

2022 CCCBA Basic Trial Skills Series



## ***#2 Discovery & Depositions - The Meat and Potatoes of Trial Preparation***

1

- ▶ Ashley Ayad of Chan + Punzalan
- ▶ Dean Christopherson of Dawe & Christopherson
- ▶ Andrew Oberst of Brothers Smith
  
- ▶ Moderator: Jaime Herren of Holland & Knight

2

## Discovery Overview . . .

- ✦ Determine Your Opponent's Position, Under Oath
- ✦ Evaluate The Relative Strengths And Weaknesses of Each Side's Case
- ✦ Can Seek Information in a Variety of Ways –
  - Interrogatories – Written Questions Requiring Written Answers Under Oath
  - Document Requests – Written Requests Requiring Production of Documents (With Verification)
  - Request For Admissions – Written Requests to Admit That Facts are True or Documents are Genuine
  - Independent Medical Exams (IME) – Requiring Other Party to be Evaluated by "Independent" Doctor
  - Expert Discovery – Identification of Experts and Production of their Reports Followed by Deposition of Each Side's Experts

Dawe & Christopherson LLP

3

## What's "discoverable", and when?

- ▶ ✦ Discovery scope is broad – "relevant to the subject matter" and "reasonably calculated to lead to the discovery of admissible evidence" Code of Civil Procedure §2017.010
- ▶ ✦ "Relevance" for discovery is broader than relevance at trial –
 

"For discovery purposes, information is relevant if it 'might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement...' [Citation]  
Admissibility is not the test...These rules are applied liberally in favor of discovery..."

*Lopez v. Watchtower* (2016) 246 Cal.App.4th 566, 591
- ▶ ✦ Because of broad scope of discovery, relevance objections disfavored
- ▶ ✦ When can discovery be taken?
  - ▶ • Plaintiffs – stayed until 10 days after service of complaint, 20 days for depositions
  - ▶ • Defendants – no stay, can propound discovery immediately
  - ▶ • Discovery Cutoff – Discovery must be completed 30 days before date first set for trial (absent order to the contrary)
  - ▶ • *In Federal Court* – Initial Disclosures required generally before discovery is begun (requiring identification of witnesses, production of documents and damage calculations)

Dawe & Christopherson LLP

4

## Form Interrogatories

- What are they?
- Interrogatories are written questions sent by one party to another, that must be answered under penalty of perjury.
- This makes Interrogatories very effective during depositions.
  - **Tip: When deposing a witness use interrogatory responses and other written discovery responses to lock in testimony as to the facts and the law to narrow issues for summary judgements or trial.**
- Interrogatories allow the parties to ask who, what, when, where and why questions.
- There are two types of interrogatories: form interrogatories and special interrogatories. Form interrogatories are approved by the California Judicial Council and prepared simply checking the boxes for the questions
  - **TIP: in limited cases you may only propound a TOTAL of 35 discovery requests. Example: if asking 35 interrogatories, you will not be able to request any admissions or request any documents.**
- The "Standard" Form Interrogatories
- Judicial Counsel Forms:
  - DISC-001 – GENERAL (PERSONAL INJURY AND DAMAGES)
  - DISC-002 – FORM INTERROGATORIES—EMPLOYMENT LAW
  - DISC-003 – FORM INTERROGATORIES—UNLAWFUL DETAINER
  - DISC-004 – FORM INTERROGATORIES—LIMITED CIVIL CASES
  - DISC-005 – FORM INTERROGATORIES—CONSTRUCTION LITIGATION
  - <https://www.courts.ca.gov/forms.htm>

