THE DISCOVERY FOLLIES

INSPECTION DEMANDS, INTERROGATORIES, REQUESTS FOR ADMISSIONS AND EXPERT DISCLOSURE IN CALIFORNIA

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We spend a lot of time working with out-of-state in-house counsel and co-counsel defending companies in tort and business litigation. And very often we have a conversation early in the going with our non-California counterpart saying something like the following:

> "Bruce, we've got some interrogatories we've developed here in [Michigan; Indiana; Massachusetts – you fill in the blank] for cases like this. I'm going to e-mail these to you, and I want you to just clean them up and put them in the California case caption and send them over the other side. Oh, and the first thing we want to find out is who their experts are and what they have to say."

And then our end of the conversation goes something like this:

"Uh, Mary, we can't do either of those things."

And we proceed to explain how the sides will disclose expert information seven weeks before trial and take their depositions in the three or four weeks before trial, and how we have to write interrogatories in a way that doesn't make sense to anyone who was taught to write sentences and paragraphs in that strange manner we refer to as common English.

California's Discovery Act has been reformatted in the past several years in a way that only a tax lawyer would love. So, the purpose of this white paper is to set out the rules for written discovery in the Golden State in a way that mere mortals may be able to understand.

For now, we'll skip the arcane kinds of written discovery – like most lawyers, we

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haven't taken a deposition on written questions in quite awhile – and talk about the rules for the most common forms of written discovery: Interrogatories, Requests for Admissions, Inspection Demands and Expert Disclosure.

DRAFTING AND RESPONDING TO INTERROGATORIES

Ok, we have two kinds of interrogatories. First, there are form interrogatories, of which there are several types – one set designed for virtually all cases and several sets for specific kinds of cases. You can find examples of these at the California State Judicial Counsel's web site, more specifically at

http://www.courtinfo.ca.gov/forms/documents/disc001.pdf.

We'll talk a little bit more about these further on in this section.

Then we have "Specially Prepared" interrogatories. These are the ones that give non-California lawyers fits. The primary rules are these:

- The interrogatories can't be compound.
- They must be "full and complete in and of themselves." So no "If answer to the preceding interrogatory is 'yes,' then set forth . . . . ."
- They can't contain any subparts: none of this "If you contend that the defendant is a cad and a lout, then set forth (a) each and every fact on which you base your contention; (b) each witness who supports your contention; (c) each document which supports your contention . . . . ." etc.
- No introduction paragraphs. No "In answering these interrogatories, you must provide all information known to you, your lawyers, your relatives, people you run into on the street, and anything you used to know or wish you knew. . . . "
- No preliminary definitions: No paragraphs at the start reading "As used in these interrogatories, the term "Plaintiff" means you, your lawyer, your family and anybody else who has ever sued our client. . . . .

Oh, and there's a limit to the number of interrogatories. Well, sort of. Each party is limited to 35 specially prepared interrogatories to any other party. Except when they aren't. And they aren't if the lawyer who serves the interrogatories includes a declaration under penalty of perjury that says he or she has reviewed each of the interrogatories, that they are necessary and the reason why (a conclusory statement of the complexity of the case will do the trick) and that they aren't being propounded for any improper or harassing purpose. Then, if the other side thinks there are too many interrogatories, he or she has to file a motion with the court for a protective order – not

a really high-percentage motion.

How does this work in real life? This way: When we design our discovery plan, we first look to the Judicial Council Form Interrogatories and see what information we can get from these. There may be some privilege objections to some of these, but there aren't any format objections available. Moreover, to the limited extend we're constrained by the 35 interrogatory limit, that limit doesn't include form interrogatories.

Then, let's suppose that in another jurisdiction, we would have the usual introductory paragraphs and definitions, and that we would then have sub-part driven, compound contention interrogatories seeking names, addresses, employers, telephone numbers of witnesses, etc., descriptions of relevant documents and custodial information, etc. Such non-California interrogatories might look like this:

Definitions:

As used in these interrogatories, the words "YOU" and "YOUR" refer to Plaintiff Jones Company, its officers, agents, employees, investigators, attorneys, and anyone working on its behalf.

As used in these interrogatories, the word "CONTRACT" refers to the contract alleged in the pleadings in this matter.

