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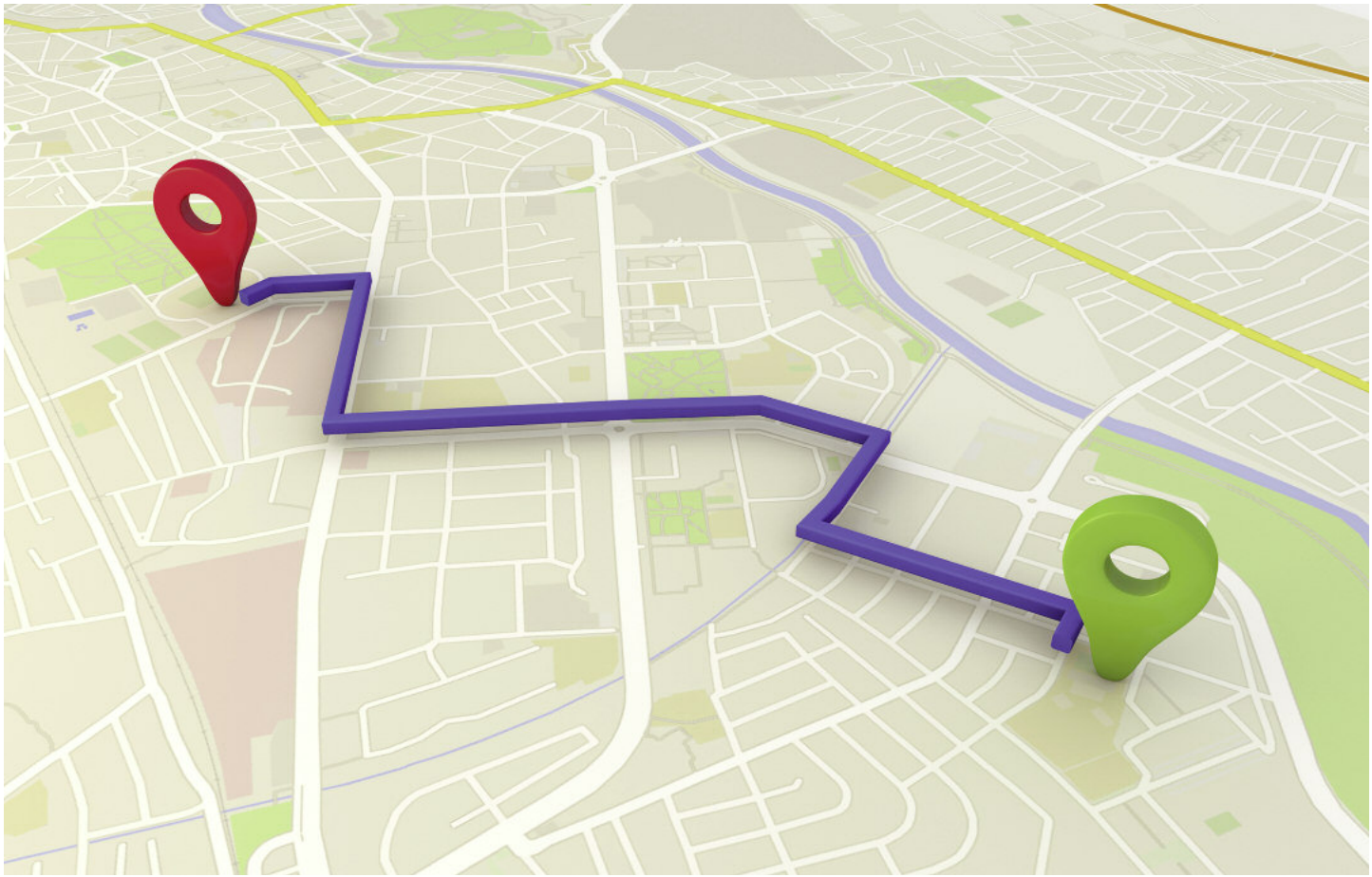
Christina Coleman



Developing a detailed discovery plan

A roadmap with practical tips on developing your discovery plan for both employment and PI cases

Discovery plans are important in all cases, but different types of cases require a different approach, and certain types of cases offer unique pre-filing discovery tools that a diligent litigator should take advantage of. A discovery plan should include pre-filing "discovery" requests that are available, to get you off to the right start, and may assist you in addressing common evidentiary "issues" that come up later.

