Creating Your Discovery Plan

Cedric C. Chao
Lawrence P. Ebiner

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Scope of Guide

This Action Guide helps you decide which discovery method to use and how to plan the sequence of your discovery requests. It includes the discovery rules for limited civil cases and the effect of the Trial Court Delay Reduction Act and other deadlines on discovery. This Action Guide highlights the effectiveness of the various discovery procedures in given situations, including the advantages and disadvantages of oral depositions, interrogatories, requests for admission, demands for inspection and other means of obtaining documents, and physical and mental examinations. For detailed discussion on the exchange of expert witness information that occurs close to trial, see Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2008).

Abbreviations

Civil Discovery	California Civil Discovery Practice (4th ed Cal CEB 2006)
Civ Proc Before Trial	California Civil Procedure Before Trial (4th ed Cal CEB 2004)
Civ Proc During Trial	California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995)
Depositions	Handling Depositions (Cal CEB Action Guide February 2007)
Handling Expert Witnesses	Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2008)
Judicial Council Forms Man	California Judicial Council Forms Manual (Cal CEB 1981)
Laying a Foundation	Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008)
Motions to Compel	Handling Motions to Compel and Other Discovery Motions (Cal CEB Action Guide March 2007)
Obtaining Discovery	Obtaining Discovery: Initiating and Responding to Discovery Procedures (Cal CEB Action Guide March 2007)
Subpoenas	Handling Subpoenas (Cal CEB Action Guide December 2006)

About the Authors

Cedric C. Chao is a partner in the San Francisco office of Morrison & Foerster, LLP, specializing in commercial litigation, white-collar criminal defense, and international arbitration. He co-chairs the firm's international litigation and arbitration practice. Mr. Chao received his B.A. from Stanford University and his J.D. from Harvard Law School, and was a law clerk to U.S. District Judge William H. Orrick, Northern District of California. Before joining Morrison & Foerster, Mr. Chao was a federal prosecutor. He has handled numerous jury and court trials in both commercial and criminal matters, has taken or defended hundreds of depositions, and has led teams in significant international arbitration proceedings under the rules of the ICC, LCIA, ICDR, JAMS, and UNCITRAL. He has argued cases before the California Court of Appeal, the Ninth Circuit Court of Appeals, and the U.S. Supreme Court. He is a past chair of the California State Bar Litigation Section, a past president of the Asian American Bar Association of the Greater Bay Area, a past member of the American Bar Association Standing Committee on the Federal Judiciary representing the Ninth Circuit, and a current member of the American Law Institute. He is listed in both the Guide to the World's Leading Litigation Lawyers (2008, Legal Media Group) and the Guide to the World's Leading Experts in Commercial Arbitration (2008, Legal Media Group). *San Francisco* magazine included Mr. Chao on its 2009 list of "Northern California Super Lawyers," and *Asialaw* magazine included him on its "Asialaw Leading Lawyers 2009" list for dispute resolution

in Asia.

Lawrence P. Ebiner is a partner in the Los Angeles office of Holmes Roberts & Owen, LLP. He focuses on complex business, energy, and intellectual property litigation in federal and state courts, representing technology companies, electric power producers, manufacturers, developers, and real estate ventures. He has significant experience representing independent power producers, alternative-energy suppliers, and natural gas, drilling, and pipeline companies (and other energy businesses), with a particular emphasis on power contracts, geothermal leases, construction and warranty claims, and unfair-competition issues. Mr. Ebiner received his J.D. in 1985 from the University of California, Los Angeles, School of Law. Before joining Holmes Roberts & Owen, he practiced for 20 years with Morrison & Foerster. He clerked for U.S. District Court Judge Lawrence K. Karlton of the Eastern District of California and was a judicial extern for the Honorable Stephen R. Reinhardt of the U.S. Court of Appeals for the Ninth Circuit. Mr. Ebiner has extensive mediation, arbitration, and trial experience, and is a seasoned practitioner in every phase of discovery. He is an expert in the protection and discovery of e-mail and other electronic records and is a frequent speaker on the topic. Mr. Ebiner is currently a Director of the UCLA Law School Alumni Association. He has been actively involved in promoting diversity in the legal profession and was an original member of the Orange County Diversity Task Force.

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Before Preparing Your Discovery Plan

STEP 1. APPRECIATE THE IMPORTANCE OF A DISCOVERY PLAN

ANALYZE ISSUES, EVIDENCE, AND GOALS

Creating a discovery plan forces you to:

a. Identify critical issues in the case, *e.g.,* the elements you must prove to prevail;

b. Identify the evidence you must gather to prove your case;

c. Identify key witnesses;

d. Develop the themes you may use at trial;

e. Consider your client's litigation goals and priorities, including containing costs;

f. Anticipate issues that may affect the complexity, risk, and cost of the case; and

g. Consider the order in which to use the different discovery methods.

CONTAIN COSTS

Creating a discovery plan helps you to contain costs by:

a. Evaluating your client's ability to fund discovery (see step 9, below);

b. Making a cost-benefit analysis of ways to get the information you need; and

c. Choosing the most effective and least expensive discovery method for obtaining necessary information and evidence.

TRACK DEADLINES

A good discovery plan lays out case deadlines affecting discovery, allowing you to keep track of them, *e.g.,* the date of a case management conference and whether local rules require you to substantially complete discovery before that date. See steps 2 and 15, below.

EVALUATE PRIORITIES

A discovery plan prioritizes case preparation activities and the sequence of discovery, *e.g.,* to depose the plaintiff effectively, you may want to schedule the plaintiff's deposition after other witnesses have been deposed. Alternatively, you may want to depose the plaintiff first so that you can pin down his or her story before other witnesses testify. For discussion, see step 21.

WIN THE CASE

A discovery plan can help you win the case—through a dispositive motion, a favorable settlement, or a judgment at trial—by creating a master plan at the outset of the case for the discovery of information and evidence that will assist you in every phase of the pretrial and trial process.

Further Research: California Civil Discovery Practice, chap 2 (4th ed Cal CEB 2006), referred to throughout this Action Guide as Civil Discovery.

When Reviewing the Court's Case Management Plans

STEP 2. UNDERSTAND EFFECT OF TRIAL COURT DELAY REDUCTION ACT

MOST CASES SUBJECT TO TRIAL COURT DELAY REDUCTION PROGRAMS

Virtually all general civil cases and proceedings in the California Superior Courts are subject to the Trial Court Delay Reduction Act (TCDRA) (Govt C §§68600-68620) and the differential case management rules (Cal Rules of Ct 3.710-3.715). Govt C §§68605.5, 68608(a); Cal Rules of Ct 3.712; Cal Rules of Ct, Standards of J Admin 2.2.

NOTE

Certain cases are exempt from the TCDRA, including probate, guardianship, conservatorship, juvenile, and family law cases. Cal Rules of Ct 1.6(4), 3.712. See step 5, below, for full listing of cases exempt from the TCDRA.

UNDERSTAND DELAY REDUCTION PROCEDURES

To meet delay reduction and case management goals, a local court will (Govt C §68607(c); Cal Rules of Ct 3.714(a)):

a. Assign the case to the court's "regular" case management program;

b. Exempt the case as an exceptional case; or

c. Assign the case to the court's plan for uncomplicated cases.

Factors Considered

In making this determination, the court will consider (Cal Rules of Ct 3.715(a)):

a. The type and subject matter of the action;

b. The number of causes of action or affirmative defenses alleged;

c. The number of parties with separate interests;

d. The number of cross-complaints and the subject matter;

e. The complexity of the issues, including issues of first impression;

f. The difficulty in identifying, locating, and serving parties;

g. The nature and extent of the discovery anticipated;

h. The number and location of percipient and expert witnesses;

i. The estimated length of trial;

j. Whether some or all issues can be arbitrated or resolved through some other alternative dispute resolution process;

k. The statutory priority for the issues;

l. The likelihood of review by writ of appeal;

m. The amount in controversy and the type of remedy sought, including measures of damages;

n. The pendency of other actions or proceedings that may affect the case;

o. The nature and extent of law and motion proceedings anticipated;

p. The nature and extent of the injuries and damages;

q. The pendency of underinsured claims; and

r. Any other factor that would affect the time for disposition of the case.

UNDERSTAND TIME GOALS FOR CASE DISPOSITION

Depending on which "program" (see above) your case is assigned to, the court will manage it to achieve specified time goals for disposition of the case.

Unlimited Civil Cases

A court will manage its unlimited civil cases assigned to the court's "regular" case management program so that (Cal Rules of Ct 3.714(b)(1); Cal Rules of Ct, Standards of J Admin 2.2(f)(1)):

a. 75 percent are disposed of within 12 months of filing;

b. 85 percent are disposed of within 18 months of filing; and

c. 100 percent are disposed of within 24 months of filing.

Limited Civil Cases

A court will manage its limited civil cases assigned to the court's "regular" case management program so that (Cal Rules of Ct 3.714(b)(2); Cal Rules of Ct, Standards of J Admin 2.2(f)(2)):

a. 90 percent are disposed of within 12 months of filing;

b. 98 percent are disposed of within 18 months of filing; and

c. 100 percent are disposed of within 24 months of filing.

NOTE

In meeting these time goals for disposition of cases, the court is guided by the factors set out in Cal Rules of Ct 3.715(a).

Exceptional Cases

If, after evaluating a case using the factors listed in Cal Rules of Ct 3.400 and 3.715, the court finds that it involves "exceptional circumstances" that will prevent it from being disposed of within the time goals of Cal Rules of Ct 3.714(b), the court may exempt the case from those time goals. Cal Rules of Ct 3.714(c)(1). In such cases, the court must (Cal Rules of Ct 3.714(c)(2)):

a. Establish a case progression plan to ensure timely disposition;

b. With the goal of disposing of the case within 3 years.

Uncomplicated Cases

A local court may institute a case management plan for uncomplicated cases amenable to disposition within 6 to 9 months after filing. Cal Rules of Ct 3.714(d)(1). The court will use the factors listed in Cal Rules of Ct 3.715(a) to identify appropriate cases.

UNDERSTAND JUDICIAL CASE MANAGEMENT GOALS

To help achieve the case disposition time goals of Cal Rules of Ct 3.714, the judge will "actively manage" cases (see Govt C §68607); *e.g.,* many courts:

a. Use an individual calendar system under which case is assigned from outset to a specific judge for all purposes, including trial (see, *e.g.,* Los Angeles Ct R 7.3(i) (Central District));

b. Hold a case management or status conference within, *e.g.,* 140 days after the complaint is filed (Contra Costa Ct R 5(H)(1)(a)(2)) or no later than 180 days after filing (Cal Rules of Ct 3.721; Los Angeles Ct R 7.9(a)).

NOTE

Review Cal Rules of Ct 3.720-3.735 and any applicable local rules to determine the subjects to be considered at the case management conference.

No later than 30 days before the initial case management conference, counsel must meet and confer to consider issues identified in Cal Rules of Ct 3.727, as well as to consider resolving discovery disputes (and setting a discovery schedule), anticipated motions, issues relating to discovery of electronically stored information (ESI), and other matters. Cal Rules of Ct 3.724. The court may include appropriate orders relating to the discovery of ESI in the case management order. Cal Rules of Ct 3.728(13). See Civil Discovery, chap 2.

Judge May Establish Discovery Timetable

At the case management conference, the court may establish a timetable for the litigation, *including discovery deadlines*. See, *e.g.,* Contra Costa Ct R 12.6(B).

Court to Avoid Continuances

The court must:

a. Adopt a firm policy against continuances at all stages of the litigation (Govt C §68607(g)); and

b. Make strong efforts to begin trials when scheduled (Cal Rules of Ct 3.1332).

UNDERSTAND IMPACT ON DISCOVERY PLAN

Do not delay in creating your discovery plan:

a. Consult Cal Rules of Ct 3.720-3.735 and any applicable local rules immediately to determine case management procedures;

b. Develop your discovery plan as soon as possible after the case begins;

c. Prepare to initiate discovery without delay;

d. Plan to complete discovery well before statutory or court-imposed deadlines;

e. Follow statutory procedures for discovery requests, *e.g.,* statutory requirements for deposition and notice, to avoid delay;

f. Understand that the court may:

(1) Set a discovery schedule, including the possible early deposition of nonexperts;

(2) Try to persuade parties to stipulate to early depositions of experts if needed to resolve the case;

(3) Encourage counsel's input in developing the discovery schedule.

RECOGNIZE COURT'S POWER TO SANCTION

Judges have the power to impose sanctions, including dismissing the case or striking pleadings, to achieve delay reduction in the litigation. Govt C §68608(b).

STEP 3. RECOGNIZE LIMITATIONS ON LOCAL RULES IMPLEMENTING DELAY REDUCTION GOALS

LOCAL RULES CANNOT REQUIRE SHORTER TIME PERIODS

In setting up their own procedures to eliminate delay, local courts cannot require shorter time periods for the following (Govt C §68616):

Serving Complaint

Local rules cannot require that you serve the complaint less than 60 days after filing. Govt C §68616(a).

Responding to Complaint

Local rules cannot require that defendant serve responsive pleadings less than 30 days after service of complaint (an additional 15 days is allowed by stipulation). Govt C §68616(b).

NOTE

Local rules may authorize exceptions for longer periods of time. Govt C §68616(b).

Serving Notice or Other Documents

Under Govt C §68616(c), local rules cannot require a shorter period for serving notice or other documents than the periods set forth in CCP §§1005(b) and 1013; *e.g.,* notice of a motion must be served at least 16 court days before the hearing. CCP §1005(b).

NOTE

At the outset of the case, you might consider reaching an agreement with opposing counsel on the method to be used for serving documents during the course of discovery. Be certain to confirm any agreement in writing.

Pleading After Service of Summons

Local rules cannot require that a defendant plead in less than 30 days following service of summons under CCP §412.20. Govt C §68616(c).

Continuance

Local rules can allow parties, by stipulation filed with the court, to agree to a single continuance of up to 30 days. Govt C §68616(d).

Status Conference

Local rules cannot require a status conference sooner than 30 days after either (Govt C §68616(e)):

a. Service of the first responsive pleadings; or

b. Expiration of a stipulated continuance under Govt C §68616(d).

Discovery

Local rules cannot require shorter deadlines for discovery than those set by the discovery statutes. Govt C §68616(f); see CCP §§2016.010-2036.050. See also *County of Los Angeles v Superior Court* (1990) 224 CA3d 1446, 1456, 274 CR 712 (court cannot set date for completion of discovery when no trial date has been set).

IF LOCAL RULE VIOLATES GOVT C §68616

If your local court rules appear to violate the minimum time standards in Govt C §68616, consider the following options:

a. Comply with the local rule without protest (probably the safest option);

b. Obtain confirmation from the court that the minimum time standards in Govt C §68616 apply either by lodging a proposed stipulated order or by filing an ex parte application; or

c. Comply with the time standards prescribed by Govt C §68616 rather than the local rules, in which case you:

(1) Risk sanctions (see Govt C §68608(b)); and

(2) Will probably have to challenge the local rule in the appellate court.

STEP 4. DETERMINE WHETHER YOUR CASE IS COMPLEX

DESIGNATION OF ACTION AS COMPLEX CASE

Complex cases require exceptional judicial management to (Cal Rules of Ct 3.400(a)):

a. Avoid unnecessary burdens on the court or the litigants;

b. Expedite the case;

c. Keep costs reasonable; and

d. Promote effective decision-making by the court, the parties, and counsel.

NOTE

When a case is designated as a complex case, the court has much more control over discovery matters than would otherwise occur. The court, rather than counsel, may fashion a discovery plan that it believes is suited to the complexities of the case and to the parties involved. If you anticipate repeated discovery disputes because of the unreasonableness of your adversary's demands or objections, then you may prefer close judicial oversight. Before filing a complex case designation or counterdesignation, consider whether such close judicial oversight will be advantageous to your client.

Factors

The court may designate an action as a complex case if it is likely to involve (Cal Rules of Ct 3.400(b)):

a. Numerous pretrial motions raising difficult or novel legal issues that are time-consuming to resolve;

b. Management of a large number of witnesses or a substantial amount of documentary evidence;

c. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or

d. Substantial postjudgment judicial supervision.

Use of Technology in Conducting Discovery

Under CCP §2017.730(a), on noticed motion, the court may order the use of technology, *e.g.,* e-mail, for conducting discovery in cases designated as complex (Cal Rules of Ct 3.400-3.403) and exceptional (Cal Rules of Ct 3.714(c)(1); see steps 2-3, above). The court may order the use of electronic technology to (CCP §2017.730(d)):

a. Serve discovery requests and their responses;

b. Serve motions;

c. Store and access information in electronic form; and

d. Conduct discovery in electronic media.

Further Research: See CCP §2017.710 for definition of technology.

NOTE

Using technology under CCP §2017.730 to conduct discovery should not be confused with obtaining electronically stored information (ESI) from your opponent. A case does not need to be designated complex or exceptional for you to obtain ESI from the opposing party. See CCP §2031.010(e).

Document Depository

A court involved in a complex case may specify in a case management order that documents filed electronically in a central electronic depository available to all parties are deemed served on all parties. Cal Rules of Ct 3.751.

Cases Provisionally Designated as Complex Cases

The following cases are provisionally designated as complex cases (Cal Rules of Ct 3.400(c)):

a. Antitrust or trade regulations claims;

b. Construction defect claims involving many parties or structures;

c. Securities claims or investment losses involving many parties;

d. Environmental or toxic tort claims involving many parties;

e. Claims involving mass torts;

f. Claims involving class actions; or

g. Insurance coverage claims arising out of any of the above-mentioned claims.

NOTE

A case is not provisionally complex if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine. Cal Rules of Ct 3.400(d). A court may decide, through the adoption of local rules, which cases it deems or does not deem to be complex cases.

PROCEDURES

Complex Case Designation

A plaintiff may designate an action as a complex case by so marking the Civil Case Cover Sheet (Judicial Council Form CM-010) that must be filed with the initial complaint. Cal Rules of Ct 3.220(a)-(b), 3.401.

Noncomplex Counterdesignation

If a plaintiff has filed and served a civil case cover sheet designating the action a complex case, and the court has not previously declared the action case to be a complex case, a defendant, before its first court appearance, may file and serve a counter civil case cover sheet (Judicial Council Form CM-010) designating the action as not a complex case. Cal Rules of Ct 3.402(a).

In this instance, the court has 30 days after the defendant's filing to decide, with or without a hearing, whether the action is a complex case. Cal Rules of Ct 3.402(a).

Complex Counterdesignation

Before its first court appearance, a defendant may file a counter civil case cover sheet designating the action as complex. Cal Rules of Ct 3.402(b).

The court has 30 days after the defendant's filing to decide, with or without a hearing, whether the action is a complex case. Cal Rules of Ct 3.402(b).

Joint Complex Designation

A defendant may join the plaintiff in designating an action as a complex case. Cal Rules of Ct 3.402(c).

ACTION BY COURT

Decision on Complex Designation

A court must decide as soon as reasonably possible whether an action is a complex case. Cal Rules of Ct 3.403(a). Even without a request by the plaintiff or defendant, the court may decide on its own motion with or without a hearing that a civil action is a complex case, or that an action previously declared to be a complex case is no longer a complex case. Cal Rules of Ct 3.403(b).

STEP 5. DETERMINE WHETHER YOUR CASE IS EXEMPT FROM THE TRIAL COURT DELAY REDUCTION ACT

DETERMINE WHETHER YOUR CASE IS SUBJECT TO TCDRA

The Trial Court Delay Reduction Act (TCDRA) (Govt C §§68600-68620) specifically exempts the following actions and proceedings (see Govt C §68608(a); Cal Rules of Ct 1.6(4), 3.712(a)):

a. Juvenile cases;

b. Probate actions;

c. Guardianship and conservatorship actions;

d. Cases and actions under Divisions 6 through 9 of the Family Code, the Uniform Parentage Act, the Domestic Violence Prevention Act, and the Uniform Interstate Family Support Act;

e. Small claims proceedings;

f. Unlawful detainer proceedings; and

g. Other civil petitions, including, *e.g.:*

(1) Petition for writ of mandate;

(2) Temporary restraining order;

(3) Writ of possession;

(4) Appointment of receiver; and

(5) Name change.

WHEN TO ASK COURT TO TREAT CASE AS EXCEPTION

Courts are reluctant to exempt cases from the TCDRA, but if your case involves exceptional circumstances that will prevent the court and the parties from meeting case management goals and deadlines—or if it would be in the interests of justice—consider asking the court to exempt the case. See Cal Rules of Ct 3.714(c)(1). See also, *e.g.,* Los Angeles Ct R 7.6(c)-(d).

When Starting to Formulate Plan

STEP 6. PREPARE CASE CALENDAR

LIST DEADLINES

Immediately at the outset of the case, prepare a calendar of relevant dates based on the Code of Civil Procedure and any applicable local rules, *e.g.:*

a. When the complaint must be served, *e.g.,* 60 or 90 days after filing; and

b. When the responsive pleading must be filed.

NOTE

Ordinarily, the court will not set a trial date until the initial case management conference, which in some counties may not take place until 180 days after the filing of the complaint. For purposes of preparing your case calendar, therefore, you should assume that the court will set a trial date so that the matter can be resolved within 1 year after the complaint is filed. Once the court has set a trial date, add the specific discovery and trial deadlines governing your case.

Reasons to Prepare

Preparing a case calendar will allow you to:

a. Schedule your discovery within statutory deadlines;

b. Evaluate the nature and extent of the discovery that will be necessary in your case and how to accomplish it; and

c. Help the court establish a suitable discovery schedule.

REVISE CALENDAR AS NEEDED

Discovery and trial deadlines inevitably change during the course of a case, whether by stipulation of counsel or by order of the court. Review and revise your calendar regularly to ensure that your deadlines are accurate and up to date.

Sample Form: For a sample Case Management Calendar, see Appendix A.

STEP 7. BEGIN PLANNING FOR DISCOVERY EARLY

OBJECTIVE

Begin planning early to create a discovery plan that will:

a. Identify witnesses, documents, and other information necessary to meet your litigation goals, *e.g.,* information needed to achieve a settlement, or to prevail in a pretrial motion or at trial (see steps 8, 14, below);

b. Coordinate and schedule discovery to:

(1) Use resources efficiently, *e.g.,* don't waste time and money taking depositions before you have the information necessary to prepare for them (see step 14, below);

(2) Ensure that you complete discovery to meet your litigation goals before statutory or strategic deadlines;

(3) Prioritize your discovery requests, *e.g.,* avoid taking marginally helpful or repetitive depositions; and

(4) Order your discovery, *e.g.,* obtain documents before taking depositions and take depositions in a logical order;

c. Assist your client in formulating a litigation budget; and

d. Get the jump on your opponent.

