

Discovering discovery at trial

Using what you already have and getting what you need

By Casey Hultin

Trial starts tomorrow. You are going through the case file again, thinking about witness order, surprises you may face, and how you will put your evidence before a jury. You have thought about this trial for weeks, maybe months, maybe years. And still, in the moments before you start, last-minute, panicked questions set in. You get that same feeling that happens when you think too much about how breathing works and suddenly do not remember how to do it. You start asking yourself questions like, "How do I get an interrogatory answer into evidence?" or "How do I use deposition testimony?" or "Oh gosh, am I missing a record that I need to lay foundation for key evidence?" I get calls like this almost every week from new and experienced trial attorneys alike. If you are experiencing this moment right now and found this as part of your late-night Google search panic, I have you covered.

Weaponizing written discovery

The written discovery everyone spent years collecting can prove very useful at trial. I recommend having copies of every discovery response (and the initial request if counsel opted not to reproduce the inciting requests in the responses) at trial. Note that these should generally *not* be exhibits on an exhibit list as they add unnecessary volume to exhibit binders.

There are many ways to utilize written discovery responses at trial. You can read them separately as part of your case in chief. You can read them in the middle of examination of a witness. You can stipulate that the responses are in evidence and then argue them in closing.

To read interrogatories or requests for admission into evidence, first meet and confer with opposing counsel about which interrogatories or requests for admission you intend to read and how you will read them. Often, responses contain boilerplate objections, which should not be read to the jury, but instead ruled upon by the court first if opposing counsel is standing on their written objections. If there is anything for the court to decide, alert the court at a break that you intend to read discovery responses and after meeting and conferring with opposing counsel, there are objections you need ruled upon before doing so.

If you are going to read a discovery response during examination of the witness as impeachment, you walk through the standard impeachment questions about answering questions under oath, then state on the record which discovery response you would like to read and wait for any objections. If you

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are going to read a discovery response during examination of a witness for some other purpose, be sure to meet and confer with opposing counsel first and have any objections ruled upon by the court. Some judges may want the discovery response in evidence first, so depending on your judge, you may want to do that first, then confront the witness with the response. This can be helpful during cross-examination of expert witnesses.

Lastly, while you certainly can stipulate with opposing counsel that certain discovery responses are part of the record and can be argued to the jury during closing argument and made available to the jury during deliberations, this would not be wise. Juries will often work with only what they hear or see before them during trial, even if other items are technically "in evidence." This same caution is true for any exhibits. However, if the other side approaches you about using discovery responses that are not favorable for you but you expect will be admitted, consider whether stipulating that those responses are part of the record could help you minimize the impact of that evidence.

A few extra notes on requests for admission: Note that denials of requests for admission are not generally admissible to impeach that party's testimony at trial. (*Gonsalves v. Li* (2015) 232 Cal.App.4th 1406, 1417.) But, under Code of Civil Procedure section 2033.410, subdivision (a), matters admitted in response to requests for admission are deemed conclusively established and no contrary evidence is admissible.

The one form of written discovery you are unlikely to use at trial is the response to requests for production. The documents from the production are likely exhibits at trial subject to their own admissibility requirements. Perhaps a scenario could arise where you need to make use of a party stating they do not have any responsive documents, but ideally, there is a request for admission that addresses the issue as these are easier for a jury to digest.

Deploying deposition transcripts

Code of Civil Procedure section 2025.620 governs the use of deposition testimony at trial and states:

"At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under section 2025.410, so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with a series of provisions."

An adverse party's deposition testimony can be used at trial for any purpose, even if the testimony is not impeachment and even if the adverse party is testifying. Code of Civil Procedure section 2025.620, subdivision (b) makes clear that an adverse party is not just the named defendant, but includes anyone who was an officer, director, managing agent, employee, agent, or designee under section 2025.230 of a party. If the deponent is an employee or falls under any of these categories at the time of deposition, they are considered an adverse party under section 2025.620(b). It does not matter if they have later left the company.

However, if a deponent is already a former employee at the time of deposition, they are less likely to be considered an adverse party under section 2025.620(b) unless they have been designated as a person most qualified by an adverse party.

Depositions of other witnesses may also be admissible under certain circumstances at trial. Of course, if a witness is testifying and contradicts their sworn deposition testimony, that deposition testimony can be read into the record for impeachment. But if a witness has gone missing or is otherwise unavailable, the deposition transcript can be read or played into the record. The same goes for any witness that resides more than 150 miles from the courthouse under section 2025.620, subdivision (c).

For deposition testimony that is admissible at trial, many people wonder specifically *when* they can read from the transcript or play part of the deposition testimony. This varies somewhat by witness type and judge, but the world is your oyster. Of course, you can read from a witness's deposition transcript during that witness's trial testimony for impeachment purposes. But that is not your only option if you have other reasons for being able to play the tape or read the transcript. Consider whether instead of directly confronting a witness with deposition testimony on the stand, you might be better off simply playing the tape before or after their testimony. I have found this particularly useful if I have a witness who is sympathetic or may be difficult in person but gave me everything I needed at deposition.

One last important note: The party offering deposition testimony needs to make sure to lodge the deposition transcript with the clerk before the start of trial. Generally, you are required to lodge the original, signed version, but in practice, most courts, assuming all parties are fine with it, will allow a certified copy to be lodged instead.

Hail Mary: Discovery is closed and I need more evidence

If the restless nights before trial lead you to the conclusion that you need additional evidence at trial, fear not, there are options. Some of these strategies are true Hail Mary attempts. Treat them as such.

