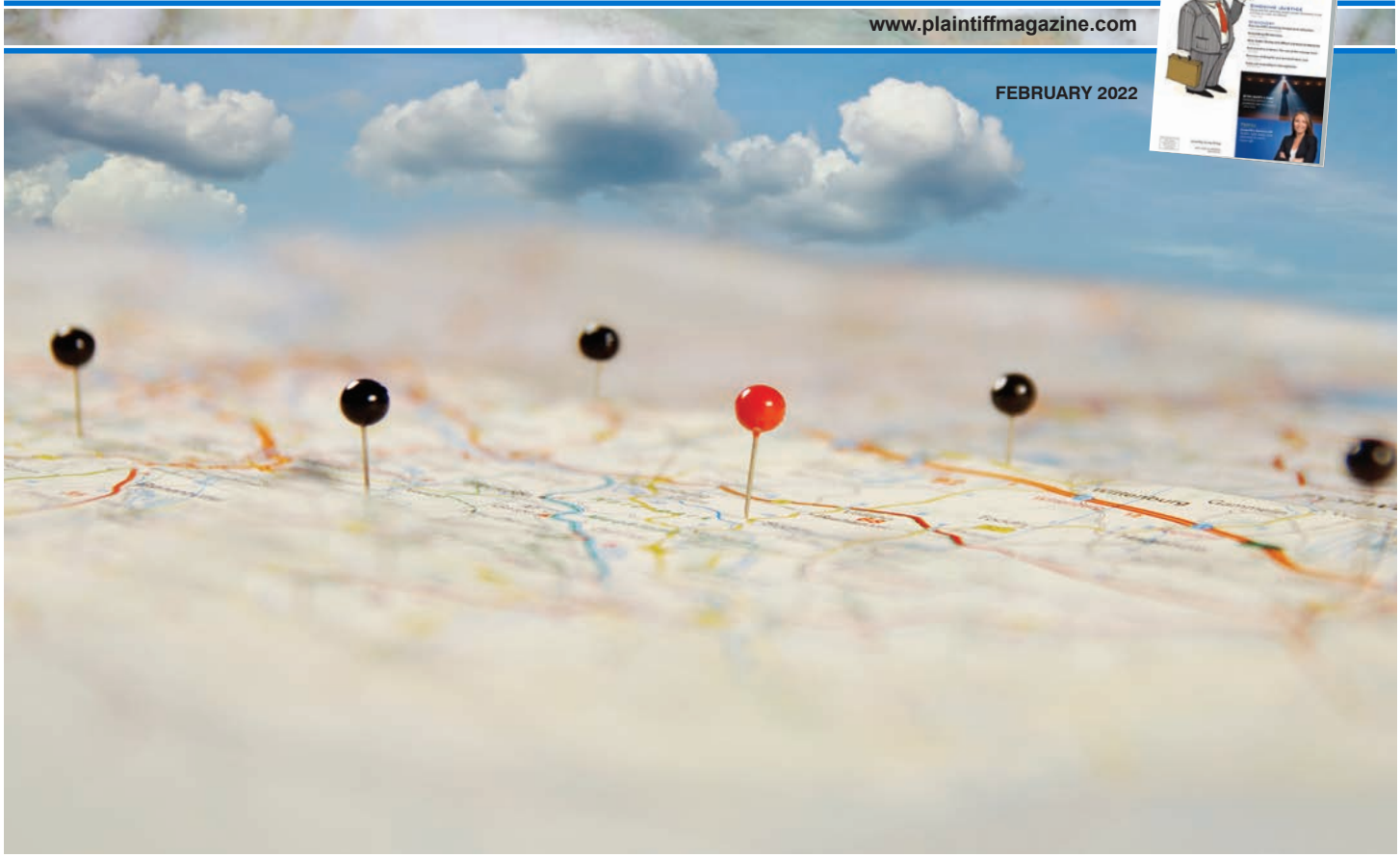


Discovery roadmap for your personal-injury case

Discovery being propounded to the opposing party: How to effectively use discovery, with practical pointers

By Erika Contreras

Discovery is the process by which both sides exchange information, evidence, names of witnesses, and documents. For the plaintiff, this process helps in understanding what, if anything, could have been done to prevent the injury-producing event. The discovery process is also an efficient tool to help prepare the case for trial as it helps identify what viable defenses will be raised at trial. Discovery can also help eliminate issues and streamline the trial process.