5

## Requests for Admissions

- **ONE OF THE MOST POWERFUL WRITTEN DISCOVERY TOOLS!**
- Most discovery procedures are aimed at preparing for trial. Requests for admission are aimed at setting to rest a triable issue so that it will not have to be tried, or to for decision upon summary judgment.
- Requests for admission are more closely akin to summary adjudication than to orthodox discovery.
- **Responses to requests for admission more powerful than answers in deposition or to written discovery.**
  - Once answers are obtained, they cannot be amended without leave of court.
  - Responses in deposition or to written discovery can be changed in form and substance before certification of the transcript or before trial.
  - However, a party may amend or withdraw an admission only by leave of court, which may be granted only if the court determines that the admission was the result of mistake, inadvertence, or excusable neglect, and that the requesting party will not be substantially prejudiced if the admission is amended or withdrawn.
  - Motion to have Admissions deemed Admitted.
- Know that legal issues may be set aside using Requests for Admissions, therefore "calls for a legal conclusion" is not a valid objection.
- "when a party is served with a request for admission concerning a legal question properly raised in the pleadings he cannot object simply by asserting that the request calls for a conclusion of law. He should make the admission if he is able to do so and does not in good faith intend to contest the issue at trial, thereby "setting at rest a triable issue." *Burke v. Superior Court* (Fidelity & Deposit Co. of Maryland) (1969) 71 Cal.2d. 277, citing *Cembrook v. Superior Court* (1961) 56 Cal.2d 423.

6

## Requests for Admissions and Form Interrogatory 17.1

- Serving Request for Admissions with Form Interrogatory 17.1 provide thirty-five (35) additional **Contention** Interrogatories.
- FORM INTERROGATORY 17.1:
- Is your response to each request for admission served with these interrogatories and unqualified admission? If not, for each response that is not an unqualified admission:
  - (a) state the number of the request;
  - (b) state all facts upon which you base your response;
  - (c) state the names, ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and
  - (d) identify all DOCUMENTS and other tangible things that support your response and state the name, ADDRESS, and telephone number of the PERSON who has each DOCUMENT or thing.

7

## Requests for Admissions (cont.)

- Framing Requests for Admissions and Contention Interrogatories:
  - Look to the Complaint or the Answer.
  - Look to the Judicial Council of California Civil Jury Instructions (CACI) and prior response to discovery.
    - Compose each using one legal element or one fact to create each Request for Admission.
  - Contention Interrogatories
    1. Please list each and every fact that you claim supports your contention in paragraph \_\_\_ of the Complaint that “\_\_\_\_\_”.
    2. Please IDENTIFY each and every person whom you claim has knowledge in support your contention in paragraph \_\_\_ of the Complaint that “\_\_\_\_\_”.
    3. Please IDENTIFY, with sufficient specificity to support a request for production of documents, each and every document that you claim supports your contention in paragraph \_\_\_ of the Complaint that “\_\_\_\_\_”.
- Requests for Admissions
  - CACI 400: 1. That Defendant was negligent; 2. That Plaintiff was harmed; and 3. That Defendant’s negligence was a substantial factor in causing [name of plaintiff]’s harm.
  - Admit that Defendant \_\_\_\_\_ was negligent.
  - Admit that Plaintiff was harmed.
  - Admit that Defendant’s negligence was a substantial factor in causing Plaintiff’s harm.

8

## Requests for Admissions (cont.)

- Timing
  - Timing of Request for Admissions is case and Plaintiff or Defendant specific.
  - Plaintiff may wish to establish if a Defendant is going to contest liability at the onset of the case.
  - Defendant may wish to discover all of a Plaintiff's claims and contentions before issuing request for admissions.
  - 100 days before trial. Sweep discovery and request for admissions.

9

## General Tips to Live By

- Know thy deadlines!
  - True in all aspects of civil litigation, not just discovery.
  - Calendar these and know them by heart: 30 days for response to verified discovery, all service deadlines, 45 days for motion to compel, last day to object before deposition, 100 days before trial date, expert demand date, expert disclosure date, discovery close date.
  - One of the biggest causes of malpractice claims remains missing of calendar deadlines.
- Objections and legal Authority
  - Both for meet and confer efforts to meritless objections and for your own discovery objections create a running list of applicable authority to reference and use so research efforts are not duplicative.

