

Discovery Overview

- **Purpose of Discovery**
 - All Discovery must be “Reasonably calculated to lead to the discovery of admissible evidence.”
- **General Principle**
 - The basic purpose of discovery is to take the “game” element out of trial preparation by enabling parties to obtain the evidence necessary to evaluate and resolve their dispute beforehand. *Greyhound Corp. v. Sup. Ct.*, 56 Cal.2d 355, 376, 15 Cal. Rptr. 90, 99 (1961).
- **Definition of Discovery**
 - A pre-trial device that can be used by one party to obtain information about the case in order to assist the party’s preparation for trial - Black’s Law Dictionary 5th Ed.
- **Scope of Discovery**
 - “Unless limited by order of the court ... any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved ... if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence ...” CCP Section 2017.010
 - Permissible scope of discovery depends on three factors
 - Is the information relevant to the subject matter involved?
 - Is it admissible or reasonably calculated to lead to the discovery of admissible evidence?
 - Is it privileged or confidential? If so, it’s not discoverable)
- **Discovery Plan**
 - A Discovery plan sets out the potential Discovery you will undertake in a case. Always have a Discovery plan – even if you decide not to undertake discovery. Every case is different and the available Discovery tools can obtain helpful information.
- **Discovery Tools:**
 - Interrogatories
 - Written questions asked by one party to another, which requires a written responses under oath, and can be used as evidence at trial.
 - Oral and Written Depositions
 - Testimony taken by one party on another party or a non-party; before trial; under oath; subject to cross examination; and preserved in writing.

- o Requests for Admission
 - Written demands made by one party on another party requiring the admission or denial of certain facts or contentions under oath.
- o Inspection and Production of Documents, Tangible Things, Land, and Other Property
 - A demand which compels a party to allow entry upon land or the production of documents, tangible things and other property for the purpose of copying, inspecting, testing and measuring.
- o Independent Medical Exams
 - A medical exam of a party whose mental or physical condition is in controversy in the action.
- o Expert Trial Witnesses
 - An individual that will aid the trier of fact through specialized knowledge, which was gained through skill, education, training, or experience beyond that of the ordinary person/juror/judge.
- **What will Discovery achieve?**
 - o Preserves evidence for Trial
 - o Provides a better assessment of the case
 - o Basis for Pre-Trial Motions
 - o Narrows Issues
 - o Promotes out of Court Settlements
- **Disadvantages of Discovery**
 - o Costs
 - o Time consuming
 - o May provide opposing party with advantageous information.
- **Parties vs. Nonparties to the Action**
 - o Discovery is available to both the plaintiff and defendant.
 - o Must determine parties and non-parties in the action.
 - o Discovery generally cannot be obtained from non-parties.
- **Responding to Discovery and Objections**
 - o The party, entity or person that receives Discovery is known as the responding party.
 - o The responding party must provide timely responses or the propounding party (the party that is requesting the discovery) can request court sanctions.

- o Responses can include objections. An objection is a legal basis as to why the propounding party is not entitled to the discovery. There are various objections that can be asserted

CASE MANAGEMENT

- Always document your case.
- Calendar when Discovery must be completed.
- Calendar when Discovery can be initiated.
- Calendar the date that responses are due.
- Create separate discovery section in the case file.
- A copy of the discovery is sent out by the propounding party. The Responding party mails back original responses.

CCJI

When drafting a complaint or answer, the California Civil Jury Instructions should be reviewed. These instructions are helpful in determining the element(s) of the cause(s) of action that must be proven by the plaintiff or the defenses that should be asserted by the defendant. Discovery provides an opportunity for a party to prove or disprove element(s) of the cause(s) of action and/or the defenses asserted. For more information on jury instructions, visit : <http://www.courtinfo.ca.gov/jury/juryinst.htm>

LIMITED VS. UNLIMITED CIVIL ACTIONS

Cases that are \$25,000 or under, and there is no dispute relating to real property, are classified as limited actions. Cases over \$25,000 and/or it relates to real property issues are classified as unlimited actions. The type of action plays very important role in the discovery process. In limited cases, a party may serve no more than 35 of any combination of interrogatories, request for admissions or inspection demands. Therefore, discovery is very restricted. See CCP Section 94. However, the 35

combination rule does not apply to unlimited cases. Each module will address the various discovery rules.

CODE OF CIVIL PROCEDURE SECTION 2019.010 - 2019.210

Approved methods

2019.010.

Any party may obtain discovery by one or more of the following methods:

- (a) Oral and written **depositions**.
- (b) **Interrogatories** to a party.
- (c) **Inspections** of documents, things, and places.
- (d) Physical and mental **examinations**.
- (e) **Requests for admissions**.
- (f) Simultaneous exchanges of **expert trial witness** information.

NOTE: These are the formal Discovery tools, but Discovery is not limited to just these enumerated methods.

- Informal discovery is all other activity that takes place during the discovery process which involves gathering information and facts about the case.

Sequence and timing

2019.020.

(a) Except as otherwise provided by a rule of the Judicial Council, a local court rule, or a local uniform written policy, **the methods of discovery may be used in any sequence**, and the fact that a party is conducting discovery, whether by deposition or another method, shall not operate to delay the discovery of any other party.

(b) Notwithstanding subdivision (a), **on motion and for good cause shown, the court may establish the sequence and timing of discovery** for the convenience of parties and witnesses and in the interests of justice.

Court-imposed restrictions

2019.030.

(a) **The court shall restrict** the frequency or extent of use of a discovery method provided in Section 2019.010 **if it determines either of the following:**

(1) The discovery sought is **unreasonably cumulative or duplicative**, or is **obtainable from some other source that is more convenient, less burdensome, or less expensive**.

(2) The selected method of discovery is **unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues** at stake in the litigation.

(b) The court may make these determinations **pursuant to a motion for a protective order** by a party or other affected person. This motion shall be accompanied by a **meet and confer** declaration under Section 2016.040.

(c) **The court shall impose a monetary sanction** under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who **unsuccessfully makes or opposes** a motion for a protective order, **unless it finds** that the one subject to the sanction acted with **substantial justification** or that other **circumstances make the imposition of the sanction unjust**.

NOTE: The phrase “unreasonably cumulative” implies that discovery can be cumulative so long as it is reasonably cumulative. And “unduly burdensome” implies that discovery can be burdensome so long as it is unduly burdensome.

Application of discovery to electronically stored information

2019.040.

(a) **When any method** of discovery **permits** the production, inspection, copying, testing, or sampling of documents or tangible things, **that method shall also permit** the production, inspection, copying, testing, or sampling of **electronically stored information**.

(b) **All procedures** available under this title **to compel, prevent, or limit the production**, inspection, copying, testing, or sampling of documents or tangible things **shall be available** to compel, prevent, or limit the production, inspection, copying, testing, or sampling of **electronically stored information**.

NOTE: This section ensures that electronic information is governed by the same rules that govern more traditional methods of storing information.

Misappropriation of trade secrets

2019.210.

In any action alleging the misappropriation of a trade secret under the Uniform Trade Secrets Act (Title 5 (commencing with Section 3426) of Part 1 of Division 4 of the Civil Code), **before commencing discovery relating to the trade secret**, the party alleging the misappropriation **shall identify the trade secret** with reasonable particularity subject to any orders that may be appropriate under Section 3426.5 of the Civil Code.

DISCOVERY INTRO REVIEW QUESTIONS

- What is the definition of discovery?
- Permissible scope of Discovery?
- What are the six (6) discovery tools?
- What will discovery achieve?
- What are the advantages and disadvantages of discovery?