At the outset of any case, before commencing discovery with the opposing party, you should conduct your own initial investigation; obtain a copy of the 911 calls, police report and photos along with any dashcam or body-worn camera footage. Keep in mind that most agencies only preserve 911 call recordings for six months or less. Preservation letters to the opposing party and/or its representatives should also be sent to ensure the proper preservation of evidence. All of these items will provide you with a proper foundation of the events leading up to and following the incident and will help direct discovery requests in your case.

This article will focus on discovery being propounded to the opposing party, how to effectively use discovery, and will give practical pointers.

Generally, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, electronically stored information, tangible thing, or land or other property. (Code Civ. Proc., § 2017.010.)

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Keep this wording in mind when you are drafting your discovery requests as you want to cast as wide a net as possible with your first set of discovery. Once more information is obtained, you can home in on specific items which may have not been previously produced. For instance, instead of making a general demand for any and all videos of the subject incident, break down the request into multiple requests. There should be separate requests for (a) videos and photos of the subject incident; (b) videos and photos of any vehicle involved in the subject incident (before and after the incident); and (c) videos and photos of any person involved in the subject incident. Although a party may not have video of the subject incident, they may have access to video immediately before the incident or after, which may help determine speed, direction or area of impact and point of rest for the vehicles.

Although written discovery is important, equally important are vehicle and site inspections and depositions. In general, it is a good idea to have the benefit of the defendant's discovery responses before noticing any liability depositions. This is especially true before taking the deposition of corporate Persons Most Qualified ("PMQ"). Having the witnesses either contradict or express ignorance of company policies in effect at the time of the subject incident during their deposition makes for compelling videotaped testimony at trial.

Written discovery

Form interrogatories

Judicial Council-approved Form Interrogatories – General, is a great place to start your discovery. Be sure to check off Interrogatory No. 2.11 (which asks the defendant if they were acting as an agent or employee of anyone at the time of the incident) and 16.1 (which asks the defendant if they contend anyone other than the plaintiff or defendant contributed to the occurrence of the incident). These two interrogatories can help you identify any other possible defendants or defenses raised in the case.

Requests for admission

The primary purpose of requests for admission is to set at rest triable issues so that they will not have to be tried; they are aimed at expediting trial. (*Brooks v. Am. Broad. Co*. (1986) 179 Cal.App.3d 500, 509.) Any party may obtain discovery . . . by written request that any other party to the action admit the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of law to fact. (Code Civ. Proc., § 2033.010.) In responding to the request, the party must (a) admit so much of the matter involved in the request as is true; (b) deny so much of the matter involved in the request as is untrue; (c) specify so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge. (Code Civ. Proc., § 2033.220.) If the responding party lacks sufficient personal knowledge, it must make a reasonable investigation into the facts prior to responding. (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 529.) Additionally, if only a part of a request is objectionable, the remainder of the request shall be answered. (Code Civ. Proc., § 2033.230.)

The defendant's burden to respond to requests for admission is very specific. In order to provide Code-compliant responses, the defendant must make a reasonable investigation into the facts and, based on that investigation, either admit or deny the request.

In addition to having a discovery purpose, requests for admission can also help a party recover costs of proof if the case is tried. Where a party unreasonably fails to admit such a matter, cost of proof sanctions under Code of Civil Procedure section 2033.420 are designed not as a penalty but rather, "to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission where the admission sought was 'of substantial importance' [. . .] such that trial would have been expedited or shortened if the request had been admitted." (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864-865.)

