2

Creating a Discovery Plan

Martin L. Fineman
Joshua S. Goodman
Farley J. Neuman

I. SCOPE OF CHAPTER §2.1

II. PREPARING TO CREATE DISCOVERY PLAN
A. Determining Issues of Case §2.2
1. Legal Issues: Reviewing Pleadings and Anticipated Jury Instructions §2.3
2. Factual Issues §2.4
3. Possible Sources of Evidence to Prove Facts and Resolve Legal Issues §2.5
4. Drafting Chronology §2.6
B. Identifying Discovery Goals §2.7
1. Identifying Uncontested Facts and Issues; Committing Opponent to Specific Version of Facts §2.8
2. Preparing for Pretrial Motions §2.9
3. Minimizing Discovery Disputes §2.10
4. Preserving Evidence for Trial §2.11
5. Obtaining Information for Settlement §2.12
C. Obtaining Client's Participation in Discovery Decisions
1. Interviewing Client About Key Events §2.13
2. Informing Client of Duty to Preserve Evidence §2.14
3. Setting Priorities Within Litigation Budget §2.15
4. Analyzing Risks and Benefits §2.16
D. Determining Type of Case §2.17
1. Complex Case §2.18
2. Limited Civil Case §2.19
E. Taking Timing Into Account §2.20
1. When Discovery Closes §2.21
2. Extensions of Time to Respond to Discovery §2.22
3. Motion Timing §2.23
4. Local Rules §2.24
5. Case Disposition Time Goals (TCDRA) §2.25
a. Exempting Case From Disposition Time Goals §2.26
b. Expedited Disposition §2.27

6. Judicial Arbitration Deadlines §2.28
F. Determining Which Discovery Methods to Use §2.29

III. CREATING DISCOVERY PLAN
A. Deciding When to Develop Plan §2.30
B. Conferring With Other Counsel §2.31
C. Planning Informal Discovery §2.32
1. Witness Interviews §2.33
a. Party Represented by Counsel §2.34
b. Written or Recorded Statements §2.35
c. Unrecorded Interviews §2.36
2. Investigations and Informal Procedures
a. Internet Searches §2.37
b. Inspection of Property Open to the Public §2.38
c. Parties' Exchange of Information §2.39
d. Early Exchange of Expert Witness Opinions §2.40
e. Public Records Search §2.41
D. Other Statutory Procedures for Discovery §2.42
1. Request for Statement of Damages §2.43
2. Demand for Bill of Particulars §2.44
3. Gathering Information to Introduce by Judicial Notice §2.45
4. Using Injunction to Prevent Destruction of Evidence §2.46
5. Using Subpoenaed Records at Trial Without Witness §2.47
6. Request Under California Public Records Act §2.48
7. Request Under Freedom of Information Act §2.49
8. Request Under Public Safety Officers Procedural Bill of Rights Act §2.50
E. Coordinating Formal Discovery Methods §2.51
1. Interrogatories and Demands for Inspection §2.52
2. Interrogatories With Requests for Admission §2.53
3. Documents Before or at Depositions §2.54
4. Documents Before Medical Examination §2.55
F. Determining Sequence of Discovery
1. Sequence of Discovery Methods in General §2.56
2. Sequence of Depositions §2.57
a. Locking Plaintiff Into His or Her Story §2.58
b. When Plaintiff's Injuries Are Unresolved §2.59
c. When One Party Is a Corporation §2.60
d. Defendants' Identity and Liability §2.61
e. Identity of Percipient Witnesses §2.62
f. Medical Records §2.63
g. Medical Examinations §2.64
G. Revising Discovery Plan §2.65

IV. STRATEGIC CONSIDERATIONS
A. Larger Consequences of Decisions §2.66
B. Hiring and Consulting Experts Early §2.67
C. Using a Discovery Referee
1. When Discovery Referee May Be Helpful §2.68
2. Obtaining Discovery Referee §2.69
3. Payment of Referee's Fees §2.70
4. Scope of Referee's Authority §2.71
5. Peremptory Challenge of Referee §2.72
D. Handling Complex Litigation
1. Complex Litigation Defined §2.73
2. Designating Case as Complex §2.74
E. Stipulated Discovery Plan When Multiple Parties §2.75
1. Sample Provisions of Stipulated Plan §2.76
2. Using Database in Large Document Cases §2.77
F. Using Technology §2.78
G. Preserving Electronic Evidence §2.79

V. PLANNING DISCOVERY IN FEDERAL COURT §2.80

§2.1 I. SCOPE OF CHAPTER

This chapter addresses how to make a plan for discovering, in the most cost- and effort-efficient manner, the evidence necessary to prove or defend counsel's case.

