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Opening Plenary

Litigation ABCs: D is for Discovery…and Don't Distress

Presenters:

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About the Presenters...

Cathleen Dettmann is a shareholder at Palmersheim Dettmann, S.C., and concentrates her practice on business litigation, including franchise disputes, copyright and trademark issues, business break-ups, non-compete and trade secret litigation as well as general contract disputes. Cathleen is an experienced trial attorney and is adept at advising clients through the court process, from filing a complaint to a jury trial. She has successfully tried several cases to juries and to judges in both state and federal courts. Cathleen has also successfully argued cases before the Wisconsin Court of Appeals, the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals in Chicago. Prior to joining Palmersheim Dettmann, Cathleen worked for several years as a lobbyist and public policy analyst, representing a variety of clients' interests before the Wisconsin State Legislature. As a lobbyist and attorney, Cathleen has gained a great deal of experience in analyzing complex issues, in resolving multifaceted disputes efficiently, and in advocating for the best interests of her clients and their businesses. Cathleen graduated from the University of Wisconsin Law School cum laude and achieved Order of the Coif. Since 2016 Cathleen has been recognized as a top attorney in Wisconsin by Super Lawyers. She was elected to serve as president of the Dane County Bar Association by attorneys, judges and justices in the county, serving in 2020-2021. In law school, she was active on the Moot Court Board and co-produced the school's popular annual comedy sketch show, Stuart's Law Revue. While in college, Cathleen studied abroad at Trinity College in Dublin, Ireland, studying Irish poetry and literature.

Kevin Palmersheim is the founding shareholder of Palmersheim Dettmann SC as well as its managing attorney. He excels at finding cost-effective strategies to resolve business disputes and execute complex transactions and is solicited by judges and lawyers to act as a mediator in business disputes. Kevin has been recognized by his peers as one of the top business lawyers in Dane County in surveys by Madison Magazine, and also in surveys conducted by Thompson Reuters of the best Wisconsin "Super Lawyers." In addition to being named one of the best business lawyers in Wisconsin, in 2010 Kevin received a Leader in The Law Award by the Wisconsin Law Journal, recognizing outstanding contributions to the state's legal profession and to the development of the law. Kevin is past president of the Dane County Bar Association and has served on their board of directors since 1997. He is also active in the Western District Bar Association and the State Bar of Wisconsin. He has served on the Wisconsin State Bar's Board of Governors and has been appointed to chair of several of its committees. In addition to his legal practice, Kevin is a writer and editor on a variety of legal and non-legal topics and lectures frequently to lawyers, professional groups, and college classes on topics such as entrepreneurship, business law, and legal rights and responsibilities. Kevin graduated from the University of Wisconsin Law School in 1992, earning a masters degree in Business from the University of Wisconsin at the same time. He also has an undergraduate degree in Political Science and Business from UW-River Falls. Kevin also serves on the board of directors of a number of for-profit corporations and non-profit organizations. Madison has been his home since 1989, but he has previously resided in Illinois, Minnesota, and was born in Iowa.

Litigation ABCs: D is for Discovery ...and Don't Distress

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By: Kevin Palmersheim & Cathleen Dettmann,
Palmersheim Dettmann, S.C.

I. Oh, Crap, I'm In Litigation. Now What?

A. We all know we shouldn't dabble. We also know our job is to help our clients. (**SCR 20:1.1 Competence)**

B. Yes, most cases settle. But what if it doesn't? If case doesn't settle or isn't resolved on motion practice, it still comes down to storytelling, and rarely the needle-in-a-haystack email that makes or breaks your case (and which may never be produced, even if it does exist).

C. How important is discovery? Focus on the most efficient aspects of discovery that maximize the benefit to your client.

II. Setting client expectations at the outset

A. Cases on a budget. Have you agreed to take the matter all the way through trial, or only to a certain point, such as through summary judgment? **SCR 20:1.2 Scope of Representation.**

B. Battles we'll fight and ones we won't

C. What to expect from other side

1. Case specific – who has control of most documents, us or them? Big firm on other side/Billable pressures? Is your case about documents? Testimony?

2. Clients tend to find counsel who match their personality. If the opposing client is a jerk, then opposing counsel may also …not be added to your holiday card list.

D. How judges view discovery disputes. Hint: They hate them more than you do.

E. Confidential/AEO designations – fine at the beginning but understand it's coming out eventually. ***Doe 1 v. Madison Metropolitan School District***, 2022 WI 65, ¶19, 403 Wis.2d 369, 976 N.W.2d 584 ("Wisconsin law has a strong presumption in favor of openness for judicial proceedings and records.")

