INTRODUCTION TO DISCOVERY

A lawsuit is filed and general denial has been served. Now what? Do you just wander into court on the trial date and let each side tell their story? Only in small claims, and maybe not even there. Where and how do you begin to get ready for your day in court?

In planning discovery, many lawyers begin at the end--- with jury instructions and closing argument. What are the elements of each cause of action? What do you need to prove or disprove to prevail? What evidence do you have and what do you need to acquire to support your position on each issue? Where will you find the missing evidence? Witnesses, third parties, the Internet, annual reports, surveillance cameras, private investigators, chat rooms, ISPs, other lawyers, government agencies, etc.? What is the best way to obtain it? Is it necessary or desirable to use formal discovery? How will you get that evidence admitted? Will witnesses be available at the time of trial?

You also need to know what your opponent contends and what evidence it may or may not have relevant to those contentions; you need to know the facts, documents witnesses and other potential evidence that your opponent knows. Are there any smoking guns, unknown documents, or unknown witnesses that will destroy your case? As the case progresses you may need to update this information.

Start with a plan, even if it is to conduct no discovery, and be prepared to adjust that plan as the case evolves. If you are in a jurisdiction that follows the federal rules you need to plan for the initial mandatory disclosures and discovery conference to occur early in the litigation. If not, the discovery is initiated by the parties. Is it better to depose the opposing party immediately or to gather as much information and evidence first? What will be most effective or important for your case? Thorough economic analysis and expert testimony? Pinning down a slippery party? Finding the smoking gun e-mail?

Be aware of the timing of formal discovery, the possibility of delays, and the

chance that your expectations may be unfulfilled. You may request document production to occur a week before the critical deposition. But, when the day for production arrives you may get nothing, a request for an extension of time, boilerplate objections, a document dump that prevents effective review, equivocal and evasive responses, documents in a foreign language or in a computer program you cannot read, or all of the above.

As you acquire the evidence you will want to be able to keep track of it and to integrate it into your case management. You may use binders or case management software. You may want to make sure you get in it a form you can use most effectively: paper, electronic, TIFF, native format etc.

You may want to budget for discovery and to obtain your client's approval after a careful and periodic cost / benefit analysis.

If you are the plaintiff, you have probably been thinking about your case for some time. You may have been gathering evidence from your client, from friendly witnesses, from the Internet, from other research and resources such a other lawsuits or other lawyers. Perhaps you have hired a private investigator to throughly research and informally gather all available evidence from all available sources. You will have to use formal discovery to fill the final gaps in your evidence. What is the most effective way to do so? If your opponent serves discovery on you, will you have to turn over the fruits of your labor gained at considerable expense to your opponent at no charge? Can you protect some of it under a claim of work product or privilege or by obtaining a protective order?

As a defendant you have to play catch up. Who are they? Why have they sued your client? You may need to flush out the pleadings with contention interrogatories. You may have standard form discovery that has been refined over years of practice in a specialized area that you propound after reviewing and modifying it to fit this case. The

jurisdiction may have approved form discovery that can be served or it may require disclosures without a formal discovery request.

IF IT'S RELEVANT AND NOT PRIVILEGED IT'S DISCOVERABLE. That is the simplistic yet basic rule that governs all civil discovery. Relevance for discovery purposes is broader than for trial and information need not be admissible to be discoverable. Jurisdictions employ the phrase "relevant to the subject matter" or the more narrow "relevant to the issues" or "relevant to the claims or defenses". Privileges may differ from jurisdiction to jurisdiction both as to how they are defined and applied and as to whether they are even recognized; yet, most are common to all jurisdictions and the basic elements tend to be the same. Federal courts in diversity cases apply the privilege law of the states since it is considered to be substantive rather than procedural.

How do you obtain discovery? Sometimes discovery is required to be provided automatically and without request from opposing counsel. See FRCP Rule 26(a)(1) re early mandatory disclosure of witnesses, documents, damages and insurance information. More commonly, discovery must be requested by formal document served on parties. Details of the form of a discovery request and response may be prescribed, in whole or part, by rule or statute. Form books provide samples for general use or for use in specialized litigation but most lawyers will customize their forms and revise them with experience. Lawyers who specialize in a particular area will develop form discovery appropriate to that type of case. In some jurisdictions, a standard form may be prescribed or form discovery may be provided. See California C.C.P. §2033.710 *et seq*. California developed general forms for discovery and limited specialized forms [e.g. employment litigation]. Such forms are available on the Judicial Council web site.

Statutes or rules may impose limitations as to the number of requests that may be propounded, the timing at the beginning and end of a case, the structure of the request [e.g. prohibitions on compound requests, use of subparts, use of definitions,etc.]