Notices to appear and produce

Code of Civil Procedure section 1987 governs requests to appear at trial and requests for production from a party to the case. These must be served 10 calendar days in advance if just requesting the appearance of a party witness or 20 calendar days in advance if requesting the production of documents. The practice is to serve notices to appear and produce for your trial date at the hub.

Many people believe that a section 1987 notice to appear and produce must

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be served at least 20 days before trial. However, the code is clear that a section 1987 notice to appear and produce must be served 20 days *before the time required for attendance*, not the date of trial. If you are less than 20 days away from your trial date, serve it now and state the time required for attendance in the alternative, for example: "the fifth day of trial or March 20th, whichever comes sooner."

Keep any requests for production narrow; a request to appear and produce is not meant to be as broad as a request for production. Use these for specific documents like the original version of a photo or video, or for sub-rosa video or other surveillance.

Many lawyers on both sides serve a notice to appear and produce with a full duplicate of any requests for production they have previously served. This is improper, as section 1987, subdivision (c) requires the notice to state the exact materials or things desired, not merely a category of documents. The time to object to a notice to appear and produce is short: five days after service of the notice or "any other time period as the court may allow." Be sure to keep your requests specific and exact so your objections are better taken to any notice received from the other side.

Another common fumble with notices to appear occurs when a party notices the person most knowledgeable from the defendant entity to appear under section 1987. Person most knowledgeable notices are fine for deposition – they are not fine for trial and must be specifically identified by name both in the notice to appear and on the witness list.

Trial subpoenas – I need a witness

Note that there is *no* mileage limit for civil subpoenas if the witness is a California resident. A quick search online will direct you to an applicable code section for witness subpoenas in criminal matters, which are only effective within 150 miles of the courthouse unless the court finds sufficient cause to justify the subpoena anyway. Opposing attorneys are quick to take advantage of this confusion, but the code is clear: the mileage limit only applies in criminal cases. (See Code Civ. Proc., § 1989.)

There is also, technically, no minimum number of days before trial for service of a subpoena. Subpoenas can even be served while trial is underway. But Code of Civil Procedure section 1987, subdivision (a) does require that the witness has a reasonable amount of time for preparation and travel to the place of attendance. Practically speaking, more notice is always better, but in the current day and age it is difficult to know more than a few days in advance when, exactly, you will need a witness. I will often serve a subpoena for the first day I expect to present evidence and include a letter asking the witness to please call or email me as soon as possible to make arrangements for a convenient time for them to testify and, assuming I am fine with virtual testimony from this witness, letting them know virtual testimony is an option.

If the witness does call and is unwilling to cooperate, which can happen, especially with medical providers, I remind them that they have been served with a subpoena and while I would prefer to avoid asking the court to make them appear, that is an option I have at my disposal.

One other common question that comes up in trial is whether a plaintiff can subpoena an expert retained by the defense. The answer is yes. This often comes up once you have realized that you need a defense expert to fill a gap in your case, or you decide to save the cost of calling your own expert because your own expert and the defense expert say essentially the same thing. Because the plaintiff puts on evidence first and the defense will not know what exactly the plaintiff presents before the plaintiff presents it, you will realize you need a defense expert's testimony to gap-fill before the defense realizes you do. But if the gap is obvious to you, it will also be obvious to even minimally competent defense counsel. So, serve the subpoena before the defense realizes you have a problem.

Subpoenaing a defense expert could, of course, raise suspicion that there is an issue with your case in chief. If this is a big enough concern, consider subpoenaing all the defense experts. This will likely result in a phone call from defense counsel where you can negotiate a stipulation, agreeing not to call the defense's experts during your case in chief so long as the defense agrees they are calling those experts during their case in chief.

If the plaintiff does end up calling a defense expert during their case in chief, the plaintiff is responsible for the defense expert's testimony fee for that time. (See Gov. Code, § 68092.5, subd. (a).)

Document subpoenas

You can also seek documents at the time of trial through a subpoena duces tecum under Code of Civil Procedure section 1985. You can also utilize a subpoena duces tecum to obtain documents from a party to the case, but given they are more labor intensive than a notice to appear and produce, this is not an optimal decision. The subpoena duces tecum form walks through what needs to be in the accompanying good cause affidavit under section 1985, which includes the exact material to be produced; their importance to the case; facts constituting good cause for their production; and an affirmation that the witness has those items in their possession, custody, or control. Good cause for production generally requires that the documents are not available from any other source.

A subpoena duces tecum can be served at any time and, critically, notice to opposing parties is *not* required like it is for a deposition subpoena. So yes, the defense may be subpoenaing additional records for trial without your knowledge (unless there are notice-to-consumer requirements).

Rebuttal expert testimony

Still need an additional witness or realize there is a foundational issue with

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an expert witness? You should have a lot of leeway on rebuttal. *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, makes clear that you can call an undesignated expert on rebuttal to rebut an incorrect assumption underlying a defense expert's opinions. This is different than merely contradicting another expert's opinions; an impeachment expert must provide testimony contradicting or proving false a fact upon which the defense expert relied in providing an opinion.

This is critical: Impeachment in the rebuttal of expert testimony means negating the *basis* of the opinion, *not* the opinion itself. This is a careful line to walk but if, for example, an electronic-data recorder contradicts a defense accident reconstructionist's version of events, calling your own accident reconstructionist on rebuttal to discuss the data and lay its foundation may prove successful.


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