Interrogatory No. 33: If YOU contend that defendant Smith Corporation breached the CONTRACT, please:

a. Set forth each fact which supports this contention;

b. Set forth the name, address, telephone number, employer and employer address of each person who has or claims to have knowledge of any facts set forth in your response to the preceding subpart; and

c. Identify each document which refers or relates to each fact set forth in your response to subpart c of this interrogatory.

But under California law, there are all kinds of things wrong with this drafting: no introductory definitions are permitted; the sub-parts are not allowed, sub-part b is compound, and subparts b and c have no meaning without reference to subpart a, meaning they are not full and complete in and of themselves. Although some judges would cut you a break on at least some of these problems, you run a real risk that if these are the interrogatories you submit and the other side objects without giving answers, you aren't going to get any answers.

The drafting solution is as follows:

> Interrogatory No. 33: Please provide SUPPORTING INFORMATION concerning YOUR contention that Smith Corporation breached the CONTRACT (As used in these interrogatories, "SUPPORTING INFORMATION" means all facts which support a given contention, the name, address, telephone number, employer and employer address of each person who has or claims to have knowledge of any such facts, and a description of each document which refers or relates to any such facts. As used in these interrogatories, YOU and YOUR refer to Plaintiff Jones Company, its officers, agents, employees, investigators, attorneys, and anyone working on its behalf. As used in these interrogatories, "CONTRACT" refers to the contract alleged in the pleadings in this matter).

Cumbersome? Absolutely. Awkward? You bet. Tested in the Courts of Appeal? Nope. And we'd probably recommend not taking the "definition" mechanism any farther than this -- in other words, you can't define "red" to mean "green" or "black" to mean "white." And because California Appellate courts only rarely publish discovery decisions, there is not published law on the subject. But one of California's most respected pretrial practice treatises, Weil and Brown's California Procedure Before Trial [get correct cite], by two of California's most respected motion judges, recommends doing it just this way. In our experience, this is the closest there is to a sure-fire way to draft non-objectionable interrogatories.

Now, how about answering them? Not surprisingly, California has some peculiarities, and these peculiarities make answering interrogatories sometimes less difficult than they might otherwise be. They also make interrogatories less useful as a discovery tool than they might otherwise be. The basic rules are these:

- Generally speaking, responses are due (a) 30 days after service of the interrogatories if they are served by hand; (b) 35 days after service of the interrogatories if they are served by mail; and (c) 32 days after service if they are served by overnight delivery or by facsimile (if the parties have a written agreement to accept service by fax -- otherwise, service by facsimile isn't service at all). As with most pleading deadlines in California, if the due date falls on a weekend or holiday, the due date is the next court day. The parties can agree to an extension of time. This must be confirmed in a writing, and it is customary to confirm by letter. The confirmation should state the agreed date when responses are due, and should confirm an extension of time to "respond" -- not just "answer" the interrogatories to make sure objections are preserved. And responses can be served by mail no matter how the interrogatories were served -- i.e., hand-served interrogatories can be responded to by mail.

- A "responding party" may object to interrogatories and not answer them. The grounds for objection are the following: (a) attorney-client privilege or work product privilege; (b) privacy, confidentiality, proprietary information and the like;[2] (c) the information sought is irrelevant to the subject matter and the interrogatory is not reasonably calculated to lead to the discovery of admissible evidence; (d) the interrogatory is vague, ambiguous, unintelligible, overbroad, etc. It is difficult to have the relevance or format objections sustained, and the courts tend not to look kindly on parties who find all interrogatories irrelevant, or who somehow can't seem to understand any of the questions.

- The objections must be made within the time permitted for responses, or <u>they are waived</u>. If a party fails to timely respond to interrogatories and the propounding party files a motion to compel answers, the courts will almost invariably order that the interrogatories be answered "without objection."

- Interrogatories must be answered directly and in a straightforward manner. The courts tend to take a dim view of answers that are evasive or try to artfully dodge the question. If part of an interrogatory is objectionable, the responding party must answer the rest.

