps, the client is more capable of assessing its options and more likely to be pleased with counsel.

D. LOGICAL STEPS IN DISCOVERY STRATEGY & BUDGETING

I. Initial receipt of assignment from client.

A. Important information to get from client:

1. Type of case (nature of commercial dispute)

2. Facts of case (as much as is known)

3. Client's assessment regarding strengths and weaknesses of liability of case/defense

4. Damage information - hard medical, employment, job, working, age

5. Client's assessment regarding exposure

6. Plaintiff's attorney - name and number - assess strengths and weaknesses

7. Court - change venue/remove

8. Date of service

B. Obtain assurance of immediate delivery of petition and summons.

II. Develop meaningful first impression of case

A. Start to think about all of this case information, because

1. client may call and ask

2. helps hone your planning

3. plaintiff may want early settlement

B. Based only on what you've been told and what you think of that information

C. Develop first impression of liability case -- strengths/weaknesses

D. Damages exposure

E. The discovery control plan to which the case most likely will be assigned

F. Costs to discover/evaluate/settle

G. Verdict range

H. Costs to prepare for trial

I. Costs to try

J. Settlement value

III. Develop initial discovery strategy

A. What you want/need to get and how you're going to get it.

B. Which discovery is most important in light of the limits on discovery created by the new rules.

C. The timing of discovery and a schedule of how it may be accomplished within the discovery period.

D. Communicate informally with Plaintiff's attorney to obtain information regarding:

1. Plaintiff's story of how the dispute arose

2. Plaintiff's view of liability case against defendant

3. Plaintiff's damages, such as:

(a) nature and extent of plaintiff's direct damages
(b) consequential damages

4. Ask for informal discovery cooperation regarding:

(a) documents already obtained
(b) list of key fact witnesses
(c) execution of your record authorizations

5. Offering cooperation regarding:

(a) early settlement evaluation
(b) discovery deadlines
(c) mutually convenient deposition scheduling

IV. Call defendant/point person for information regarding:

A. Story of how dispute arose

B. Plaintiff's contributory negligence, if any.

C. Plaintiff's damages - nature, extent.

E. Obtaining records

F. Arranging interview with:

1. co-workers
2. supervisors
3. policymakers

G. Formulating future game plan

1. enlist cooperation, advice, and support

V. Call attorney friends for help regarding:

A. Opposing Counsel

1. strengths/weaknesses
2. personality
3. experience/inexperience
4. familiarity with court
5. trier/settler
6. cooperative/Rambo
7. smart/not so smart

B. Court

1. strengths/weaknesses
2. personality - peccadillos
3. familiarity with opposing counsel

VI. Call your firm support

A. Associates, paralegals, and secretaries

1. alert them to case and client
2. line them up for immediate work on:

a. drafting answer
b. drafting initial paper discovery
c. possible legal research regarding venue or novel legal issues.

VII. Outline your initial case evaluation

A. Facts of case

1. time, date, setting, conditions
2. people involved
3. how dispute arose
4. description of damages

B. Nature, extent, and cause of commercial injuries

C. Plaintiff's liability theories and facts that support

D. Plaintiff's damages

E. Defenses

1. Liability defenses

a. client's defenses
b. other parties' liability

2. Damages defenses

F. Potential Verdict Range

1. Initial liability analysis

a. chances of being found liable and at what percent responsibility
b. chances of escaping liability finding altogether
c. liability percentage of other parties

2. Initial damages award

3. Net exposure to client

a. percentage of liability multiplied by likely damage award
b. verdict potential in range of X (give or take Y)

G. Initial settlement value

1. Based on potential verdict range

2. Factoring in range of costs for discovery, pre-trial, and trial

3. Settlement value in range of 1/n x to x

H. Settlement strategy

1. Factors

a. plaintiff's demand
b. client's inclination to settle or try

2. Starting point and ending point

3. Pitch to be made on liability and damages

4. What to disclose and what to hold back for now regarding strengths of your case and weakness of plaintiff's case

I. Potential discovery strategy options (for client to choose) and budget for each

1. Lawyer's preferred/proposed course of discovery

a. best protects clients and lawyer from missing important evidence or defense

b. from now to trial

c. includes:

(1) informal discovery
(2) internal investigation

(a) lawyers
(b) in-house
(c) contractor investigators

(3) fact depositions
(4) expert analysis

(a) in house experts
(b) outside experts

(5) expert depositions
(6) mediation/ADR costs
(7) breakout costs for:

(a) total discovery
(b) components to extent possible

2. Note assumptions

a. kind of case

(1) claims

(a) liability claims
(b) damages claims
(c) cross-claims, counterclaims

(2) products
(3) damages
(4) parties
(5) fact witnesses
(6) expert witnesses

b. whether case is likely to be settled, tried, or just discovered

c. current estimate of exposure level

(1) verdict range
(2) settlement value

d. projected staffing

(1) types of lawyers involved
(2) in-house participation
(3) outside contractors to be retained

e. includes milestones for review

(1) in x days; or at completion of y task or stage; or expenditure of z costs

(2) note -- liabilities, damages, verdict potential, and settlement value will be re-examined periodically. Assumptions will be revised if necessary and budget will be revised accordingly

VIII. Initial oral report to clients

A. Provide whatever amount of above information and detail client wants

B. Give client chance to absorb your evaluation of case

C. Give client chance to express his views regarding case

1. client's exposure

2. preference for settlement vs. trial

3. extent of discovery contemplated

4. what client wants from you in written report

a. client may want:

(1) initial evaluation,
(2) discovery/case management plan, and
(3) budget for entire case; or

b. client may instead only want:

(1) preliminary report of case facts,
(2) without verdict ranges and settlement value assessment

c. no budget yet

d. immediate course of discovery described

IX. Initial written report to client, based on:

A. Desires of client

B. Evaluation of case as outlined

C. Evaluation of discovery strategy

D. Budgeting constraints

1. $50K, $500K, or $500M

2. client's attitude regarding try vs. settle vs. discovery with desire to uncover all helpful facts

X. Conduct Discovery

A. With cost-benefit analysis applied to every proposed discovery activity in mind

B. With exposure level in mind

C. With client's preference regarding settle vs. try in mind

D. With the discovery control plan limits on the duration and extent of discovery in mind

E. Pursue informal discovery with Plaintiff and obtain what you can

F. Pursue formal discovery

1. interrogatories
2. requests for Production
3. requests for Admission
4. depositions

a. fact witnesses
b. expert witnesses

5. statements

G. Outside expert's analysis

XI. Prepare revised status and evaluation letters (every 90 days)

A. Significant developments regarding:

1. liability facts
2. plaintiff's liability theories
3. defendant's liability defenses
4. damages facts
5. new damages claims
6. new damages defenses

B. Evaluation of how much discovery:

1. has been completed, and
2. remains to be completed

C. Evaluation of how assumptions:

1. have remained valid
2. have changed
3. have newly arisen

D. Evaluation of how accurate your budget:

1. has proved to be
2. has been off