F. Not casting a super wide net on purpose – the volume of potential documents in the digital world makes it risky for small firms to make requests that will overwhelm them with responsive documents. (0.007% of the planet's information is in paper, with over 99.99% in digital format. **Science Mag**., Vol 332 Issue 6025, Feb 10, 2011.)

G. Discovery is necessary evil and an economic driver in litigation but doesn't really win or lose cases. The odds of getting a "smoking gun" document are low.

III. Preliminary considerations of discovery information

A. Litigation hold letter, notifying party not to destroy documents and information.

1. Risk of spoliation sanctions if documents, including digital data, are intentionally destroyed. Sanctions may include an adverse inference that the documents would be harmful to destroying party, or helpful to opposing party. *See* ***American Fam. Ins. Co. v. Golke***, 2009 WI 81, ¶42, 319 Wis. 2d 397, 768 N.W.2d 729.

2. But see **Wis. Stat. Sec. 804.12(4m)**, which is a safe harbor that applies to indicate that if digital data is lost due to routine, good-faith operations, then no sanction may apply. (FYI, server crashes and lost computers seem to have a higher occurrence rate among opposing parties than among the public as a whole. It's a weird coincidence.)

B. Protective orders.

1. Common in business cases.

2. Don't let the big firms overwhelm you with hyper-technical draft protective orders.

a) Abuse of "confidential" and "attorney eyes only" designations to create hurdles to you preparing your case.

b) Placing burden on you to challenge any mis-identified or over-protected information.

C. For the love of all that is holy tell your clients not to email/text about case with anyone (including each other). Communications between clients should include you. If they want to gossip about you, that's fine. Pick up the phone then.

D. General scope, and possibility of fee-shifting some costs of producing information.

1. Scope under **Wis. Stat. Sec. 804.01(2)(a)**: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in

resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

2. The court may limit the extent of discovery or shift some costs to the requesting party, based on the following considerations under **Wis. Stat. Sec. 804.01(2)(am):**

a) The specificity of the discovery requests;

b) The quantity of information available from other and more easily accessed sources;

c) The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;

d) The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;

e) Predictions as to the importance in usefulness of the information;

f) The importance of the issues at stake in the litigation; and

g) The parties' resources.

3. We're still waiting for our first case where the court applies any of the above to limit the crazy over-litigation and discovery practices of most big law firms.

IV. Using discovery as settlement tool

A. Motion to dismiss strategies to leverage a stay or fight the case without a stay. See **Wis. Stat. Sec. 802.06(1)(b)** ("Upon the filing of a motion to dismiss ..., all discovery and other proceedings shall be stayed for a period of 180 days after the filing of the motion or until the ruling of the court on the motion …unless the court finds good cause upon the motion of any party that particularized discovery is necessary.")

B. Stipulate to Informal discovery to allow for cost effective analysis enabling early settlement in appropriate cases (even if the case it doesn't settle, you still gain valuable insight).

C. Unless you have big budget/deep pockets and it's in line with overall strategy, avoid overly broad requests which often backfire in the age of electronically stored information (ESI).

V. Using discovery referees. See Wis. Stat. Sec. 805.06.

A. Decent tool if the case justifies it and it's important to protect from disclosure or if difficult to get documents from opposing counsel.

B. Many judges lack practical civil experience. Combined with high case volume and limited court law clerks and staff attorneys, disputes with complex discovery can bog down a case.

C. Able to avoid irritating judge with squabbles, especially in more complicated matters where the only other documents in the court's file at that point are the pleadings.

VI. Four Primary Discovery Weapons Available. There are various benefits and limitations with the four main discovery tools: written interrogatories; requests for production of documents; requests for admissions, and depositions.

A. You're an attorney. By now, you know language matters.

1. Be careful crafting search terms, definitions, drafting specific questions/requests, and making objections.

2. Be careful in drafting vague or overbroad interrogatories or requests for documents that will raise easy objections and non-responsive answers.

B. Objections

1. This is not a law school exam. Just because you can make an objection, doesn't mean you should.

2. Think about why you are objecting. Objections rarely come up by the time of trial and may have limited practical impact -- especially if it's a deposition and the witness has to answer anyway, or it's a written discovery response and you follow up your objection with "notwithstanding" and then provide an answer.

3. Limited exceptions where objecting is absolutely necessary – privilege, truly insane tangents in depositions by opposing counsel, and excessively long depositions and holding the party to the 7-hour limit.