- Now, here is one of the tricky parts: <u>If</u> an answer would require a summary or abstract of documents, if the burden of preparing the summary or abstract would

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[2] None of these grounds are absolute bars to discovery. All of them involve a balancing of interests between the interests of disclosure and non-disclosure, and a court may well rule that the discovery must take place subject to a protective order.

be the same for either side, and if the responding party is responding within the time permitted (i.e., 30, 32 or 35 days, or any extension agreed to), the responding party can simply offer a description of the documents that contain the necessary information and refer to the code section that allows this reference -- Code of Civil Procedure section 2030.230. For example, in a personal injury case, you send an interrogatory asking the plaintiff the amount of his medical bills. If his responses are timely, he can answer as follows:

> "Answer to Interrogatory No. 18: In response to this interrogatory, responding party refers to California Code of Civil Procedure section 2030.230, and states that the answer to this interrogatory may be derived or ascertained from documents previously produced herein by responding party, specifically those documents bearing Bates numbers 000567 through 000890."

Interrogatory responses need to be verified under penalty of perjury (unless they consist solely of objections). Individuals generally must verify them on personal knowledge, while it is customary for a designated employee of a corporate party to verify "on information and belief."

The propounding party may move to compel further answers, but any such motion must be filed and served within forty-five days of service of the responses (five days are added if the responses are served by mail, 2 if by facsimile or by overnight delivery). However, the party filing a motion must show a good faith effort to resolve the dispute informally prior to filing a motion. If the motion isn't filed within the time permitted, the right to move to compel is waived.

REQUESTS FOR ADMISSIONS

The rules for drafting Requests for Admissions are very similar to those for interrogatories: a presumptive limit of 35 (but this does not include admission of the genuineness of documents); no preliminary paragraphs, preliminary definitions, subparts, compound requests, etc. The deadlines for responding and for moving to compel are the same.

There is a Judicial Counsel Form, which you can download here:

http://www.courtinfo.ca.gov/forms/documents/disc001.pdf

It isn't all that useful, and, unlike the form interrogatories, is not exempt from the 35 request limit.

The objections are about the same as for interrogatories. However, the consequences of responses, or non-responses, are quite different. If a party fails to respond, the propounding party may move to have the matters deemed admitted. This is a relatively toothless motion, however; if the party in default serves proper responses before the hearing on the motion, the motion must be denied (although the defaulting party will likely be sanctioned).

To the extent that the responding party responds with admissions, those admissions are binding and preclusive for the duration of the case. If the responding party fails to admit that which in good faith was uncontestable, then he or she may be required to pay attorneys' fees incurred in proving the wrongful denied fact(s).

Again, the responses must be verified unless they contain only objections. There is a forty-five day window to move to compel further responses, and a meet-and-confer requirement.

INSPECTION DEMANDS

This shows you how the practice of law used to be kinder and gentler than it is today: once in California, we had "Requests for Production of Documents and Tangible Things." Now, we have "Inspection Demands." Sigh . . . .

Anyway, this is an area where the law is similar to the Federal Rules and practice in other states. There are no limits on the numbers of requests. No problem with subparts, introductions, definitions, compound requests, etc. All of those 400-word definitions of what is meant by the word "document" are perfectly legal. Probably worthless, but legal.

The "propounding party" sends out a demand -- it has to go to a party to the case, not a third-party witness -- designating "the documents, tangible things, or land or other property to be inspected either by specifically describing each individual item" or by particularizing categories. The demand should specify a reasonable place, and a reasonable time at least thirty days after the demand is served. And, it should specify anything else the propounding party wants to do during the inspection and how that "related activity" will be performed, as well as if the propounding party has anything destructive planned.

As with the other written discovery, the responding party has 30 (for personal service) 32 (for overnight service or facsimile service if agreed to) or 35 days to respond, and its responses can be mailed no matter how the demand was served. However, the content of the response is circumscribed by the statutes. As to each item or category demanded, the response must be one of the following:

- A statement that the party will allow the production and inspection in whole or in part, and that all documents or things in the demanded category that are in the possession, custody or control of the responding party and as to which no objection is being made will be included in the production;

- (a) A representation that the party is unable to comply with the demand, and (b) a statement that diligent search and reasonable inquiry have been made in an attempt to comply with the demand; and (c) a specification as to whether the item or category has never existed, has been destroyed, lost, misplaced or stolen, or has never been, or is no longer in the possession, custody or control of the responding party; and/or

- Objections to some or all of the category or item, setting forth the specific legal basis for objection and an identification "with particularity" of "any document, tangible thing or land" to which an objection is being made. In other words, giving the statute a literal reading, any responsive document which is withheld on the basis of any objection has to be described with sufficient particularity that the other side, and the court, can determine whether the objection is meritorious or the document has to be produced.