Pre-lawsuit "discovery"

You just signed on your new client. If it is an employment case, the employer defendant might not yet know that the employee is even considering filing suit, much less retained counsel, which means the game has not yet changed. This is a very small window of opportunity to get documents and information that you may not get later. If it is a personal injury case, the defendant (and its insurer) may know a suit is coming, and pre-lawsuit discovery is critical to an early resolution, if desired. No matter what type of case, an attorney considering proceeding is obligated to research the basic facts to ensure that the attorney does not pursue an action that is meritless or frivolous. Pre-lawsuit discovery, using all available means, is the key to getting your client's action off to the right start.

Get your authorizations signed!

Along with the retainer agreement, you should also provide your new client with authorizations that will permit you to obtain their medical records, prior employment records, records in possession of other attorneys representing your client on other matters, and other important documents. Make sure your forms indicate that a copy is as valid as an original, so you can use the same authorization(s) to seek

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all of the records. Also obtain a list from your client of all medical providers with whom the client has consulted for any conditions relating to the case, and every past employer of your client for at least five years back.

Once you have your signed authorizations and list of providers, employers and attorneys, send letters to each of them (except an employer who is the anticipated defendant) enclosing a signed authorization and requesting the records. Some (but not all) of these records will be discoverable by the defendants later, but you will have a preview long before then and be on notice of any potential problems and bad facts in those documents.

Get their employment records!

An employer is required to permit an employee – pursuant to a written *or* oral request – to inspect or copy their payroll records within 21 days of receiving the request. (Lab.Code, § 226(b)-(c).) In a non-employment case, such as an injury case where you need payroll/personnel records to show lost wages or use of vacation sick/time due to an injury, you can handle this for the client using a signed authorization. But in an employment case, the employee (with your help from behind the scenes) should request the employer for an inspection or, alternatively, for copies to be sent (for which the employer is permitted to charge its actual costs of reproduction).

Similarly, an employer is required to give a copy of any document the employee was required to sign relating to "the obtaining or holding of employment" upon request. (Lab.Code, § 432.) Further, the employee has a statutory right to inspect his/her "personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee" and must make the contents of those records available to the employee "at reasonable intervals and at reasonable times." (Lab.Code, § 1198.5.)

Your client should also request from the employer copies of all documents bearing the employee's signature (which often includes things like write-ups, performance evaluations, in addition to the hiring paperwork), and either a copy of his/her entire personnel file or the opportunity to inspect it.

If the employer will not provide a copy of the entire personnel file, your client should make an appointment to inspect his/her file, and do one or more of the following: (1) with a pencil in the bottom corner of each page, number the pages in the file, so the employee knows how many pages are currently in there; (2) on a pad of paper, make a note of what each document (by page number) is in the file; and, if possible, (3) using a cell phone, take pictures of the pages. In an employee-employer case, it is important to know, and be able to prove, what was in the personnel and payroll records before the employer defendant knows they are being sued and either peppers the file with manufactured documents, removes important documents, or creatively edits its contents. Usually, a request by the employee is handled by the employer defendant's own Human Resources department or other personnel, not a lawyer, so there is a far greater chance at this stage that the file can be viewed as it actually exists at that time.

If the employee can't do it, or is terrified of having any direct communication with the former employer, then this request can come in the form of a letter from the attorney. You'll still get your records, but who knows if they are as pristine as they may have been had your client gotten them himself.

Get the EDD and/or Labor Board records!

Many employment cases often involve claims for unemployment or disability benefits (maintained by the EDD) or Labor Board complaints, maintained by the Labor Commissioner. Using your authorizations, you should also request copies of the entire files maintained by each of the applicable agencies. When requesting the unemployment file, be sure to request the entire file *and* a copy of the audio tape(s) from any appeals hearings. It is questionable whether any of the unemployment or disability benefits files are admissible or even discoverable, but better to have them either way.

Don't forget records from related actions by other attorneys!

Some injury or employment cases also have a workers' compensation action being handled by another attorney. Wrongful death actions might have a related probate action. Any type of case or client may have a related or unrelated action pending in the family court, or a prior history of bankruptcy filings. Most of these other files will include verified or sworn declarations, affidavits and even deposition testimony by your client or other involved persons. There may be other civil actions, such as if your client defaulted on bills because he or she was unable to work due to injuries and got sued by creditors, or an unlawful detainer action. You need to get those records! Some are publicly available, but not all. Your client should request from his/her own attorney as much of the attorney's file as the client is entitled to, including all sworn testimony. The workers' compensation file may also already have many of the medical records you need, as well as reports relating to ongoing treatment. If you haven't done so, do a quick search on PACER to see if your client has filed for bankruptcy, maybe multiple times. If you find any bankruptcies, download all petitions and any documents signed under penalty of perjury.