A party has a limited time to respond by way of answer or objection and in some

cases by actions such as appearing at a deposition or medical examination or producing documents. If a party fails to timely object to discovery, an objection may be waived, though relief may be possible if some justification can be made. If a party is not satisfied with a discovery response they may seek a court order for a further response. Often the parties are required to attempt to resolve issues informally before making a motion---a process often called "meeting and conferring". There may be a time limit in which to make a motion to compel discovery and failure to meet that limit may waive any right to further response. When making a motion, the prevailing party may be entitled to monetary compensation for its effort--- commonly called "sanctions" or an award of sanctions.

Discovery is a creature of statutes and rules supplemented by case law and limited by privileges, public policies and Constitutional provisions. The Federal Rules of Civil Procedure ("FRCP") and the state discovery rules and statutes provide basic tools for accessing information, eliminating issues, determining what your opponent knows etc.

Each discovery tool has its unique function and inherent limitations and frustrations. Federal Rules are relatively brief and controlling case law may be elusive. State laws are based on the FRCP discovery provisions. The California Civil Discovery Act, Code of Civil Procedure (hereinafter "C.C.P.") Sections 2016 - 2036 is long and detailed but a careful reading resolves many disputes and answers most questions. In addition, significant case law has developed in the past 45 years to supplement and illustrate the discovery rules. Finally there may be local rules or policies and even special rules adopted and applied by one judge.

DISCOVERY DEVICES

Depositions may be noticed and witnesses subpoenaed in order to ask oral questions of the witness who must answer under oath before the lawyers and parties and whose testimony is recorded. A deposition is like oral testimony at trial without the evidentiary rules and without a judge to control the proceedings. The production of documents may be required at a deposition. Depositions may be taken of both parties and

non-parties and is the only formal discovery available to compel testimony or document production from non-parties. Written discovery is limited to parties. Interrogatories are served on parties to request written answers under oath to written questions. Formal Requests for Production of Documents can be served on parties who must conduct a reasonable search and respond under oath and produce documents. That device is also used to inspect property or request production and inspection of other things. Specialized rules allow discovery regarding expert witnesses and by way of medical examinations. Discovery laws also provide for requests for admissions of facts or the genuineness of documents. Discovery laws provide for protective orders to prevent abuses and control discovery. Finally, the laws are enforced and abuses controlled by what are commonly called "sanctions" which include orders to pay money, to establish issues or facts, or to enter judgments.

The basic discovery devices---depositions, interrogatories, document production, medical examinations, admissions, sanctions and protective orders---exist in most jurisdictions. Expert discovery came later, is less standard and has been eliminated in at least one jurisdiction. Jurisdictions may modify the rules periodically so each jurisdiction's rules must be read often and with care. Special discovery rules may be added dealing with limited issues such as the discovery of insurance information.

Each jurisdiction provides tools for extracting information, narrowing issues and preparing for trial. Each tool has its own function, purpose, advantage and limitations. Recognizing these strengths and weaknesses will not only allow a party to use them effectively but will avoid frustration when they do not meet unrealistic expectations. It will also enable a party to design an effective discovery plan and to determine whether it is worthwhile to pursue discovery in court.

Greyhound Corp. v. Superior Court

(1961), 56 Cal.2d 355

[The discovery act was enacted in 1957 and numerous cases made there way to the Supreme Court. In the Greyhound case, Justice Peters provided an analysis of the history, purpose, basic principles and provisions of discovery law that has largely withstood the test of time despite numerous amendments and extensive case law. The Greyhound case also illustrates how a variety issues and privileges may arise in a discovery motion and how important issues can be overlooked. The issue in this case, the production of a written statement of a potential witness to the accident, is a common subject of dispute 40 years later. Why should that be? Would a change in facts produce a different result? The discussion of the statutory scheme should be read regarding the interrelationship of the provisions. Although significant amendments have occurred as to some provisions, the basic structure remains intact in California as in other jurisdictions.]

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The general problems running through all of the cases are six in number. They can be listed as follows:

1. What discretion is vested in the trial court in discovery matters, and to what extent are the appellate courts bound by the exercise thereof?

2. What showing is necessary to support an order granting discovery?

3. Need discoverable material be such as will be admissible in evidence at the trial of the action?

4. Are the discovery statutes unconstitutional because they permit unreasonable searches and seizures?

5. What is the nature and extent of the attorney-client privilege protected from discovery under the act?

6. To what extent, if any, should discovery be allowed when a party seeks material which is peculiarly the work product of his adversary or the adversary's attorney?

Before specific answers can be given to these questions the act must be examined in its entirety to ascertain, if possible, its general purpose and intent.