WHAT DISCOVERY PLAN LOOKS LIKE

The format of your discovery plan will depend on the type and complexity of your case and on your personal preferences, *e.g.,* a chart, a table, or a simple list. The more complex the case, the more detailed the discovery plan will be, but whatever its format, every discovery plan will usually include:

a. A list of the witnesses who have relevant documents, evidence, or other information;

b. The discovery method you anticipate you will need to obtain that information from each witness (see CCP §2019.010); and

c. The deadlines for serving, responding to, and enforcing your discovery.

Review Elements of Claims or Defenses

Analyze the elements of each cause of action or defense to determine the evidence you will need:

a. To prove the claim or defense; or

b. To rebut the claim or defense of your opponent. See step 10, below.

Identify Sources of Evidence

Once you have determined the evidence you will need, identify the witnesses and other sources from which you can obtain that evidence.

Determine Discovery Methods

Determine which discovery methods will be the most efficient and effective in obtaining the evidence from the witnesses and sources you have identified.

Identify Deadlines

Taking into account the discovery methods you select, calendar the statutory and court-imposed deadlines for serving and enforcing your discovery.

Anticipate Delays

Your plan should anticipate delays from opposing parties, *e.g.,* extensions of time, evasive answers, missing documents, and required motions to compel.

Examples

Example 1: If you are familiar with the type of case and it requires only minimal discovery, you may be able to formulate the plan in your mind and then calculate and calendar only the deadlines for *completing* discovery before trial. Unless you are an experienced trial lawyer, however, the better practice is to put your discovery plan into writing.

Example 2: If the case requires more than minimal discovery, you will benefit from listing the known witnesses, identifying the key facts each witness is likely to have, and then figuring out the best methods of discovery for obtaining that evidence.

NOTE

There is no single "correct" discovery plan. Practitioners use many different types, depending on factors such as the size of the dispute, its subject matter, whether the client is a plaintiff or a defendant, and the client's litigation budget.

Sample Forms: See Appendix B for a sample discovery plan.

BEGIN EARLY

Analyze your case and plan your discovery at the *outset of the litigation* because:

a. If you wait, your opponent will likely put you on the defensive by implementing its discovery plan before you prepare yours;

b. Discovery can be very time-consuming, particularly in a contentious case, and it may take months to obtain the discovery you need if your opponent aggressively resists it;

c. As time passes, documents tend to disappear and memories fade, and you may be unable to obtain the strongest evidence you can to prove your case;

d. Some discovery methods are numerically limited (see step 16, below);

e. Clients like to see your plan for the case and what it is going to cost and will probably ask you to prepare a written "litigation budget" showing:

(1) The steps that you propose to take in the litigation; and

(2) The estimated costs of those steps;

f. You should plan for pretrial motions, *e.g.,* dispositive or summary judgment motions, so that you complete:

(1) The discovery necessary for the motion; and

(2) Any motions before the applicable deadlines, *e.g.,* a motion for summary judgment must be heard at least 30 days before the trial date. See Making and Opposing a Summary Judgment Motion (Cal CEB Action Guide October 2005).

Example: Plaintiff's counsel, anticipating that the defense will move for summary judgment, should complete in advance the discovery necessary to oppose such a motion, thus obviating the need to move for a continuance for further discovery. See CCP §437c(h). See also California Civil Procedure Before Trial §§36.84-36.85 (4th ed Cal CEB 2004), referred to throughout this Action Guide as Civ Proc Before Trial.

REVISE PERIODICALLY

Review your plan in light of the information you gain from each discovery method and from the discovery undertaken by other parties to the litigation and revise the plan as necessary.

Example: If the opposing party names new witnesses or brings up previously unknown facts, revise your plan immediately to schedule the discovery of this information.

Further Research: See Civil Discovery, chap 2.

STEP 8. ANALYZE LITIGATION GOALS

OBJECTIVE

Determine the amount, type, and timing of your discovery by identifying and analyzing all the parties' litigation goals.

YOUR CLIENT'S GOALS

IDENTIFY GOALS

Discuss with your client the goals in the litigation.

To Learn More About Merits of Case

At the beginning of the case, your client may not in fact know its long-term goals, because the client lacks the facts to make a realistic assessment. In these circumstances, an initial goal may be to serve discovery simply to learn more about the merits of the case and then reevaluate the goals using the information obtained.

To Resolve by Dispositive Motion

Determine whether your client wants to resolve the matter at an early stage in the litigation, *e.g.,* by summary judgment motion if that option is feasible. Whether or not you can resolve the case by dispositive motion will depend on the applicable law and facts alleged in the pleadings (in the case of a pleading motion like a demurrer) or the facts that you can show are undisputed (in the case of a summary judgment motion).

To Explore Settlement

Determine whether your client wants to explore settlement of the case and the terms under which it might be willing to settle. Whether or not the client wishes to explore an early settlement may depend on the initial investigation and discovery you do.

To Proceed to Trial

Evaluate whether your client wants to try the case:

a. Regardless of the risk and cost;

b. Only if the risk and cost can be kept within limits defined by the client; or

c. Under no circumstances.

PERIODICALLY REVIEW GOALS

As the case progresses, periodically review your client's goals and objectives because they may change depending on, *e.g.,* the evidence you obtain and the cost of the litigation.

Example 1: Although your client may initially express an interest in settlement, he or she may later change course as facts come out during discovery that indicate that a reasonable settlement is unlikely. Prepare a discovery plan that addresses both contingencies.

Example 2: On the basis of your initial discussions with your client, you may conclude that there appears to be a good statute of limitations defense, and you may wish to focus some initial discovery on obtaining facts to establish the defense. Once you obtain the evidence, you will need to reevaluate whether it is sufficient to support a summary judgment motion.

OPPOSING PARTY'S GOALS

IDENTIFY GOALS

Evaluate Whether Opponent Expects a Trial

Review the opposing party's pleadings for completeness and quality, *e.g.,* a well-prepared complaint or immediate requests for discovery may indicate a willingness to spend the time and money necessary to proceed to trial.

Evaluate Whether Opponent Prefers to Settle

Determine whether the case is likely to settle by:

a. Considering carefully any communications from opposing counsel for indications of a desire to settle; and

b. Reviewing the opposing party's pleadings and papers for the articulation of a theory of the case, the specificity of the allegations supporting the claims, and an indication of an acceptable settlement figure.

Further Research: See Civil Discovery, chap 2.

STEP 9. EVALUATE DISCOVERY AND LITIGATION CAPABILITIES

OBJECTIVE

Determine the amount, type, and timing of your discovery by analyzing the litigation and discovery capabilities of the parties and counsel.

YOUR CLIENT'S CAPABILITIES

DETERMINE CLIENT'S CAPABILITIES

Discuss with your client the client's capabilities, such as:

a. Financial resources available for the litigation;

b. Willingness and ability to invest time and emotional energy in the litigation;

c. Willingness to make previously private information public;

d. Prior litigation experience;

e. Attitude toward the litigation and the opposing party; and

f. Willingness to accept the potential effect of the litigation on the client's relationships, reputation, and goodwill.

OPPOSING PARTY'S CAPABILITIES

ASSESS OPPONENT'S CAPABILITIES

Determine the opposing party's and opposing counsel's capabilities by assessing:

a. The extent to which the opposing party and counsel are actively pursuing the litigation;

b. The knowledge and experience of opposing counsel or the opposing party;

c. Their reputations in the community; and

d. How the opposing party has dealt with other litigation, *e.g.,* usually settles or usually proceeds to trial.

NOTE

Experienced lawyers are often more efficient in reaching the essential issues of the case by not consuming deposition time on insignificant issues, by not interposing objections during depositions unless the subject matter has significance, and by being amenable to reaching stipulations on procedure.

EVALUATE INFORMATION

Analyze information about the opposing party's and opposing counsel's capabilities, *e.g.:*

a. Financial resources available for the litigation;

b. Willingness and ability to invest time and emotional energy in the litigation;

c. Experience, ability, and reputation of opposing counsel;

d. Attitude toward the litigation, your client, and you; and

e. Depositions and other discovery you anticipate the other party will undertake.

NOTE

The more determined the adversary, the more expensive it may be, in terms of time and money, for you to prepare for each phase of discovery.

Further Research: See Civil Discovery, chap 2.

STEP 10. IDENTIFY THE LEGAL ELEMENTS OF YOUR CASE

ASCERTAIN ELEMENTS OF CLAIMS AND DEFENSES

To determine what information you will need to discover, review the applicable jury instructions or other legal authority to identify the elements of:

a. Your claims, defenses, or counterclaims; and

b. The opposing party's claims, defenses, or counterclaims.

REVIEW AUTHORITY

Jury Instructions

Jury instructions will clearly set forth the elements that the parties must prove at trial and around which you must center your discovery. See California Civil Jury Instructions (CACI), available online at http://www.courtinfo.ca.gov/jury/civiljuryinstructions/.

Other Legal Authority

For other legal authority that may set forth the elements of your claim or defense, see, *e.g.,* California Tort Guide (3d ed Cal CEB 1996); Witkin, Summary of California Law (10th ed 2005); California Forms of Pleading & Practice (Matthew Bender); or California Civil Practice (With Forms) (Bancroft-Whitney 1992).

IDENTIFY BURDEN OF PROOF

Compare the parties' relative burdens of proof on *each* element of *each* claim, defense, or counterclaim in the case, *e.g.,* the plaintiff's burden of proof on the plaintiff's claims and the defendant's burden of proof on the defendant's affirmative defenses.

When Planning Your Discovery

STEP 11. GATHER INFORMATION

GET INFORMATION ABOUT YOUR CASE

Before serving any discovery, conduct an initial investigation by gathering as much information as you can from your client and other available sources.

Obtain Information From Client

Your client is often the best source of initial information about the case, including facts relevant to the elements of your claims and defenses. You can obtain that information by:

a. Interviewing your client about the facts of the case;

b. Interviewing your client about the opponent;

c. Asking your client to identify all potential witnesses; and

d. Asking your client to identify and collect all relevant documents.

Obtain Information From Other Sources

Once you have interviewed and collected documents from your client, obtain information from other sources, *e.g.:*

a. Interview client-related witnesses about the facts of the case;

b. Interview third party witnesses who have relevant information;

c. Identify and collect relevant documents from these witnesses;

d. Obtain declarations from friendly third party witnesses;

e. Search for relevant public records; and

f. Search the Internet for relevant information.

Example 1: In a contract case, interview employees of your client regarding the negotiation, drafting, and performance of the agreement.

Example 2: In a trade libel case, interview third parties who may be able to testify about what a potential defendant did or said and consider whether to obtain their declarations.

NOTE

Before interviewing client-related or third party witnesses, consider whether the attorney-client privilege (Evid C §§950-962) applies. If not, then the content of the interviews may be discoverable by other parties. Also, confirm whether the witness is separately represented by counsel in connection with the dispute, because this might prevent you from conducting the interview. On the attorney-client privilege, see Civil Discovery, chap 3.

Consider an Investigator

Depending on the nature of the case, you may want to hire an investigator to locate evidence and interview witnesses.

Caution: Make sure the investigator is reputable and will abide by professional and ethical rules, including all licensing requirements.

ORGANIZE INFORMATION

Organize the information and evidence you obtain from your client and other sources, *e.g.:*

a. Draft summaries of your interviews;

b. Prepare chronologies;

c. Prepare witness tables listing the names and addresses of all persons with material information and summarizing the information each witness has;

d. Prepare issue tables listing the significant issues in the case and summarizing the evidence relevant to each issue;

e. Scan documents into database; and

f. Select appropriate litigation management software.

Sample Forms: For sample Issue Table, see Appendix G. For sample Witness Table, see Appendix H.

EVALUATE INFORMATION

If Representing Plaintiff

If you represent the plaintiff, determine:

a. The facts that you have to support the elements of your claims;

b. The facts that you need but do not yet have;

c. The key witnesses and documents on which you will rely;

d. A preliminary theme of the case;

e. The amount of damages; and

f. The methods of proof, *e.g.,* whether you will be able to present the facts by means of documents, testimony, or discovery responses such as answers to interrogatories or requests for admission.

If Representing Defendant

If you represent the defendant, determine:

a. The facts that you have to support any cross-claims;

b. The facts that you have to establish your affirmative defenses;

c. The facts that you need but do not yet have;

d. The key witnesses and documents on which you will rely;

e. A preliminary theme of the case;

f. The issues that may create doubt about your client's liability;

g. The facts necessary to minimize damages claimed by the other party; and

h. The methods of proof.

LEARN ABOUT OPPOSING PARTY'S CASE

Learn about the opposing party's case by doing the things described above, *e.g.,* interviewing and collecting documents from your client, interviewing and collecting documents from third parties, searching for public records, and searching the Internet.

If Representing Plaintiff

If you represent the plaintiff, determine:

a. The legal defenses the defendant might raise;

b. The potential cross-claims the defendant may file;

c. The key witnesses on which the defendant will likely rely;

d. The key documents on which the defendant will likely rely;

e. The facts that will undermine the defendant's case; and

f. The potential discovery the defendant may serve.

If Representing Defendant

If you represent the defendant, determine:

a. The facts that you have to defeat the elements of each cause of action;

b. The key witnesses on which the plaintiff will likely rely;

c. The key documents on which the plaintiff will likely rely;

d. The facts that will undermine the plaintiff's case; and

e. The potential discovery the plaintiff may serve.

Further Research: See Civil Discovery, chap 2.

STEP 12. IDENTIFY UNDISPUTED FACTS AND ISSUES

IDENTIFY UNDISPUTED FACTS AND ISSUES

Your discovery goals will depend in part on whether issues and facts are disputed or undisputed. At the outset of the case most of the material facts will be disputed. However, some facts, *e.g.,* the existence of a contract, failure to perform the contract, or date notice of the breach was sent, may be undisputed. Accordingly, during your initial investigation, determine which material facts are likely to be undisputed, because you can use them to focus your discovery plan.

USE UNDISPUTED FACTS AND ISSUES

Identifying and eliminating uncontested facts and issues will help you:

a. Focus your discovery plan on key facts that may put you in a better position to achieve an early settlement;

b. Evaluate whether to bring a motion for summary judgment or adjudication and, if so, the timing of such a motion;

c. Assess whether a court trial or a jury trial would be preferable; and

d. Analyze potential damages.

NOTE

Of course, you will ultimately want to pin down what you believe are undisputed facts by serving requests for admission or taking the deposition of your opponent.

STEP 13. IDENTIFY YOUR DISCOVERY GOALS

IDENTIFY YOUR DISCOVERY GOALS

Once you have completed your initial investigation and identified the issues and material facts, identify your specific discovery goals in light of:

a. Your litigation goals, *e.g.,* favorable settlement, dispositive pretrial motion, preservation of evidence, or trial (see below discussion and step 8, above);

b. Your discovery and litigation capabilities (see step 9, above); and

c. The legal elements of the case (see step 10, above).

FAVORABLE SETTLEMENT

If your client's goal is to obtain a favorable settlement, you may want to focus your discovery on the facts and issues that tend to promote settlement, such as the amount of damages or a dispositive defense.

Example 1: In a case in which liability is not genuinely disputed and you anticipate that the central issue will be damages, focus your discovery efforts on determining causation and the amount of damages.

Example 2: In a case in which you have a viable statute of limitations defense, direct your discovery efforts to establishing that defense.

DISPOSITIVE PRETRIAL MOTION

If, on the basis of your initial investigation, you believe that you may be able to obtain a favorable ruling on a dispositive pretrial motion such as a motion for summary judgment or summary adjudication, focus your discovery on the evidence necessary to prevail on that motion, *e.g.,* evidence showing that there is no triable issue regarding any material fact and that you are entitled to a judgment as a matter of law. See CCP §437c(c).

Example 1: In a breach of contract case in which your primary defense is accord and satisfaction, focus your discovery on facts that will establish the elements of both.

Example 2: In a case in which the issue is whether your client had a legal duty, focus your discovery on whether a common law, statutory, or contractual duty existed.

PRESERVE EVIDENCE

One of your discovery objectives may be to preserve evidence, *e.g.:*

a. To take depositions to preserve evidence if you anticipate that a witness will be unavailable at trial or will change his or her testimony over time. See step 22, below.

b. To obtain documents and electronically stored information (ESI) before they can be misplaced, erased, destroyed, or lost (especially important for third party witnesses and ESI that may be overwritten or erased in the course of normal business procedures). See steps 26 and 30, below.

NOTE

Although you may make a written request to the party controlling ESI to preserve information that is likely to be relevant to the litigation, your best protection is to propound document demands and to *obtain* the evidence as soon as possible. See step 30, below.

Seek Injunction if Documents May Be Destroyed

If there is a specific danger that evidence, particularly ESI, may be lost through spoliation or otherwise, counsel should consider

seeking an injunction to preserve the records. *Dodge, Warren & Peters Ins. Servs., Inc. v Riley* (2003) 105 CA4th 1414, 130 CR2d 385. See step 30, below.

PREPARE FOR TRIAL

If your case is not disposed of by settlement, dispositive motion, or some other means, one of your key discovery objectives will be to obtain the evidence you will need for trial.

Source: Civil Litigation/Creating Your Discovery Plan (Action Guide)/When Planning Your Discovery/STEP 14. CHOOSE THE METHODS THAT FIT YOUR DISCOVERY GOALS

STEP 14. CHOOSE THE METHODS THAT FIT YOUR DISCOVERY GOALS

METHODS OF DISCOVERY

Code of Civil Procedure §2019.010 provides for the following discovery methods:

a. Oral and written depositions;

b. Interrogatories to a party;

c. The inspection of documents, things, and places;

d. Physical and mental examinations;

e. Requests for admission; and

f. The exchanges of expert trial witness information.

IDENTIFY MOST EFFECTIVE METHODS

Choose the most effective discovery methods to achieve your particular discovery goal, *e.g.,* favorable settlement, dispositive pretrial motion, preservation of evidence, or trial (see below).

Example 1: If one of your objectives is to bring a summary judgment motion based on a narrow issue of fact, the most effective discovery method may be a narrowly tailored set of requests for admission, followed up by a deposition, if necessary.

Example 2: If one of your objectives is to reach an early settlement in a commercial dispute, you may want to focus your initial discovery on damages by serving interrogatories and document requests on the subject, followed up by a deposition, if necessary.

Example 3: If one of your objectives is to preserve documents, you may want to serve a focused document request that lists the documents you want preserved, followed up by a custodian of records deposition.

ASSESS COST

Know the value of your case and consider whether it is worth the cost of the discovery methods you are considering, *e.g.:*

a. Weigh the need for discovery:

(1) Extensive discovery may be called for when, *e.g.:*

(a) A great deal of money is at stake;

(b) The case is complex; or

(c) Most of the information relevant to the issues is in the hands of your opponent or third parties;

(2) Less discovery may be appropriate when, *e.g.:*

(a) Your client has control of most of the documents and information necessary to the case;

(b) The case is straightforward; or

(c) The amount at risk is small;

b. Choose discovery methods or informal devices (see step 19, below) for their ability to help you prevail, *i.e.,* do not waste money on duplicative discovery or unproductive investigations;

c. Consider the costs of each procedure, including enforcement costs;

d. Make a cost-benefit analysis of each discovery method, *e.g.,* consider whether a written deposition of an out-of-state witness makes more sense than an oral deposition in light of the travel expense and expected testimony; and

e. Discuss with your client the financial resources available to fund discovery.

CONSIDER ORDER OF DISCOVERY

After you have evaluated how the order of your discovery will affect your case and the evidence you obtain, you may decide to, *e.g.:*

a. Take early depositions of key witnesses;

b. Obtain certain documents before a particular deposition;

c. Depose a particular witness before you are required to produce documents that might affect the testimony of that witness;

d. Lock in testimony from one witness before deposing another;

e. Serve contention interrogatories before taking any depositions;

f. Wait to serve requests for admission until you have taken key depositions and obtained key documents.

Example 1: When a key witness may be unavailable for trial, schedule an early deposition to preserve that witness's testimony.

Example 2: When you suspect that a witness intends to change his or her testimony to conform it to the testimony of other witnesses or to documents that will be produced, schedule an early deposition.

CONSIDER TIMING

Keep in mind:

a. The statutory restriction on a plaintiff's ability to propound discovery at the beginning of the case, *e.g.,* plaintiff may not serve interrogatories or demands for inspection, copying, testing, or sampling or make requests for admission until 10 days after the service of the summons (CCP §§2030.020(b), 2031.020(b), 2033.020(b));

b. The statutory deadlines for completing discovery (see step 15, below);

c. The notice requirements for each discovery method, *e.g.,* an oral deposition must be scheduled for a date at least 10 days after service of the deposition notice (CCP §2025.270(a)); see also Appendix C and Obtaining Discovery: Initiating and Responding to Discovery Procedures (Cal CEB Action Guide March 2007), referred to throughout this Action Guide as Obtaining Discovery); and

d. The court's case management deadlines (see steps 2-5 above).

REVIEW LIMITATIONS

When planning your discovery, remember:

a. The numerical limitations applicable to each discovery method (see step 16, below); and

b. The scope of discovery (see step 17, below).

WEIGH VALUE OF EACH DISCOVERY METHOD

For *each* discovery method, review:

a. The features of that method (see steps 20, 23, 26, 31, and 34, below);

b. The cost of that method;

c. The advantages and disadvantages of that method (see steps 21, 24, 27-29, 32, and 35, below); and

d. The strategy for each method (see steps 22, 25, 30, 33, and 36, below).

NOTE

Unless the court orders otherwise, the parties may by written stipulation modify the procedures provided for any method of discovery permitted under CCP §2019.010. CCP §2016.030.

IF PROMOTING SETTLEMENT

DEVELOP STRONG CASE

If your discovery goal is to obtain a favorable settlement, develop the strongest case you can by gathering information from your client and developing favorable facts by using the most effective discovery methods. The facts you focus on and the discovery methods you select will depend on the nature of the case.

Example 1: If the other side has produced a "hot" document (*i.e.,* a document that strongly supports your case), schedule a deposition of the person most qualified to testify about the document in order to authenticate it and to pin down his or her testimony about it.

Example 2: Serve requests for admission to force your opponent to admit key facts that support your claims or defenses.

EXPOSE WEAKNESSES IN OPPONENT'S CASE

Expose weaknesses in the opposing party's case by, *e.g.:*

a. Taking depositions of the opposing party and favorable nonparty witnesses (see steps 20-22, below); or

b. Using requests for admission to reveal to the opposing party the weaknesses in his or her case (see steps 31-33, below).

NOTE

If the opposing party is a large corporation taking an unreasonable position against your client, you may want to depose a key decision-maker to learn corporate information and educate him or her about the merits of your case.

