

Discovering Discovery

By Matthew Gruskin

In recent years, many Chinese find themselves involved in civil litigation in New York, either because doing business in that state makes them subject to the jurisdiction of the New York courts, or because they may have filed a claim against a New York entity. Litigation in New York (and in most other states) may be long, exhausting and uncertain, due in no small part to the discovery procedure which takes place prior to trial.

Nothing brightens a litigator's day like an Order to Show Cause served on one of his sophisticated, well-funded commercial clients. What this generally means is a lot of up-front work, fast-track discovery, substantial client contact, and, of course, a nice retainer with hourly billing to follow. Underlying this gem is the (perceived) necessity for full-scale discovery. Absent some form of enforceable limits in discovery—such as mandatory arbitration which maintains rigorous time limits on discovery—the potential abuse by your adversary is almost limitless.

The misunderstanding by many Chinese clients of the discovery process is rooted in both the differences in legal systems and the statutes relating to discovery. The current Chinese legal system belongs to the socialist legal system, but is originally derived from the European continental Roman law system. On the other hand, the United State's legal system is based on the English Common Law. While both Chinese Law and American Law recognize a right to pre-trial discovery, the differences in approach and methodology are astounding. First, what exactly is this grand adventure called "discovery"?

The underlying concept which led to pre-trial discovery is very simple—a party to a lawsuit should not be surprised by its adversary on the day of trial, and therefore has the right to full discovery, prior to trial, of all relevant evidence, including documents (broadly defined to include virtually every tangible and intangible form of record keeping) and witness testimony related to the matter at issue in the litigation. Under New York law, a party to a lawsuit has the means to delve into areas of an adverse party's (or frequently a non-party, as well) "business" so long as the area of inquiry seems to bear some relationship to the matter in dispute. It is unfortunate, but a fact, that what is considered allowable in practice, often bears only slight relevance to the dispute.

New York law recognizes several discovery devices: (i) oral depositions (examinations under oath before trial), (ii) discovery and inspection (a way to obtain physical evidence and documents owned or controlled by the opponent), (iii) notice to admit (a method of obtaining an admission from an adversary as to the truthfulness of certain matters or genuineness of documents relevant to the case), (iv) physical and mental examinations (this method is commonly used in a personal injury suit), and (v) written interrogatories (written questions prepared by one party and served upon the other party).

Chinese law does not specifically recognize any of these methods, although it does not rule out

using such methods. Article 61 of the Law of Civil Procedure of the People's Republic of China is the only law regulating and defining "discovery" by lawyers in China. It states, "Lawyers acting as litigant representatives or other representatives of the litigant have the rights to investigate, collect evidence and inspect the files of the case in question. The scope and procedure for inspecting the files of the case in question shall be formulated by the Supreme People's Court." While a party may request that documents be produced for trial, it does not appear that an individual must respond to the requests of that party.

Another difference is the requirement that the Chinese people's court conduct independent discovery into the case. "The people's court shall investigate and collect evidence which litigants and their representatives cannot collect because of objective reasons." CPL Art. 65. In the United States, a court is allowed only to examine the documents presented by the parties and cannot do any outside discovery of evidence. The integral participation of the people's court in the discovery process is meant to ensure that all the necessary documents come before the court and that a party does not lose a case based on the ineffective discovery by counsel.

A party to New York litigation will soon find that the United States discovery process is much more adversarial and complex. The most intensive, aggressive and therefore most expensive discovery device within the United States is oral deposition, or pre-trial examination.

Under New York law, parties, as well as non-parties, may be deposed, and may be required to bring relevant documents to the deposition. The deposition is usually held at the office of one of the attorneys where a stenographic reporter transcribes the testimony. The deponent is questioned by the attorney of the party who sought the deposition, and the attorneys for the other party may cross-examine the witness at the conclusion of the direct examination. It is common that the parties stipulate, among other things, that all objections to questions during the deposition be reserved to the time of the trial.

The transcript of a deposition of a party can always be introduced at trial by the adversary, if it is relevant and material. As a general rule, a party cannot use his own deposition as evidence at trial, unless it falls within one of the exceptions specified in the New York Civil Practice Law and Rules, (for example, the witness is deceased, the witness is outside the state, the witness is unable to testify by reason of age, sickness, imprisonment, or, the court finds that special circumstances justify the use of the deposition).

Of course, discovery, and especially depositions, can be invaluable when conducted after thorough preparation and in good faith. They not only uncover relevant facts and lead to the discovery of relevant evidence, but also give each side a live preview of opposing testimony.

A suggestion to foreign counsels and clients—if you must litigate in New York, be involved in the case, make sure to get copies of every document that surfaces, or is produced and generated in the case including correspondence between counsel and memos by local counsel to the file, and insist on detailed monthly bills. Litigation can be like a roller coaster, so fasten your safety belt and take a deep breath.