Discovery can be wide-ranging. Under California discovery law, a party is entitled to obtain information about any unprivileged matter that is relevant to the subject of the lawsuit, if the matter itself is "admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." CCP §2017.010. Precisely because discovery can be so extensive, it must be carefully planned. On the scope of discovery, privileges, and other protections, see chaps 1, 3.

Discovery can also be the most expensive and time-consuming phase of litigation. Unplanned discovery creates the risk of unnecessary lawsuit expense, duplication of effort, and insufficient evidence to prove the client's case. See §2.10. Careful planning helps avoid discovery disputes, which are perhaps the single most wasteful aspect of litigation. On discovery motions and sanctions, see chap 15.

II. PREPARING TO CREATE DISCOVERY PLAN

§2.2 A. Determining Issues of Case

Because one of the primary purposes of a discovery plan is to obtain the evidence needed to prove the client's case, the starting point for any discovery plan is an analysis of the factual and legal issues the case presents. Counsel should identify the issues in the case, determine what evidence is needed to prove or disprove each element of each claim or defense, and decide how best to obtain that evidence. Counsel should ask these ultimate questions: "What do I have to prove at trial? How am I going to prove it?" The answers to these questions lead to the creation of a discovery plan. In addition, counsel should use discovery to determine what evidence the other side has against his or her client, what evidence they are likely to present at trial, and to determine how best to counter that evidence or blunt its impact.

PRACTICE TIP➤ A good discovery plan should evolve as the case progresses and counsel learns of new potential sources of evidence. Accordingly, counsel should develop an initial discovery plan which anticipates change and allows ample time before the discovery cutoff for at least one or more additional waves of new discovery to follow-up on leads from the prior round of discovery. One of the most common mistakes attorneys make is not beginning discovery early enough to allow time to conduct additional discovery as the case develops.

§2.3 1. Legal Issues: Reviewing Pleadings and Anticipated Jury Instructions

Pleadings. The pleadings (complaint, cross-complaint, and answers to the complaint and any cross-complaints) define the scope of the case and reveal the causes of action and affirmative defenses in issue. They are the starting point for determining the legal issues. Counsel should make a list of each cause of action pled in the complaint and any cross-complaints and each affirmative defense pled in the answer (or answers).

Jury instructions. To determine which law governs the claims and defenses tendered in the pleadings, it is useful to consult the jury instructions that the trial judge is likely to apply to plaintiff's claims

and defendant's defenses at trial. Jury instructions also determine in large part what facts need to be proved at trial. Consult the California Civil Jury Instructions (CACI) for each cause of action and defense that appears in the pleadings and conduct supplementary research if necessary. Although the CACI instructions are relatively complete, they do not cover every conceivable facet of every cause of action or defense. To view the CACI on the Web, see www.courtinfo.ca.gov/reference/documents/civiljuryinst.pdf.

NOTE➤ The Judicial Council-approved CACI instructions "are the official instructions for use in the state of California" and "it is recommended that the judge use the Judicial Council instruction" that applies to a subject on which the trial court judge determines the jury should be instructed. Cal Rules of Ct 855(a), (e) (use of CACI instructions "is strongly encouraged").

§2.4 2. Factual Issues

After making a list of the legal issues presented by the case, counsel should make a list of the facts that must be proven in order for counsel's client to prevail on those issues. Determining how to obtain the evidence to prove those facts is, in effect, the discovery plan.

NOTE➤ A plaintiff's attorney who fails to carefully consider the elements of a claim before filing the complaint or fails to thoroughly plan how to obtain the necessary evidence early in the case is likely to encounter a failure of proof either at trial or when opposing a motion for summary judgment or summary adjudication of the issues. The same is true of a defendant's attorney with regard to an affirmative defense or a cross-complaint. The practice of pleading lengthy lists of often frivolous affirmative defenses usually only serves to encourage useless discovery and unnecessary costs.