4. Think about who the records custodians are, and how to craft search terms.

VII. Interrogatories. See Wis. Stat. Sec. 804.08

1. Limited to 25 questions, including subparts. **Wis. Stat. Sec. 804.08(1)(am)**. Limits means you need to use these carefully, especially in state court where you don't have benefit of the parties being required to provide initial disclosures under **FRCP Rule 26**.

2. Common issues with violations on limits include use of subparts and asking a catch-all question demanding that a party explain all denials to requests for admissions.

3. Consider working with opposing counsel if they've gone over the limit. You may be able to use your willingness to respond to more than 25 as leverage to get compliance on things YOU want.

4. Can offer inspection in lieu of answer, but a lot less prevalent now with electronic docs – issues with giving access to internal systems.

5. Contention interrogatories – how to leverage these, how to delay responding to them as appropriate.

a) One of the few useful interrogatories tools at trial, can use to impeach /cast doubt when witness testifies beyond scope of well crafted contention interrogatories.

b) ***See In re Convergent Technologies Securities Litigation,*** 108 F.R.D. 328, 333-35 (discussing Fed. R. Civ. P. 33(b), its accompanying Advisory Committee Notes, and the "considerable … authority" supporting a general policy of deferring propounding and answering contention interrogatories until near the end of the discovery period).

6. There is a duty to supplement interrogatory responses, which makes these more valuable than other discovery methods that don't have the automatic trigger to require supplementation of responses with new/updated information. **See Wis. Stat. Sec. 804.01(5).**

7. Signature pages – attorneys sign for objections, but clients provide sworn affirmations of responses. The timeliness of objections is what matters the most, and so it's easy to forget clients' signatures to verify sworn responses.

A. Depositions. See **Wis. Stat. Sec. 804.05.**

1. Practical tips for taking

a) Limited to 10, so make good decisions on who to depose. See **Wis. Stat. Sec. 804.045**.

b) Yes, you may depose an entire corporation or LLC. Consider a **FRCP 30(b)(6)/Wis. Stat. Sec. 804.05(2)(e)**.

(1) You are permitted to identify categories of question areas/information about which you plan to inquire.

(2) Organization has to make available up people with knowledge, including them obtaining knowledge from other people within the organization. Follow up questions necessary when deponent says they don't know answers.

(3) If the organization decides to make more than one person available, that still only counts as one deposition against your limit of 10, and you have up to 7 hours to depose each person (but if you use all 7 hours, you're likely dead to us).

(4) Practical uses, including when a corporate representative is also deposed in her/his individual capacity.

c) Even in complex cases, long depositions are almost never necessary

d) You don't need 1,000 background questions

e) Use silence to your benefit, because witnesses are uncomfortable and fill the gaps with helpful information.

f) Don't show off your knowledge. Act like you're just having a conversation.

g) Don't just ask "what." Focus on the "why."

2. Have a game plan for taking depositions.

a) Go over the basic theme/story of your case. Discovery is the hunt for the winning story.

b) Outline the essential events.

c) Know the elements of the claims, and high points from the pleadings.

d) If you have documents or responses to interrogatories, then go over them to identify follow up questions.

e) Learn about the witness.

(1) Search the internet

(2) Check CCAP for other matters.

3. What are your goals for the deposition?

a) Learn essential facts

b) Confirm what you think you already know

c) Lock in the witness's version of events (the story), to prevent new stories from emerging later (including a miraculous jolt of recollection at trial by the witness that unsurprisingly supports their claim/defense.)

d) Set up impeachment questions for trial.

e) Have witness explain documents, and identify missing documents

f) Identify others with knowledge that may help your case, or your opponent's case.

g) Don't overestimate importance of exhibits. Interrupts narrative flow, reduces potential for undercutting testimony later. If document speaks for itself then do you really need to ID it and read out an email if your only question is something like – did you send that email? Consider whether you actually have a question about the document, rather than just establishing that it exists.

h) Some depositions are literally just trying to find stuff out. May ask questions that you would never ask at trial or that could hurt you, because you want to know how they'll answer. This way you can strategize on how to counteract.

i) Just like at trial, leave good answers alone if at all possible. Don't draw attention or try to get an "even better" answer – this often backfires.

j) May withhold certain key documents or question areas depending on overall case strategy. If settlement is likely and you want deposition to be key for emphasizing why party should settle, then maybe show your cards. Some cases, you'll want to consider withholding some limited documents/issues from questioning to deprive other side of preparation benefits.