Get your client's documents!

Immediately after accepting the new case, instruct your client to dig up every shred of paper they can locate relating to the action and their damages. Caution your client not to be selective or to try to find only those documents that they think are relevant, because the client usually does not know what is and is not relevant, and the defendant is going to ask for every shred of paper anyway, so you might as well have it ready to go. Remind your client not to limit the search only to hard copies of documents, but to also preserve any emails they have on their personal accounts, and text and voice messages on their phones (and to thereafter be very careful about any future emailing or texting and use of social media).

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Serve discovery on your client

Wait, what? Yes! "Serve" discovery on your client. In nearly every case, a plaintiff will have to respond to Judicial Council Form Interrogatories – General. Additionally, in nearly every employment case (excepting possibly straight wage & hour cases), an employee plaintiff will also have to respond to Judicial Council Form Interrogatories – Employment Law. So be ready to answer those interrogatories well in advance by having your client "respond" to these interrogatories also well in advance of being required by defendant to do so. This will also save you time later since the form interrogatories, no doubt, will be accompanied by a mountain of other discovery for your client to respond to, so it's nice to have one batch already out of the way.

Post-filing discovery

Have discovery ready to go before you file

There is a 10-day hold on written discovery after service of the lawsuit on any particular party. (Code Civ. Proc., §§ 2030.020(b), 2031.020(b), 2033.020(b).) Careful! The day service is deemed complete depends on the manner of service. (See Code Civ. Proc., § 415.10, *et seq*.) Everyone knows that you sometimes don't hear from an attorney for defendants until the eve of their answer due date and, even then, usually just to request an extension of time to respond. A diligent plaintiff can have his/her first round of discovery ready to go for service directly on the probably-unrepresented defendant on that tenth day following service, even if it is just a first set of form interrogatories and maybe a request for production of documents. Have these ready to go before you even file the case, so that after you file, you need only add the case number.

Have your form interrogatories ready to go, several sets if needed depending on the various claims, each set with "Incident" specially and discretely defined to reflect each of your client's various claims. The first set will be the all-inclusive set, which seeks all of the ordinary background information, with your first definition of incident. Each subsequent set will be No. 1.1, and only those interrogatories that use the word "Incident," which now has a different meaning. Unless your case really is a simple accident or breach of contract case, do not check the generic definition of "Incident"; check box (2) on the second page, and insert your definition. Depending on your case, examples of "incident" to serve on the defendant, in particular, a series of events that occur over a period of time or to address only one of several causes of action, are:

- INCIDENT means: Responding party's medical treatment of plaintiff over the last two years.
- INCIDENT means: The separation of plaintiff's employment with responding party.
- INCIDENT means: Responding party's alleged defamation of plaintiff, as alleged in the Twelfth Cause of Action of plaintiff's Complaint.
- INCIDENT means: The alleged wage and hour violations as set forth in the Eleventh through Sixteenth Causes of Action of plaintiff's Complaint.

Also having a "standardized" set of requests for admission, accompanied by Form Interrogatory No. 17.1 (checked off in Set One, only), can be of huge benefit. Remember that a request for admission can properly request admission of a legal conclusion to eliminate the need for proof. (*Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 429.) This might include things like:

- Your termination of plaintiff violated the public policy of the State of California.
- On January 1, 2014, there was a dangerous condition on your property.
- At the time of plaintiff's termination, plaintiff was disabled.
- On January 1, 2014, plaintiff suffered physical injuries as a result of your negligence.
- During plaintiff's employment with you, you misclassified plaintiff as an exempt employee.
- On January 1, 2014, you breached your contract with plaintiff dated October 1, 2013.

On the tenth day after service upon your defendant is effective, serve that discovery that has been waiting for this moment. Don't forget to serve your second "wave" of discovery – Form Interrogatory No. 15.1 and a corresponding request for production – send that the day that you receive the defendants' answers!

"Is that allowed?" you ask. Yes, it is, and no, it's not abusive.

Some defense counsel are not shy about being hypocritical (you know, serving you with a ton of discovery and complaining about yours), and the response to your discovery will likely be one of two things or both: (1) a request for an extension, and/or (2) a request that you withdraw or limit your discovery as being abusive and harassing, possibly with a threat to move for a protective order and seek sanctions.

If it is a request for an extension, "Sure, why not! How long do you need?" I always say.