10

## Propounding Special Interrogatories

What are Special Interrogatories:

- ▶ Specially prepared interrogatories ("special interrogatories") are written questions not found on form interrogatories
- ▶ Typically used to state the facts and legal arguments on which it intends to rely for its claims, defenses, or damages in a lawsuit
  - ▶ Use to establish contentions or to identify relevant documents, witnesses, or other information relevant to the subject matter
  - ▶ Consider whether the information can be obtained through other discovery methods

Formatting Considerations:

- ▶ Typical Pleading Caption
- ▶ Definitions

Numerical Limitations:

- ▶ Each party may propound 35 special interrogatories to each other party (Cal. Civ. Proc. Code § 2030.030(a)(1)).
  - ▶ If a party exceeds 35 special interrogatories, a "Declaration for Additional Discovery" must be included.
- ▶ Subparts are prohibited (Cal. Civ. Proc. Code § 2030.060(f)).

Other Considerations:

- ▶ Ensure interrogatories are clear and unambiguous
- ▶ Limit each interrogatory to a single subject matter
- ▶ Ensure each interrogatory is full and complete (so the responding party need not resort to other materials to complete the question)

11

## Responding to Special Interrogatories

A Responding Party must provide an answer and/or objections to each request made.

- ▶ Note: If Propounding Party serves over 35 Special Interrogatories without a Declaration for Additional Discovery, responses are only required as to the first 35 interrogatories.
- ▶ Duty to provide "complete" answers
- ▶ Duty to obtain information
  - ▶ Exception: The duty to make reasonable efforts to obtain requested information does not apply to "information equally available to the propounding party." Cal. Code Civ. Proc. § 2030.220(c), *Regency Health Services, Inc. v. Sup.Ct.* (Settles) (1998) 64 CA4th 1496, 1504.)

Objections

- ▶ Each objection must be stated separately and must be specific to each interrogatory
- ▶ Improper objections: hearsay, calls for an opinion, assumes facts not in evidence, conducting a fishing expedition
- ▶ Proper objections: privilege, work product, or constitutional right of privacy; exceeds permissible scope of discovery (irrelevant); exceeds permissible number of interrogatories without declaration for additional discovery; contains subparts; compound, conjunctive, and/or disjunctive question; seeks the content or production of documents (description and location of document is not objectionable)
- ▶ If objection not made, it is waived.
- ▶ Verifications required
- ▶ Amending Responses
  - ▶ Responding party need only provide such information as is available at the time the answers are prepared. There is no duty to update or amend the answers, either to correct errors or to include new information discovered later, but has the option to do so. (Cal. Code Civ. Proc. §§ 2030.060(g), 2030.310(a).)
  - ▶ Amended answers can simply be served on the interrogating party and all others who received copies of the original answers. [CCP § 2030.310(a)]

12

## Supplemental Interrogatories

- ▶ There is NO duty to supplement interrogatory responses.
- ▶ Propounding Party can serve supplemental interrogatories to ensure the Responding Party's prior responses are still accurate and current. (Cal. Civ. Proc. Code § 2030.070(a)).
- ▶ The substance of a supplemental interrogatory typically is limited to the following statement: "Please review your responses to interrogatories previously served on you in this action. If for any reason any answer is no longer correct and complete, identify the answer and state whatever information is necessary to make it correct and complete as of this date."
- ▶ Supplemental Interrogatories can be served three times:
  - ▶ Twice before any trial setting
  - ▶ Once after the initial trial setting (and before the 30-day "cut-off" on discovery proceedings before trial)
  - ▶ Note: Parties may be able to serve further supplemental interrogatories if "good cause" is shown (e.g., lengthy continuances of the trial date), the court may permit more supplemental interrogatories (Cal. Civ. Proc. Code § 2030.070(c)).