Punitive damages example. If a plaintiff employee is making a punitive damages claim against a corporate employer, the plaintiff must prove that "an officer, director, or managing agent of the corporation" either engaged in, authorized, or ratified the conduct that is found to constitute oppression, malice, or fraud, or that the employer had advance knowledge of the unfitness of the employee who

engaged in the wrongful conduct, and employed that person with a conscious disregard of the rights and safety of others. CC §3294(b). See JC Cal Civ Jury Inst 3943 (CACI). The legal issues involved in proving punitive damages give rise to a host of factual issues that plaintiff's counsel might consider when creating the discovery plan. For example:

- What evidence is likely to prove that the employer had knowledge of a particular employee's unfitness or misconduct?
- Who or what is the likely source of this evidence?
- Who are the corporation's managing agents? How can counsel prove this status?
- Should counsel consider interrogatories and/or a demand for production of the allegedly unfit employee's personnel file?
- Should counsel consider deposing the unfit employee's supervisors or coworkers?
- What occurred after the incident in question that might show ratification? When did this occur?
- Should counsel depose other witnesses to obtain evidence about what happened after the incident to show ratification?
- What are other possible sources of information that might show ratification?

§2.5 3. Possible Sources of Evidence to Prove Facts and Resolve Legal Issues

Once counsel has identified the legal issues in the case and the facts that must be proven to win the case or to defend it, he or she should consider what evidence is likely to exist, what form it may take, and who is likely to have custody of it. For example, evidence that a corporate employer ratified the wrongful acts of its employee might be contained in notes of meetings between corporate officers preserved, *e.g.,* in a meeting participant's e-mail, in a memo on a corporate officer's private home computer, in the voicemail box of a participant's colleague, or in a letter in a corporate officer's file cabinet. Although the sources of evidence will be revealed in the discovery process, when planning discovery it is useful to consider what evidence is likely to be

available to prove the necessary facts and where this evidence may be found.

EXAMPLE➤ If the case requires the deposition of out-of-state witnesses, counsel must build extra time into the discovery plan for, *e.g.*, retaining local counsel or traveling to the deposition location. On out-of-state depositions, see chap 12.

The client is frequently the best and most efficient source of information. Before embarking on discovery, counsel should almost always thoroughly interview the client in person, and review the client's pertinent documents. If the client is an entity, interviews of several or many people may be appropriate. Surprisingly, attorneys often do not want to "bother" their clients with questions, interviews, and requests to examine documents, but an early and thorough investigation is a very wise investment. For example, a defense attorney sometimes discovers that the plaintiff's allegations are all true—or, worse yet, that the plaintiff does not yet fully understand the extent of the defendant's wrongdoing. Thus, early and thorough inquiries to the client not only aid development of a discovery plan, they may also aid in deciding whether to engage in early settlement negotiations with the goal of preventing a bad case from becoming worse.

On when the duty to preserve electronic evidence arises, see §§4.6–4.8. On how information can be stored electronically and the possible sources of electronic evidence, see chaps 4, 8.

On obtaining information from the client, see §2.13.

On informal discovery, see §§2.32–2.41.

§2.6 4. Drafting Chronology

Making a detailed chronology of the facts affecting liability can help counsel understand the case and plan for discovery. A chronology can be one of the most important steps in the discovery process, often highlighting the significance of events, documents, or testimony that might go unnoticed if not viewed in context. This is particularly true in cases involving issues of notice, discovery of facts giving rise to a cause of action, and other claims or defenses that depend on proof of a party's state of mind at a particular time.

PRACTICE TIP➤ Counsel should be sure that any chronology provided to an expert is factually accurate. If the expert relies

on the chronology, opposing counsel can use any errors to undermine the basis of the expert's opinions. For this reason, many attorneys do not provide the chronology to expert witnesses to avoid this potentially embarrassing problem. On expert discovery, see chap 11.

Like the discovery plan itself, the chronology should be created at the outset of the case and revised as litigation proceeds. Similarly, when one of the parties is entity, it is useful to create a organizational chart early in the litigation. On using a chronology when preparing for depositions, see §6.5.