If it is the request that you withdraw or limit your discovery, politely decline, making sure to set forth all of the legal authority supporting your position, including the broad scope of permissible discovery, as well as:

There is nothing improper or abusive about a party serving separate but identical discovery on each of the defendants. (*Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 396 [finding nothing improper or abusive about each of three defendants serving separate but identical sets of requests for admissions to each of 35 plaintiffs, requiring over 2200 separate responses].)

It is improper for defendants to be dictating to your client how he/she should be conducting discovery in his/her case, so long as the discovery complies with the law. "[U]nless restricted by the trial court, [parties] are free to utilize any of the prescribed discovery methods during the action in any sequence." (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 402.) "It follows that the selection of the method of discovery to be utilized is to be made by the party

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seeking discovery. *It cannot be dictated by the opposing party*…A party is permitted to use multiple methods of obtaining discovery and the fact that information was disclosed under one method is not, standing alone, a proper basis for refusing to provide discovery under another method." (*Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal.App.4th 733, 738-739 (emphasis added).)

With respect to the Form Interrogatories, and the inevitable objection that they don't think multiple sets is proper, plaintiff has a statutory right to serve "*[a]ny additional number* of official form interrogatories…that are relevant to the subject matter of the pending action." (Code Civ. Proc., § 2030.030(a)(2) (emphasis added).) In many types of cases, a propounding party is required to specially-define the term "INCIDENT" because the generally defined "INCIDENT" is not appropriate for use where the action arises from a course of conduct or a series of events occurring over a period of time, like in nearly every case that is not a one-time incident or simple breach case. [See, Instructions, Sec. 2(c).] When defense counsel complains, I point out that, had plaintiff served but one set of form interrogatories and checked the generally defined "INCIDENT," we would certainly have received an objection that use of the generally defined term "INCIDENT" was vague and ambiguous where there are five (or 10 or more) causes of action alleging a course of conduct or series of events occurring over a period of time, and point out in case they missed it that all sets after the Set One include only those form interrogatories which employ the term "INCIDENT."

There are still compromises to be made. For example, I permit a responding party to respond to all sets of Form Interrogatories in one omnibus answer, but the response must indicate within it to which set(s) any particular information responds, if not all of them (e.g., as to Sets 1, 3 and 4, defendant responds no. As to Set 2, defendant responds, yes…) This seems to make them a little happy. I also offer an even longer extension (than the one they probably already asked for and received) to give them more time to respond. I also respectfully request the defendant provide whatever legal authority it believes supports its position, so I can consider it in good faith, as required by an adequate meet and confer (don't expect to receive it though).

At the end of the day, don't let yourself be bullied into withdrawing valid discovery. (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1294 [refusal to be "bullied into re-writing adequate interrogatories and extending more time for responses does not constitute a failure to meet and confer"].) Indeed, this exercise will demonstrate to opposing counsel at the outset that you: (1) intend to work up this case; (2) know the discovery rules and laws; (3) are willing to extend professional courtesies but not be steamrolled. You don't get a second chance to make a first impression.

Depositions, early or later?

For depositions, there is a 20-day hold after service of the lawsuit on any particular party. (Code Civ. Proc., § 2025.210(b).) While you may already have a preliminary list of persons you want to depose, the hit 'em fast concept above is not equally applicable to depositions. In fact, in this case, I say, "After you, sir!" There is no hold at all on a defendant who has been served, and defendant can serve a notice for plaintiff's deposition the same day. A defendant will almost never make an offer to settle the case until they have deposed the plaintiff…so let them! In fact, the earlier the better.

Aggressive defense counsel will notice the plaintiff's deposition right away, sometimes concurrently with the defendant's first appearance in the case or even earlier, so give up the plaintiff right away. Don't argue or withhold plaintiff while you wait for defendant to respond to your discovery (although proper objections are fine accompanied by an agreement to produce on the date noticed or a mutually convenient date). Chances are, the earlier the plaintiff is deposed, the less prepared defense counsel will be to take that deposition, and they only get one shot. (Code Civ. Proc., § 2025.610(a).) Moreover, if plaintiff's time to respond to defendant's first request for production of documents is not yet even due by the time plaintiff's deposition is taken, then plaintiff has a good argument that defense counsel's standard, "I reserve the right to further depose the plaintiff after I have received production of documents" cannot be used to circumvent the "one deposition rule" because defendant set the timeline for the discovery and the documents are not even due yet by defense counsel's own design. Further, if your client is going to be a good witness, you want defendants to know this *immediately*, because this will also encourage a settlement offer.

