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## **Discovery in a Contested Collection Matter**

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You have turned over a delinquent account to your attorney. Your attorney has now called you back and advised you that the debtor has retained counsel and has filed a responsive pleading disputing that money is owed to you. What is the next step in the litigation process that will allow you to "cut through" the debtor's response and move to judgment? The answer often lies in the process of discovery.

Discovery in the generic sense is defined as the disclosure of facts, documents, or other things, which are in the knowledge or possession of another party, which the seeking party requires in the preparation of its case. This includes the whole range of discovery devices: request for admissions, request for production of documents, written interrogatories and depositions. The first issue, however, is whether to engage in discovery at all.

The advantages of discovery are considerable. First, it provides immediate access to the facts and documents of the opposition. Knowing all the facts, both your side and the debtor's proof of contentions, can determine victory. Second, you can learn the other sides' theories or contentions. It allows you to "cement" the other sides, versions or theories. Third, in ascertaining and knowing the facts as well as the other sides' theories, it allows you to evaluate not only the other sides' case but yours as well. It will allow you to evaluate whether it is best to go to trial or attempt settlement. Fourth, it will allow the preservation of evidence. With the present status of court dockets, this is a critical advantage. Witnesses' memories fade, witnesses are unavailable and documents disappear or are lost. Finally, discovery allows you to get answers to questions that are unknown prior to trial. If the answer you get is helpful, it can be used at trial. If it isn't, it can be disregarded without harm.



There are disadvantages. The first is the cost as discovery can be expensive in time, money or both. The amount of your claim, the potential collectibility of the debtor, whether a counterclaim is involved and your fee arrangement with your attorney are factors to consider. Your attorney can mitigate the cost by selecting a method which provides the least expensive method to fulfill your needs. If the issue revolves around the amount owed, written interrogatories directed to that issue may be adequate.

A second disadvantage is delay. Discovery consumes time. The procedures under which discovery takes place interject certain time frames. If extensive discovery is engaged in, delay will be certain. If a case requires prompt disposition, especially where collectibility is an issue, for example, discovery should be significantly curtailed or not done.

Third, discovery invites retaliation. What you do often determines what is done by the other side. For each discovery device used by you, you can expect the same from the opposition. Responding can be both time-consuming and costly. It can also give rise to the fourth and fifth disadvantages of discovery. It can force you to disclose your case and can force the other side to prepare a case where it might otherwise have been previously less inclined to do so.

The advantages and disadvantages of discovery in a contested collection matter must be evaluated before discovery is undertaken or rejected. Assuming the advantages outweigh the disadvantages, what devices can be used? Typically the first device used is a "request for production of documents". This request simply requests the debtor to produce within a specified period of time specifically requested documents. It allows you to review his account payable records to determine if his own records will substantiate your claim. You can also seek documents which in anyway support the debtor's defenses. In some cases, you may very well be able to look at the issue of collectibility, by obtaining copies of income tax returns and financial statements. Requests for production are generally an inexpensive discovery tool. They can result in delay since generally the debtor will have at least 30 days in which to respond.

"Written Interrogatories" or written questions directed to the debtor are an inexpensive method of getting objective facts. Typically who, what and when questions are asked about the identity of individuals and their knowledge regarding the dispute. Identity and location of documents can be determined. Finally the specific factual support for the debtor's defenses or claims can be determined. While a low-cost method of getting facts, it is time consuming since generally 30 days are given to respond and the answers are put in a light most favorable to the debtor. An additional issue may be the court rules which may limit the number of written interrogatories as well as the subject matter.

An often overlooked discovery device in collection matters is the request for admission. The debtor is asked to admit the genuineness of documents thus eliminating the necessity of having a "foundation witness" thus saving cost and the proof of certain facts. If the debtor fails to respond on a timely basis (usually 30 days) the statements asked to be admitted as true are deemed to be true. It should also be noted that in some jurisdictions such as the federal court, and the states of Wisconsin and Illinois, failure to admit the genuineness of a document or the truth of a statement, can result in the court awarding reasonable expenses including reasonable attorneys incurred in the obtaining and presentment of the proof.

Finally, "the deposition" is the most costly discovery device, but is the most direct and timely method by which to confront the debtor. The debtor or its representative is required to appear in person and answer questions under oath. Questions can be and are directed to a wide range of subjects, Subjects can be addressed on a "real time" basis. Follow up to an answer is immediate. Pressure is constant. What is asked and said is put down in a transcript. The subject matter of the questions can be very broad or very specific depending on the issues raised. Good preparation as well as persistent questioning can put the entire matter in a position where summary judgment procedures may be available. It can force settlement discussions but it always provides the knowledge of what debtor's claims are and their factual support. While depositions can be scheduled and noticed on very short notice, costs can range from \$100.00 upward for court reporters and transcripts alone. However, the advantages of a deposition outweigh the cost considerations except in those situations where the amount involved is relatively small and issue of collectibility is questionable,

This is a very brief discussion of the various devices, which can be used in a disputed collection matter. The use of any of these tools will depend upon a review of the advantages and disadvantages as applied to your claim. It is imperative that when a claim does become contested you discuss the use of discovery with your attorney. If your attorney does not suggest it, ask. It is a series of devices that will provide answers and knowledge. They will also apply pressure and that pressure will often lead to a quicker and more satisfactory resolution of your claim.

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