IF PLANNING DISPOSITIVE PRETRIAL MOTIONS

SUPPORT PRETRIAL MOTIONS

If your litigation goal is to file a dispositive pretrial motion, obtain facts to support such a motion by, *e.g.:*

a. Preparing requests for admission (see steps 31-33, below);

b. Serving interrogatories (see steps 23-25, below);

c. Obtaining necessary documents (see steps 26-30, below); or

d. Taking depositions (see steps 20-22, below).

IF PRESERVING EVIDENCE FOR TRIAL

TAKE DEPOSITIONS

If your litigation goal is to preserve evidence for trial, take witnesses' depositions. See steps 20-22, below.

OBTAIN DOCUMENTS AND ESI

Determine early in the case what documents and ESI you will need to obtain to (see step 30, below):

a. Help your subsequent discovery; and

b. Minimize the danger of loss, destruction, or misplacement of documents or ESI.

NOTE

On construction of the term "documents" to potentially also include ESI, see the Note under Demand for Production in step 26, below.

Choose Appropriate Method

Determine the appropriate method to obtain necessary documents. See step 26, below.

IF PREPARING FOR TRIAL

CONSIDER ALL DISCOVERY METHODS

If your litigation goal is to prepare the case for trial, consider all discovery methods necessary to obtain the admissible evidence you will need at trial to prove your claims or defend against your opponent's claims.

ASSESS CREDIBILITY

Depose the opposing party and other potential trial witnesses to assess their credibility and demeanor, in anticipation of their possible testimony at trial. (You may want to videotape the testimony of the most important witnesses.) See steps 20-22, below.

LOCK IN TESTIMONY

Lock in the testimony of the opposing party or witness, *e.g.,* for possible impeachment at trial, by taking the deposition of that party or witness.

PREPARE TO LAY FOUNDATION

Gather facts to authenticate documents or establish the foundation for the admissibility of physical evidence or business records, *e.g.:*

a. Depose the custodian of records or other qualified witness (see steps 26 and 29, below); or

b. Send a request for the authentication of documents (see steps 31-33, below).

Further Research: See Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008), referred to in this Action Guide as Laying a Foundation.

STEP 15. CONSIDER DISCOVERY DEADLINES AND OTHER TIMING MATTERS

EARLIEST DATE FOR DISCOVERY

For Plaintiff

After you serve the summons or the defendant appears in the action, wait:

a. **20 days** to serve a *deposition* notice (CCP §2025.210(b)); and

b. **10 days** to serve other discovery requests (CCP §§2030.020(b), 2031.020(b), 2033.020(b)).

NOTE

The plaintiff may move (with or without notice) for a court order to serve a deposition notice earlier if good cause is shown. CCP §2025.210(b).

For Defendant

A defendant may:

a. Serve a deposition notice or a demand for a physical examination of the plaintiff in a personal injury case any time after your client (CCP §§2025.210(a), 2032.220(b)):

(1) Is served; or

(2) Makes a general appearance, whichever occurs first.

b. Serve other discovery requests at any time. CCP §§2030.020(a), 2031.020(a), 2033.020(a).

LATEST DATE FOR DISCOVERY

You must complete discovery:

a. **15** days before an arbitration (Cal Rules of Ct 3.822(b)); or

b. **30** days before the *initial* trial date (discovery motions can be heard **15** days before the initial trial date) (CCP §2024.020(a)).

See step 3, above, for statutory limitations on local rules implementing delay reduction plans.

NOTE

When the last day to complete discovery proceedings or for a court to hear discovery motions falls on a Saturday, Sunday, or holiday, calculate the last day as the next court day. CCP §2016.060.

Exceptions

Discovery can take place after these deadlines if:

a. The court orders it, *e.g.,* after the trial date is continued (CCP §2024.050(a));

b. The parties depose expert witness(es) or make motions concerning experts (CCP §2024.030; for deadlines for expert witnesses, see below); or

c. The parties stipulate (CCP §2024.060).

NOTE

Although a continuance of a trial to a later date does not reopen discovery, each time an action is tried, an "initial trial date" is set, *i.e.,* discovery reopens whenever a new trial date is set following a mistrial, order granting a new trial, or reversal on appeal. *Beverly Hosp. v Superior Court* (1993) 19 CA4th 1289, 24 CR2d 238. Then, the last date for completing discovery is calculated from the date initially set for the new trial of the action. See *Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 92 CR2d 70. See also Civil Discovery §2.21; California Trial Practice: Civil Procedure During Trial §2.4 (3d ed Cal CEB 1995), referred to throughout this Action Guide as Civ Proc During Trial.

DEADLINE FOR GENERAL DISCOVERY MOTIONS

General discovery motions must be heard on or before the 15th day before the *initial* trial date. CCP §2024.020(a).

DEADLINES FOR EXPERT WITNESS DISCOVERY

For expert witnesses (CCP §2024.030):

a. Complete discovery **15** days before the *initial* trial date; and

b. Set motions regarding experts on or before the **10th** day before that *initial* date.

Further Research: On selecting and using expert witnesses, see Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2008), referred to throughout this Action Guide as Handling Expert Witnesses.

MOTION TO MODIFY DEADLINES

If you cannot comply with a discovery deadline, notice a motion asking the court to extend the deadline. See CCP §2024.050.

NOTE

You may not be able to persuade the court to extend the time for discovery if your case falls under the Trial Court Delay Reduction Act (TCDRA) (Govt C §§68600-68620). See steps 2-5 above. In any event, do not count on an extension of time. Always plan your discovery so that it is completed well before statutory or court-imposed deadlines.

LIMITED CIVIL CASES

For discovery procedures in limited civil cases, see Appendix D; Civil Discovery, chap 14.

Source: Civil Litigation/Creating Your Discovery Plan (Action Guide)/When Planning Your Discovery/STEP 16. REVIEW NUMERICAL LIMITATIONS ON DISCOVERY METHODS

STEP 16. REVIEW NUMERICAL LIMITATIONS ON DISCOVERY METHODS

INTERROGATORIES

LIMITATIONS

You may propound:

Form Interrogatories

An unlimited number of Judicial Council form interrogatories (CCP §2030.030(a)(2)); and

Special Interrogatories

A total of 35 specially prepared interrogatories, unless you attach a declaration stating why a greater number of interrogatories is needed (CCP §2030.030(a)(1)). See Exceptions, below.

NOTE

You may want to propound form interrogatories—which often elicit significant information about the other side's theories of the case, basis for damages, or defenses—with a few carefully tailored special interrogatories as a "first wave." After evaluating the responses, you can then send out a "second wave" of interrogatories.

EXCEPTIONS

Propound additional (more than 35) special interrogatories by preparing and serving a declaration showing that you need additional interrogatories because of (CCP §§2030.040-2030.050):

a. The complexity or quantity of existing and potential issues in the case;

b. The financial burden if you are required to pursue this information through an oral deposition; or

c. The expedience of using interrogatories to allow the responding party to conduct an investigation of files or records to provide the information you seek.

Sample Form: For sample form Declaration for Additional Discovery, see Civil Discovery §7.143.

NOTE

You cannot be *assured* of obtaining responses to more than 35 special interrogatories. If the opposing party files a motion for a protective order challenging your additional interrogatories, many courts will closely examine the declaration for additional discovery and may find that the discovery is unwarranted. Thus, do not squander your interrogatories by seeking information of dubious value.

LIMITED CIVIL CASES

On interrogatories in limited civil cases, see Appendix D.

SUPPLEMENTAL INTERROGATORIES

LIMITATIONS

You may serve a supplemental interrogatory "to elicit any later-acquired information bearing on all answers previously made by any party" (CCP §2030.070(a)-(b)):

Before *Initial* Trial Date

Twice before the *initial* trial date is set; *and*

After *Initial* Trial Date

Once after that date has been set, subject to CCP §§2024.010-2024.060 time limits on discovery proceedings and motions (see step 15, above); and

For Good Cause

If you show good cause, the court may allow you to propound additional supplemental interrogatories. CCP §2030.070(c).

NOTE

Use supplemental interrogatories instead of prohibited "continuing" interrogatories.

Further Research: See Civil Discovery §§7.7, 7.12, 7.28; see step 17, below, for discussion of scope of discovery in general.

REQUESTS FOR ADMISSION

LIMITATIONS

Documents

You may make unlimited requests for admission of the genuineness of documents *unless* they subject the responding party to *unwarranted* (CCP §2033.030):

a. Annoyance;

b. Embarrassment;

c. Oppression; or

d. Burden and expense.

Other Admissions

You may make 35 requests for admission *not* relating to the genuineness of documents. CCP §2033.030(a).

EXCEPTIONS

You may propound additional (more than 35) requests by preparing and serving a declaration that shows you need additional requests because of the complexity or quantity of existing or potential issues in the case. CCP §§2033.040-2033.050.

Sample Form: For sample form Declaration for Additional Discovery, see Civil Discovery §7.143.

LIMITED CIVIL CASES

On requests for admission in limited civil cases, see Appendix D.

DEPOSITIONS

ONE-DEPOSITION RULE

Only one deposition (which may extend over more than 1 day) may be taken of a witness by (CCP §2025.610(a)):

a. The party that noticed the first deposition; or

b. Any other party that received notice of that deposition.

NOTE

If you have not covered all relevant topics or if you have a legitimate basis (*e.g.,* deponent has failed to provide all documents), before the day's session is over you should say on the record that the deposition is being "continued" or is being "adjourned." Otherwise, your silence about the status of the deposition may be interpreted as your tacit agreement that the deposition is being "concluded."

EXCEPTIONS

You may take more than one deposition of a witness if:

On Behalf of Party Organization

The deponent is a natural person who has been designated to testify *on behalf of an organization* and you also depose him or her *individually* (CCP §2025.610(c)(1));

Right to Attach Order

If a right to attach order has been issued by the court (CCP §485.230) for the limited purpose of discovering the identity, location, and value of property in which the deponent has an interest (CCP §2025.610(c)(2));

Stipulation

The parties stipulate *in writing* to a subsequent deposition, and you obtain any nonparty deponent's consent to being deposed again (CCP §2025.610(b)); or

Court Order

You show good cause and the court grants your motion for leave to take a subsequent deposition (CCP §2025.610(b)).

NOTE

Meet and confer with opposing counsel *before* you bring a motion for an additional deposition. See CCP §2023.020. See Handling Motions to Compel and Other Discovery Motions (Cal CEB Action Guide March 2007), referred to throughout this Action Guide as Motions to Compel.

LIMITED CIVIL CASES

On depositions in limited civil cases, see Appendix D.

DEMANDS FOR production

NO NUMERICAL LIMITATIONS

You may make unlimited demands that documents, electronically stored information (ESI), and other physical evidence be produced (CCP §2031.010), *unless* those demands subject the responding party to *unwarranted* (CCP §2031.060(b)):

a. Annoyance;

b. Embarrassment;

c. Oppression; or

d. Burden and expense.

LIMITED CIVIL CASES

On demands for inspection in limited civil cases, see Appendix D.

NOTE

The term "inspection demand," as used in this Action Guide and in the Code of Civil Procedure, includes what some lawyers more

commonly call "demands to produce." A "demand to produce" or "production demand" is simply another way of saying the opposing party is required to produce documents or things for inspection, copying, testing, or sampling. On construction of the term "documents" to potentially also include ESI, see the Note under Demand for Production in step 26, below.

PHYSICAL OR MENTAL EXAMINATIONS

PHYSICAL EXAM IN PERSONAL INJURY ACTION

The defendant is entitled to demand *one* physical examination of the plaintiff in a personal injury action. CCP §2032.220(a). See step 34.

ANY OTHER PHYSICAL OR MENTAL EXAM

Any other examination, whether physical or mental, must proceed by:

a. Court order (CCP §2032.310(a)); or

b. Agreement (CCP §2016.030).

***Further Research*:** See Civil Discovery, chap 10.

ENFORCING LIMITATIONS

HOW LIMITATIONS ARE ENFORCED

The responding party must (CCP §§2019.030, 2030.090, 2031.060, 2033.080):

a. Make a good-faith attempt to resolve the problem informally, *e.g.:*

(1) Convince you to reduce number of interrogatories, demands, or requests; or

(2) Offer to answer a limited number of interrogatories, demands, or requests; and

b. If you and responding party cannot agree, *promptly* move for a protective order.

LIMITATIONS MAY NOT BE ENFORCED

Depending on type of case and local custom, you *may* find that your discovery is not limited, because opposing counsel decides not to move for a protective order to enforce these numerical limitations.

CONSIDER RISKS AND BENEFITS OF EXCEEDING NUMERICAL LIMITATIONS

Because judges and discovery commissioners have considerable discretion over whether to enforce numerical limitations when the responding party moves for a protective order, plan your discovery accordingly.

Further Research: See *Catanese v Superior Court* (1996) 46 CA4th 1159, 54 CR2d 280 (interrogatories violated rule of 35 and requirement that each interrogatory be full and complete in and of itself).

STEP 17. ANALYZE SCOPE OF DISCOVERY AND IMPACT OF SANCTIONS

SCOPE GENERALLY

WHAT MAY BE DISCOVERED

Relevant Information

Any discovery method is limited to obtaining information or material that is not privileged and (CCP §2017.010):

a. Is relevant to:

(1) The subject matter of the action; or

(2) The determination of any motion made in the action; and

b. Either:

(1) Is itself admissible in evidence; or

(2) Appears reasonably calculated to lead to the discovery of admissible evidence.

Claim or Defense

Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. CCP §2017.010.

Witnesses

Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter. CCP §2017.010.

Documents, Things, or Property

Discovery may be obtained of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property. CCP §2017.010.

Physical or Mental Condition

A physical or mental examination may be used *only* when the examinee's physical or mental condition is in controversy in the action, *i.e.,* it is not enough that the condition is relevant to the subject matter of the action. See CCP §§2032.220, 2032.310-2032.320. On physical or mental examinations, see steps 34-36, below, and Appendix C.

Example 1: A sexual harassment plaintiff who makes specific allegations of mental and emotional distress places her mental state "in controversy" under former CCP §2032(a). *Vinson v Superior Court* (1987) 43 C3d 833, 239 CR 292.

Example 2: A sexual harassment cross-complainant who alleges only that she suffered emotional distress in the past, and does not allege that distress is ongoing, does *not* place the nature and cause of her current mental condition "in controversy." *Doyle v Superior Court* (1996) 50 CA4th 1878, 58 CR2d 476.

Further Research: See Civil Discovery, chap 10.

Insurance Policy

You may discover:

a. The existence and contents of the insurance policy under which an insurance carrier may be held liable to satisfy any part of a settlement or judgment (CCP §2017.210); and

b. Whether that insurance carrier is disputing coverage of the claim (but not the nature and substance of the dispute) (CCP §2017.210).

NOTE

Even though you may discover the existence of insurance coverage, the fact of insurance coverage is not admissible in evidence at trial. CCP §2017.210; Evid C §1155.

Sexual Conduct

You may discover information concerning the plaintiff's sexual conduct with someone other than the alleged perpetrator if (CCP §2017.220(a)):

a. The plaintiff is alleging sexual:

(1) Harassment;

(2) Assault; or

(3) Battery; and

b. You first obtain a court order on *noticed motion* by establishing:

(1) Specific facts showing good cause for the discovery; and

(2) That the information is relevant and reasonably calculated to lead to the discovery of relevant evidence.

Further Research: On the scope of individual discovery methods, see Civil Discovery, chaps 5-11; Obtaining Discovery. See also Motions to Compel.

LIMITS ON SCOPE OF DISCOVERY

BURDENSOME, EXPENSIVE, OR INTRUSIVE DISCOVERY

The court will limit the scope of discovery if it determines that the burden, expense, or intrusiveness of the discovery "clearly outweighs" the likelihood that the information sought will lead to the discovery of admissible evidence. CCP §2017.020(a).

NOTE

In evaluating whether to grant a motion for a protective order, the court will not only balance the importance of the requested discovery against the burden, expense, or intrusiveness involved in obtaining it, but also consider whether there are other, more effective means of obtaining the same information.

PRIVILEGED INFORMATION

A party may not discover any privileged matter, absent a waiver of the privilege. CCP §2017.010. Privileged matter includes confidential communications between, *e.g.:*

a. Attorney and client (Evid C §§950-952);

b. Husband and wife (Evid C §§970-980);

c. Clergy member and penitent (Evid C §1032); and

d. Doctor and patient (Evid C §992).

ATTORNEY WORK PRODUCT

Absolute Protection

You may not discover *any* writing that reflects an attorney's work product, *i.e.,* the attorney's (CCP §2018.030(a)):

a. Impressions;

b. Conclusions;

c. Opinions;

d. Legal research; or

e. Legal theories.

NOTE

The work-product doctrine applies to both attorneys and nonattorneys representing themselves in propria persona. *Dowden v Superior Court* (1999) 73 CA4th 126, 86 CR2d 180.

An important difference between California and federal law on attorney work product is in the definition of work product itself. The federal rule limits work product to documents and tangible items prepared in anticipation of litigation or for trial. In California, the protection is not so limited. It applies also to writings prepared by an attorney while acting in a nonlitigation capacity. *County of Los Angeles v Superior Court* (2000) 82 CA4th 819, 98 CR2d 564.

Qualified Protection

You may not discover any other work product of an attorney that is not absolutely protected (see above) unless:

a. You convince the court that denial of the discovery will (CCP §2018.030(b)):

(1) Unfairly prejudice your client; or

(2) Result in injustice; or

b. The work product is relevant to an issue in the action, *e.g.,* breach of duty in:

(1) A State Bar disciplinary action if the client of the attorney being disciplined consents to discovery (CCP §2018.070(a)); or

(2) An action between an attorney and a client (CCP §2018.080).

Further Research: For further discussion of attorney work product protection, see Civil Discovery, chap 3.

STATEMENTS IN MEDIATION

Absent the consent of the parties, statements or admissions made in the course of a mediation are not subject to discovery, and disclosure of any such evidence cannot be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given. Evid C §1119(a).

MENTAL EXAM

The court will not order a mental examination if the examinee stipulates that (CCP §2032.320(b)-(c)):

a. No claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed; and

b. No expert testimony on emotional distress will be presented at trial.

Further Research: For further discussion on the scope of discovery, see Civil Discovery, chap 1; on physical and mental examinations, see Civil Discovery, chap 10.

IMPACT OF SANCTIONS

SANCTIONS

The Civil Discovery Act (CCP §§2016.010-2036.050) encourages cooperation among attorneys in the following ways:

Meet and Confer

Requiring attorneys to meet and confer in an attempt to resolve discovery disputes informally before bringing discovery motions (CCP §2023.020);

Motions

Directing the court to penalize a party that unsuccessfully makes or opposes a discovery motion without substantial justification (CCP §§2017.020(b), 2023.010(h), 2023.030);

However, absent exceptional circumstances, sanctions may not be imposed for the failure to provide electronically stored information (ESI) that has been "lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system." CCP §§2031.060(i), 2031.300-2031.320. See Civil Discovery, chap 8;

Misuses

Defining "misuses of the discovery process" to include the failure to confer with opposing counsel in a reasonable and good-faith attempt to resolve *informally* any discovery dispute (CCP §2023.010(i)); and

Other

Affording the court latitude in imposing a variety of sanctions on parties and their attorneys during discovery proceedings (CCP §2023.030). See *Doppes v Bentley Motors, Inc.* (2009) 174 CA4th 967, 991, 94 CR3d 802 (discussing range of penalties for conduct constituting misconduct of discovery process).

Further Research: See Civil Discovery, chap 15, and Motions to Compel, together with Appendix E to that Action Guide, for more information about discovery sanctions.

STEP 18. CONSIDER OTHER STATUTORY PROCEDURES FOR DISCOVERY

REQUEST FOR STATEMENT OF DAMAGES

Because in personal injury or wrongful death actions the plaintiff must not state in the complaint the amount of damages sought (see CCP §425.10(b)), a defendant in such actions may serve a request for a statement of damages at any time on the plaintiff, who must then serve a responsive statement within 15 days setting forth the nature and amount of the damages being sought. CCP §425.11(b).

NOTE

Consider waiting to serve a request for a statement of damages until later in the case, after the plaintiff has responded to, *e.g.*, Judicial Council form interrogatories, because items such as claimed medical expenses and lost wages will likely be set forth in greater detail.

DEMAND FOR BILL OF PARTICULARS

A defendant may demand a bill of particulars to force a plaintiff suing on an account to provide an itemization of the amount alleged to be owed, even before responsive pleadings are filed. See CCP §454.

NOTE

This device may not be used in negligence or other actions pleading general damages; it is also improper in an action on an account stated. *Ahlbin v Crescent Commercial Corp.* (1950) 100 CA2d 646, 224 P2d 131.

Further Research: For discussion of the procedures for demanding a bill of particulars, see Civ Proc Before Trial, chap 30.

JUDICIAL NOTICE

Do not overlook the option of gathering information to introduce by judicial notice, which allows a party to introduce facts and propositions that are (Evid C §452(h)):

a. Not reasonably subject to dispute; and

b. Are capable of immediate determination by resort to sources of reasonably indisputable accuracy.

Further Research: For discussion of the procedures for judicial notice, see Civ Proc During Trial, chap 14.

STEP 19. CONSIDER INFORMAL MEANS OF ACHIEVING DISCOVERY GOALS

INFORMAL DISCOVERY METHODS

INITIAL INVESTIGATION

Before serving any discovery, conduct an initial investigation by gathering as much information as you can from your client and other sources. See step 11, above.

TYPES OF INFORMAL DISCOVERY

At each stage of the case, consider the extent to which you can obtain discovery by informal means, *e.g.:*

a. Obtaining all relevant information that is within your client's possession, custody, or control that you did not obtain during your initial investigation;

NOTE

Remember that much information within your client's control may be stored electronically, and you want to be sure that your client does not inadvertently delete or destroy it. Additionally, a duty to preserve electronically stored information (ESI) can arise because of the pendency of litigation or the possibility of future litigation (see *Zubulake v UBS Warburg LLC* (SD NY 2003) 220 FRD 212, 216), and it is the responsibility of a party's counsel to advise the party to take reasonable measures to preserve such evidence, *e.g.,* by sending the client a "legal hold" or data preservation letter. For sample legal hold and preservation letters, see Appendixes E-F.

Further Research: For a full discussion of identifying, preserving, collecting, and processing ESI, see Civil Discovery, chap 4.

b. Informally requesting record production from third parties, *e.g.,* your client's tax preparer or accountant, who will sometimes supply documents without a subpoena if directed to do so by your client;

NOTE

To obtain information from third parties, you may need to supply them with your client's authorization for the release of the information.

c. Interviewing witnesses (you or a private investigator can conduct interviews);

NOTE

Remember that you may not interview a party you know to be represented by another counsel in the matter unless you have the consent of the other counsel. Cal Rules of Prof Cond 2-100(A). Note that changes to the California Rules of Professional Conduct were pending as this publication went to press, and counsel may wish to consult the California State Bar website for the most current version of the rules: http://calbar.ca.gov/state/calbar/calbar_home.jsp.