4. Practical tips for defending

a) Educate clients on not filling silences. Yes or no may be a complete answer.

b) "I don't know" is an acceptable answer if it's really true. Don't get clever with this – hurts you later if your case requires the deponent to actually know the answer.

c) When/how to cure client answers when defending depositions

(1) If the deposition is before summary judgment motions, consider implications for affidavits you'll need and how testimony may conflict.

(2) Questions from opposing counsel on what was discussed during breaks

(3) Try not to ask clarifying questions at your client's deposition unless it's really important or if the answer was clearly demonstrating deponent didn't understand question. Can backfire.

d) May need to track time for opponent's abuse of 7-hour limit. Also may need to raise issues with overly long breaks.

5. Who can be present – corporate rep AND individual parties. May have to dismiss parties during questions regarding "Attorney Eyes Only"(AEO) information.

6. Objections almost never matter. Other than privileged matters, or if conduct of counsel is outrageous, objections are unlikely to have any practical applications at trial.

7. How clients should respond to questions about pleadings

8. When/how to use video recording.

9. Zoom depositions - Good tool for keeping costs down.

B. Document Requests. See **Wis. Stat. Sec. 804.09**.

1. Consider small-firm appropriate software products for document management, if the case will involve thousands of documents.

2. Don't fall into the trap of casting a broad net. You'll just invite objections, expense, motion practice and document dumps. Big firms make their money on discovery, not trials.

3. Targeted document requests are increasingly necessary to keep litigation reasonable in cost/scope.

4. You are also permitted to inspect physical evidence and enter onto physical property if that is relevant to your case. See **Wis. Stat. Sec. 804.09(1).**

5. Responding to doc requests – pick your battles. If your case is on a budget, then you may be better off having your client provide broader disclosures than the client or you believes is reasonable simply to limit motion practice on the discovery (unless disclosure is totally inappropriate).

6. Protective orders – AEO/Confidential information.

a) What clients should understand about how their info will be used.

b) Using Confidential/AEO in motion practice – how to redact, filing under seal, other related issues.

C. Requests for Admissions. See **Wis. Stat. Sec. 804.11**

1. Not a terrible idea to propound, but don't overestimate practical value. The law formerly placed the burden on the one admitting the request (including admissions due to not responding) to establish grounds for withdrawing the admission. Now, the proponent of the request must prove it will be prejudiced by the withdrawal, with the court's policy being to allow withdrawal in order to consider the claims or defenses on the merits. *See* ***Luckett v. Boder***, 2009 WI 68, 318 Wis.2d 423, 769 N.W.2d 504 (withdrawal of admissions upheld as non-prejudicial even though they were withdrawn 18 months later, the day before the final pre-trial conference before trial, which necessitated postponing the trial).

2. So many possibilities for respondent to weasel out of an admission.

3. Sure, there is the possibility for fees by having to prove what the other side declines to admit but we haven't seen it happen very often. Briefing on this issue alone can be expensive and exhaustive, creating a lot of costs/work for little return on client's investment.

VIII. ESI

A. Hot topic, with multiple CLEs analyzing nuances and details. However, much of that does not really come up in practical terms. We've been dealing with ESI rules in complex litigation for years now and the big issues relate mostly to emails (volume/scope) and stuff we all do on an every day basis, not fancy tech knowledge.

B. What matters:

1. Limiting overall volume - Unless you have a big firm army of law librarians and associates, you'll need a cost efficient software tool to produce documents AND review/analyze what you receive. Helpful tools aid in search, labelling/notes for intraoffice planning and case strategy; identify duplicates in production; help with inevitable need for multiple reviews when case theories shift and different kinds of evidence become important.

2. Scope - Custodians and search terms – almost exclusively for request for "communications."

3. How documents are produced

a) Avoid single page TIFF production – big firms all want this and use it, but very unwieldy

b) OCR'd PDF is our preference. Pages are grouped together into discrete documents, easily readable by both you and your client (parent/child documents are grouped together)

c) How you want hard copy only documents converted to electronic (color, scanned PDFs).

d) When/how you want natives produced (usually just excel spreadsheets and power points).

C. Meta Data is…not nearly as important as all those ESI CLE's you've attended would have you believe.

1. Everyone talks about it and we've never once seen it matter.

2. Agree it *won't* be produced unless something happens where there's an apparent need.

3. The theory/line of evidence you'd need to prove something via a meta data is complicated so it better be a really exciting find. Even if you think there's something important there, it's rarely practical to actually try and use it. Maybe you'll raise a question at a deposition about it, but it rarely goes further.

