LAW & STEIN LLP

Avoid Surprises!
Obtain & Share Evidence Early!

by Griffin R. Schindler, Esq.

One of the most important, and most expensive, phases of litigation is the discovery stage. It is through discovery that litigants learn what documents the other side has and what their testimony at trial will be. While it may seem counterintuitive to give the opposing party the evidence supporting your claim, the primary purpose of discovery is to avoid surprises at trial.

By discovering what each party has in support of their allegations and defenses, you and your counsel can more effectively evaluate your litigation position and decide if settling sooner or pushing through to trial is in your best interest.

In California civil and probate litigation, there are two main categories of discovery: written discovery and oral discovery.

Written Discovery

As the name suggests, written discovery is when one party sends, or "propounds," written questions and demands to another party that must be answered and verified in writing by the responding party as true and correct under penalty of perjury. One type of written discovery is interrogatories. These take the form of questions and demands aimed at establishing the responding party's personal knowledge about a particular topic. In a trust litigation case where it is alleged that the trustor lacked the mental capacity to amend the trust, a party may ask the other side to "state all facts indicating that the trustor could manage his own finances at the time the amendment was signed." The responding party would then have to explain how they know that the trustor was capable of handling his own finances. The

inability to respond with concrete facts may end up supporting the notion that the trustor was mentally incapacitated.

Another form of written discovery is requests for admission. This discovery tool requires the responding party to either admit or deny specific statements. In the same trust litigation case, a request for admission may ask the responding party to “admit that the trustor was declared incapacitated by a medical professional.” Depending on the interrogatories that were propounded, the responding party may be required to justify any response that is not an unequivocal admission by stating all facts and identifying all people and documents supporting the basis for the denial.

The final type of written discovery is inspection demands, which are sometimes called 'requests for production of documents'. These requests ask the responding party to produce tangible items supporting their allegations or defenses. An inspection demand typically requires the responding party to produce documents, but it can also require that land be made available for testing or that computers be scanned so that electronically stored information can be extracted. It is the responding party’s obligation to gather and produce (or make available) all responsive tangible items within their possession, custody, or control.

Your attorney will help craft your responses by, among other things, including objections as a preface to your response. For example, there may be grounds to object to a particular request because it is irrelevant or seeks privileged information. Depending on the objections raised, your attorney may decide that you should not respond at all to a specific request.

Oral Discovery

On the other side of the discovery spectrum is oral discovery, which takes the form of depositions. At a deposition, the attorney of the party who scheduled the deposition will ask the deponent (i.e., the responding party) a series of questions. Depositions are taken under oath, which means your responses must be truthful. If you are being deposed as an individual, the deposition could last up to seven hours. As with written discovery, it is important to make objections. However, just because you or your attorney object to a question does not mean that you do not have to answer. Unless your counsel instructs you not to answer a question, you should respond.

Whether you are responding to written discovery or being deposed, it is crucial that you preserve your rights. This means objecting to questions and demands that, among other things, are improperly phrased or seek privileged information. There is a myriad of objections to make before responding to a particular question (or not responding at all, as the case may be). However, if the objection is not made before you respond, it will be waived, and you will not be allowed to make that objection at trial.

Discovery Related Deadlines

There are strict deadlines that must be adhered

to when responding to discovery requests or reviewing discovery responses. A party who receives requests must serve their responses to the asking party within 30 days of the date the requests were sent, not the date they were received. Depending on how the requests were delivered (e.g., email, regular mail, etc.), the 30-day deadline may be automatically extended by a set number of days. Keep in mind that some delivery methods extend the response deadline by court days while other methods increase the deadline by calendar days.

As a professional courtesy, attorneys routinely grant the responding party additional time to respond if needed. However, these extensions will not be granted if too many are requested or if it appears that the responding party is abusing the discovery process. Any such extensions must be in writing. Failing to timely serve discovery responses can result in a waiver of all objections to the requests, including objections based on the attorney-client privilege and attorney work product doctrine.

After your receipt of discovery responses, you must carefully review them to confirm that they are code compliant. In this case, “code compliant” does not mean that you like or agree with the responses. Rather, it means that the responses are technically proper. If the responses are improper (e.g., the responding party failed to respond to some or all your requests) or if the objections raised are meritless, you can bring a Motion to Compel.
Depending on the responses, the motion will either be a Motion to Compel Responses (if no responses were made at all) or a Motion to Compel Further Responses (if responses were made but they were still improper). If the responding party fails to respond to your requests for admission, you can bring a Motion to Deem Facts Admitted, which, if granted, means that the facts that were requested to be admitted are deemed true. This can be a huge blow to the other side’s case.

A Motion to Compel must be brought within 45 days of the date the responses were served. However, the 45-day deadline does not apply if no responses were served. You should not just wait around in this circumstance as the judge may deny the motion if you take too long to file it. Prior to bringing a Motion to Compel (except in situations where the other side did not respond at all), you are required to discuss the basis of your motion with the responding party and attempt to resolve the dispute. This is called 'meeting and conferring'. Failing to meet and confer before filing a Motion to Compel will likely result in a swift dismissal of the motion.

Penalties for Abusing the Discovery Process Title

Discovery should not be treated as a game. Failing to properly participate in the discovery process can result in severe penalties. If a party requests documents, they must be produced unless there is a legitimate reason not to (e.g., privileged communications, trade secrets, etc.). Withholding documents that should be produced or failing to identify witnesses can result in the withholding party’s inability to use those documents or call those witnesses at trial (remember, discovery is supposed to prevent surprises).

The judge has broad authority to penalize a party who is misusing or exploiting discovery. For example, the judge can order the responding party to pay the propounding party’s attorneys’ fees and costs for having to bring a Motion to Compel. If a party is ordered to respond to certain discovery requests or disclose information but still fails to do so, the judge can rule that certain issues are automatically decided in the other side’s favor or, if the discovery abuse is significant enough, the judge can terminate the lawsuit

and determine that the other side is the prevailing party.

Discovery is a necessary but complex stage of litigation. It can take months or years to complete and can often make or break a case. It is vital that your attorney takes advantage of all the discovery tools available (where appropriate).

The attorneys at Law & Stein are well versed in preparing and responding to discovery requests, and they are ready to help you use discovery to strengthen your case.

We look forward to serving you & wish you the best

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