Example 1: Generally, a plaintiff's attorney is not barred by Cal Rules of Prof Cond 2-100 from interviewing *current* nonmanagement corporate employees to investigate plaintiff's claims when those employees are not represented by counsel. *Jorgensen v Taco Bell Corp.* (1996) 50 CA4th 1398, 1403, 58 CR2d 178. *Former* employees generally also may be contacted, even about an act or omission that binds the former employer for purposes of liability. *Continental Ins. Co. v Superior Court* (1995) 32 CA4th 94, 111, 37 CR2d 843.

Example 2: If you represent a plaintiff in a wrongful employment termination case, you may not communicate with an officer or management-level employee of the corporation, or with a current employee, if the communication is about that employee's act or omission that may impute liability to the corporation. See Cal Rules of Prof Cond 2-100(B)(1)-(2).

NOTE

Before interviewing client-related or third party witnesses, consider whether the attorney-client privilege (Evid C §§950-962) applies. If not, then the content of the interviews may be discoverable by other parties. Also, confirm whether the witness is separately represented by counsel in connection with the dispute, because this might prevent you from conducting the interview. On the attorney-client privilege, see Civil Discovery, chap 3.

d. Consulting public records, *e.g.,* county recorder's office for real property documents (information may be obtained from the federal government through the Freedom of Information Act (5 USC §§552-553) and from the California government through the California Public Records Act (Govt C §§6250-6276.48));

Example 1: In an action for false imprisonment, three former county jail inmates who were unsuccessful in obtaining county documents during discovery were entitled to use records in the litigation that were acquired by filing a request under the Public Records Act (Govt C §§6250-6276.48). *County of Los Angeles v Superior Court* (2000) 82 CA4th 819, 98 CR2d 564.

Example 2: A plaintiff who was struck and injured by a municipal train requested public documents under the Public Records Act (Govt C §§6250-6276.48). The court held that the right to disclosure under this Act is broader than the "relevancy to subject matter" standard of civil discovery and may be enforced by writ of mandate. *Wilder v Superior Court* (1998) 66 CA4th 77, 77 CR2d 629.

e. Researching newspaper articles, technical publications, and textbooks;

f. Exchanging information with other parties through agreement of counsel;

g. Conducting investigations through Internet searches; or

h. Conducting inspections of property open to the public.

Example: A plaintiff's expert was entitled to gather information relevant to the lawsuit when he visited a store in which a slip-and-fall injury had occurred and conducted a quick test on the floor so that he could testify on the floor's condition at trial. The property, which is open to the public, may be inspected without resorting to former CCP §2031. *Pullin v Superior Court* (2000) 81 CA4th 1161, 97 CR2d 447.

Further Research: See Civil Discovery §§3.22, 3.25-3.27; Wrongful Employment Termination Practice §§9.47, 11.8 (2d ed Cal CEB 1997).

ADVANTAGES OF INFORMAL INTERVIEW

Save Expense

An informal interview costs substantially less than a formal deposition and takes less time, and you may decide after the interview that a deposition is unwarranted.

Avoid "Educating" Opponent

An informal interview allows you to obtain information without your opponent being present to learn:

a. Your legal theories, *i.e.,* your opponent is not present to deduce your legal theories from your questions; and

b. The witness's identity.

NOTE

Through formal discovery, the opposing party may learn the identity and location of witnesses with knowledge of any discoverable matter. CCP §2017.010.

Obtain More Information

An informal interview presents the possibility that a witness will be more open than in a formal deposition setting.

Acquire Written or Recorded Statement

You may obtain a more favorable written or recorded statement by not having the other side present. This statement may be used at trial to impeach or to refresh the witness's recollection. Evid C §§791, 1235-1238.

DISADVANTAGES OF INFORMAL INTERVIEW

Statement Inadmissible

If you obtain a written or recorded statement from an informal interview, that statement (Evid C §§791, 1235-1238):

a. Is not itself admissible as evidence at trial; but

b. May be used to impeach or to refresh a witness's recollection.

Issue of Bias

An informal interview may raise the issue of bias because, if the witness gives you a statement but refuses to talk to the opposing attorney, the trier of fact may view the witness as biased in favor of your client.

Risk of Changing Testimony

If you cannot obtain a written statement from the witness, you risk the witness's changing his or her testimony by the time of a deposition or trial, and it may be difficult or impossible to impeach the witness on the basis of the interview.

Content Might Be Discoverable

If the interview is not protected by the attorney-client privilege (Evid C §§950-962), then the content of the interview might be discoverable by other parties. See Civil Discovery, chap 3.

NOTE

If there is a risk that the witness will change his or her mind after an interview or will be unavailable for trial, consider deposing the witness, even if he or she is friendly.

OBTAIN STIPULATION

CONSIDER STIPULATION

Particularly in cases in which there are multiple parties, consider stipulating under CCP §2016.030 to a discovery plan among counsel to reduce the risk of duplicative and inefficient discovery, *e.g.:*

a. Counsel can agree that one defense counsel will serve form interrogatories on plaintiff's counsel;

b. To avoid dueling deposition notices, counsel can agree to set aside a number of consecutive days for taking several depositions; and

c. In cases involving numerous documents, counsel can agree that documents being produced by a given party will be labeled in a predetermined manner.

Confirm Stipulation in Writing

If you can agree, confirm the stipulation *in writing, i.e.,* send the opposing attorneys a letter that accurately and completely recites the terms of the stipulation. See CCP §2016.030.

Further Research: For additional discussion of informal discovery, see Civil Discovery §§2.32-2.41. For further discussion of stipulated discovery plans, see Civil Discovery §§2.75-2.76. See also Obtaining Discovery; Motions to Compel.

When Determining Whether to Take Oral Deposition

STEP 20. REVIEW FEATURES OF ORAL DEPOSITION

WHAT YOU OBTAIN

At oral deposition, you obtain:

Testimony

a. The sworn testimony given by the witnesses before trial; and

b. Testimony preserved in writing.

Evidence for Trial

Under certain circumstances, the deposition may be admissible at trial. See step 22, below.

Documents

You may also obtain the production of documents and other evidence. CCP §§2020.010-2020.510, 2025.220.

NOTE

A party may be compelled to perform a physical reenactment of an event at a videotaped deposition. *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 68 CR2d 883.

Further Research: See Appendix C for important procedural requirements for depositions. See also Civil Discovery, chaps 5, 6; Obtaining Discovery; Handling Depositions (Cal CEB Action Guide February 2007).

DEPOSING NATURAL PERSONS

You may take the oral deposition of "any person" who is a (CCP §2025.010):

a. Party; or

b. Nonparty.

Party

Use a deposition notice to compel a party's (see CCP §2025.220):

a. Attendance and testimony;

b. Attendance, testimony, *and* production of records, documents, or things. On construction of the term "documents" to potentially also include electronically stored information (ESI), see the Note under Demand for Production in step 26, below.

Nonparty

Use a deposition subpoena to compel a nonparty's:

a. Attendance and testimony (CCP §2020.310);

b. Attendance, testimony, *and* production of records, documents, electronically stored information (ESI), or things (CCP §2020.510); or

c. Production of business records (CCP §2020.410).

NOTE

During discovery, only the deposition subpoena (or a court order) can compel nonparties to provide information or produce documents or ESI; you cannot serve a nonparty with interrogatories, inspection demands, or requests for admission. See CCP §2020.010(a).

Further Research: See Civil Discovery, chap 5; Handling Subpoenas (Cal CEB Action Guide December 2006), referred to throughout this Action Guide as Subpoenas. On preparing and serving mandatory Judicial Council forms of deposition subpoenas, see Appendix C.

If Individual's Name Not Known

If you do not know the name of the individual whom you wish to depose (CCP §2025.220(a)(3)):

a. Serve a deposition notice or subpoena on the organization for which the individual serves as an officer, director, agent, or employee;

b. State in the deposition notice or subpoena "a general description sufficient to identify the person or particular class to which the person belongs";

c. The organization is then required to produce the person or a person within the particular class that you have described.

Example 1: When your opponent has produced documents with notes in the margins and you cannot determine who wrote the notes, serve a deposition notice or subpoena asking your opponent to produce the person who wrote the notes.

Example 2: When a witness testifies in a deposition about a key employee of the defendant who has relevant information, but the witness cannot remember the name of the employee, serve a deposition notice asking the defendant to produce the unnamed employee referred to in the earlier deposition.

DEPOSING ORGANIZATIONS

You may take the deposition of an organization (*e.g.,* a corporation, partnership, association, or governmental agency) that is either a party or nonparty. CCP §§2020.310, 2025.230.

Serve Deposition Notice or Subpoena

The deposition notice or subpoena must (CCP §§2020.310(e), 2025.230):

a. Specify "with reasonable particularity" the matters on which examination is requested; and

b. Advise the organization of its duty to designate an officer, director, managing agent, or an employee to attend.

Organization Must Designate and Produce Most Qualified Witness

After receipt of the deposition notice or subpoena, the organization must designate and produce the person or persons most qualified to testify on the organization's behalf who are currently in its employ and who know the designated subject areas or who have familiarized themselves with the subject areas from information reasonably available to the deponent.

Example 1: In a trade secrets action in which plaintiff-company seeks to recover damages for the actual loss caused by an alleged misappropriation (see CC §3426.3), consider deposing the person most qualified to testify on behalf of the organization about the steps taken by the company to maintain the confidentiality of the trade secrets.

Example 2: In a lost-profits case, consider deposing the person most qualified to testify about company profits, particular accounting methods, and specific financial statements.

NOTE

Be as precise as possible about the matters on which examination is requested. Otherwise, clever opposing counsel may produce a witness who can testify about the general category you described but who has no information about the specific issue in which you are interested.

DEPOSING EXPERT WITNESSES

Review the rules that apply only to the depositions of expert witnesses, *e.g.,* exchanging lists of experts. CCP

§§2034.410-2034.470; see Civil Discovery, chap 11; Handling Expert Witnesses; Depositions.

NOTE

Retained experts are not permitted to testify at trial unless the subjects about which they will testify are described in the expert's declaration under CCP §2034.300(c). *Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289. An expert may not offer trial testimony that exceeds the scope of the expert's deposition testimony under CCP §2034.410 if the opposing party does not receive notice regarding the new testimony in time to redepose the expert. *Easterby v Clark* (2009) 171 CA4th 772, 780, 90 CR3d 81.

Expert's Fees

The deposing party must pay the expert's fees, either when the expert's deposition notice is served or at the beginning of the deposition, at the option of the party noticing the deposition. CCP §2034.430(b). *True v Shank* (2000) 81 CA4th 1250, 1256, 97 CR2d 462.

NOTE

A *treating* physician and surgeon or other treating health care practitioner *who is asked to express an opinion* at the deposition must be paid his or her reasonable and customary hourly or daily fee. CCP §2034.430(a)(2). The percipient witness who is not asked to express an opinion during the deposition is not entitled to expert witness fees. See *Brun v Bailey* (1994) 27 CA4th 641, 32 CR2d 624.

Further Research: A treating physician is not a retained expert for purposes of CCP §2034.210(b) and may testify without submission of an expert declaration. *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 91 CR2d 293. The treating physician's testimony is not limited to personal observations but may include both fact and opinion testimony on diagnosis, prognosis, causation, and standard of care. See also Civil Discovery, chap 11.

DEPOSING PERSONS OUTSIDE OF CALIFORNIA

A party may take the deposition of a witness outside of California. CCP §2026.010.

Deposition of Party

If the deponent is a party or an officer, director, managing agent, or employee of a party (CCP §2026.010(b)):

a. Compel the witness to attend the deposition by service of a deposition notice on the deponent; and

b. Designate a place for the deposition that is within 75 miles of the deponent's residence or business office.

Deposition of Nonparty

If a deponent is neither a party nor an officer, director, managing agent, or employee of a party, you must follow the process and procedures required and available under the laws of the state, territory, or insular possession where the deposition is to be taken. CCP §2026.010(c).

NOTE

If you plan to take a deposition outside of California, consider hiring local counsel to assist you in complying with the process and procedures required by the jurisdiction in which the deposition will be held. The last thing you want is to prepare for the deposition and travel to another state only to find that a witness is not showing up because you did not follow the correct procedures. On and after January 1, 2010, the Interstate and International Depositions and Discovery Act (CCP §§2029.100-2029.900) governs depositions taken outside California.

***Further Research*:** On out-of-state depositions, see Civil Discovery, chap 12.

COMPARE WITH WRITTEN DEPOSITION

HOW WRITTEN DEPOSITION DIFFERS

To conduct a written deposition (CCP §§2028.010-2028.080), a rarely used discovery method, generally follow the same procedures as for an oral deposition (see CCP §§2020.010-2020.510, 2025.010-2027.010), except:

Notice and Direct Examination Questions

Serve all parties with both the notice *and* the direct examination questions.

Cross-Examination Questions

The opposing party then serves *you* with questions for cross-examination.

Re-Direct Examination Questions

Serve all parties with questions for re-direct examination.

Re-Cross-Examination Questions

The opposing party may serve *you* with questions for re-cross-examination.

Questions to Deposition Officer

Send all questions to the deposition officer.

Who Sets Date and Time

The deposition officer may set a date and time for the deponent to answer questions *after* the questions are completed.

Attorneys Do Not Attend

On the date and at the time set, the *deposition officer* asks the written questions and records the deponent's answers to be provided to you.

NOTE

Written depositions may be useful in establishing admissible evidence from nonparties about matters that are not controversial to the lawsuit. Although counsel will invest time in drafting the written questions, this discovery method may preclude the need for attorneys or the deponent to travel to a distant location for an oral deposition.

Further Research: For oral depositions, see generally Civil Discovery, chaps 5-6; Obtaining Discovery, steps 10-22. For written depositions, see Civil Discovery §§5.160-5.199; Obtaining Discovery, steps 23-28. For further information about the various forms of depositions, *e.g.,* telephonic or video depositions, and their procedural requirements, see Depositions.

STEP 21. CONSIDER THE ADVANTAGES AND DISADVANTAGES OF TAKING AN ORAL DEPOSITION

ADVANTAGES

OBTAIN EVIDENCE FROM NONPARTIES

A deposition is the only discovery method that permits you to obtain testimony, documents, electronically stored information (ESI), and other evidence from *nonparties*. See CCP §§2020.010-2020.510.

LOCK IN TESTIMONY

A deposition is usually the best way to lock in the testimony of unfriendly witnesses and opposing parties.

MAKE PERSONAL OBSERVATIONS

You have an opportunity to personally observe the deponent in an examination setting and assess his or her potential effect on the trier of fact if the case goes to trial.

OBTAIN SPONTANEOUS RESPONSES

You can elicit more spontaneous and complete answers to your questions than with interrogatories because:

a. The witness has less opportunity to be evasive because his or her responses are less likely to have been rehearsed with opposing counsel; and

b. If the witness tries to evade a question or not answer it completely, you can immediately follow it with narrower, more precise questions until you are satisfied with the response.

NOTE

The time for the opposing party and hostile witnesses to prepare is generally much shorter than it would be if other discovery methods were used, *e.g.,* 10 or 15 days after the deposition notice (or 20 or 25 days if consumer's personal records are to be produced at the deposition). CCP §§1013(a), 2025.270(a), (c), 2028.030-2028.050 (written deposition).

NO NUMERICAL LIMIT TO QUESTIONS

Because there are numerical limits on interrogatories and requests for admission but no limits on the number of questions you may ask during a deposition, depositions are an important way of learning the facts of the case.

DEFENDANT MAY OBTAIN EARLY DISCOVERY

If you represent the *defendant,* you can notice a deposition as soon as your client (CCP §2025.210(a)):

a. Is served with the complaint; or

b. Appears in the action, whichever occurs first.

MAY PROMOTE SETTLEMENT

If you want to settle the case and are deposing someone with settlement authority, carefully worded questions supported by documents demonstrating the strength of your case may affect the other party's confidence in its claims or defenses and be persuasive in lessening a party's resolve to bring the matter to trial.

DISADVANTAGES

EXPENSE

Preparing for and taking depositions may be more expensive than other forms of discovery, *e.g.:*

Reporter Fees

If you represent the party that noticed the deposition:

a. Each transcript page costs from $4.50 to $5 (in communities such as San Francisco or Los Angeles);

b. Each exhibit attached to the transcript adds cost, varying from about $.35 per page to $1 per page;

c. Additional fees may accrue, such as for using Realtime software, which allows you to instantaneously see the transcript on your computer monitor during the deposition, and can cost an additional $150 to $200; thus

d. The total for a full day of deposition can range from $500 to $1,200 (usually for the original plus one copy).

NOTE

There are also costs to the party *defending* the deposition, *e.g.,* about $2 to $3 per transcript page as well as an additional charge for each exhibit.

Videographer Fees

For particularly important depositions, you may decide to videotape the deposition. This often more than doubles the cost of the deposition.

Attorney Fees

Your client will pay your fees for time you spend, *e.g.:*

a. Reviewing the file;

b. Preparing exhibits;

c. Researching legal issues;

d. Reviewing prior transcripts;

e. Preparing questions; and

f. Traveling to and taking the deposition.

NOTE

In general, a fair assumption is that it will take you an hour to prepare for each hour of deposition, although this can vary dramatically in relation to the complexity of the case and the nature of the deposition.

INEFFICIENT IF YOU ARE UNPREPARED

If you are unprepared, you will waste time sorting through facts and documents for the first time during the deposition. Thus, consider demanding documents and interrogatory responses to detailed factual questions *before* taking the deposition.

REVEALS INFORMATION TO OPPONENT

You lose the advantage of surprising the opposing party and opposing counsel at trial, by:

a. Revealing your:

(1) Probable areas of examination at trial; and

(2) Interrogation methods; and

b. Stimulating opposing counsel to prepare for trial more carefully, *e.g.,* your questions may reveal previously unknown facts and issues to opposing counsel.

EDUCATES WITNESSES

You run the risk that witnesses who make poor showings at a deposition will:

a. Learn by their mistakes;

b. Be coached to become stronger witnesses at trial; and

c. Disclose grounds for impeachment or weakness in testimony that the opposing party can use at trial.

COMPARE WITH WRITTEN DEPOSITION

WRITTEN DEPOSITION ADVANTAGES

Compared with an oral deposition, a written deposition (CCP §§2028.010-2028.080), *e.g.:*

a. May be less expensive than an oral deposition because you do not have to attend;

b. Elicits information from the witness when an oral deposition would be difficult, *e.g.,* the deponent is ill or out of the country.

If distance is a problem, *e.g.,* the deponent resides at a faraway location, and you seek limited and essentially neutral information, *e.g.,* authentication of documents, you may prefer to stipulate with opposing counsel for a deposition by telephone conference call. Although there is no express authorization in California discovery law for a telephonic deposition, counsel may arrange such deposition by written stipulation. See CCP §2016.030.

WRITTEN DEPOSITION DISADVANTAGES

A written deposition has significant disadvantages, *e.g.:*

a. A written deposition requires much more time for notice and the exchange of questions than does an oral deposition (see CCP §§2028.030-2028.050);

b. You cannot formulate follow-up questions based on the deponent's responses, as you can in an oral deposition; and

c. You will not obtain spontaneous responses.

STEP 22. PLAN ORAL DEPOSITION STRATEGY

IDENTIFY WITNESSES

On the basis of your initial investigation and collection of documents from your client and other sources, identify:

a. Witnesses whom you may want to depose; and

b. The subject matter of their expected testimony.

EVALUATE NEED TO DEPOSE

To decide whether to depose a witness, ask:

a. Whether this witness is the only source of the information you need; and

b. In the case of friendly witnesses, whether it is better to depose the witness or simply to conduct an interview, on the basis of the witness's:

(1) Probable availability;

(2) Continued favorable attitude; and

(3) Continued ability to recall events by the time of trial.

DETERMINE ORDER OF DISCOVERY METHODS

Determine whether a deposition should follow other depositions or come after the production of documents or other physical evidence because:

a. You will need the information from the earlier depositions or from particular documents; or

b. The deposition will be more effective if it trails other discovery.

Example: If the case involves many documents, consider requesting the documents first so that you can use them in preparing for the deposition and questioning the witness.

Further Research: See Civil Discovery §§5.31-5.49.

DETERMINE ORDER OF DEPOSITIONS

Analyze whether to depose witnesses in ascending or descending order of importance to the case, *e.g.:*

a. If you want to limit costs, depose the most important witnesses first, and depose others as the budget allows; but

b. Consider whether this sequence best suits the needs of your case.

Example: If the case turns on the plaintiff's credibility, defense counsel will often notice the plaintiff's deposition early in the case to lock in his or her story before the plaintiff deposes individual defendants.

NOTE

Delaying a deposition until you have obtained significant information from other sources avoids problems with the one-deposition rule (see CCP §2025.610) but conflicts with the need to pin down the opposing party's story before your own client is deposed.

DETERMINE TIMING OF DEPOSITIONS

You may decide to depose a witness or party early in the case when you need to, *e.g.:*

To Learn About Case

Obtain information from party and nonparty witnesses (including experts) about the nature of the plaintiff's claims or the defendant's defenses.

To Promote Settlement

Promote settlement by exposing weaknesses in the opposing party's case, *e.g.:*

a. Depose a nonparty witness who provides information favorable to your case to encourage the opposing party to take your claims or defenses more seriously;

b. Vigorously depose the opposing party so that:

(1) Opposing counsel will perceive you as a resolute, well-prepared adversary; and

(2) The opposing party will appreciate the rigors of continued litigation;

c. Notice depositions at an early stage to:

(1) Enhance the chances of settlement before substantial costs are incurred; and

(2) Lock in the opposing party's testimony and contentions before the opposing party learns your client's claims or defenses.

NOTE

Weigh the advantages of deposing early against the general rule that a witness can be deposed only once. See CCP §2025.610(a). For discussion of the one-deposition rule, see step 16.

DEPOSE TO PRESERVE TESTIMONY

You may be able to use a deposition at trial for *any purpose* if:

a. The witness is an adverse party, or officer, director, managing agent, employee, or agent of a party (CCP §2025.620(b));

b. The deponent resides more than 150 miles from the place of trial (CCP §2025.620(c)(1));

c. The deponent is (CCP §2025.620(c)(2)(A)-(E)):

(1) Exempted or precluded from testifying on the ground of privilege, *e.g.,* the witness will not testify, on the basis of the Fifth Amendment;

(2) Disqualified from testifying, *e.g.,* the witness has been declared incompetent;

(3) Dead;

(4) Unable to testify because of an existing physical or mental illness or infirmity;

(5) Not subject to the court process; or

(6) Not served with a subpoena, because you were unable to serve the witness after diligent attempts; or

d. Exceptional circumstances exist (CCP §2025.620(c)(3); *Jordan v Warnke* (1962) 205 CA2d 621, 630, 23 CR 300).