NOTE➤ There is a variety of computer programs that can assist counsel in creating and maintaining timelines and with overall case management.

§2.7 B. Identifying Discovery Goals

The next step in formulating a discovery plan is to identify and consider the goals for discovery in the case. The general goals of discovery are to obtain evidence in favor of a client's case and to determine what evidence the other side will likely present. Other important goals include:

- To identify uncontested facts and issues (see §2.8);
- To commit the opponent to a specific version of the facts (see §2.8);
- To prepare to make or oppose pretrial motions (see §2.9);
- To minimizes discovery disputes (see §2.10);
- To preserve evidence for trial (see §2.11); and
- To obtain information for settlement (see §2.12).

NOTE➤ Unfortunately, some attorneys believe there are other discovery goals, such as to increase the opposition's litigation expenses or to wear down the opposition psychologically. These tactics are not only unethical but also usually ineffective. When faced with such adversity, litigants rarely fold their cards; instead, they tend to become more entrenched and less rational, escalating the cost and anguish to all parties.

§2.8 1. Identifying Uncontested Facts and Issues; Committing Opponent to Specific Version of Facts

Identifying uncontested facts and issues. Even relatively minor or uncontroversial facts (*e.g.*, dates, places, persons present, genuineness of documents) may have to be proved at trial. To ignore these facts is to run the risk that proof at trial may be unavailable or expensive to obtain, or that the opposing party will suddenly deny or dispute the facts or raise new issues after discovery has closed. To avoid surprise at trial, counsel should obtain testimony confirming these matters at a deposition, make them the subject of interrogatories or requests for admission early in the litigation, or obtain a written stipulation from opposing counsel.

EXAMPLE➤ Plaintiff's punitive damages claim is that the corporate employer knew that the person who engaged in the wrongful conduct was unfit, but employed that person anyway with conscious disregard for the rights and safety of others. The plaintiff should be prepared to prove that this person was an employee of the employer on the date of the wrongful conduct.

Committing opponent to specific version of the facts. It is often crucial to "lock in" the testimony of an opposing party or an unfriendly witness to the maximum extent possible, even if counsel already knows what that witness intends to say. Discovery of detailed facts allows counsel to develop the claims or defenses at issue in the case.

PRACTICE TIP➤ If counsel can confine the witness to a particular version of the facts during a deposition, it will be possible to impeach that witness at trial if the witness changes that version or varies from it significantly. See §5.32.

On deposition procedures, see chap 5; on conducting and defending depositions, see chap 6.

§2.9 2. Preparing for Pretrial Motions

From a defense perspective, one important purpose of discovery is to uncover facts to support a dispositive motion, *e.g.*, summary

judgment (all causes of action) or summary adjudication of issues (some causes of action). See CCP §437c. The task of plaintiff's counsel is to obtain the evidence necessary to oppose such motions on the grounds that a triable issue of material fact exists for each cause of action or defense. CCP §437c(c). For discussion of summary judgment and summary adjudication motions, see California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

NOTE➤ Counsel should be aware of the potential need for discovery immediately after the commencement of the litigation if a request has been made for a temporary restraining order or a preliminary injunction. These motions often involve issues in addition to those presented by the merits of the case, *e.g.*, the extent of the parties' injuries and the equities of granting provisional relief. On obtaining a temporary or preliminary injunction, see Civ Proc Before Trial, chap 32.

§2.10 3. Minimizing Discovery Disputes

One of the underlying causes of unnecessary discovery disputes is the pursuit of discovery with no specific ultimate goal in mind. Conducting discovery with a well-defined purpose may help avoid time-consuming and wasteful disputes that often create friction with clients who see their legal fees mount without much substantive accomplishment. Even when discovery disputes cannot be avoided, a well-defined discovery plan will help counsel justify the challenged discovery to opposing counsel, the client, or a discovery commissioner or judge. On motions to compel and motions for protective orders in general, see chap 15. Some discovery may appear to the responding party to be irrelevant and thus suspect, but if it is part of a well thought out discovery plan, counsel is in a much better position to overcome this first impression.