But what about deposing the defendants? Frequently, plaintiff's counsel will wait until after a summary judgment motion (MSJ) is filed before deposing defendants, in order to raise a triable issue of fact. This approach makes sense for a number of reasons: you will already have a preview of their case through their discovery responses, questioning of plaintiff and their MSJ. This might also change your mind about whether you need to depose someone you were going to depose, thinking they were important but maybe not so much, or deposing someone you were not going to depose, thinking you knew what they would say but were wrong. However, many times it is better to get the ball rolling and serve all of your initial discovery and notices of depositions at the same time.

Timely meet and confer on deficient discovery responses

Received nothing but a bunch of boilerplate objections and/or vague responses? Is the defendant refusing to provide contact information for its witnesses? Rather than identify documents as required, did defendant simply refer you to the entirety of its document production? This is unacceptable, and you are entitled to more. Not sure what you're entitled to? Quite a bit, in fact.

Standard of responsiveness to interrogatories

When responding to all interrogatories, a party owes a duty to respond in good faith as best as it can, to answer the interrogatories as completely and

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straightforwardly as possible given the information available to it, stating "the truth, the whole truth, and nothing but the truth in answering written interrogatories." (Code Civ. Proc. § 2030.220; *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783; *Guzman v. General Motors Corp.* (1984) 154 Cal.App.3d 438, 442.) Further, if a responding party does not know the answer to a particular discovery response, that party must make a reasonable inquiry and investigation to acquire the knowledge or information from *all sources* under the responding party's control, including *all* employees and the responding party's attorney, and if a party cannot furnish details, the response should set forth the efforts made to secure the responsive information. "Verification of the answers is in effect a declaration that the party has disclosed *all* information which is available to him. If only partial answers can be supplied, the answers should reveal all information then available to the party. If a person cannot furnish details, he should set forth the efforts made to secure the information. He cannot plead ignorance to information which can be obtained from sources under his control." (*Deyo,* 84 Cal.App.3d at 782 (emphasis added).)

Interrogatories may be used to discover the existence of documents in the other party's possession, and if an interrogatory asks the responding party to identify a document, an adequate response *must* include a description of the document... (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 293; *Deyo,* 84 Cal.App.3d at 783; *Best Products, Inc. v. Superior Court* (2004) 119 Cal.App.4th 1181, 1190.) A response that says "see documents produced" or any iteration of this is *not* proper: You are entitled to a description of the documents so you can actually locate them within the document production (or note that it's missing), as well as to which specific documents within the production are responsive to specific inquiries. Contrary to defense counsel's position, you're not actually required to figure this out yourself.

Interrogatories may also be used to discovery the identities *and locations* of witnesses. (Code Civ. Proc., § 2017.010.) "The disclosure of names and addresses of potential witnesses is a routine and essential part of pretrial discovery." (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1249-1240, quoting *People v. Dixon* (2007) 148 Cal.App.4th 414, 443.) You are required to subpoena all non-managerial and former employees to appear at trial, and require their contact information to do so; a notice to appear is only sufficient to compel the attendance of an officer, director or managing agent. (Code Civ. Proc., § 1987(b); *Puerto,* 158 Cal.App.4th at 1240, quoting *Dixon*, *supra*.) Further, you have the right to directly communicate with any non-managing agent employees who are simply witnesses (not players) in the events leading up to and encompassed by the lawsuit. (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1209-1210; Rules of Prof. Conduct, rule 2-100.) Don't let defense counsel obstruct this right by refusing to give you the contact information and acting as gatekeeper to ordinary witnesses.

Standard of responsiveness required to request for admissions

Because requests for admissions are aimed at setting to rest issues not genuinely in dispute and expediting trial, boilerplate objections, while bad enough when asserted in response to interrogatories, are even less appropriate in the context of requests for admissions. "The claims of ambiguity, calling for opinion and conclusion, and those other objections summarized above, have been discussed in the other decisions filed this day. They were there found to be untenable. The reasons set forth in those cases for holding such objections unsound when applied to other discovery procedures, are peculiarly applicable to requests for admissions. ...[T]he fact that the request is for the admission of a controversial matter, or one involving complex facts, or calls for an opinion, is of no moment. If the litigant is able to make the admission, the time for making it is during discovery procedures, and not at the trial." (*Cembrook,* 56 Cal.2d at 429.)