DEPOSE FOR TRIAL PREPARATION

When your goal is to prepare for trial, schedule depositions to serve several purposes.

To Obtain Admissions

When deposing an opposing party or party-related witness, ask questions that will force the witness to admit facts that are favorable to you.

To Establish Favorable Facts

Whether you are deposing a party, a party-related witness, or a third party witness, ask questions that will establish facts that you can use to support your theory of the case, your theme, and the credibility of your client.

To Learn Unfavorable Facts

So that you are not surprised by unfavorable facts at trial, plan your deposition to explore all unfavorable issues and facts.

To Evaluate Witness

Schedule depositions to:

a. Study the deponent's reactions to your questions, *e.g.,* is the witness:

(1) Clearheaded or confused;

(2) Calm or easily angered;

(3) Direct or evasive; or

(4) Confident or unsure of answers.

b. Weigh whether the jury will find the deponent credible, likable, and sympathetic.

c. Determine whether the deponent has a good recollection of detailed facts.

NOTE

Recognize that depositions provide the best, and frequently the only, way to evaluate witnesses.

To Impeach Witness

You may be able to impeach a witness at trial with his or her deposition testimony, *e.g.,* if at deposition the witness's testimony was favorable to your case, but at trial the witness testifies against your client's position. See CCP §2025.620(a). See also Evid C §§770, 1235.

To Use Expert's Deposition at Trial

You can use an expert's videotaped deposition testimony at trial if you have (CCP §2025.620(d)):

a. Videotaped the deposition of:

(1) A treating or consulting physician; or

(2) Some other expert deponent; and

b. Reserved in the deposition notice the right to offer it at trial; and

c. Notified *on time* the court and all parties of:

(1) Your intent to offer the videotaped deposition; and

(2) The portions of the videotaped deposition you want to offer.

To Use Adverse Party's Deposition at Trial

Without establishing any special circumstances (see above discussion about preserving testimony), you may use the deposition of an adverse party for *any purpose* (CCP §2025.620(b)), *e.g.,* an adverse party makes an admission that helps you prove your case at trial.

NOTE

Keep in mind the one-deposition rule (see CCP §2025.610) when planning depositions. If the deposition may take more than 1 day, make sure you state in the deposition notice that "the deposition will continue from day to day until completed." And remember that the deponent can seek a protective order if the deposition goes on so long that it becomes an unwarranted

annoyance or undue burden. See CCP §2025.420.

CONSIDER WRITTEN DEPOSITION

Although it is rarely used, consider a written deposition as an alternative. See discussion of written deposition in steps 20-21, above.

When Considering Whether to Serve Interrogatories

STEP 23. REVIEW THE FEATURES OF INTERROGATORIES

WHAT YOU OBTAIN

In response to interrogatories (written questions from one party to another), you can obtain answers in writing and under oath relating to (CCP §2030.010(a)):

a. The contentions of a party;

b. The facts on which these contentions are based;

c. The identity of witnesses who have knowledge of the facts;

d. The identification of relevant writings; and

e. Any other relevant facts.

IF RESPONSE REQUIRES COMPILATION

If the answer to an interrogatory would require the responding party to prepare a compilation of documents, and the burden or expense of preparing that compilation would be substantially the same for the propounding party, the responding party (CCP §2030.230):

a. Has no obligation to make a compilation of the information;

b. Can respond to the interrogatory by referring to CCP §2030.230 and specifying the writings from which the answer may be derived or ascertained; and

c. Must then provide a reasonable opportunity for you to:

(1) Examine the records during normal business hours; and

(2) Make copies, compilations, abstracts, or summaries.

NOTE

If the responding party decides to answer an interrogatory in this way, the responding party cannot merely refer to files, records, or pleadings, *e.g.,* a party cannot respond with "see business records." See *Deyo v Kilbourne* (1978) 84 CA3d 771, 783, 149 CR 499.

Further Research: See Civil Discovery, chap 7. See also Appendix C; Obtaining Discovery, steps 29-33.

STEP 24. CONSIDER THE ADVANTAGES AND DISADVANTAGES OF SERVING INTERROGATORIES

ADVANTAGES

LESS EXPENSIVE

Using interrogatories may be less expensive than taking depositions because interrogatories generally require, *e.g.:*

a. Less preparation time, *e.g.,* Judicial Council form interrogatories are available;

b. No court reporter fees;

c. No transcript fees; and

d. No witness fees or travel costs.

NOTE

To reduce costs, some attorneys serve boilerplate interrogatories in cases involving the same subject matter. This is not good practice, especially in light of the 35-interrogatory limit.

When Costs Increase

Costs of using interrogatories may increase substantially by time spent:

a. Drafting precise questions to avoid objections and nonresponsive answers; and

b. Bringing motions to compel or responding to motions for protective orders, including court appearances.

FORCE OPPONENT TO DISCLOSE CONTENTIONS

Because it is improper in a deposition to ask about legal contentions, *e.g.,* "Tell me all the facts on which you base your contention that …" (see *Rifkind v Superior Court* (1994) 22 CA4th 1255, 1261, 27 CR2d 822), interrogatories or requests for admission are often the only way to learn the opposing party's legal contentions and the facts supporting those legal contentions.

NOTE

An interrogatory is not objectionable, because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation for trial. CCP §2030.010(b).

FORCE OPPONENT TO IDENTIFY WITNESSES AND DOCUMENTS

Interrogatories are an excellent discovery method for learning the identity of witnesses and for identifying relevant documents.

Example 1: In a contract case, serve interrogatories that ask the plaintiff to identify all persons who have information, evidence, or knowledge regarding the alleged breach of the agreement.

Example 2: In a premises liability case involving a fall caused by an allegedly defective railing, serve interrogatories that ask the defendant property owner to identify all documents regarding the design, maintenance, and repair of the railing.

Example 3: To discover the basis of the plaintiff's damages claim, serve interrogatories that ask him or her to identify *with specificity* all documents supporting the claim for damages.

SHOW BASIS FOR OPPONENT'S DENIALS

Serve interrogatories with requests for admission (see step 25, below) to require your opponent to disclose the facts and evidence

on which he or she bases a denial of any request for admission.

OPPONENT MUST PROVIDE AVAILABLE INFORMATION

The responding party is required to furnish answers that are "as complete and straightforward as the information reasonably available" permits. CCP §2030.220(a).

Must Answer

A responding party who cannot answer an interrogatory completely must nevertheless answer it "to the extent possible." CCP §2030.220(b).

NOTE

A court may issue evidence-preclusion sanctions when a party repeatedly refuses to respond properly to interrogatories. *Juarez v Boys Scouts of Am., Inc.* (2000) 81 CA4th 377, 390, 97 CR2d 12.

Must Conduct Investigation

If the responding party does not have personal knowledge sufficient to answer an interrogatory, that party must:

a. Conduct a reasonable and good-faith investigation to ascertain the information (CCP §2030.220(c)); and

b. Attempt to obtain the information from others (see CCP §2030.220(c); *Deyo v Kilbourne* (1978) 84 CA3d 771, 782, 149 CR 499), *e.g.:*

(1) Officers and employees;

(2) Other agents; and

(3) Attorneys.

NOTE

Corporate employees are not required to verify discovery responses if doing so would violate their Fifth Amendment rights. *Avant! Corp. v Superior Court* (2000) 79 CA4th 876, 94 CR2d 505.

Limits to Responding Party's Duty

The responding party does not have to (CCP §2030.220(c); *Bunnell v Superior Court* (1967) 254 CA2d 720, 723, 62 CR 458):

a. Seek requested information from third party witnesses (but must make a "reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations"); or

b. Furnish information that is *equally* available to you, *e.g.,* matters of public record.

DISADVANTAGES

LIMITED TO PARTIES

You can serve interrogatories only on *parties,* in contrast to using a deposition subpoena to acquire information from nonparties. See steps 26 and 29, below.

LIMITED NUMBER ALLOWED

Without a declaration showing why a greater number of interrogatories is proper, you are limited to 35 specially prepared interrogatories. However, you may serve any number of relevant official form interrogatories, which are helpful in many different types of commercial disputes. CCP §2030.030(a). See step 16, above. On interrogatories in limited civil cases, see Appendix D.

ANSWERS PREPARED BY COUNSEL

Opposing counsel will usually prepare the answers to your interrogatories, with the result that the answers are often stated in a

way that, although consistent with the truth, can be more helpful to your opponent than to your client.

Spontaneity Lost

With 30 days to prepare a response, none of the answers will be spontaneous.

NO IMMEDIATE FOLLOW-UP

You have no opportunity to ask immediate follow-up questions when a response is vague or evasive, or suggests a new area of inquiry.

CANNOT EVALUATE WITNESS

You cannot personally assess the opposing party's:

a. Credibility;

b. Demeanor; or

c. Ability to recall details.

MAY REVEAL INFORMATION TO OTHER SIDE

If interrogatories are served before you depose the opposing party, opposing counsel may be better able to prepare his or her client for a subsequent deposition.

Further Research: See Civil Discovery, chap 7.

STEP 25. PLAN INTERROGATORY STRATEGY

SERVE EARLY IN CASE

Use interrogatories as an *initial* discovery method to gather basic information before using other methods, *e.g.:*

a. The identity and location of witnesses with knowledge of pertinent facts;

b. Facts from the opposing party;

c. The nature of the opposing party's legal claims (facts, witnesses, or documents on which claims are based);

d. The existence and identity of relevant documents, including electronically stored information (ESI); and

e. Information about the opposing party's computer system, *e.g.,* types of computers and software, and the identity of staff who might know where key electronic data are stored.

FILL INFORMATION GAPS

Use interrogatories whenever you find information gaps regarding witnesses, documents, contentions, or specific facts, *e.g.,* from your investigation or responses to other discovery methods.

IDENTIFY SOURCES OF ESI

When there is a need to gain background information or to determine the existence, description, nature, custody, or condition of any ESI, consider serving interrogatories before making a production demand under CCP §§2031.010-2031.510.

SUPPLEMENT PRIOR INTERROGATORIES

Use a supplemental interrogatory to obtain information acquired by the opposing party after that party has responded to an earlier set of interrogatories. CCP §2030.070(a). You may propound supplemental interrogatories twice before and once after the initial trial date is set, subject to the time limits on discovery and motions. CCP §2030.070(b). See step 16, above.

COMPEL PARTY TO ANSWER BEYOND PERSONAL KNOWLEDGE

Seek information known not only to the responding party but also to the responding party's attorney, other agents, and employees, because the opposing party cannot provide vague answers or claim lack of knowledge without first searching for the requested information (compare with step 20, above), *e.g.:*

a. Medical history, including names, dates, and addresses of treating doctors;

b. The existence and identity of other witnesses and of witness statements (including the identity of a custodian of witness statement);

c. Financial information, *e.g.,* exact dates and amounts of transactions;

d. An explanation of internal corporate structure;

e. The existence and nature of prior accidents, claims, litigation, and testimony;

f. Employment history; and

g. The existence and amount of insurance.

AVOID BOILERPLATE QUESTIONS

Avoid using boilerplate interrogatories (*i.e.,* standard questions having no relationship to issues of particular case).

USE CONTENTION INTERROGATORIES

Draft special contention interrogatories and follow them with interrogatories asking for (CCP §2030.010(b)):

a. The facts on which each contention is based;

b. The names and addresses of witnesses having personal knowledge of those facts; and

c. The identity of relevant documents.

Sample Forms: For sample contention interrogatories, see Civil Discovery §§7.39-7.43.

Further Research: Civil Discovery, chap 7.

AVOID NUMERICAL LIMITATION PROBLEMS

To avoid problems of numerical limitations on discovery (see step 16, above):

Use Judicial Council Form Interrogatories

Because form interrogatories do not count toward the numerical limitation (CCP §2030.030(a)(2)), use them to elicit basic information such as the identity of documents or witnesses or the existence and nature of insurance policies in most cases and, in particular, when the case involves (CCP §2033.710):

a. Personal injury;

b. Property damage;

c. Wrongful death;

d. Breach of contract;

e. Fraud;

f. Unlawful detainer; or

g. Family law.

Save Some

When you propound special interrogatories, consider not using your entire quota of 35 in the first set; save some of your allotment for later use, when you know more about the case and your discovery needs.

Limit Number

For each proposed interrogatory:

a. Decide in advance whether it is likely to result in helpful information; and

b. If not, leave it out.

Stipulate

Parties can stipulate to a lesser, greater, or unlimited number of interrogatories. See CCP §2016.030.

NOTE

Assess early in the litigation whether you are likely to reach such a stipulation with your opponent.

Justify More

In *complicated* commercial cases, you can usually justify to the court that propounding more than 35 interrogatories is proper. However, in *simple* matters you may have difficulty obtaining an order compelling responding party to answer more than 35 interrogatories if that party has challenged your declaration advocating a need for a greater number of questions.

COORDINATE DEMAND FOR DOCUMENTS AND ESI

Use Form Interrogatories to Identify Documents and ESI

Analyze whether your case would benefit by:

a. First serving form interrogatories to identify documents and ESI;

b. Then demanding those documents and ESI; and

c. Later serving another set of interrogatories to pinpoint information revealed by the documents and ESI.

Avoid Special Interrogatories to Identify Documents and ESI

In view of the numerical limitation on *specially prepared* interrogatories, you may want to avoid using them for identification of documents and ESI unless you have specific items in mind, and instead:

a. Use Judicial Council form interrogatories if they apply to your case (see California Judicial Council Forms Manual (Cal CEB 1981), referred to throughout this Action Guide as Judicial Council Forms Man); or

b. Carefully draft demands for inspection, copying, testing, or sampling that describe (CCP §2031.030(c)(1)):

(1) Categories of documents and ESI with reasonable particularity; or

(2) Each individual item.

NOTE

Each demand may request an unlimited number of documents or items of ESI, as long as the request is not unduly burdensome. On construction of the term "documents" to potentially also include ESI, see the Note under Demand for Production in step 26, below.

COORDINATE REQUESTS FOR ADMISSION

Consider propounding interrogatories to follow up answers received to earlier requests for admission. As to facts not admitted, send Judicial Council Form DISC-001 (Form Interrogatories—General), Interrogatory No. 17.1, which asks for:

a. All facts;

b. All witnesses; and

c. All documents that support the responding party's denial.

NOTE

Do *not* combine interrogatories in the *same* document with requests for admission. CCP §2033.060(h).

Further Research: See Civil Discovery, chap 7.

When Ascertaining How to Obtain Documents and Other Evidence

STEP 26. REVIEW WAYS TO ACQUIRE DOCUMENTS, OTHER TANGIBLE EVIDENCE, AND ELECTRONICALLY STORED INFORMATION (ESI)

DEMAND FOR PRODUCTION

WHAT YOU MAY OBTAIN

You may obtain:

Documents

The production, inspection, or copying of documents within the categories you specify (CCP §2031.010(b)). On the 2009 amendment of CCP §2031.010 and construction of the term "documents" to potentially also include ESI, see the Note, below.

ESI

The production, inspection, copying, testing, or sampling of ESI within the categories you specify. CCP §2031.010(e). ESI is "information that is stored in an electronic medium." CCP §2016.020(e). "Electronic" is broadly defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." CCP §2016.020(d).

The demanding party may specify the form(s) (*e.g.,* native format, PDF, TIFF) in which ESI is to be produced. CCP §2031.030(a)(2).

NOTE

As amended operative June 29, 2009, CCP §2031.010 makes individualized references to "documents" and "electronically stored information" (ESI) with respect to demands for production. CCP §2031.010(b), (e). Before the enactment of the Electronic Discovery Act (EDA) (Stats 2009, ch 5) in 2009 and the related amendment of CCP §2031.010 to make specific reference to ESI, the term "documents" was interpreted to include virtually every form of electronic data recordation, *e.g.,* (1) all versions of relevant word processing documents; (2) e-mail; (3) computer programs; (4) databases; (5) graphics files; (6) cookies and history files; (7) data compilations; (8) voice mail; (9) computer logs; (10) audit trails; (11) access lists; (12) computer hard drives; and (13) backup tapes. In addition, the terms "document" and "writing," as used in the Civil Discovery Act, already were required to be given the meaning ascribed to "writing" in Evid C §250. CCP §2016.020(c). That definition had been interpreted to include various types of electronically stored information.

Although the legislature's intent is somewhat difficult to discern, it appears that the drafters of the 2009 EDA intended the Civil Discovery Act's references to "documents" to continue to include ESI—as they had through case interpretation before the EDA. It therefore is likely that the definition of ESI was added for clarity, not to expand (or contract) the scope of discovery, and that the EDA added references to ESI only in those provisions in which it was deemed necessary to address specific procedures applicable to the discovery of ESI, such as in CCP §2031.010. This view remains subject to further legislative or judicial interpretation.

Further Research: Evid C §250 (definition of "writing"). See Civil Discovery, chap 8. For a full discussion of the types of ESI that may be subject to a production demand, see Civil Discovery, chaps 4, 8.

Other Tangible Things

The production, inspection, photographing, testing, or sampling of any tangible thing (CCP §2031.010(c)); and

Access to Real Property

The entry on land or other property for (CCP §2031.010(d)):

a. Inspection;

b. Measurement;

c. Surveying;

d. Photographing; or

e. Testing or sampling of the land or any designated object or operation on it.

FROM WHOM

Production demands may be propounded only to *parties*. CCP §2031.010(a)-(e).

WRITTEN RESPONSE

The responding party is required to provide *verified* responses (CCP §§2031.210(a)(1)-(3), 2031.250(a)):

a. Identifying all items within the categories specified in the request; and

b. Either:

(1) Agreeing to produce them ("Statement of Compliance"); or

(2) Stating objections, with the reasons for not complying.

To Demand for ESI

If no form for production is specified in a demand for ESI or if objection is made to the specified form, the responding party must state the form in which it intends to produce each type of information. CCP §2031.280(c).

To preserve objections to the discovery of ESI on the ground that it is from a source that is not reasonably accessible because of undue burden or expense, the responding party must identify the types or categories of sources of ESI that it asserts are not reasonably accessible. CCP §2031.210(d).

NOTICE TO PRODUCE AT DEPOSITION

WHAT YOU MAY OBTAIN

At an oral deposition, you may obtain the production of documents or other physical evidence within the control of a party or party-affiliated deponent. CCP §§2025.220(a)(4), 2025.280(a).

FROM WHOM

A deposition notice requires production by a party or party-affiliated deponent (CCP §2025.280(a)), *i.e.:*

a. Officer;

b. Director;

c. Managing agent; or

d. Employee of party.

NOTE

Use a deposition subpoena for all other persons, including persons for whose immediate benefit an action or proceeding is prosecuted or defended. CCP §2025.280(b). See below and second note at step 20, above.

DEPOSITION SUBPOENA

WHAT YOU MAY OBTAIN

Use a deposition subpoena to obtain the production of business records, documents, ESI, and tangible things. CCP §§1985.8, 2020.020(b)-(c), 2020.030. On construction of the term "documents" to potentially also include ESI, see the Note under Demand for Production, above.

NOTE

You may also require the deponent's attendance at deposition to testify about the evidence produced. CCP §2020.020(c).

FROM WHOM

Use a deposition subpoena to obtain production from a nonparty. For the appropriate Judicial Council deposition subpoena form that must be served, see Appendix C.

STIPULATION

WHAT YOU MAY OBTAIN

You can agree with another party or nonparty to exchange evidence, or agree that certain facts are true. See CCP §2016.030.

Sample Form: For sample form stipulation, see Civil Discovery §8.122.

Further Research: See Appendix C; Civil Discovery, chap 8. See also Obtaining Discovery, steps 34-37 and Appendix E.

STEP 27. CONSIDER ADVANTAGES AND DISADVANTAGES OF A DEMAND FOR PRODUCTION

ADVANTAGES

CAN CONDUCT EARLY DISCOVERY

If Plaintiff

The plaintiff may serve a production demand 10 days after the summons is served or the defendant appears, whichever is sooner (CCP §2031.020(b)), instead of waiting 20 days after service of summons to serve a notice to produce at deposition (CCP §2025.210(b)). For advantages and disadvantages of notice to produce, see step 28, below.

If Defendant

The defendant may serve a demand on (CCP §2031.020(a)):

a. The plaintiff as soon as the action has begun; and

b. Any other party at the time, or after, that party is served with the summons and complaint.

LESS EXPENSIVE

A production demand is inexpensive when compared with:

a. Taking a deposition; or

b. Propounding a set of interrogatories or requests for admission.

When Costs Increase

The cost increases if you must:

a. Review, or pay for copying of, voluminous documents; or

b. Move to compel production.

RESPONDING PARTY MUST SEARCH

A responding party who is unable to comply with a particular demand must (CCP §2031.230):

Undertake Diligent Search

Affirm that he or she made a diligent search and reasonable inquiry in an effort to comply with the demand; and

Specify Reasons for Not Finding

Specify that he or she is unable to comply because the demanded item:

a. Never existed;

b. Has been destroyed;

c. Has been lost, misplaced, or stolen; or

d. Has never been or is no longer in the possession, custody, or control of the responding party, in which case the party must provide the name and address of the person or entity known or believed to have possession, custody, or control of that item.

NOTE

Consider deposing the custodian of records shortly after they are produced to confirm that the opposing party conducted a thorough search and interpreted the requests correctly.

Further Research: Civil Discovery §8.78.

ACCOMMODATES SCHEDULES

A production demand:

a. Allows you to be flexible in arranging the time and place for production; and

b. Compares favorably with CCP §1985 procedures or with a notice to produce at deposition (CCP §2025.220(a)(4)), both of which usually require you to coordinate the schedules of the court reporter, opposing counsel, and the deponent.

ALLOWS RELATED ACTIVITY

You must specify any inspection, copying, testing, sampling, or related activity demanded and set forth in the notice, as well as (CCP §2031.030(c)(4)):

a. The manner in which the activity will be performed; and

b. Whether the activity will permanently alter or destroy the item involved.

SUPPLEMENTAL DEMAND

A supplemental demand is permitted to inspect, copy, test, or sample any later-acquired or -discovered documents, tangible things, land or other property, or electronically stored information (ESI) that are in the possession, custody, or control of the party on whom the demand is made (CCP §2031.050):

a. Twice before the initial setting of a trial date; and

b. Subject to the time limits on discovery and motions provided in CCP §2024.020(a), once after the initial setting of a trial date.