13

## Request For Production of Documents

- ▶ Typically used by one side to inspect and copy documents or other tangible evidence held by another party
- ▶ No limit on how many requests may be made
- ▶ Propounding Request for Production of Documents
  - ▶ Description: Designate the documents or other evidence to be inspected by specifically describing each item or by "reasonably particularizing" each category of item. (Cal. Code Civ. Proc. § 2031.030(c)(1).)
    - ▶ Consider limiting the scope with "non-privileged," date limits, account limits, etc.
  - ▶ Form in which ESI to be produced: The demanding party may "specify the form or forms in which each type of electronically stored information is to be produced." (Cal. Code Civ. Proc. § 2031.030(a)(2).)
  - ▶ The time and place for producing the documents must be stated in the demand, and that date must be at least 30 days after service of the demand (CCP § 2031.030(c)(2).)

14



## Responding to Request for RPD

### Substance of Responses

- ▶ Agreement to comply: A statement that the party will comply by the date set for inspection with the particular demand for inspection, testing, etc.; or
- ▶ Representation of inability to comply: A statement that the party lacks the ability to comply with the particular demand; or
- ▶ Objections: An objection to all or part of the demand. (Cal. Code Civ. Proc. § 2031.210(a))

### Format of Production

- ▶ Documents must be sorted and labeled to correspond with the categories in the document demand. (Cal. Code Civ. Proc. § 2031.280(a).)
- ▶ Electronically Stored Information:
  - ▶ Where the demand does not specify a form for producing ESI, it "shall" be produced in the form "in which it is ordinarily maintained" or in a form "that is reasonably usable," unless the parties agree or the court orders otherwise. (Cal. Code Civ. Proc. § 2031.280(d)(1).)
  - ▶ If demand requires "native form," the "reasonable expense" of translating the data into "reasonably usable form" must be paid by the demanding party." (Cal. Code Civ. Proc. § 2031.280(e).)

### Objections based on Privilege

- ▶ When asserting claims of privilege or attorney work product protection, the objecting party must provide "sufficient factual information" to enable other parties to evaluate the merits of the claim, "including, if necessary, a privilege log." (Cal. Code Civ. Proc. § 2031.240(c)(1); *Lopez v. Watchtower Bible & Tract Soc. of New York, Inc.* (2016) 246 CA4th 566, 596-597.)
  - ▶ a "privilege log" identifies each document for which a privilege or work product protection is claimed, its author, recipients, date of preparation, and the specific privilege or work product protection claimed.

### Verifications Required

15

## Subpoenaing Documents from Third Parties

- ▶ Prepare a Deposition Subpoena for Production of Business Records (Mandatory Judicial Council Form No. SUBP-010)
  - ▶ must designate the business records to be produced either by specifically describing each individual item or "by reasonably particularizing each category of item." (Cal. Code Civ. Proc. § 2020.410(a).)
- ▶ A copy of the Deposition Subpoena must be served on all attorneys of record, and they must be given an opportunity to purchase a copy of the documents produced
  - ▶ A party may not be able to object if they are not the consumer or employee of the witness from whom the records are sought. However, they may move to quash the deposition subpoena.
- ▶ Deposition Subpoena should be served with sufficient time in advance of the due date for production to allow the witness a reasonable opportunity to locate and produce the documents.

16



## Subpoenaing Personal Records of Consumers

- ▶ “Consumer records” are records sought from telephone companies; banks, insurance and financial services providers; health care providers; schools; attorneys; or accountants (Cal. Code Civ. Proc. § 1985.3(a)(1))
- ▶ If the records sought are personal records of a consumer, then the Consumer must be served with a “Notice to Consumer” (Mandatory Judicial Council Form No. 982(a)(15.5)). (Cal. Code Civ. Proc. § 1985.3(b).)
  - ▶ Advises that the records are being sought and the consumer has the right to object
  - ▶ Must serve the Notice to Consumer at least 10 days before serving subpoena for records on the witness (5 days if using personal service) and at least 25 days before the date of production (20 days if using personal service). (Cal. Code Civ. Proc. § 2025.270(c).)
    - ▶ The consumer must be served with the deposition notice, a copy of the deposition subpoena, and notice of the privacy rights specified in Cal. Code Civ. Proc. § 1985.3(e). (Cal. Code Civ. Proc. § 2025.240(b).)
  - ▶ Note: Notice to Consumer is not required where the demanding party has the consumer’s written authorization to release the information.
- ▶ Deposition subpoena to deponent must include a proof of service of the Notice to Consumer OR the consumer’s written authorization to release the records.
- ▶ If the consumer objects or files a motion to quash, the witness is not permitted to respond to your Deposition Subpoena.
  - ▶ Motion to Compel Production deadline: 20 days after service of the written objection

