

# Frequent Errors in Discovery

By Don Karotkin, JD

According to the ABA Profile of Legal Malpractice Claims: 2008-2011, lawyers' failures to adequately investigate legal matters and to use correctly the discovery process during litigation cause an average of 9% of legal malpractice claims. This article provides an overview of how these types of errors manifest in the daily practice of law, and offers tips on how to avoid them.

Generally speaking, lawyers representing clients in litigation have a legal and ethical duty to use the discovery tools the law provides in a careful, prudent manner for the client's benefit. However, most jurisdictions differentiate between liability for criminal defense lawyers and civil lawyers. In fact, the criminal defense bar is essentially immune from liability for errors made in the discovery process because of the common-law rule requiring the plaintiff to prove, as an essential element of his or her case, that he or she has been exonerated, through direct appeal, post-conviction relief, or otherwise, of the offense of which he or she was convicted. Without such exoneration, public policy dictates that the criminal conduct of the convict be regarded as the sole proximate cause of his or her conviction, thus prohibiting the convict from profiting from

illegal conduct and shifting the consequences of the crime to a third party. See, e.g., *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995).

In contrast, where the action in the underlying case was civil, no analog to the rule of *Peeler* exists. In such

cases, the legal malpractice plaintiff has only the traditional burden of proving: 1) a legal duty of the lawyer to the client based on the existence of a lawyer-client relationship at the material time; 2) breach by the lawyer of the duty to exercise reasonable care; and 3) the breach proximately caused plaintiff's injuries and damages. *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989).

The following list of discovery-related errors is based on this writer's personal experience in defending legal malpractice cases as well as legal research into the relatively small number of reported appellate cases involving alleged legal malpractice in which one of the plaintiff's allegations was lawyer negligence during the discovery process in the underlying civil case which adversely affected the outcome.

## Frequent errors made in written discovery include:

- Failing to serve appropriate interrogatories, requests for production, requests for disclosure and requests for admissions.
- Failing to object properly to an adverse party's failure to make proper discovery responses.
- Failing to serve properly responses to written discovery requests, leading to the imposition of sanctions, including the exclusion of evidence or witnesses.
- Failing to assert properly applicable claims of privilege.
- Failing to properly file supplemental discovery responses, resulting in exclusion of evidence or witnesses.
- Failing to respond timely to a request for admissions,

resulting in deemed admissions.

- Failing to designate properly persons with knowledge of relevant facts, resulting in exclusion of witnesses.
- Failing to designate properly expert witnesses, resulting in exclusion of experts.
- Failing to designate expert witnesses who are properly qualified to testify on the issues on which expert testimony is needed.

## Frequent errors made in depositions include:

- Failing to depose important adverse witnesses.
- Failing to depose favorable witnesses who may become unavailable to testify at trial.
- Failing to use available impeachment evidence.
- Failing to use available evidence of bias.
- Failing to use available publications to impeach an adverse expert.
- Failing to obtain important, relevant documents through depositions on written questions.

## Frequent errors made in other discovery matters include:

- Failing to preserve and protect evidence, resulting in a claim of spoliation.
- Failing to move for the physical and/or mental examination of a party, where indicated.

## Measures you can take to avoid mistakes include:

- Declining representation in matters you are not qualified by training and experience to handle.
- Calendaring all deadlines,

especially critical ones such as expert designations and discovery cutoffs, on the calendars of at least two people in your office.

- Addressing all discovery requests promptly after service, particularly those that require active client cooperation and participation for response.
- Speaking to the client early on about persons with knowledge of relevant facts, expert witness candidates and important documentary and other evidence. Communicating to the client that urgency is necessary and disclosing evidence far in advance of trial in order to assure that the judge will admit it is important. Explaining to the client that witnesses and evidence identified at the eleventh hour before trial may be excluded.
- Determining early in the case which potential witnesses need to be deposed and promptly initiating the scheduling process. If a witness critical to the case is in poor health, has a very busy travel schedule, or has characteristics or habits that create doubt about his or her willingness and/or ability to appear as a live witness at trial, consider videotaping his or her deposition to preserve the testimony.

- Before conducting depositions (particularly those of adverse experts), obtain and review all important, relevant and discoverable documents by way of requests for production and depositions on written questions, if necessary.

- Having a thorough familiarity with the documents directly involved in the case, but also obtaining and reviewing evidence pertinent to the expert's qualifications and

testifying history, together with relevant publications and anything that may be available for impeachment.

- Defining and explaining "spoliation of evidence" to your client early in the case, including taking the time to emphasize the probable consequences resulting from spoliation. It may be prudent to take possession of original documents and other important evidence and keep them in your office, properly identified, labeled and secured against inadvertent disposal or destruction.
- Carefully guarding important evidence in your care. Some years ago, a Houston lawyer left a soft drink can that was the subject of a pending products liability case in which he represented the defendant on his desk when he left his office for the night. When he returned the next morning, it was gone. Efforts to retrieve it from the office building dumpster failed. The court told counsel that he intended to give the jury a spoliation instruction which would have made it virtually impossible for the defendant to win. Promptly thereafter, the case settled. And yes, the lawyer had to call his professional liability insurer.

The key to risk management is often having established and followed, consistent procedures, so it may be helpful to create a checklist that covers discovery procedures for your firm as a means to prevent discovery errors.

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