DISADVANTAGES

LIMITED TO PARTIES

You may use production demands only with parties. CCP §2031.010(a)-(e).

LONGER WAIT UNTIL INSPECTION

You usually have to wait at least 30 days after serving the demand to inspect the evidence (see CCP §2031.030(c)(2)), which is longer than if you use a notice to produce at deposition (see CCP §2025.270(a), (c)). See step 28, below.

Further Research: Civil Discovery, chap 8.

STEP 28. CONSIDER THE ADVANTAGES AND DISADVANTAGES OF A NOTICE TO PRODUCE AT DEPOSITION

ADVANTAGES

SHORTER NOTICE PERIOD

A notice to produce at deposition allows you to inspect documents after a shorter period, *e.g.,* you could inspect after 10 to 15 days' notice, depending on how notice of deposition was served (see CCP §2025.270(a)), instead of at least 30 days after serving a production demand (see CCP §2031.030(c)(2)); for a discussion of the advantages and disadvantages of production demands, see step 27, above.

NOTE

Scheduling an inspection of documents under CCP §§2031.010-2031.510 to occur *before* a deposition allows sufficient time to prepare deposition questions based on your analysis of the documents. See step 30, below.

SECOND CHANCE TO OBTAIN DOCUMENTS

Although you have already made a production demand, you may use a notice to produce at deposition if, *e.g.:*

a. In its response to your production demand, the opposing party objected to the production of all of the documents you requested; or

b. You missed the deadline for filing a motion to compel further responses (*i.e., 45* days after opposing party's response). CCP §2031.310(c). See *Carter v Superior Court* (1990) 218 CA3d 994, 996, 267 CR 290 (allowed second "bite").

LESS EXPENSIVE

Unless you must move to compel, a notice to produce at deposition is not an expensive part of the overall deposition costs.

DISADVANTAGES

LIMITED TO PARTIES

A notice to produce at deposition is effective only if the evidence is in the possession or under the control of a party or party-affiliated deponent, *i.e.,* officer, director, managing agent, or employee of a party. CCP §2025.280(a). See step 26, above.

RESPONSE NOT RECEIVED UNTIL DEPOSITION

You can lose the advantage of using items at the deposition if the responding party either (CCP §2025.420):

a. Obtains a protective order; or

b. Raises an objection at the deposition and refuses to produce the requested items.

Further Research: Civil Discovery §§8.34-8.41; Depositions.

STEP 29. CONSIDER THE ADVANTAGES AND DISADVANTAGES OF DEPOSITION SUBPOENA

ADVANTAGES

SHORTER NOTICE PERIOD

Like a deposition notice, a deposition subpoena commanding only the production of business records allows you to inspect the documents after a shorter period of time, *e.g.,* usually 15 days after notice unless consumer records are sought. CCP §§1985.3, 2020.410(c); for discussion of the advantages of a notice to produce at deposition, see step 28, above.

NOT LIMITED TO PARTIES

You can serve a deposition subpoena on nonparties. CCP §2020.010(a).

DISADVANTAGES

PRODUCTION FOR COPYING LIMITED TO BUSINESS RECORDS

You can copy documents without a deponent's personal appearance, but only if they are business records. CCP §§2020.410-2020.440.

RESPONSE NOT RECEIVED UNTIL DEPOSITION

If you serve a deposition subpoena commanding both testimony and the production of documents or other evidence, then you risk losing the advantage of using the items at the deposition if the responding party either (CCP §§2020.010(a)(1), 2025.420):

a. Obtains a protective order; or

b. Raises an objection at the deposition and refuses to produce the requested items.

Further Research: Civil Discovery, chap 5; Depositions.

STEP 30. PLAN STRATEGY FOR OBTAINING DOCUMENTS, ELECTRONICALLY STORED INFORMATION (ESI), OR PHYSICAL EVIDENCE

IDENTIFY RELEVANT DOCUMENTS AND ESI

During the course of your initial investigation and identification of discovery goals (see steps 11 and 13, above), compile a list of potentially relevant documents and ESI and categories of documents and ESI you would like to obtain by, *e.g.:*

a. Reviewing each allegation of the complaint and asking your client whether your opponent (or third parties) may have documents and ESI relevant to the allegation;

b. Reviewing each defense in the answer and asking your client whether your opponent (or third parties) may have documents and ESI relevant to the defense;

c. Considering the elements of each cause of action and defense, and identifying relevant documents and ESI you think you will need to prove or disprove each one;

d. Evaluating the theme of your case and listing pertinent documents and ESI you would like to see;

e. Brainstorming about relevant documents and ESI you believe should exist given the nature and facts of the case; and

f. Identifying documents and ESI relevant to damages.

Example 1: In a products liability case, get documents and ESI related to the design, modification, development, manufacture, and testing of the product.

Example 2: In a lost-profits case, get financial records showing business and customers before and after the alleged wrongful conduct.

On construction of the term "documents" to potentially also include ESI, see the Note under Demand for Production in step 26, above.

SERVE PRODUCTION DEMAND EARLY IN CASE

Evaluate whether, early in the case, you should serve a production demand so that you can, *e.g.:*

To Examine Relevant Evidence

Identify, inspect, copy, test, and sample nonprivileged physical evidence that has evidentiary value, when, *e.g.:*

a. An issue in the case depends on documents or ESI (such as contracts, letters, and accounts), and production will allow you to review and analyze this evidence independently of witness testimony; or

b. The case involves real property, and a physical inspection and evaluation of the property will enable you to:

(1) Understand the opposing party's contentions; and

(2) Perhaps obtain off-the-record information about the property from the opposing party or counsel.

To Avoid Numerical Limitation Problems

Avoid the limitations on the numbers of other discovery methods by using documents and ESI to frame other discovery requests, *e.g.,* use documents and ESI that you receive to frame fewer, narrowly focused:

a. Interrogatories;

b. Requests for admission; or

c. Deposition questions.

ASK FOR DOCUMENTS AND ESI SUPPORTING CONTENTIONS

Ask for documents and ESI supporting your opponent's contentions, which will put the burden on your opponent to produce the documents and ESI or risk having them excluded from trial.

ASK FOR SPECIFIC DOCUMENTS AND ESI

If you know that particular documents or items of ESI exist, ask for them specifically. The more specific you can be in your request, the more likely your opponent will be forced to produce the documents and ESI, and the more likely the court will grant a motion to compel in the event your opponent does not produce them.

CONSIDER SEEKING PRESERVATION ORDER

If the case involves ESI, consider seeking a preservation order in the form of an injunction at the outset of the litigation to require the preservation of, *e.g.:*

a. All versions of relevant word processing documents;

b. Databases;

c. Graphics files;

d. E-mail;

e. Data compilations; and

f. Voicemail.

Preservation Letter

Alternatively, or in advance of seeking a formal preservation order, consider sending the opposing party a letter (sometimes referred to as a "legal hold" letter) that specifically details the types of ESI sought and potential sources of that information.

NOTE

It may also be appropriate to send a preservation or legal hold letter to your own client so that your client can identify, locate, and preserve evidence that may be relevant to the litigation.

Further Research: For further discussion of preserving ESI, see Civil Discovery, chaps 4, 8. For sample "legal hold" and "preservation" letters, see Appendixes E-F.

OBTAIN BEFORE DEPOSITION

If you obtain documents and other evidence *before* the deposition, you will conduct a more effective deposition, *e.g.:*

If Many Documents and Items of ESI

If the case involves numerous documents and items of ESI, *e.g.,* in business litigation, you can:

a. Review the documents and ESI to use in preparing for the deposition; and

b. Organize the documents and ESI to use while questioning the deponent.

If Other Physical Evidence

If the case involves real property, machinery, or other physical evidence, you will be familiar with the site or evidence to formulate questions for the deponent, *e.g.,* "How long has there been a crack in the foundation of the residence?"

OBTAIN AT DEPOSITION

Although it is better practice to obtain documents before a deposition, you may want the deponent to produce records at the deposition.

When to Obtain

Have the deponent produce records at the deposition when:

a. You are deposing:

(1) An individual on behalf of a large entity, *e.g.,* state agency or corporation;

(2) Someone other than the person who verified the response to your earlier production demand; or

(3) Someone who *may* have additional records not already produced; or

b. The responding party has failed to produce documents in response to your production demand, and you have waived the right to compel production of the documents by failing to make a timely motion to compel.

Further Research: Compare *Carter v Superior Court* (1990) 218 CA3d 994, 996, 267 CR 290 (allowed to obtain documents by requiring deponent to produce even though failed to make motion to compel), with *Professional Career Colleges, Magna Inst., Inc. v Superior Court* (1989) 207 CA3d 490, 494, 255 CR 5 (party who failed to make timely motion to compel answer to interrogatory could not propound same question again).

How to Proceed

Schedule the production of documents in the morning and the deposition in the afternoon to give yourself time to:

a. Review the documents; and

b. Organize the documents so that you can easily use them during the deposition.

OBTAIN WITH INTERROGATORIES

You may demand the production of all documents identified in a response to an interrogatory by either:

a. Simultaneously sending interrogatories and a production demand; or

b. Following interrogatories with a production demand. For discussion of coordinating interrogatories with a production demand, see step 25, above.

Further Research: For further discussion of strategy for obtaining documents, ESI, or physical evidence, see Civil Discovery, chaps 4, 8; Obtaining Discovery.

When Deciding Whether to Prepare Requests for Admission

STEP 31. REVIEW THE FEATURES OF REQUESTS FOR ADMISSION

WHAT YOU OBTAIN

Requests for admission (written requests for admissions or denials) allow you to obtain the admission or denial of any of the following (CCP §2033.010):

a. The genuineness of any relevant document specified in the request;

b. The truth of any specified relevant matters of fact, *even* a matter that clearly is in controversy;

c. Opinion relating to fact; or

d. The application of law to fact.

WHO MUST RESPOND

Requests for admission may be directed only to parties. CCP §2033.010.

Further Research: *Elston v City of Turlock* (1985) 38 C3d 227, 232, 211 CR 416; *Cembrook v Superior Court* (1961) 56 C2d 423, 426, 15 CR 127; Civil Discovery, chap 9. See also Appendix C; Obtaining Discovery, steps 38-40.

STEP 32. CONSIDER THE ADVANTAGES AND DISADVANTAGES OF REQUESTS FOR ADMISSION

ADVANTAGES

RELATIVELY INEXPENSIVE

Requests for admission are relatively inexpensive, *e.g.:*

a. You may save time and expense by using approved Judicial Council forms. CCP §2033.710. See Judicial Council Form DISC-020, Judicial Council Forms Man 1-48.39.

b. If the requests are clear and unambiguous, the responding party is required to make a good-faith effort to respond to the "substance" of each request or to admit as much of the request as possible. CCP §§2033.210(b), 2033.220.

REQUIRE RESPONDING PARTY TO INVESTIGATE

The responding party must investigate facts *not* personally known before responding to the request. See *Chodos v Superior Court* (1963) 215 CA2d 318, 323, 30 CR 303.

REDUCE DISCOVERY COSTS

Requests for admission narrow factual issues so that subsequent discovery can be focused on areas of genuine dispute.

REDUCE TRIAL COSTS

Requests for admission can reduce trial costs; *e.g.,* they may:

Authenticate Documents

Eliminate the need to call witnesses at trial simply to authenticate documents (see *Miller v Marina Mercy Hosp.* (1984) 157 CA3d 765, 769, 204 CR 62; Civil Discovery §9.19);

Narrow Issues

Reduce or eliminate issues for trial by allowing you to bring a motion for summary judgment or summary adjudication of issues based on admissions in answers to your requests (CCP §437c); and

Eliminate Need for Proof

Eliminate the need for proof at trial on a point covered by an admission because the admission has binding effect (CCP §2033.410(a)).

NOTE

The party to whom the requests for admission are directed must sign the responses under oath unless the responses contain only objections. CCP §2033.240(a). See *Allen-Pacific, Ltd. v Superior Court* (1997) 57 CA4th 1546, 1550, 67 CR2d 804 (unsworn response tantamount to no response at all); *Brigante v Huang* (1993) 20 CA4th 1569, 25 CR2d 354 (party, not attorney, must verify responses).

PROMOTE SETTLEMENT

Requests for admission can reveal to the opposing party weaknesses in his or her case that can encourage movement toward settlement.

PROVIDE POSSIBLE SANCTIONS AT TRIAL

You may be able to recover the reasonable expenses, including attorney fees, incurred in proving each fact or the genuineness of

each document at trial if (CCP §2033.420(a)):

a. The opposing party failed to admit the genuineness of any document or the truth of any matter when requested to do so; and

b. You prove at trial that the document is genuine or the matter is true.

Further Research: See *Allen-Pacific, Ltd. v Superior Court* (1997) 57 CA4th 1546, 1556, 67 CR2d 804; *Brigante v Huang* (1993) 20 CA4th 1569, 25 CR2d 354; *Smith v Circle P Ranch Co.* (1978) 87 CA3d 267, 274, 150 CR 828.

DISADVANTAGES

LIMITED NUMBER

You are limited to 35 requests for admission that do *not* relate to the genuineness of documents. CCP §2033.030(a); see step 16, above.

RESPONSES MAY NOT BE HELPFUL

Do not expect the opposing party to make admissions on key issues as long as there is an arguable dispute about them. The opponent may respond that he or she (CCP §2033.220):

a. Is unable to admit or deny because investigation and discovery are not yet complete; or

b. Lacks sufficient "information and belief" and therefore denies the request.

OTHER DISCOVERY NEEDED FIRST

You will not realize the full benefit of requests for admission if you use them too early in case, *e.g.:*

a. It is generally a good idea to wait until your own discovery allows you to identify facts, issues, or documents that are sham or should not be tried.

b. The opposing party is likely to give more complete responses in the later stages of discovery when the opposing party's own position is more clear.

Further Research: See Civil Discovery, chap 9; Obtaining Discovery.

STEP 33. PLAN REQUESTS FOR ADMISSION STRATEGY

FOCUS ON KEY UNDISPUTED FACTS

In planning your strategy for requests for admission, focus on the key material facts in the case that your opponent cannot genuinely dispute.

Example 1: As counsel for the plaintiff in a contract case involving the failure to pay, serve requests for admission to establish the existence of the contract, the amount due under the terms of the contract, and the fact of nonpayment.

Example 2: As counsel for the defendant in a contract case involving the failure to pay, serve requests for admission to establish that the plaintiff never delivered the goods or delivered defective goods.

BE PRECISE AND UNAMBIGUOUS

Draft your requests for admission so they are clear, precise, and unambiguous. This may deter your opponent from objecting on the grounds that the requests are vague, ambiguous, and overbroad.

AVOID DEFINITIONS

Although the Code of Civil Procedure allows you to define terms, avoid definitions if possible because they often *create* ambiguities. In addition, using definitions in the introduction of a request for admission may make it difficult to use the admission at trial.

SERVE EARLY IN CASE

To Advance Settlement

Although you may not realize the full benefit of requests for admission if served too early in the case, consider serving early in the litigation to evaluate weaknesses in the opposing party's case if you want to try to achieve an early settlement.

To Narrow Issues

You may want to serve requests early to eliminate undisputed facts and issues. See *Miller v Marina Mercy Hosp.* (1984) 157 CA3d 765, 769, 204 CR 62.

SERVE DURING DISCOVERY

Serve requests for admission during the case to, *e.g.:*

To Prepare for Summary Judgment Motion

Establish undisputed facts on which you can base a motion for summary judgment;

To Determine Opinion

Ask a party to admit opinion relating to fact. See CCP §2033.010; *Chodos v Superior Court* (1963) 215 CA2d 318, 323, 30 CR 303 (property value); or

To Lock in Testimony

Commit the responding party to admitted facts for trial.

SERVE CLOSE TO TRIAL

Serve requests for admission close to trial:

To Obtain Information

If served close to the discovery cutoff date, *i.e.,* 30th day before the *initial* trial date (CCP §2024.020(a)):

a. The opposing party will have had more opportunity for investigation and discovery; and

b. The responding party will have difficulty denying the admission on the basis of incomplete investigation or lack of knowledge.

To Lay Foundation

Establish facts needed to lay a foundation at trial to admit relevant evidence. See Evid C §§403, 1220. See also Laying a Foundation (Preparing and Using Evidence at Trial).

AVOID NUMERICAL LIMITATION PROBLEMS

To obtain maximum benefit from a limited number of requests (see step 16, above):

Limit Number

For *each* proposed request for admission:

a. Determine in advance whether the request is likely to result in an admission; and

b. If not, leave it out.

Save Some

When you propound requests for admission, consider not using your entire quota of 35 in the first set. Save some of your allotment for later use, when you know more about the case and your discovery needs.

Distinguish Requests for Genuineness of Documents

Because the number of requests that relate to the genuineness of documents is limitless (CCP §2033.030(c)):

a. Draft your requests so that requests regarding facts and requests regarding the genuineness of documents are clearly distinguished from each other.

b. Consider issuing them in separate sets.

When Evaluating Whether to Obtain Physical or Mental Examination

STEP 34. REVIEW THE FEATURES OF PHYSICAL OR MENTAL EXAMINATIONS

WHEN AVAILABLE

A physical or mental examination is available when the action involves a controversy over the mental or physical condition of (CCP §2032.020(a)):

a. Any party to action;

b. An agent of any party; or

c. A natural person in the custody or under the legal control of a party.

HOW TO OBTAIN

By Demand

In a personal injury case, the defendant can demand one physical examination of the plaintiff. CCP §2032.220(a). See Appendix C.

By Court Order or Agreement

In any other instance, including an additional physical examination of the plaintiff in a personal injury case, a party can obtain a physical or mental examination by:

a. Court order (CCP §2032.310(a)); or

b. Agreement (CCP §2016.030).

NOTE

In personal injury cases, stipulations are generally used to schedule physical examinations.

WHEN EXAMINEE DEMANDS COPY OF EXAM REPORT

If the person who submits to the examination or produces another person for examination demands and obtains a copy of the examination report under CCP §2032.610(a), he or she:

a. Waives all privilege or work product protection under CCP §§2018.010-2018.080 for any reports relating to the same condition (CCP §2032.630); and

b. Must provide the party requesting the examination with existing and future reports regarding the condition (CCP §2032.640).

LIMITS ON EXAMINATION

Condition in Controversy

An examination is limited to the condition in controversy. CCP §2032.020(a). See Civil Discovery §§10.5-10.11.

Qualifications of Examiner

The examiner must be a licensed (CCP §2032.020(b)-(c)):

a. Physician or other appropriate health practitioner; or

b. Clinical psychologist with the required degree and experience.

Nature of Examination

Unless the court orders otherwise, the examination cannot include a test or procedure that is (CCP §2032.220(a)(1)):

a. Painful;

b. Protracted; or

c. Intrusive.

Location

Except as ordered by the court, the examination must be conducted within 75 miles of the examinee's residence. CCP §§2032.220(a)(2), 2032.320(e).

Emotional Distress

A mental examination of a party seeking recovery for personal injuries cannot be ordered except on a showing of exceptional circumstances if the party stipulates that (CCP §2032.320(b)-(c)):

a. No claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed; and

b. No expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages.

STEP 35. CONSIDER THE ADVANTAGES AND DISADVANTAGES OF A DEMAND FOR PHYSICAL OR MENTAL EXAMINATION

ADVANTAGES

PROVIDES VALUABLE INFORMATION

A physical or mental examination may be necessary to prove or disprove a claim or defense, *e.g.,* a defense contention that plaintiff's injury is not as extensive as claimed.

IMMEDIATE REQUEST

The defendant in a personal injury case can demand a physical examination of the plaintiff immediately after being served with the complaint. CCP §2032.220(b).

DISADVANTAGES

SIGNIFICANT EXPENSE

Examination Costly

The physical or mental examination can be costly.

Obtaining Order Likely to Increase Costs

Because so many examinations are available only on court order after motion, obtaining an examination usually increases the cost of the litigation.

STEP 36. PLAN STRATEGY FOR OBTAINING PHYSICAL OR MENTAL EXAMINATION

AFTER DEPOSITION

In general, plan to request a physical or mental examination *after* you have deposed the potential examinee (usually the plaintiff) and learned the extent of his or her claims.

After Completing Your Discovery Plan

STEP 37. PREPARE DISCOVERY CALENDAR

DEVELOP DISCOVERY CALENDAR

Set up a specific discovery calendar for your case to be sure you comply with the court's case management requirements and other statutory deadlines *after* you have:

a. Prepared your overall case calendar (see step 6, above); and

b. Developed your discovery plan.

Trial Court Delay Reduction Deadlines

Analyze your discovery goals and develop a calendar that allows you to complete your discovery within the deadlines established by the court's case management plans. See steps 2-5.

Other Statutory Deadlines

Calendar the last day for discovery and discovery motions with an eye to any relevant local rules. See CCP §2024.010.

Stipulated Deadlines

Calendar any discovery deadlines that that you have agreed to with other counsel.

CALCULATE TIMETABLE

a. List important court-required dates on your calendar (see step 6, above);

b. Count backwards to develop a discovery timetable based on:

(1) The discovery methods in your plan;

(2) Their purposes; and

(3) Your schedule for initiating them; and

c. Remember that your timetable will change if you have to move to compel discovery or seek further discovery, so you should (see step 38, below; see also Civil Discovery, chap 15; Motions to Compel):

(1) Include deadlines for possible motions;

(2) Allow time to meet and confer with opposing counsel before filing the motion;

(3) Calculate the period needed for hearing and any delay in learning court rulings, if the judges of the local court are likely to take matters under submission; and

(4) Estimate additional time needed for any further responses, if the court so orders.

REVISE CALENDAR

After the initial creation of your discovery plan:

a. Periodically reevaluate it in light of:

(1) Information you receive in response to any discovery request; and

(2) Information you obtain from investigation;

b. Decide whether you should alter your discovery plan; and

c. Calendar any revised dates.

Example 1: You learn the name of a new witness from answers to interrogatories. *Determine whether you should take that witness's deposition.*

Example 2: Your investigator obtains a favorable statement from a third party witness. *You may decide that you no longer need to take that witness's deposition.*

Example 3: Your case is set for arbitration, and all discovery (except for experts) must be completed before the arbitration (see CCP §§1141.24, 2024(b); Cal Rules of Ct 3.822(b)). *Revise discovery deadlines accordingly.*

COMPLETE DISCOVERY WELL BEFORE DEADLINES

Although your discovery calendar will list all the deadlines, do not wait until you approach a deadline to start working on a particular discovery requirement. The best practice is to plan well in advance, start early, and finish early.

Further Research: For additional information regarding developing a discovery calendar, see Motions to Compel. For additional information regarding preparing an overall case calendar, see Preparing for Trial (Cal CEB Action Guide March 2008).