When propounding requests for admission, look at the jury instructions for the causes of action being alleged. Each element of the cause of action should have its own request for admission. For example, (a) admit that you were negligent; (b) admit that you caused the collision; (c) admit that the plaintiff was injured; (d) admit that the plaintiff did not do anything to cause the collision. When propounding requests for admission, be sure to include Form Interrogatory 17.1, as it requires the responding party to identify facts, witnesses, and documents which support their denial of any request for admission.

Unlike other forms of written discovery, requests for admission should not be sent out right away. This will avoid blanket objections from the responding party about discovery just commencing and investigation still ongoing.

Requests for production of documents

A request for production allows you to obtain a copy of all documents and evidence in the other parties' possession, custody, or control. Although the document requests will vary depending on your case, there are certain categories which are all-encompassing and apply to a multitude of situations. Staples in any request for production of document should include photographs and video of the scene, as well as any person or vehicle involved in the incident. If the case involves policies and procedures, copies of the policy and procedures as well as any modifications made before and after the incident should also be requested. It is now commonplace to ask a defendant driver for his cell phone record for the time frame shortly before and shortly after the incident. This will not only allow you to show whether the driver was on his cell phone at the time of the collision, but also identify any potential witnesses with whom he spoke immediately after the incident.

When responding to discovery requests, a party is required to produce

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



documents in an easily identifiable manner. Code of Civil Procedure section 2031.280, subdivision (a) requires "[a]ny documents or category of documents produced in response to a demand for inspection, copying, testing, or sampling shall be identified with the specific request number to which the documents respond."

Additionally, if a party is withholding any document on the basis of privilege, or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log. (Code Civ. Proc., § 2031.240.)

Keep these statutes in mind when reviewing discovery responses. Often a party may dump thousands of documents in response to discovery without properly identifying them in hopes of delaying or hindering the discovery process.

Inspection demand

A party may demand that any other party allow the requesting party, or someone acting on that party's behalf, to enter on any land or other property that is in the possession, custody, or control of the party on whom the demand is made, and to inspect and to measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it. (Code Civ. Proc., § 2031.010.) Be sure to specifically identify in your inspection notice the components you intend to inspect as well as whether photographing, measuring, and/or testing will be done. This will avoid any objections being raised during the actual inspection and ensure that the expert is able to complete the inspection. For example, if you intend to download the electronic data from the vehicle during the inspection, be sure to specifically articulate that in the inspection demand. Or, if during a site inspection you would like to inspect and photograph the surveillance system and camera angles, be sure to articulate that in the request.

Special interrogatories

Special interrogatories allow a party to tailor questions specifically to the case at hand. These can be helpful when trying to conduct discovery on or investigate defenses raised by the opposing party as well as the basis for those defenses. The following set of questions can be propounded for each claimed defense:

- "If you contend that Plaintiff was comparatively negligent, identify all facts that support your contention."
- "If you contend that Plaintiff was comparatively negligent, identify all witnesses that support your contention."
- "If you contend that Plaintiff was comparatively negligent, identify all documents that support your contention."

Although responding to these types of interrogatories can be exhausting, if answered truthfully, the responses can provide a trove of information for your case. If no facts, witnesses, or documents can be identified to support a claimed affirmative defense, these responses could be used as an exhibit to any motion for summary adjudication.

Depositions

Once you have the benefit of the defendant's written discovery responses and document production, you are better prepared to take depositions of the defendant, its employees and agents, as well as any third-party witnesses. When noticing a deposition, be sure to include notice that you intend to videotape the proceedings and use them at trial. Code of Civil Procedure section 2025.620 allows a party to use the videotaped deposition in lieu of live trial testimony, for any purpose without regard for the witness's availability, as long as the deponent is a party to the action, or at the time of the deposition was an officer, director, managing agent, employee, agent, or PMQ designee of a party.

A notice of deposition should also include a notice that each witness is required to produce all documents utilized in preparation for the deposition pursuant to Evidence Code section 771. Evidence Code section 771 provides that, if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken. An argument can be made that the application of 771 includes privileged material not usually discoverable.