D. Privilege logs – just don't. Similarly, don't include blanket objections on producing documents other than privileged docs unless you're actually withholding specific documents that you know of AND that are relevant but privileged. Those

objections are not necessary to protect the privilege and just invite inquiry from opposing counsel on exactly what you're withholding (followed by a demand for a privilege log).

IX. Use Scheduling Orders to Limit Discovery

A. Early case conference with opposing counsel is required for ESI, if not also pursuant to specific court practices. Try to negotiate and incorporate concepts such as initial disclosures.

1. Sets time frame for disclosing itemized list of damages – no actual requirements on timing in state court (as opposed to federal rule).

a) This is really important for defendants in order to (1) expose bogus claims that are valueless; (2) force plaintiff to incur costs of expert testimony; (3) gives you hard timeframe for disclosure so you can prepare for trial and otherwise strategize on settlement/mediation.

b) Also helpful for client management as plaintiffs – lots of clients don't understand how the law of damages works and how hard they can be to prove. Having a "put up or shut up time" on this issue can drive case resolution when client management is a problem.

2. Other efforts to mirror best parts of federal rules that allow predictability and limits on shenanigans.

B. Timing strategy in case schedule

1. Disclosure of experts – before or after MSJ?

2. Closing discovery well before trial to limit expense and allow for trial prep.

C. Duty to supplement. Other than interrogatories, there is seldom a statutory requirement to supplement if additional information is later discovered by your opponent. Need to issue updated requests to capture communications/documents that post-date original discovery demands.

X. Dispute resolution/Motion Practice

A. Meet and Confer

1. Dane County R. 319 (professional conduct – helps with needless blustering or threats of sanctions).

2. Litigators abuse of meet/confer requirements to delay and drive up costs

3. Of course, you must meet your obligations and work cooperatively to reach practical resolutions. But you don't have to engage in endless run arounds

and requests for long phone conferences. Use judgment on what can/cannot be resolved, cut the cord and just file when you have to.

B. It is important to document, via email, the course of dealings on discovery matters. Don't rely on phone calls. If an issue gets put in front of a judge, what's in writing outweighs what attorneys say in affidavits to the court.

C. Motion to Compel. Try to work it out, but sometimes a motion is necessary. Wisconsin case law is fairly sparse, you'll often rely on federal cases: ***Seifert v. Balink*, 2017 WI 2, ¶55, 372 Wis. 2d 525, 888 N.W.2d 816** (Wisconsin courts may look for guidance from federal cases interpreting analogous federal statutes, and that Wisconsin courts may also look to the Advisory Committee Notes to the Federal Rules of Civil Procedure).

1. Don't delay. Timely motions are required or judge will be less likely to grant you relief.

2. Airing dirty laundry – benefits/drawbacks

3. Impact of delay/motions on case schedule, holding defendant feet to fire (and defendant delay tactics)

4. If moving to compel, include well-drafted proposed orders that a court can easily just adopt. Also a benefit because provides a clear snap shot of what you want the court to do.

5. Sanctions issues. **See Wis. Stat. Sec. 804.12**. These are so case-specific, and judge-specific. Usually takes multiple abuses by opposing party before they get nailed with sanctions.

XI. Third Party Discovery. Don't overlook the ability to subpoena information from third parties. Be aware of time delays when dealing with third parties, and the fact you have limited procedural methods to force compliance.

XII. 2018 changes – Impact six years later

A. Main practical change is that if a party files a motion to dismiss claims, or a motion for judgment on the pleadings, that all discovery is stayed until the court rules on the motion, up to a maximum time delay of 180 days. See **Wis. Stat. Sec. 802.06(1)(b)**.

B. Verbal nuances on proportionality/cumulative/duplicative have no practical impact – parties act the same, judges still just a gut check with most information being discoverable. Expense of arguing about compliance still prohibitive; Nothing has changed as a practical matter – still all about big firm economics, big pockets and spending power as leverage.

C. Are the rules technically different in terms of scope of discovery? Sure. Practically different? No.

D. Dearth of case law on how courts are implementing the "ambiguities" in revised scope language since 2018.

1. Probably because (1) no one can afford to appeal a discovery issue; (2) all of the parsing over whether something is "unreasonably cumulative" (old rule) or whether it's just "cumulative" (new rule) is just a bunch of academic hand wringing and not actually something that our overworked/overloaded judiciary can spend a lot of time analyzing.

2. Sure, if you have to file a motion you're going to emphasize this language in your brief. At the end of the day, (1) the odds favor discoverability; and (2) it's just tough to get a judge to limit discovery unless you can really demonstrate in a substantive way that demand is extremely cost prohibitive and in relation to a tangentially relevant issue.