STEP 38. EVALUATE THE POSSIBILITY AND TIMING OF DISCOVERY MOTIONS

DETERMINE NECESSITY

Although discovery motions can be very expensive, particularly in a contentious case, you may face a situation in which you are unable to obtain the information you need (and to which you are entitled) unless you bring a discovery motion. Consider the following factors in determining whether to bring a motion to compel:

a. The extent to which you need the discovery to prove or defend your case;

b. Whether you can obtain the evidence by means of some other discovery method;

c. The likelihood you will prevail on your motion; and

d. The cost of the motion.

CHECK LOCAL RULES

In creating your discovery plan, review local rules and applicable deadlines to decide how to handle any necessary motions to compel.

If Assigned to Single Judge

Consult local rules to determine whether your case will be assigned to a single judge for all matters, and, if so:

a. Consider your chances of success in light of the particular judge if you move to compel discovery; and

b. Be careful not to appear unreasonable before the judge hearing the motion, because he or she will:

(1) Also be your trial judge; and

(2) Remember if either party acted unreasonably, *e.g.:*

(a) Insisted on bringing a motion to compel even though the opposing party offered to produce some of the requested information; or

(b) Took an outlandish position in seeking or refusing to comply with discovery.

Meeting With Judge to Arrange Schedule

If discovery is not proceeding smoothly, consider requesting that all counsel meet with the judge to establish a schedule compatible with progress toward trial.

CONSIDER STIPULATING TO REFEREE

If you are having difficulty resolving discovery issues and anticipate a motion to compel, *e.g.,* if the motion is to compel further responses or involves complex privilege issues, consider stipulating to have the motion heard by a mutually acceptable discovery referee, such as a retired judge or a lawyer knowledgeable about the subject matter of the lawsuit, because:

a. You can save time and money by stipulating to a referee; and

b. Many courts routinely appoint referees if the parties stipulate to using one.

WHEN PARTIES DO NOT CONSENT TO REFEREE

When the parties do not consent to using a discovery referee, the court can, on the motion of a party, or on its own motion, appoint a discovery referee despite the lack of consent. CCP §639(a)(5).

NOTE

A peremptory challenge of a discovery referee under CCP §170.6(2) must be timely, *i.e.,* made either:

a. **If a discovery referee has been appointed for all discovery purposes (CCP §639(b)(A)):** Within 10 days after notice of the appointment or, if the party has not yet appeared in the action, on a motion made within 10 days after the party's appearance; or

b. **If the discovery referee has been assigned only for limited discovery purposes (CCP §639(b)(B)):** At least 5 days before the date set for hearing, if the referee assigned is known at least 10 days before the date set for hearing.

Prepare Detailed Order

Be sure to prepare a thoroughly detailed order defining (CCP §639(c)-(d)):

a. The scope of the referee's powers;

b. The limitations, if any, on the kinds of discovery disputes to be submitted to the referee; and

c. How the referee's fee will be divided between the parties.

IF DISCOVERY COMMISSIONER WILL HEAR MOTIONS

If you are appearing in a court that uses commissioners to hear discovery matters, *e.g.,* San Francisco County, the commissioners may be less likely to assign discovery referees if there is no stipulation.

NOTE

Consider whether it is advantageous to stipulate to the commissioner to hear the matter as a judge pro tem so that you can have your discovery disputes resolved as soon as possible.

Further Research: For further discussion of discovery motions, see Civil Discovery, chap 15; Obtaining Discovery, and Motions to Compel.

Source: Civil Litigation/Creating Your Discovery Plan (Action Guide)/APPENDIX A Sample Case Management Calendar

APPENDIX A
Sample Case Management Calendar

Case Name _____

CASE MANAGEMENT CALENDAR

_____ Discovery Cutoff

_____ Discovery Motion Deadline

_____ Trial Date

Deadlines	**Internal Deadline**	**Court Deadline**
Last day to serve complaint		
Last day to serve responsive pleading		
First day plaintiff may serve written discovery (CCP §§2030.020(b), 2031.020(b), 2033.020(b))		
First day plaintiff may serve deposition notice (CCP §2025.210(b))		
Last day for hearing on motion for summary judgment (CCP §437c(a))		
Ordinary Discovery Cutoff (CCP §2024.020(a))		
Expert Discovery Cutoff (CCP §2024.030)		
Last day to file and serve notice of motion for summary judgment by mail (CCP §437c(a))		
Last day to file and serve notice of motion for summary judgment by personal delivery (CCP §437c(a))		
Last day for hearing on motion for summary judgment (CCP §437c(a))		
Last day to demand exchange of expert information by mail (CCP §§2024.030, 2034.220)		
Last day to demand exchange of expert information by personal service (CCP §2034.220)		
Last day to serve expert information by personal delivery (CCP §2034.220)		
Last day to serve notice of expert deposition by mail (CCP §2024.030)		
Last day to serve supplemental expert list by personal delivery (CCP §2034.280(a))		
Last day to serve notice of expert deposition by personal service (CCP §2024.030)		
Last day to serve written discovery by mail (CCP §§2030.020(b), 2031.020(b), 2033.020(b))		
Last day to serve written discovery		

by personal service (CCP §§2030.020(b), 2031.020(b), 2033.020(b))		
Last day to serve deposition notices by mail (CCP §2025.210(b))		
Last day to serve deposition notices by personal service (CCP §2025.210(b))		
Motion cutoff; last day to hear ordinary discovery motions (CCP §2024.020(a))		
Last day to file and serve discovery motions by mail (CCP §§1005, 2024.020(a))		
Last day to file and serve discovery motions by personal service (CCP §§1005, 2024.020(a))		
Last day to serve expert discovery motions by mail (CCP §§1005, 2024.030)		
Last day to serve expert discovery motions by personal service (CCP §§1005, 2024.030)		
Expert motion hearing cutoff; last day for expert discovery motions (CCP §2024.030)		
Last day to serve MSJ by mail (CCP §437c)		
Last day to serve MSJ by personal service (CCP §437c)		
MSJ cutoff; last day to hear summary judgment motions (CCP §437c)		
Last day to file motion for judgment on the pleadings (CCP §438(e)		
Last day to deposit jury fees (CCP §631)		
Last day to serve §998 offer to compromise by mail (CCP §998)		
Last day to serve §998 offer to compromise by personal service (CCP §998)		
Last day to serve Notice to Consumer re personal appearance at deposition with the production of consumer records by mail (CCP §§1985.3, 2025.210(b))		
Last day to serve Notice to Consumer re personal appearance at deposition with the production of consumer records by personal service (CCP §§1985.3, 2025.210(b))		
Last day for the issuance of a deposition subpoena solely for the production of personal records of a consumer (CCP §§1985.3, 2020.410(c))		
Last day for the issuance of a		

deposition subpoena solely for the production of business records (CCP §§1985.3, 2020.410(c))		
Last day to serve subpoena for personal appearance at deposition with the production of consumer records (CCP §§1985.3, 2020.410(c), 2025.210(b))		
Last day to serve notice of deposition of subpoenaed party to personally appear with or without business records by mail (CCP §2025.210(b))		
Last day to serve subpoena for personal appearance at deposition with or without business records (CCP §§2020.410(c), 2025.210(b); "reasonable notice" assumed as 10 days)		
Last day to serve notice of deposition of subpoenaed party to personally appear with or without business records by personal service (CCP §2025.210(b))		
Last day to serve notice to attend trial if documents requested by mail (CCP §1987)		
Last day to serve notice to attend trial if documents requested by personal service (CCP §1987)		
Last day to serve notice to appear (no documents) by mail (CCP §1987)		
Last day to serve notice to appear (no documents) by personal service (CCP §1987)		
Five (5) days before final settlement conference, counsel to exchange the following: 1) A list of premarked exhibits which the party intends to use at trial; 2) Copies of the exhibits on the list; 3) A list of witnesses which the party intends to call at trial; 4) Short Statement of the Case to be read to the jury; 5) Proposed jury instructions; and 6) Special verdict forms. (Los Angeles Ct R 7.9(h))		
On or before final settlement conference, parties must file and provide to the Court: 1) Joint Statement of the Case; 2) Joint Exhibit List; 3) Joint Witness List; 4) Joint proposed jury instructions (see Los Angeles Ct R 8.26); and 5); Joint special verdict forms. (Los Angeles Ct R 7.9(h))		
Last day to serve and file trial preparation motions, including		

motion for bifurcation, by personal delivery (CCP §1005; Los Angeles Ct R 7.9(h)) for hearing at final settlement conference		
Last day to serve and file motions in limine by personal delivery (Los Angeles Ct R 7.9(h); see also Los Angeles Ct R 8.92)		
Last day to serve and file opposition to motion for bifurcation by personal delivery (CCP §1005; Los Angeles Ct R 7.9(h))		
Last day to serve and file opposition to motions in limine by personal delivery (CCP §1005; Los Angeles Ct R 7.9(h))		
Last day to serve and file reply papers in support of trial preparation motions by personal delivery (CCP §1005; Los Angeles Ct R 7.9(h))		
Submit to court on the day of trial the following: 1)Trial briefs; 2) Lodge original deposition transcripts; 3) Present set of binders containing all of the documentary and photographic exhibits for: a) the court, b) the clerk, c) the witness box, and d) counsel for the opposing party (Los Angeles Ct R 7.9(h))		

Comment: This sample case management calendar references Los Angeles County Court Rules. Be sure to check local rules for the county in which your action is pending for case management requirements and deadlines.

APPENDIX B
Sample Discovery Plan

This sample discovery plan is based on a contract case. It sets out a rudimentary plan that a defendant might use and takes into account the elements of the underlying claim. The details of the plan, of course, will depend on the nature of the contract, the claims and defenses alleged, the number of witnesses, the kinds of documents, and the specific facts and law that may apply to your case. REVIEW the plan frequently and, as the case progresses, REVISE the plan accordingly. For example, as you learn about new witnesses and facts, consider whether to add them to the discovery plan. If you find you are missing evidence to support your claim or defense, determine the best way to obtain it. As due dates and deadlines change, revise the document accordingly.

DISCOVERY PLAN

_____ Discovery Cutoff

_____ Discovery Motion Deadline

_____ Trial Date

DISCOVERY METHOD	**SUBJECT**	**SET**	**WITNESS**	**DATE SERVED**	**DATE DUE**	**MOTION DEADLINE**
DOCUMENT COLLECTION						
	Contract history documents					NA
	Communications between parties					NA
	Client accounting records					NA
INTERVIEWS						
	Negotiation of contract					NA
	Performance of contract					NA
	Interpretation of contract					NA
	Breach of contract					NA
	Damages					NA
	Defenses					NA
INTERROGS						
	Identification of witnesses					
	Identification of documents					
	Contentions of adverse party					
	Damages					
DOCUMENT AND ESI REQUESTS						
	Contract documents					
	Performance of contract					
	Accounting records					
	Damages documents					
REQUESTS FOR						

ADMISSION						
	Existence of contract					
	Authenticity of documents					
	Other undisputed facts					
PARTY DEPOSITIONS						
	Negotiation of contract					
	Performance of contract					
	Interpretation of contract					
	Breach of contract					
	Damages					
NONPARTY DEPOSITIONS						
	Causation					
	Failure of condition precedent					
NONPARTY DOCUMENT SUBPOENAS						
	Relevant bank records					
	Relevant accounting records					
EXPERTS' EXCHANGE OF INFORMATION						
	Usage of particular contract terms					
	Industry expectations					
	Damages					
EXPERTS' DEPOSITIONS						
	Usage of particular contract terms					
	Damages					
OTHER DISCOVERY						

APPENDIX C
Checklist of Non-Expert Discovery Procedural Requirements

GENERAL REQUIREMENTS

1. PROPOUNDING PARTY

___ FORMAT OF INTERROGATORIES, DEMANDS FOR PRODUCTION, AND REQUESTS FOR ADMISSION

1. Include in first paragraph immediately below title of case (CCP §§2030.060(b), 2031.030(b), 2033.060(b)):

a. Identity of propounding party;

b. Set number (number each set consecutively);

c. Identity of each responding party.

2. Separately set forth each interrogatory, demand, or request. CCP §§2030.060(c), 2031.030(c), 2033.060(c).

3. Number each interrogatory, demand, or request consecutively, *e.g.,* number of first interrogatory of set is one number higher than number of last interrogatory of immediately preceding set. See CCP §§2030.060(a), 2031.030(a), 2033.060(a).

4. Make each interrogatory or request "full and complete in and of itself." CCP §§2030.060(d), 2033.060(d).

5. Do not include preface or instructions with interrogatories or requests unless approved by Judicial Council under CCP §§2033.710-2033.740 (form interrogatories and requests for admission). CCP §§2030.060(d), 2033.060(d).

6. If you specially define any term, type it with all capital letters whenever it appears (see, *e.g.,* form interrogatories). CCP §§2030.060(e), 2033.060(e).

7. Do not include subparts or a compound, conjunctive, or disjunctive question in any interrogatory or request. CCP §§2030.060(f), 2033.060(f).

___ ON WHOM TO SERVE

Serve copies of interrogatories and demands for inspection, copying, testing, or sampling, and requests for admission, on all parties who have appeared in action, unless court on motion with or without notice allows otherwise because service *on all other parties* would be unduly expensive, oppressive, or burdensome.

CCP §§2030.080, 2031.040, 2033.070.

___ CUSTODY

1. Retain original of interrogatories, demands, or requests with original proof of service affixed.

2. Receive original responses and verification from responding party and retain them until at least 6 months after final disposition of action.

CCP §§2030.280(b), 2031.290(b), 2033.270(b).

___ NO FILING REQUIREMENT

Do not file discovery papers with court. If pertinent to a motion, *e.g.,* to compel, file as exhibit to a declaration.

CCP §§2030.280(a), 2031.290(a), 2033.270(a).

2. RESPONDING PARTY

___ FORMAT OF WRITTEN RESPONSE

1. Include in first paragraph immediately below title of case:

a. Responding party's identity;

b. Set number;

c. Propounding party's identity.

2. Number each response with same number and respond in same sequence as corresponding interrogatory, demand, or request.

3. Set forth nature of document in title, *e.g.,* supplemental response. See Cal Rules of Ct 3.1000(a).

4. Do not repeat the original interrogatory, demand, or request in your response. CCP §§2030.210(c), 2031.210(c), 2033.210(d).

See Civil Discovery §§7.58-7.63, 8.76-8.83, 9.47-9.61.

___ **EFFECT OF FAILURE TO RESPOND TIMELY**

1. Failure to respond on time waives any objection to interrogatories, demands, or requests (including objections based on attorney-client privilege and work product doctrine).

2. Responding party may move court for relief from these waivers, on showing that:

a. It subsequently served written response; and

b. Earlier failure to serve timely response was result of mistake, inadvertence, or excusable neglect.

3. The propounding party may move for order compelling response and for monetary sanctions under CCP §2023.010. See Motions to Compel.

CCP §§2030.290, 2031.300, 2033.280.

___ **OBJECTIONS**

1. If you object, set forth in response specific ground for objection, *e.g.,* privilege, work product.

2. If only part of request is objectionable, answer remainder of request.

CCP §§2030.240, 2031.240, 2033.230.

___ **VERIFICATION**

1. Have responding *party* sign written response under oath unless it contains *only* objections.

2. If any response contains an objection, sign response as the attorney for responding party.

3. Attach signed verification form at end of answers.

4. If responding party is corporation, partnership, association, or governmental agency, have officer or agent sign response on behalf of organization-party, *but:*

a. If officer or agent signing response is attorney, that party waives any attorney-client privilege or attorney work product protection during any subsequent discovery from that attorney that is related to sources of information contained in response.

b. As matter of practice, corporate officers or agents who sign verifications on behalf of corporation or other entity usually verify some of answers on information and belief.

CCP §§2030.250, 2031.250, 2033.240.

___ **ON WHOM TO SERVE RESPONSES**

1. Serve original on propounding party.

2. Serve copies of responses on all other parties who have appeared in action, unless court on motion has ruled otherwise on grounds that service on all parties would be unduly expensive, oppressive, or burdensome.

CCP §§2030.260(a), (c), 2031.260(a), 2033.250(a).

___ **NO FILING REQUIREMENT**

Do not file responses with court. They are retained by propounding party (see Propounding Party, No Filing Requirement, above). If pertinent to a motion, *e.g.,* for summary judgment, file as exhibit to a declaration.

CCP §§2030.280, 2031.290, 2033.270.

DISCOVERY METHODS

1. ORAL DEPOSITIONS

___ **EARLIEST MAY SERVE NOTICE**

Plaintiff: 20 days after service of summons, or appearance by *any* defendant, whichever occurs first. CCP §2025.210(b).

Defendant: Any time after being served with summons and complaint, or after appearing in action, whichever occurs first. CCP §2025.210(a).

By Leave of Court: For "good cause," plaintiff with or without notice may seek court order permitting notice of deposition to be served within 20 days after service of summons or *any* defendant's appearance. CCP §2025.210(b).

Stipulation: If parties stipulate in writing, deposition may be taken at any time or place, before any person, and on any notice. CCP §2016.030.

See Civil Discovery §§5.16-5.23.

___ **HOW TO INITIATE**

Serve notice on all parties at least 10 days before deposition (plus additional days if served by mail, overnight delivery, or fax). CCP §2025.270(a).

Deposition of Party:

Include in notice (CCP §2025.220):

1. Date;

2. Time and place of deposition;

3. Deponent's name;

4. Any materials to be produced by deponent;

5. Any intention to record testimony by audiotape or videotape in addition to recording testimony by requisite stenographic method;

6. Any intention to record testimony by stenographic method, through instant visual display of the testimony (if so, a copy of deposition notice must also be given to deposition officer); and

7. Any intention to use at trial videotaped deposition of treating or consulting physician or of any expert witness.

Deposition of Nonparty:

Personally serve deposition subpoena to allow witness a reasonable time to prepare and travel to place of deposition and, if documents, electronically stored information (ESI), or things are commanded, a reasonable opportunity to locate and produce any records or other evidence, subject to time frame specified in CCP §2020.410, *i.e.,* deposition date must be at least 20 days after subpoena was issued or 15 days after subpoena was served, whichever is later. CCP §2020.220(a).

Use Judicial Council Form SUBP-015 (Deposition Subpoena for Personal Appearance) (see Judicial Council Forms Man 1-35) or Judicial Council Form SUBP-020 (Deposition Subpoena for Personal Appearance and Production of Documents and Things) (see Judicial Council Forms Man 1-37). Sign subpoena as issuing attorney. See Subpoenas.

Pay witness fees of $35 per day and mileage actually traveled to and from place of deposition (20¢ per mile). Govt C §68093. You have option to pay either at time of service or at deposition. CCP §2020.230(a).

CCP §§1985, 1986, 1986.5, 1987(a), 2025.010-2025.620; Govt C §68093; Cal Rules of Ct 1.30-1.44, 2.131-2.134; Civil Discovery, chap 5.

___ **WHO MAY ATTEND**

Parties and their attorneys.

Nonparties, *e.g.,* expert witnesses, unless protective order has been obtained that excludes them from attending.

CCP §2025.420(b)(12); Civil Discovery §6.18.

___ **HOW TO PRESERVE TESTIMONY FOR USE AT TRIAL**

Party noticing deposition may record it by audiotape or videotape if so stated in deposition notice *or* if all parties agree. CCP §§2025.220(a)(5), 2025.330(c).

Any other party may make simultaneous audiotape or videotape record of deposition, if it serves written notice of intention at least 3 days before deposition. CCP §2025.330(c).

Videotape of deposition may be presented at trial on showing of good cause (*e.g.,* witness not available at trial). See CCP §2025.620(c).

Videotape of deposition does not take place of court reporter's record; stenographic transcript remains official record of deposition. CCP §2025.510(g).

After deposition transcript is signed, or if deponent fails to sign and deposition officer so notes on original of transcript, officer certifies that deponent was sworn by officer and that deposition transcript is true record of deponent's testimony and of any changes made by deponent. CCP §§2025.520-2025.540.

To suppress deposition, deponent must expressly disapprove of transcript's accuracy by refusing to sign it; file a motion to suppress it; and file declaration showing good faith attempt to resolve each issue in motion. If no motion, transcript given same effect as though signed. CCP §2025.520(f)-(g).

Deposition officer seals certified transcript in envelope and transmits it to attorney who noticed deposition. Attorney protects transcript against loss, destruction, or tampering, and maintains custody until 6 months after final disposition of action. CCP §2025.550.

See Civil Discovery, chaps 5 and 6.

2. INTERROGATORIES

___ **EARLIEST MAY BE SERVED**

Plaintiff: 10 days after service of summons on, or appearance in action by, responding party. CCP §2030.020(b).

Defendant: Any time after being served with summons and complaint. CCP §2030.020(a).

By Leave of Court: For "good cause," plaintiff may seek court order with or without notice permitting interrogatories to be served less than 10 days after service of summons or appearance by responding party. CCP §2030.020(d).

See Civil Discovery, chap 7.

___ **WHEN TO RESPOND TO INTERROGATORIES**

Without Court Order: Within 30 days after interrogatories served (plus 5 additional days if interrogatories served by mail in California, 10 days if to out-of-state address, 2 additional court days if served by overnight delivery or fax (if parties agree in writing)). CCP §§1013, 2030.260(a).

By Leave of Court: Court on motion of propounding or responding party may shorten or lengthen time to respond. CCP §2030.260(a).

Stipulation: Propounding and responding parties can stipulate to extend time to respond, but be sure agreement with opposing counsel is to answer, object, or otherwise respond (*i.e.,* do not waive right to object). Confirm this agreement and specific extended date in writing. CCP §2030.270.

See Civil Discovery, chap 7.

3. DEMAND TO INSPECT OR PRODUCE DOCUMENTS, ESI, TANGIBLE THINGS OR TO PERMIT ENTRY ON LAND

___ **EARLIEST MAY BE SERVED**

Plaintiff: 10 days after service of summons, or appearance by party to whom demand is directed. However, for "good cause," plaintiff with or without notice may seek court order permitting production demand within this 10-day period. CCP §2031.020(b), (d).

Defendant: At any time. CCP §2031.020(a).

See Civil Discovery, chap 8.

___ **FORMAT**

Designate documents, ESI, things, or land by specifically describing each individual item or by "reasonably particularizing" each category of item. CCP §2031.030(c)(1).

Specify (CCP §2031.030(c)(2)-(3)):

1. Reasonable time for inspection, copying, testing, or sampling at least 30 days after demand served (unless court, on showing of good cause, allows earlier date);

2. Reasonable place for making inspection, copying, testing, or sampling, and performing any related activity.

See Civil Discovery, chap 8.