The testimony of the PMQ can be very powerful and have a significant impact on the case. As the PMQ, the witness is speaking on behalf of the corporate defendant and their testimony binds the corporation in whatever areas are designated in the deposition notice.

Remember that the defendant has an affirmative duty to produce a PMQ who is prepared to discuss the topics identified in the deposition notice. Producing a warm body will not suffice. Code of Civil Procedure section 2025.230 requires that the PMQ deponent must testify "to the extent of any information known or reasonably available." "Under the current law, '[i]f the subject matter of the questioning is clearly stated, the burden is on the entity, not the examiner, to produce the right witnesses. And, if the particular officer or employee designated lacks personal knowledge of all the information sought, he or she is supposed to find out from those who do!'" (*Maldonado v. Superior Ct.*, (2002) 94 Cal.App.4th 1390, 1395-96 (quoting Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2001) ¶ 8:475, p. 8E-18).)

Supplemental discovery

As you approach your trial date, it is always a good idea to send out supplemental discovery requests asking the parties to review their prior responses and supplement with any new or additional information. Unlike in federal actions, parties in a state court action do not have a continuing duty to

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



supplement their discovery responses. (*Biles v. Exxon Mobil Corp*. (2004) 124 Cal.App.4th 1315, 1328.)

Code of Civil Procedure sections 2030.070 and 2031.050 allow a propounding party to ask for updated information "bearing on answers already made" and "later acquired or discovered documents, tangible things, land or other property."

Responses to requests for admission cannot be amended without leave of Court. (Code Civ. Proc., § 2033.300.)

Sub rosa discovery

Form Interrogatories 13.1 and 13.2 ask a party to identify any individual who has conducted surveillance of anyone involved in the incident or prepared a written report on the surveillance. Although these are good starting points, special interrogatories and requests for production on sub rosa surveillance should also be propounded. It is a good idea to wait until it is closer to your trial date to propound the more extensive discovery as most parties conduct surveillance throughout the litigation and the discovery should be timed to give as complete a production as possible.

When propounding special interrogatories regarding surveillance, in addition to asking the identity of the person taking the surveillance, a list of dates when the surveillance was taken should also be requested. The document production should ask for all bills, invoices, and notes relating to surveillance. A cross reference of the defendant's discovery responses may reveal that only some, probably that most damning, surveillance footage was produced. Other video not produced may show the plaintiff in pain, limping, or having trouble with mobility.

It is also a good idea to request any and all photographs or video obtained by the defendant of the plaintiff on social media networks or video-sharing sites.

Notice to appear and produce

A notice to appear at a trial or hearing and produce documents in California is authorized by the provisions of Code of Civil Procedure section 1987, subdivisions (b) and (c) and can be used on a party to the action or proceeding, or someone who is an officer, director, or managing agent of any such party. The notice should list a name of all the corporate officers, directors, or managing agents who need to be produced at trial as well as a list of all of the documents that have been requested in the litigation.

Although you may have been diligent with your discovery, sometimes last-minute events give light to documents or witnesses which were not previously produced or identified in discovery. You can include these items in your notice to appear and produce at trial and only give the defendant 20 days' notice for the production. It is important to also request sub rosa documents and video in the notice to appear and produce, as additional surveillance may have been conducted between the time of the defendant's last discovery responses and the commencement of trial.

If the defendant fails to produce the documents and/or witnesses requested in the notice to appear and produce, you can then move to compel the production with the trial court.

Conclusion

Although discovery can be a daunting task, the information and tactical advantage it provides is invaluable. If used effectively, it can help eliminate issues and surprises before trial and streamline the process for you and your client. A party who has taken full advantage of the discovery process will have a distinct advantage at trial and a trove of information to put before the jury.

Erika Contreras is an attorney with Panish, Shea, Boyle & Ravipudi LLP. *She graduated Loyola Law School and is licensed to practice in California and Nevada. She focuses her practice on personal injury and wrongful death cases. She can be reached by email at contreras@psblaw.com.*


Contreras

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**