Requests for admission do not require personal knowledge of the fact or document to be admitted; rather, they impose a duty upon the responding party to make a reasonable investigation of the facts of those matters not within his personal knowledge to enable a response. (*International Harvester Co. v. Superior Court* (1969) 273 Cal.App.2d 652, 655; *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 634.) The responding party must make the admission if able to do so and does not in good faith intend to contest the issue at trial, thereby "setting at rest a triable issue"; otherwise, he must set forth in detail the reasons why the request cannot be truthfully admitted or denied. (*Cembrook, supra*; *Burke v. Superior Court* (1969) 71 Cal.2d 276, 282.)

Standard of responsiveness required to request for production.

A party may only appropriately respond to requests for production of documents in three ways: (1) a statement that the party will comply with the request, (2) a statement of inability to comply, or (3) an objection. (Code Civ. Proc., § 2031.210.)

A party's statement of compliance *must* indicate whether it will respond *in full or in part*. (Code Civ. Proc., § 2031.220.) You are entitled to know whether defendant has stated under penalty of perjury that he/she has or will produce absolutely everything responsive, or make it clear that its compliance is only partial. Otherwise, how are you to know whether what you get is all there is?

A statement of inability to comply *must* (1) affirm a diligent search and reasonable inquiry has been made, (2) that the inability to comply is because the responsive item has never existed, has been destroyed, lost misplaced or stolen, or has never been or is no longer in the responding party's possession, custody or control. The statement *must* also set forth the name and address of the person or organization believed to have possession, custody or control of the item. (Code Civ. Proc., § 2031.230.)

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Do not accept anything other than a fully Code-compliant statement of inability to comply!

This is not a petty requirement. One must assume the requirement found on the face of the Code is there for a reason, which appears to be prevention of unfair surprise at trial. For example, if a particular responding defendant does not have the document, but someone else does, plaintiff needs to be able to get it from that other source. Further, plaintiff is entitled to lock each defendant down and capture the full range of documents that might be used at trial. If defendants do not have a document, but do not state it has never existed and/or that someone else has it as the Code requires, defendants can get the document and surprise plaintiff with it at trial. If the response is that the document has never existed, then any attempt by defendants to use a document that was responsive but not produced (with its existence denied) can be dealt with appropriately by a motion to exclude from trial. Simply stated, plaintiff is entitled to identify and cull the universe of documents that may be used as evidence in this case, and cannot do so without responses to request for production that comply with the requirements of the Code.

Finally, even if a party asserts objections, if only a part of an item or category is objectionable, a responding party must agree to comply with the non-objectionable portion. (Code Civ. Proc., § 2031.240(a).) If any documents are withheld pursuant to an objection or claimed privilege, the responding party *must* (either within its response or a separate privilege log): (1) identify each withheld document with particularity, (2) clearly state the grounds for the objection and/or particular privilege, and an express assertion of claimed work product if that is one of the bases. Code Civ. Proc., § 2031.240(b).) The purpose of this requirement to provide a specific factual description of documents in aid of substantiating a claim of privilege in connection with a request for document production is to permit a judicial evaluation of the claim of privilege, and was recently codified making it clear that complying with the "privilege log" requirement is to occur at the time the responses are served. (*Hernandez,* 112 Cal.App.4th at 292; Code Civ. Proc., § 2031.240(c)(1).) Insist on nothing less.

Scope of permissible alter ego discovery

If your case includes allegations of alter ego and/or joint employer relationships by and among certain of the defendants, you are entitled to discovery on this issue, since determination of alter ego is primarily a question of fact and, as such, requires a "fact-specific examination of numerous elements." (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 1000; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248.) No single factor is determinative, and instead a court must examine all the circumstances to determine whether to apply the doctrine. (*Talbot v. Fresno-Pacific Corp.* (1960) 181 Cal.App.2d 425, 432.) It stands to reason, then, that the plaintiff must be permitted to conduct extensive discovery to set the factual stage for such an examination, including discovery into the multiple relevant factors, such as the nature and extent of capitalization, commingling of assets, compliance with corporate formalities, as well as the sharing of offices, employees and other resources, the extent to which the parent company controls the operations of the subsidiary, the extent to which the subsidiary is acting as the agent of the parent as a principal, and the parent company's participation in any conduct misleading to third parties, and marketing of the companies as one integrated enterprise.

Given that defendants always deny this relationship, the plaintiff is absolutely entitled to gather, through discovery, as many of these facts supporting application of an alter ego as possible to prove these allegations that are certainly contested. This same information is also relevant to whether or not defendants are co-conspirators and, to some degree, joint employers.

Responding to discovery – take the high road!