___ **WHERE PRODUCTION OCCURS**

Reasonable place for inspection, copying, testing, or sampling specified in demand (CCP §2031.030(c)(3)):

Generally done at attorney's office for either propounding or responding party;

If records are voluminous or are needed for daily business, inspection may occur at responding party's place of business.

See Civil Discovery, chap 8.

___ **WHAT CAN BE DEMANDED**

Documents: Production, inspection, and copying of documents in possession, custody, or control of responding party. CCP §2031.010(a)-(b).

Documents are writings, drawings, graphs, charts, photographs, and include anything recorded in a video or digital medium. See Evid C §250.

Other Tangible Things: Inspection, photographing, testing, or sampling any tangible things in possession, custody, or control of responding party. CCP §2031.010(a), (c).

Land or Other Property: Inspecting, measuring, surveying, photographing, testing, or sampling land or property or any designated object or operation thereon. CCP §2031.010(a), (d).

Electronically Stored Information (ESI): Inspection, copying, testing, and sampling of ESI in possession, custody, or control of responding party. CCP §2031.010(a), (e).

ESI is "information that is stored in an electronic medium." CCP §2016.020(e). "Electronic" is broadly defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." CCP §2016.020(d). On construction of the term "documents" to potentially also include ESI, see the Note under Demand for Production in step 26, above.

See Civil Discovery, chap 8.

___ **WHEN TO RESPOND TO PRODUCTION DEMANDS**

Without Court Order: Within 30 days after inspection demand served (plus 5 additional days if request served by mail in California, 10 days if to out-of-state address, 20 days if to foreign address, 2 additional court days if served by overnight delivery or fax (if parties agree in writing)). CCP §§1013, 2031.260(a).

By Leave of Court: Court for good cause shown by declaration (or affidavit) may enlarge or shorten time to respond. CCP §2031.260(a).

Stipulation: Parties can stipulate in writing to extend time to respond. CCP §2031.270. On taking care not to waive right to object to demands, see Stipulation, above, for extending time to respond to interrogatories.

See Civil Discovery, chap 8.

4. NOTICE TO PRODUCE AT DEPOSITION

___ **HOW TO SERVE**

Include in notice of party's deposition. See sample form in Civil Discovery §5.216. See Oral Depositions, above, for other procedural requirements.

___ **DESCRIBE ITEMS**

Describe with reasonable particularity materials or category of materials to be produced. CCP §2025.220(a)(4).

5. DEPOSITION SUBPOENA TO PRODUCE DOCUMENTS

___ **FORMAT**

For production of documents and ESI only, use Judicial Council Form SUBP-010 (Deposition Subpoena for Production of Business Records) (see Judicial Council Forms Man 1-33). If you want deponent to testify about the records produced, use Judicial Council Form SUBP-020 (Deposition Subpoena for Personal Appearance and Production of Documents and Things) (see Judicial Council Forms Man 1-37). No affidavit or declaration showing good cause for the production of records is necessary to support the issuance of a deposition subpoena for appearance and production of documents. CCP §2020.510(b); *Terry v SLICO* (2009) 175 CA4th 352, 355, 95 CR3d 900. Sign subpoena as issuing attorney. See Civil Discovery, chap 5; Subpoenas.

___ **SERVICE REQUIREMENTS**

Witness:

For personal appearance and production of physical evidence, personally serve deposition subpoena early enough to allow deponent reasonable time to prepare and travel to deposition location, and to allow reasonable opportunity to locate and produce designated items as specified in CCP §2020.410, *i.e.,* schedule deposition date at least 20 days after subpoena was issued, or 15 days after service of subpoena, whichever date is later. CCP §2020.220(a). See Civil Discovery, chap 5.

For production of business records for copying only, set deposition date (CCP §2020.410(c)):

1. 20 days after deposition subpoena issued; or

2. 15 days after it is served, whichever date is later.

On additional procedures for subpoenaing business records without need for deposition of custodian of records, see Evid C §§1560-1566; Civil Discovery, chap 5; Subpoenas, steps 3 and 10.

Parties: Serve on parties:

1. Copy of Judicial Council Form SUBP-020 (Deposition Subpoena for Personal Appearance and Production of Documents and Things) *and* deposition notice (CCP §2025.240(a), (c)); or

2. Copy of Judicial Council Form SUBP-010 (Deposition Subpoena for Production of Business Records) *only* (CCP

§§2025.220(b), 2025.240(a)).

See Civil Discovery, chap 5; Subpoenas.

___ **WITNESS FEES**

Pay witness fees ($35 per day) and mileage actually traveled (20¢ per mile) for personal appearance, regardless of whether deponent demands fee, *either when serve witness or at deposition, at your discretion.* CCP §2020.230(a). See Govt C §68093.

If seeking production of records for copying, accompany deposition subpoena with $15 check. CCP §2020.230(b); Evid C §1563(b)(6).

___ **WHEN DEMANDING CONSUMER OR EMPLOYEE RECORDS**

Consumer or Employee:

At least 5 days before serving witness (plus additional time provided by CCP §1013 if service is by mail), serve on consumer or employee (CCP §§1985.3, 1985.6, 2025.240):

1. Copy of deposition subpoena (use either Judicial Council form described in Format, above, depending on whether you need witness to appear and testify about records);

2. Judicial Council Form SUBP-025 (Notice to Consumer or Employee and Objection) (see Judicial Council Forms Man 1-39);

3. Copy of affidavit supporting issuance of subpoena, if any;

4. Proof of service on the witness from whom the consumer's or employee's records are being requested (*i.e.,* the second page of Judicial Council Form SUBP-025 (Notice to Consumer or Employee and Objection); and

5. Copy of notice of deposition, if one was served on the parties.

Witness:

Provided you serve consumer at least 5 days before serving witness (plus additional days if service by mail), schedule deposition for production of personal records at least 20 days after subpoena issued and 15 days after service on witness, whichever date is later. CCP §§1985.3(d), 2020.410(c), 2025.270(c). The same time requirements apply when scheduling deposition for production of employment records. CCP §§1985.6(d), 2020.410(c).

Personally serve (CCP §§1985.3, 1985.6, 2020.410(d), 2020.510(c)-(d)):

1. Copy of deposition subpoena (use either Judicial Council form described in Format, above, depending on whether you need witness to appear and testify about records); and

2. Proof of service on the witness from whom the consumer's or employee's records are being requested (*i.e.,* the second page of Judicial Council Form SUBP-025 (Notice to Consumer or Employee and Objection); or

3. Consumer's or employee's written authorization to release records permitted by CCP §§1985.3(c) or 1985.6(c). CCP §2020.410(d).

If telephone records are subpoenaed, have consumer sign consent to release (Pub Util C §2891(b)) and include it with the deposition subpoena. CCP §1985.3(f).

Objections:

The *witness, party,* or *any consumer* may move to quash deposition subpoena. Court may quash deposition subpoena entirely, modify it, or direct compliance on terms and conditions court deems appropriate, including protective orders. CCP §1987.1. See CCP §§1985.3(g), 2025.420. *Any employee* may also make a motion under CCP §§1987.1. See CCP §§1985.6(f)(1), 2025.420.

The consumer or employee must give notice to witness and to deposition officer at least 5 days before production date of any motion to quash the subpoena. CCP §§1985.3(g), 1985.6(f)(1).

Instead of making a motion to quash, a *nonparty consumer or employee* has the option simply to serve, at any time before the production date, written objection on the requesting party, the deposition officer, and the witness by filling out the appropriate

portions of Judicial Council Form SUBP-025 (Notice to Consumer or Employee and Objection). The portion entitled "Objection by Non-Party to Production of Records" includes a space for specifying grounds for prohibiting production of some or all of the personal or employment records. The nonparty consumer or employee must also fill out the "Proof of Service of Objection to Production of Records" on the back of the form. CCP §§1985.3(g), 1985.6(f)(2).

If witness objects at deposition and refuses to produce items, move to compel under CCP §2025.450(a).

On subpoenaing personal records of consumer (*e.g.,* medical records, individual bank statements), see CCP §1985.3; for employment records (*e.g.,* writings pertaining to the employment of any employee maintained by a current or former employer), see CCP §1985.6; for ESI, see CCP §1985.8. See also Subpoenas, steps 24-31.

6. REQUESTS FOR ADMISSION

___ **EARLIEST MAY BE SERVED**

By Plaintiff: 10 days after service of summons on, or appearance in action by, responding party. CCP §2033.020(b).

By Defendant: Any time. CCP §2033.020(a).

By Leave of Court: For "good cause" court may allow plaintiff to serve less than 10 days after service of summons or appearance of responding party. CCP §2033.020(d).

___ **FORMAT**

Physically attach copies of documents to requests for genuineness of documents. CCP §2033.060(g).

NOTE: Do not combine requests for admission in same document with interrogatories or any other discovery method. CCP §2033.060(h).

See Civil Discovery, chap 9.

Sample Form: For sample requests for admission (including requests involving electronic documents), see Civil Discovery §§9.99-9.100.

___ **WHEN TO RESPOND TO REQUESTS FOR ADMISSION**

Without Court Order: Within 30 days after service of requests (plus additional days if served by mail, overnight delivery, or fax). CCP §§1013, 2033.250(a).

By Leave of Court: Court can shorten (propounding party's motion) or extend (responding party's motion) response period. CCP §2033.250(a).

Stipulation: Parties can stipulate in writing to extend response period, but serve stipulation on all parties who were served with copy of requests. CCP §2033.260.

See Civil Discovery, chap 9.

___ **Effect of Failure to Timely Respond:**

Propounding party may move for order that truth of any matters or genuineness of any documents specified in requests be deemed admitted: admission is not automatic. CCP §2033.280(b).

Court *must* make this order, unless before hearing on motion responding party has served written response in substantial compliance with CCP §2033.280(c). But see *Brigante v Huang* (1993) 20 CA4th 1569, 25 CR2d 354 (trial court has discretion to fashion appropriate response to motion to limit admissions or relieve party from duty to respond).

___ **EFFECT OF ADMISSION**

Any matter admitted is "conclusively established" against party making the admission, unless withdrawal or amendment has been allowed, *except* it is binding only on that party, and applies only to pending action. CCP §2033.410.

Party is not considered to have made admission for any other purpose, and it cannot be used in any manner against that party in any other proceeding. CCP §2033.410(b).

See Civil Discovery, chap 9.

7. PHYSICAL OR MENTAL EXAMINATION

___ DEMAND FOR PHYSICAL EXAMINATION IN PERSONAL INJURY CASE

Defendant may demand *one* physical examination of plaintiff in personal injury case after defendant has been served or has appeared in the action, whichever occurs first. CCP §2032.220(a)-(b).

Schedule exam for date at least **30 days** after service of the demand, unless court shortens time. CCP §2032.220(d).

Serve demand on plaintiff and on all other parties who have appeared in action. CCP §2032.220(e).

In demand, specify time, place, manner, conditions, scope, nature of examination, and identity and specialty, if any, of physician. Examination must not include any painful, protracted, or intrusive test or procedure and must be conducted at location within 75 miles of examinee's residence. CCP §2032.220(a), (c).

___ RESPOND TO DEMAND FOR PHYSICAL EXAMINATION IN PERSONAL INJURY CASE

Within **20 days after service** of demand (unless court lengthens or shortens time), serve original of response on defendant making the demand, and serve copy on all other parties who have appeared. CCP §2032.230(b).

In response, state either that plaintiff will comply with demand (1) as stated or (2) as specifically modified or (3) will refuse to submit to demand for reasons specified in response. CCP §2032.230(a).

Failure to Timely Respond waives objection to the demand, but court may, on motion, relieve plaintiff from waiver under certain circumstances. CCP §2032.240(a).

___ ALL OTHER EXAMINATIONS

Seek leave of court (CCP §2032.310(a)); or

Obtain agreement to examination (CCP §2016.030).

___ OBTAIN MEDICAL REPORTS

If party submitting to or producing another person for a physical or mental examination is prepared to *waive* any privilege or work product protection under CCP §§2018.010-2018.080 of reports and writings concerning past or future exams of physical or mental condition at issue in case, then submitting party can demand copy of examiner's current detailed written report and party requesting exam must provide it. CCP §§2032.610, 2032.630.

Submitting party who requests report must provide requesting party with *existing* reports of any examination of same condition and any *later* reports of any previous or subsequent exam of same condition. CCP §2032.640.

APPENDIX D
Checklist for Discovery in Limited Civil Cases

___ **GENERAL REQUIREMENTS**

Follow the same *notice* and *format* requirements for each particular method of discovery as provided in the Civil Discovery Act (CCP §§2016.010-2036.050), *e.g.,* interrogatories as set forth in CCP §§2030.010-2030.410. CCP §94.

NOTE: The requirements in unlawful detainer actions are often different, *e.g.,* in an unlawful detainer action, schedule the oral deposition for a date at least 5 days after the deposition notice, but not later than 5 days before trial. CCP §2025.270(b).

___ **LIMITS ON DISCOVERY**

For each adverse party, you may serve a *total of 35* of the following forms of discovery, in any combination (CCP §94(a)):

a. Interrogatories (with no subparts) under CCP §§2030.010-2030.410.

b. Demands to produce documents or things under CCP §§2031.010-2031.510.

c. Requests for admission (with no subparts) under CCP §§2033.010-2033.420.

___ **DEPOSITIONS OF ADVERSE PARTIES**

For each adverse party, you may take one oral or written deposition under CCP §§2025.010-2028.080. CCP §94(b).

___ **DEPOSITION SUBPOENA FOR PRODUCTION OF DOCUMENTS FOR PARTIES AND NONPARTIES**

a. You may serve on *any person* a deposition for production of documents requiring that person to mail copies of documents, books, or records to you at your address, along with an affidavit required by Evid C §1561. CCP §94(c).

b. Mail a copy of the response to any other party who pays the reasonable copying cost.

NOTE: Although CCP §94(c) refers to a "subpoena duces tecum," the procedure described in that section most closely resembles an option now effected by serving Judicial Council Form SUBP-010 (Deposition Subpoena for Production of Business Records). See Judicial Council Forms Man 1-33.

___ **PHYSICAL AND MENTAL EXAMINATIONS**

Physical and mental examinations are available as provided in CCP §§2032.010-2032.650. CCP §94(d).

___ **EXPERT WITNESSES**

Obtain evidence from expert witnesses as provided in CCP §§2034.010-2034.730. CCP §94(e).

___ **ADDITIONAL DISCOVERY**

a. Any party may serve on any other party a request to obtain disclosure of witnesses that the opposing party intends to call at trial as well as a description and copies of physical evidence that the opposing party intends to offer at trial. CCP §96. Consider using Judicial Council Form DISC-015 (Request for Statement of Witnesses and Evidence—for Limited Civil Cases) for this purpose. See Judicial Council Forms Man 1-48.37.

b. The parties may stipulate to additional discovery, or a party may move for additional discovery under CCP §95.

Further Research: For more on discovery in limited civil cases, see Civil Discovery, chap 14; Obtaining Discovery.

APPENDIX E
Sample Legal Hold Letter

Note: This sample letter provides an example of a letter to send to your own client for distribution to your client's employees regarding their duty to preserve records under their control. For an example of a preservation or legal hold letter to send to opposing counsel (if a complaint has been served) or to a party (if no complaint has been served) regarding either possible or pending litigation, see Appendix F.

THE COMPANY has been named in a lawsuit relating to _ _[*supply information about the matter*]_ _. You may have records or information relating to this lawsuit. This memo contains important directions about preserving relevant records and information. Make sure you understand these directions. These directions supersede all other records retention policies—even records that would ordinarily be destroyed as part of THE COMPANY'S routine records management program must be preserved. Please contact me if you have any questions regarding these directions.

Retain all records that contain any information relating to this matter. These records must be retained and maintained until you are informed by the Legal Department that the matter has been concluded and the records no longer need to be retained.

"Records" means anything that stores information:

In any medium: paper, electronic, and video- and audiotape, including e-mails, voicemail, text messages, and any other electronic files;

In any form: handwritten or typed, draft or final, desk or electronic calendars;

Created at any time, including documents you created in the past, as well as any documents you may create from this date forward;

Wherever maintained: whether on your computer, in your office, in departmental files, in a home office, on a home computer, in your car, or elsewhere.

You must retain any and all records that contain any information that has any connection whatsoever to this matter or to any of the issues summarized in the paragraph below. Even if the relevant information is only a small portion of a particular record—for example, a single bullet point in a comprehensive business or strategic plan—you must retain the entire record. If you are uncertain whether a document relates to this matter, retain it, and then check with me to determine whether to continue to retain it.

This matter involves _ _[*supply information about the matter*]_ _. The Plaintiff(s), _ _[*name(s)*]_ _, allege(s) that _ _[*state the allegations*]_ _. You must retain any records that relate to these issues, including the following records: _ _[*Name any specific records*]_ _.

If the specified records exist in paper form, you must keep them, without alteration, organized in the way you would normally keep them for business purposes (for example, if you normally keep them in file folders, continue to do so). Unless your home office is your principal office, the records should be kept at a company location within the control of you or your department. Electronic records should generally be kept in electronic form. To the extent that any such records involve data that continually changes, you may satisfy the retention requirements by printing and retaining a monthly summary. If electronic files were created but not retained, please contact me and we will determine how best to recover these documents, including e-mails sent and received.

If you believe this memo should be provided to anyone else, please advise me. If you are aware of other individuals not on this distribution list who might have documents relating to this matter, including outside contractors and vendors, please let me know and I will send them a copy of this memo. Please do not send the memo to other company employees; I want to keep a record of all individuals to whom the memo is sent.

Please notify me promptly in the event you are leaving THE COMPANY or changing jobs within THE COMPANY. I will make arrangements to appropriately preserve the documents you are maintaining pursuant to this notice.

I have attached some important reminders about document creation and inquiries from third parties regarding this matter.

Thank you for your cooperation in this important matter. If you have any questions, please contact me, _ _[*name*]_ _, at _ _[*state, e.g., phone number or e-mail address*]_ _.

APPENDIX F
Sample Preservation Letter

Note: This sample letter provides an example of a letter to send to opposing counsel (if a complaint has been served) or to a party (if no complaint has been served) regarding either possible or pending litigation. For an example of a preservation or legal hold letter to send to your own client for distribution to your client's employees regarding their duty to preserve records under their control, see Appendix E.

_ _[*Name of matter*]_ _

Dear _ _[*name*]_ _,

The purpose of this letter is to notify you and your client, _ _[*name*]_ _, not to destroy, conceal, or alter any information stored in electronic form or generated by your client's computer systems or electronic devices. This information may be relevant to the above matter and be unavailable from any other source. As you may know, such electronic information can easily be inadvertently destroyed, and the failure to take reasonable measures to preserve it pending the completion of discovery can result in sanctions being imposed against you or your client. See, *e.g., Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 74 CR2d 248; *Zubulake v UBS Warburg LLC* (SD NY 2003) 220 FRD 212, 216.

In order to comply with the discovery requests that we will make in this matter, your client will need to provide electronic evidence in its native format. Your client will also need to provide electronic documents, along with the metadata or information about data that is contained in those electronic documents. Even when a paper copy of a document or file exists, we will also seek the documents or files in their electronic format so that we also receive the information in the metadata. Our discovery requests will include certain data on your client's hard drives, floppy disks, compact disks, and backup files, and will include data not usually available to the ordinary computer user, such as deleted files and file fragments.

Thus, the electronic data and the storage devices in which they are kept that you and your client are obligated to maintain and preserve during the pendency of discovery in this case include all of the following data and devices:

1. Electronic files, including deleted files and file fragments, stored in machine-readable format on magnetic, optical, or other storage media, including hard drives or floppy disks in your client's desktop computers, laptop computers, home personal computers, and the backup media used for each;

2. E-mail, both sent and received, internally or externally;

3. Telephone files and logs such as voicemail and universal mobile telecommunications system (UMTS) data;

4. Word processing files, including drafts and revisions;

5. Spreadsheets, including drafts and revisions;

6. Databases;

7. Electronic files in portable storage devices, such as compact disks, digital video disks, and various portable drives (*e.g.,* ZIP, thumb, flash, or pen drives);

8. Computer-aided design files;

9. Presentation data or slide shows, such as PowerPoint;

10. Graphs, charts, and other data produced by project management software;

11. Data generated by calendaring, task management, and personal information management software, such as Microsoft Outlook;

12. Data created with the use of personal data assistants, such as PalmPilot;

13. Data created with the use of document management software;

14. Data created with the use of paper and electronic mail logging and routing software;

15. Internet and web-browser-generated history files, caches, and "cookies" files generated at the workstation of each employee in your client's employ and on any and all backup storage media;

16. Logs of network use by your client's employees, whether kept in paper or electronic format;

17. Copies of your client's backup tapes and the software necessary to reconstruct the data on those tapes on each and every personal computer or workstation and network server in your client's control and custody;

18. Electronic information in copiers, fax machines, and printers.

Thank you for your attention to this letter.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

APPENDIX G
Sample Issue Table

Issue tables provide a means to keep track of the main issues, the elements of the claims and defenses, and the relevant evidence. This sample table is designed for a simple negligence case. Of course, the issues you include in a table will depend on the facts and law governing the particular case. REVIEW the tables frequently and REVISE them accordingly. As you learn about new issues and facts, update the tables. Depending on the nature and complexity of the case, you may decide to have separate tables for each cause of action or defense. In some cases, you may decide to add a column for subissues.

ISSUE TABLE

_____ Discovery Cutoff

_____ Discovery Motion Deadline

_____ Trial Date

CLAIM: NEGLIGENCE		
Issue	**Plaintiff's Evidence**	**Defendant's Evidence**
Standard of Care		
Duty		
Breach		
Injury		
Causation		

DEFENSE: CONTRIBUTORY NEGLIGENCE		
Issue	**Plaintiff's Evidence**	**Defendant's Evidence**
Damages		
Plaintiff's Negligence		
Causation		

APPENDIX H
Sample Witness Table

This witness table provides a simple means to keep track of the names and contact information of witnesses who have information about the case. It provides a column to include the expected testimony of each witness, which should be based on interviews, depositions, discovery responses, and documents. REVIEW the table frequently and REVISE the table accordingly. As you learn about new witnesses and facts, update the table. Be sure to record the source of the information, *e.g.*, an interview, a deposition, a discovery response, or a document. Depending on the complexity of the case, you may want to have separate tables for different categories of witnesses, *e.g.,* plaintiff-affiliated witnesses, defendant-affiliated witnesses, third party witnesses.

WITNESS TABLE

_____ Discovery Cutoff

_____ Discovery Motion Deadline

_____ Trial Date

WITNESSES (PLAINTIFF)		
Witness	**Contact Information**	**Expected Testimony (Source)**
WITNESSES (DEFENDANT)		
WITNESSES (THIRD PARTY)		

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