17

## Independent Medical Exam

- ▶ A defendant in a personal injury case has the right to one **physical** examination of the plaintiff by written demand. (Cal. Code Civ. Proc. § 2032.220(a).)
  - ▶ No “mental” exams are allowed by demand.
  - ▶ Limited to whatever portion of plaintiff’s body or conditions are “in controversy” in the lawsuit
  - ▶ No diagnostic test or procedure that is painful, protracted or intrusive are permitted (Cal. Code Civ. Proc. § 2032.220(a)(1).)
- ▶ Demand Requirements:
  - ▶ Date and time of exam (date designated must be at least 30 days after service of demand)
  - ▶ Place of exam (within 75 miles of plaintiff’s residence)
  - ▶ The examiner’s identity and specialty (must be a licensed physician “or other appropriate licensed health care practitioner)
  - ▶ The “manner, conditions, scope and nature of the examination.” (Cal. Code Civ. Proc. § 2032.220(a)(2), (c) and (d).)
- ▶ Considerations:
  - ▶ Medical Examiner should be competent and able to testify and present information to non-doctors
  - ▶ All communications with experts are discoverable.

18

## Independent Medical Exam

- ▶ After being served with a demand for an IME, Plaintiff has 20 days to respond.
  - ▶ Plaintiff may agree, agree to the request, agree to request with specific modifications, or refuse to submit to the demanded IME for reasons specified in the response
- ▶ Plaintiff's counsel may be present to observe and record the physical examination (audio only). (Cal. Code Civ. Proc. § 2032.510(a).)
- ▶ Defendant is obligated to produce the IME report upon plaintiff's written request. (Cal. Code Civ. Proc. § 2032.610.)
  - ▶ Tip: At the time Defendant is to produce the IME Report, Defendant should serve Plaintiff with a demand for a "copy of any existing written report of any examination of the same condition by any other physician, psychologist, or licensed health care practitioner." (Cal. Code Civ. Proc. § 2032.640.)

19

## Expert Witness Demand

### Deadlines:

- ▶ Demand for expert witnesses is due 10 days after the initial trial date is set or 70 days before the trial date, whichever is closer to the trial date. (Cal. Code Civ. Proc. § 2034.220.)
- ▶ Expert witness data must be exchanged "no later than 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date. (Cal. Code Civ. Proc. § 2034.230(b).)

### Content of Written Demand:

- ▶ The name of the client or party on whose behalf the demand is made
- ▶ A statement that the document constitutes a written demand pursuant to Chapter 18 of the Civil Discovery Act (Cal. Code Civ. Proc. § 2034.210 et seq.). [Cal. Code Civ. Proc. § 2034.230(a)]
- ▶ Date when exchange is to be made
- ▶ May also include demand for reports (Cal. Code Civ. Proc. § 2034.210(c).)

### Considerations:

- ▶ A demand for exchange of expert witness information is *optional*, not mandatory. However, once a demand is served by any party, all parties are obligated to exchange such information. (Cal. Code Civ. Proc. § 2034.260(a).)