Responses to inspection demands have the same verification requirements as responses to interrogatories and requests for admissions. And, as with other motions to compel, there is an absolute forty-five day time limit and a required "good faith effort" to resolve disputes informally.

Incidentally, although inspection demands for documents typically demand the production of original documents at a specific date, time and place, it is very common for the parties to simply mail Bate numbered copies of documents.

EXPERT DISCLOSURES

As far as I can tell, this discovery is unique to California. The expert disclosure process in California seems designed to guarantee a last-minute scramble. Here's how

it works:

- No later than the tenth day after the parties receive their trial date, or seventy days before that trial date, whichever is closer, any party may serve a "demand for exchange of information concerning expert trial witnesses," commonly known as a "Demand for Disclosure of Experts" or "Demand for Disclosure of Expert Witness Information." The demand may be for a list containing the names and addresses of witnesses, and/or for "inspection of and copying of all discoverable reports and writings, if any, made by" any trial expert. Note that there is no requirement that the expert (other than a retained physician examining an adverse party) generate a report, and they rarely do.

- The demand should state the date of exchange, which will either 50 days before the initial trial date or 20 days after service of the demand, whichever is closest to the trial date. This means that the exchange is almost always 50 days before trial, and all expert depositions take place over the ensuing 35 days (as expert deposition discovery must be completed at least fifteen days before trial).

- In addition to names and addresses, the disclosure must provide a signed declaration by counsel under penalty of perjury containing the following for experts retained by a party, or experts employed by a party: (a) a brief narrative statement of the expert's qualifications (we often simply attach a vita to the declaration); (b) a brief narrative statement of the general substance of the expert's testimony; (c) a representation that the expert has agreed to testify at trial; (d) a "representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial;" and (e) a statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

The code also has a provision for supplemental experts, who may be disclosed 20 days after the "date of exchange" on subjects for which one side retained an expert and the other did not. In other words, if plaintiff retains an expert to opine on the subject of neurology and defendant does not, then defendant has 20 days to name an expert to opine on neurology. But the key is the subject of the testimony, not the area of expertise: if defendant has retained a mechanical engineer to testify about accident reconstruction, and the plaintiff retains a mechanical engineer to testify about product defect, then arguably the defendant has 20 days to retain another expert -- mechanical engineer or otherwise -- to testify about product defect. But if plaintiff retains mechanical engineer to testify about product defect and defendant retains a design engineer for the same purpose, defendant doesn't get a supplemental right to retain a

mechanical engineer, nor does plaintiff get another crack at retaining a design engineer.

Experts must be voluntarily produced for deposition, usually in the county where the case is pending, and the party taking the deposition must pay for the expert's time during the deposition itself. But the party retaining the expert pays for the expert's travel time and expenses.

APPLICABLE SECTIONS OF THE DISCOVERY ACT

All California codes, including the California Code of Civil Procedure, which contains the Discovery Act, are available without charge at

http://www.leginfo.ca.gov/calaw.html,

The portions of the Act addressing the discovery discussed in this white paper can be found at the following locations:

Interrogatories: Code of Civil Procedure section 2030.010 et seq.

http://www.calbizlit.com/00148777.DOC

Requests for Admissions: Code of Civil Procedure section 2033.010 et seq.

http://www.calbizlit.com/00148780.DOC

Form Interrogatories and Form Requests for Admissions: Code of Civil Procedure section 2033.710 et seq.

http://www.calbizlit.com/00148785.DOC

Demands for Inspection: Code of Civil Procedure section 2031.010

http://www.calbizlit.com/00148787.DOC

Simultaneous Exchange of Expert Witness Information: Code of Civil Procedure section 2034.010

http://www.calbizlit.com/00148789.DOC