Further demonstrate your knowledge and understanding of discovery obligations by actually complying with them yourself. Why hand defense counsel a "well look what they did" argument in opposition to your motion to compel? Why give the defendant the impression that you have something to hide? Follow the same rules you have the right to compel them to follow.

Motions to compel: they exist for a reason

There is no point in being aggressive and thorough in your discovery only to settle for non-compliant, non-responsive discovery responses. If the defendant serves deficient responses and a thorough meet and confer (and utilization of any informal discovery conferences your judge might offer or require) fails, don't be afraid to make your motion to compel and ask for sanctions. Indeed, a failure to move to compel responses may later preclude your ability to exclude responsive information at trial. (See, *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422-1423.)

A propounding party in receipt of responses to interrogatories or requests for admission that are evasive or incomplete, or assert overly general or frivolous objections, may move to compel further responses. (Code Civ. Proc., §§ 2030.300(a), 2033.290(a).) Similarly, a propounding party in receipt of responses to a request for production of documents with an incomplete statement of compliance, an inadequate, incomplete or evasive representation of inability to comply, and/or contains an objection that lacks merit or is too general, may move to compel further responses. (Code Civ. Proc., § 2031.310(a).) If a responding party agrees to produce documents, but does not, the party entitled to receipt of those documents may make a motion compelling the responding party to comply with its agreement to produce the responsive documents. (Code Civ. Proc., § 2031.320(a). A party making a motion to compel further responses must first meet and confer, and provide the court with evidence of the same upon making its motion. (Code Civ. Proc., §§ 2030.300(b), 2031.310(b), 2033.290(b).) A motion to compel further responses must be made within 45 days of the date the responses are served, or later if agreed to in writing. (Code Civ. Proc.,

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§§ 2030.300(c), 2031.310(c), and 2033.290(c).)

The court *shall* issue monetary sanctions, including attorney's fees against a party and/or its attorneys who unsuccessfully opposes a motion to compel further responses to discovery unless the court finds that the one subject to the sanctions acted with substantial justification or other circumstances make the imposition of the sanction unjust. (Code Civ. Proc., §§ 2023.030(a), 2030.300(d), 2031.310(d), and 2033.290(d).) It is a misuse of the discovery process to fail to respond or to submit to an authorized method of discovery, and/or making unmeritorious objections to discovery. (Code Civ. Proc., §§ 2023.010(d)-(e).) Stronger sanctions, such as evidentiary or terminating sanctions, are usually unavailable unless lesser sanctions are first imposed and a prior order compelling discovery has been violated. (*New Albertsons, Inc., supra.*)

Your discovery plan should include a time frame that permits you sufficient time to make your motion(s) to compel and have it heard (remember, there is a long wait for hearing dates in some departments), *and* obtain the information thereafter assuming the court has compelled it.

What to do about those overly broad medical and employment subpoenas? Quash 'em!

Overly broad medical and employment records subpoenas are common in many cases, and the same is true for employment cases. Keep in mind that both types of records are protected by the plaintiff's constitutional right to privacy and, thus, there is a much higher threshold for their discoverability, requiring defendant to establish a *compelling need* for the discovery, meaning defendant must first establish that each document they seek is *directly relevant to the action and essential* to its fair resolution, and thereafter, the court must still carefully balance the need for production against the fundamental right to privacy. (*Board of Med. Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 679; *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 441; *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 528-530; *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1014; *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853-1854; *Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 665; see also, *Britt v. Superior Court* (1978) 20 Cal.3d 844, 859.)

An employer defendant is not typically entitled to employment records concerning a plaintiff's performance at prior or subsequent employers because they are not relevant, including to establish that the plaintiff is guilty of whatever misconduct the employer now accuses the employee of. (Evid.Code, § 1101(a).) Payroll records from prior employers are also not typically discoverable because, while post-termination earnings are relevant to mitigation, earnings from prior employers have no bearing on mitigation.

Timely lodge your objections to offensive subpoenas, and request meet and confer. Consider offering to resolve the dispute with a "First Look Agreement" (though if you have already requested the documents pre-filing, you should already know what's in there), and if resolution is not possible, timely move to quash or modify those subpoenas and for imposition of a protective order and, if appropriate, seek sanctions. (Code Civ. Proc., §§ 1987.1, 1987.2.)

One last chance….