20

## Expert Witness Exchange

Information to be exchanged:

- ▶ Experts list: A list setting forth the name and address of each person whose expert opinion that party expects to offer at trial (or a statement that the party does not presently intend to offer any expert testimony). (Cal. Code Civ. Proc. § 2034.260(b)(1), (2).)
  - ▶ Note: Local rules may limit number of experts.
- ▶ "Expert Witness Declaration": Required where a listed expert is (a) a party to the action; (b) an employee of the party; or (c) "retained by a party" for the purpose of forming and expressing an opinion
  - ▶ Should include: experts qualifications; general substance of expected testimony; representation the expert is ready to testify; and costs and fees of expert.
  - ▶ Declaration is signed by the party's attorney (not the expert)
- ▶ If discoverable reports or writings were demanded, reports must be exchanged together with the expert list and declarations at the place and on the date specified in the demand. (Cal. Code Civ. Proc. § 2034.270.)

If a party does not disclose their experts, include an expert declaration when required, produce reports and writings of experts demanded under Cal. Code Civ. Proc. § 2034.270, or make their expert available for deposition, the court must exclude any evidence from that expert. (Cal. Code Civ. Proc. § 2034.300.)

21

## Contra Costa Discovery Facilitation

- ✧ Local Rule Requires Evaluation of Dispute before Motion Filed  
[Contra Costa Superior Court Rule 3.300 et seq.]
  - Check local rules where you're venued for similar rules
- ✧ Dispute is "heard" by attorney volunteer who attempts to resolve
- ✧ Program applies to all discovery disputes except -
  - Where no response to discovery has been provided
  - Where trial is less than 60 days away
  - Where third party refuses to respond to subpoena
  - Where court specifically orders case exempted
- ✧ Request for Appointment of Discovery Facilitator made to ADR Department
- ✧ Must be made before time to file discovery motion runs – usually 45 days after service of verified responses – *erroneously filing motion does not toll time*

Dawe & Christopherson LLP

22

## Oral Depositions -- Who, Where, When . . .

- ✦ Asking questions live – *best way to get candid responses*
- ✦ Deposition of Individual Party, Corporate Party Representative or Non-Party
  - For Party – only need to serve Notice of Deposition by mail
  - For Corporate Party – also designate topics to be discussed (“PMQ”)
  - For Non-Party – must personally serve deposition subpoena
- ✦ How much notice? – 10 days for testimony, more if documents requested
  - See special rules for “consumer records”  
(Notice must be given per Code of Civil Procedure § 1985.3)
- ✦ Where can they be taken? – either:
  - 75 miles from residence or principal place of business, or
  - Within county of venue and 150 miles from home/office
- ✦ Who can attend? – Deponent, Parties and Parties’ Counsel
- ✦ How long can they last? – Seven hours for individual deponent  
unlimited for PMQ

Dawe & Christopherson LLP

23

## Oral depositions – Court Reporter

- ✦ Role of Court Reporter –
  - Administer Oath to Deponent
  - Take down verbatim record of all that is said
  - After depo, prepares booklet deponent reviews for accuracy
  - *Court reporter tips:*
    - ▷ Don’t speak too fast (especially when reading document)
    - ▷ Don’t speak over others
    - ▷ Be clear on expected duration of deposition with reporter
    - ▷ Be mindful that reporter needs breaks
- ✦ Role of Videographer – *if videotaped*, Videographer officially starts and stops deposition
  - When to Video?
    - ▷ Important deposition to be played at trial (e.g., depo of party)
    - ▷ Sometimes controls bad behavior of counsel or deponent

Dawe & Christopherson LLP

24

## Oral depositions – Asking Questions . . .

✧ Be organized. Prepare script of questions as guideline.

- It may take as long to prepare for deposition as to take it
- ✧ Provide standard admonitions and instructions to witness
- ✧ Organize Exhibits (and note where they will be used in script)
- ✧ Exhibit numbering protocol – discuss with opposing counsel
- ✧ Refer to Exhibits by number not description, for clear record
- ✧ Don't let objections throw you off
  - Usually, witness must still answer question despite objection
  - Exception – instruction by witnesses' counsel to answer
    - ▷ Only proper where “bell can't be rung” – privilege/privacy
  - If objection as to form, consider re-asking to cure
  - If *defending deposition*, be judicious with objections

Dawe & Christopherson LLP

25

# QUESTIONS?

26