In the instant case, the order involved was entered pursuant to the provisions of subdivision (a) of section 2031 of the Code of Civil Procedure. It reads as follows:

"(a) Upon motion of any party showing good cause therefor, and upon at least 10 days' notice to all other parties, and subject to the provisions of subdivision (b) of Section 2019 of this code, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence relating to any of

the matters within the scope of the examination permitted by subdivision (b) of Section 2016 of this code and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by subdivision (b) of Section 2016 of this code. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

Subdivision (b) of section 2016, incorporated by reference in the foregoing quotation, reads as follows:

"(b) Unless otherwise ordered by the court as provided by subdivision (b) or (d) of Section 2019 of this code, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction."

Subdivision (b)(1) of section 2019 [now 2025], also incorporated by reference in section 2031 via its inclusion in section 2016, reads as follows:

"(b)(1) After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than stated in the notice, or that it shall not be taken except by allowing written interrogatories by one or more parties, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance,

embarrassment, or oppression. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs and expenses,

including attorney's fees, as the court may deem reasonable."

These sections comprise the statutory provisions governing inspection of documents and other objects (both real and personal) in the possession or control of the adversary party litigant. By the enactment of such provisions the Legislature made certain changes in the rules existing under the predecessor statute (Code Civ. Proc., § 1000) which governed inspection prior to 1958. It also incorporated certain procedures, already adopted and tested in the federal courts and in the judicial system of several states. The fundamental purpose of those enactments was to expedite the trial of civil matters by allowing litigants an adequate means of discovery during the period of preparation for trial. (Report of Committee on Administration of Justice of The State Bar of California, reprinted in Journal of The State Bar of California, vol. 31, no. 3, pp. 204 et seq., and in 1 DeMeo, California Deposition and Discovery Practice, pp. 2 et seq.) To accomplish this purpose the Legislature not only enacted the three code sections above quoted, but also enacted an entire article providing for various discovery procedures. In order to interpret any one section it is necessary to consider the entire article. Only in this fashion can the general legislative intent be ascertained.

It should first be noted that the Legislature repealed the then existing statutes on discovery, and retained only such elements of the prior system as were re-enacted in the new article. The new system differs fundamentally from the old.

A summary of the new system, together with its more important changes, is as follows:

By section 2016 [now 2025] it was provided that a litigant might take the deposition of "any person, including a party ... for the purpose of discovery or for use as evidence in the action or for both purposes." This provision greatly enlarged the prior right to take depositions which, insofar as a nonparty witness was concerned, was limited to situations wherein the circumstances indicated a danger that the witness whose testimony was required would not be available at the time of trial (prior Code Civ. Proc., § 2021; see analysis in 15 Cal.Jur.2d 690). Thus, with the exception of the deposition of a party or his agent or employee, depositions previously were provided for the sole purpose of obtaining testimony to be used at the trial. The new rules specifically provide that the procedure be utilized also for the purpose of discovering facts, without any thought of producing those facts at trial.

Subdivision (b) of the same section (quoted above) also enlarged upon the scope of the examination allowed, by providing that the deponent might be examined on any matter relevant to the subject matter involved in the action (as distinct from the previous rule that questions on deposition might be successfully objected to under those rules of evidence which prevail at trial; i.e., competency, materiality or relevancy to an issue involved in the trial). The same language is incorporated by specific reference into the provisions for other types of discovery, including interrogatories, inspection of documents, etc.

That the Legislature intended that a deponent could be asked questions beyond the scope of the questions to be allowed at trial is further indicated by the inclusion of subdivisions

(d) and (e) of the section. These subdivisions provide for the use of the deposition at the trial, in which case either party may have excluded therefrom those portions which would be inadmissible if the witness were present and examined in person. In addition, subdivision (f) provides that a party does not make the deponent his own witness, either by taking the deposition or (under some circumstances) by offering it in evidence at the trial of the action. From the foregoing, it is clear that the Legislature intended that the new procedures should provide for discovery of facts during trial preparation, including facts in the possession of the adverse party and in the possession of independent witnesses, regardless of the ultimate right to present those facts at the trial.

Section 2017 [now 2035]provides for the perpetuation of testimony by the taking of depositions when no action is pending. By the language of subdivision (a)(3), all provisions regarding scope of the examination and the various limitations and protections against abuse which control the other discovery procedures are made specifically applicable thereto.

Sections 2018 through 2029 provide streamlined and less burdensome mechanics for the actual noticing and taking of depositions both in and out of the state, and upon either oral examination or written interrogatories.

One subdivision of section 2019 requires individual scrutiny, as it is made applicable, by reference, to the other discovery procedures contained in the article. Subdivision (b)(1), entitled "Orders for protection of parties and deponents" (and quoted in full, above) provides that upon motion of any party, and for good cause shown, the court in which the action is pending may control the scope of the inquiry, limit the matters included therein, and may make "any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." The inclusion of this subdivision, and its incorporation by reference in the other sections, indicate that the Legislature was aware of the fact that the new procedures provided discovery rights far beyond the narrow confines and limitations of the old and that the wide latitude authorized by the new sections required a method of controlling abuse which did not exist theretofore.