EXAMPLE➤ Subpoenaing a plaintiff's employment records from 1983 will probably appear unnecessary to the point of harassment. On the other hand, if the propounding attorney can explain why those records will assist in the evaluation of the case, be of importance to a jury or settlement judge, or lead to relevant evidence, the attorney can probably avoid, or at least win, a discovery dispute.

§2.11 4. Preserving Evidence for Trial

A primary objective of discovery is to gather and preserve evidence for trial. It is important to take depositions to preserve evidence if counsel anticipates that a witness may be unavailable at trial or may change his or her testimony over time. See CCP §2025.620(a), (c). On depositions to preserve testimony, see §§5.32–5.33.

Preserving evidence, especially electronic evidence. If there is a danger that evidence may be lost through spoliation or otherwise, particularly electronically stored information, counsel should consider seeking an injunction to preserve the records. *Dodge, Warren & Peters Ins. Servs., Inc. v Riley* (2003) 105 CA4th 1414, 130 CR2d 385 (affirming trial court order granting plaintiff preliminary injunction requiring preservation of electronic evidence by prohibiting defendants from destroying such evidence). See also *Northpoint Homeowners Ass'n v Superior Court* (1979) 95 CA3d 241, 244, 157 CR 42. On preservation orders, see §§8.16–8.17. On spoliation of electronic evidence, see §8.108. On the duty to preserve electronic evidence, see §§4.6–4.8.

Counsel should attempt to obtain documents promptly, particularly from nonparty witnesses, before they are misplaced, destroyed, lost, or altered. Counsel may demand documents from parties under CCP §2031.010, but must rely on deposition subpoenas to obtain documents from nonparty witnesses. CCP §2020.010(b). See §5.7.

Laying a foundation. Laying a foundation for the admissibility evidence is also a task for the discovery stage of the case. Counsel should gather facts to authenticate documents at trial or establish a foundation for the admissibility of physical evidence or business records, *e.g.*, through a custodian of records or other qualified witness. Because many foundational facts are uncontroversial, it may be possible to enter into a written stipulation with opposing counsel establishing those foundational facts. If a stipulation cannot be obtained, requests for admission are well suited to establishing such facts. On requests for admissions, see chap 9.

PRACTICE TIP➤ By focusing on the objectives of discovery early in the case, an attorney is less likely to miss important facts or fail to obtain admissible evidence of these facts. An attorney's worst nightmare is being surprised at trial by damaging evidence that should have been obtained during discovery and that could have been addressed or diffused had the attorney learned about

it in time. A close second is being unable to prove some critical fact at trial because the attorney did not obtain the information in an admissible form.

§2.12 5. Obtaining Information for Settlement

Because over 90 percent of cases settle without trial, positioning the case for a favorable settlement may be an important goal of the discovery plan. Counsel may encourage a favorable settlement by discovering weaknesses in the opposing party's case and strategically revealing to the other party strengths in the client's case. For example, a party might depose a friendly witness primarily to reveal the testimony to opposing counsel to persuade him or her for settlement purposes. Counsel should always be seeking facts to help evaluate the case so the client can make an informed decision regarding settlement.

Class action settlements. The extent of discovery completed is one of the factors a trial court considers, balances, and weighs when determining whether a class settlement is fair, adequate, and reasonable. See *Wershba v Apple Computer* (2001) 91 CA4th 224, 245, 110 CR2d 145; *Dunk v Ford Motor Co.* (1996) 48 CA4th 1794, 1801, 56 CR2d 483. The amount of discovery conducted in a class-action lawsuit, however, will not dictate whether a settlement was fair, adequate, and reasonable to individual class members. *7-Eleven Owners for Fair Franchising v Southland Corp.* (2000) 85 CA4th 1135, 1150, 102 CR2d 777 (class-action settlement may be upheld as fair even if only minimal or informal discovery has been conducted).

On use of interrogatories in class actions, see §§7.23, 7.70.

C. Obtaining Client's Participation in Discovery Decisions

§2.13 1. Interviewing Client About Key Events

The client is an essential and relatively inexpensive source of information. Interviewing the client thoroughly can help both to identify issues in the case and to produce leads for admissible evidence for trial. A plaintiff is more often than not a percipient witness to many of the key events at issue in the lawsuit. By finding out who was present and what was said during these events, counsel