Remember that in state court, a responding party has no ongoing obligation to supplement discovery responses, so exercise your right to serve a supplemental interrogatory and supplemental request for production of documents before discovery is closed. You may serve a supplemental interrogatory twice, and a supplemental request for production of documents also twice, both at times of your choosing, to require disclosure and production of later-acquired or -discovered information. (Code Civ. Proc., §§ 2030.070, 2031.050.) This should help prevent unfair surprise at trial, and to also give more weight to your motion to exclude withheld information because the defendant would have to establish that they still did not have the information they failed to give you until right before trial.

Evidentiary issues

Motions in limine

You might not make them until close to trial, but you should start and maintain a running list of potential motions in limine as issues present themselves during discovery. For example, if defense counsel questions your client about irrelevant but potentially embarrassing facts during his/her deposition, add it to the list to exclude that information, so you do not have to remember it later. If during a lengthy meet and confer, defense counsel confirms in writing that defendant has produced, for example, every single email relating to your client, add it to the list to move to preclude defendant from using any other emails beyond those produced since you forewent making a motion to compel based on these representations. These are just examples, and it will make things easier down the road to exclude improper evidence.

EDD records relating to unemployment benefits and/or disability records are generally undiscoverable and inadmissible.

Unemployment and state disability records maintained by the EDD cannot be reached by subpoena, and when defense counsel asks you for these records, the employee is usually within his rights to refuse to produce them (although sometimes, who cares). The employer itself can get the unemployment benefits file as a participant, but the same is not true with a disability benefits file.

If the EDD decision was great for your client and/or the defendant made helpful admissions in the process, you might want the records to all come in. Otherwise, consider making a motion to exclude them at trial on the grounds that these records are confidential pursuant to statute and legislative intent, improper use of which or attempt to access is a misdemeanor, and expressly inadmissible. (Evid.Code § 1040; Unemp.Ins.Code, §§ 1094, 2111 and 2714; *Crest Catering Co. v. Superior Court* (1965) 62 Cal.2d

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274, 277 [sections 1094 and 2111 of the Unemployment Insurance Code "manifest a clear legislative purpose to preserve the confidentiality of information submitted to the Department of Employment"]; *Richards v. Superior Court for Los Angeles County* (1968) 258 Cal.App.2d 635, 638-639 ["Fairly interpreted, sections 2111 and 2714 of the Unemployment Insurance Code manifest a clear legislative intent to preserve the confidentiality of the information submitted to the department and to its examiner pertaining to the nature and cause of the claimant's disability"].)

Get your experts if needed

Expert testimony is helpful, even necessary, in a number of areas: nature, scope and severity of injuries and need for future medical care, reconstructing an accident for liability purposes, whether or not certain conduct met or fell below the standard of care in the community or profession, calculating past and future financial damages, and so many other topics.

Calculating the damages in cases can be complicated when dealing with the reasonable value of past or future medical services, damages caused by a breach of contract, value of lost benefits and retirement plans, the differentials in values between prior benefits (differing co-pays, higher/lower deductibles) and benefits from new employment, and expect a foundation challenge to the plaintiff's ability to provide this information him/herself.

Many cases do not require the use of experts, but to maximize your client's damages, especially for the employee who enjoyed a very comprehensive benefits package or was paid in less traditional manners such as piece-rate or commissions, utilizing a damages expert is the best way to assure your damages evidence is admissible. If you haven't read them lately, re-familiarize yourself with the deadlines and rules relating to expert discovery. (See, Code Civ. Proc., §§ 2034.210, *et seq*.)

Don't forget, for FEHA cases, expert fees are expressly recoverable pursuant to statute. (Gov.Code, § 12965(b).) In any case, service of a 998 offer can trigger the recovery of expert fees when otherwise not recoverable for non-court-ordered experts. (Code Civ. Proc., § 998.)

Conclusion

The discovery plan should include all discovery tools – both formal and informal – to obtain all necessary discovery from the defendant, who usually starts from the advantageous posture of already having most (if not all) of the relevant documents and most (if not all) of the key witnesses under their control (usually still under their employ). Comply with your own discovery obligations, so you can later demand the defendants' compliance, and don't be shy about demanding what the law says you get.

Christina M. Coleman is a senior civil litigation associate at the Law Offices of Ramin R. Younessi *in Los Angeles. With nearly 17 years of experience, her practice areas include: employment and injury litigation, including wage and hour and consumer individual and class actions, discrimination & wrongful termination, civil assault & battery, rape, sexual harassment, civil rights, personal injury, and appellate work. She graduated from UCLA with a B.A. in Linguistics and attended University of San Diego, School of Law. She is a member of many legal organizations, including the Consumer Attorneys of California, and the Consumer Attorneys of Los Angeles, and has lectured for both organizations.*