Section 2030 added a concept not previously existing in California. In summary, it provides that a party may, without previous court order, compel his adversary to fully answer in writing such written interrogatories as may be served upon him. The scope of the interrogatories is the same as that provided for depositions, and the party to whom the interrogatories are addressed is afforded the protection of the right to object and have his objection passed upon by the court. In such case, the provisions of subdivision (b)(1) of section 2019, supra, are made applicable. .... The use of such interrogatories is in addition to and exclusive of the right to take the deposition of the same party, and either procedure may be resorted to before or after the other.

Section 2031, as pointed out above, eliminated pre-existing section 1000 ("Inspection of Writings") and provided not only for the production, inspection and copying of writings, documents, photographs, etc., but for the inspection of physical objects (real and personal) not capable of being reduced to writing, and for the right to photograph the

same. The right to inspect is not enjoyed (as is the right to require answers to interrogatories) without first obtaining an order of court predicated upon a noticed motion and the showing of good cause. The scope of things which may be required to be produced, as well as the provisions for protection against abuse, was again made the same as the scope and limitations provided for in the case of depositions. Moreover, the section specifically provides that when ordering inspection the court may "prescribe such conditions as are just."

Section 2032 provides for physical, mental or blood examination of parties (and other specified persons) when the physical or mental condition, or blood relationship of such person is in controversy. Such examination may be had only on court order made on motion for good cause shown, and to that extent is similar to the right recognized by judicial decision prior to the enactment of the discovery procedures. The section, however, goes beyond the old procedure in that it provides for examination of some persons other than the parties, and also provides that the party requiring the examination must provide the examinee, on request, with "a detailed written report of the examining physician setting out his findings and conclusions, together with like reports of all earlier examinations of the same condition." If such request is made, the examining party shall be entitled to request and receive reports of examinations which the examinee caused to be made. There is also provision for the waiver of privilege connected with medical examinations.

Section 2033 adds another new procedure. Under its provisions either party may require (without first obtaining court order) that the other party admit "the genuineness of any relevant documents described in the request or ... the truth of any relevant matters of fact set forth in the request." The party so served may reply by a sworn denial or by a detailed answer setting forth reasons why he cannot admit or deny. He may also file with the court objections to the requests, and obtain a hearing thereon. Failure to take any one of the enumerated steps within the times provided is deemed an admission. The section does not incorporate the provisions of 2016 regarding scope of the admissions, but by its language limits the requests to matters not privileged and relevant. The protections set forth in section 2019, subdivision (b)(1) are specifically made applicable to this section.

Section 2034 [now each section contains such provisions plue section 2023]provides penalties which may be imposed by the court on any deponent or party who refuses to respond properly to any of the foregoing discovery procedures. Such penalties include an order requiring answer, payment of reasonable expenses incurred, including attorney fees, contempt proceedings, judicial establishment of the fact against the interest of the refusing party, prohibition against the introduction of evidence, striking pleadings or portions thereof, stay of proceedings, dismissal of action, judgment against the defaulting party, as well as any order in regard to the refusal which is just.

Section 2035 [now 2016(b)(1)] defines the word "action" (in which the foregoing proceedings are applicable) as including a special proceeding of a civil nature.

The foregoing code sections, although substantially adopted from the federal rules of

discovery, are not copied verbatim therefrom. Throughout the article the California Legislature made alterations. Most such changes were for the purpose of clarification, but there were some alterations in substance. The majority of these either extended the situations wherein a particular form of discovery might be used, or extended the persons to whom it might be applied. It is not necessary to list here the minutiae of such alterations in the California statutes, for that task (i.e., section by section comparison with the federal rules) was accomplished by The State Bar's Committee on Administration of Justice, the report of which was adopted by the Legislature (Journal of The State Bar of California, vol. 31, no. 3, pp. 204 et seq., supra, 1 DeMeo, California Deposition and Discovery Practice, supra). The importance of those alterations is that almost without exception they were made for the express purpose of creating in California a system of discovery procedures less restrictive than those then employed in the federal courts. fn. 3

Under the new statutes the Legislature adopted a complete system in which at least five methods of discovery were substituted for the three previously existing in this state. Each method was liberalized as to person, scope, and situation. The new system contemplated and created an interdependence of methods to the end that each might be utilized in support of the others. Care was taken to give to each party the rights given to his opponent. To protect against the abuses of the liberality thus created, safeguards were provided unknown to the old California procedures. The new system, as was the federal system (Moore's Federal Practice, vol. 4, pp. 1014-1016), was intended to accomplish the following results: (1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and, (9) to expedite and facilitate both preparation and trial.

Certainly, it can be said, that the Legislature intended to take the "game" element out of trial preparation while yet retaining the adversary nature of the trial itself. One of the principal purposes of discovery was to do away "with the sporting theory of litigation--namely, surprise at the trial." (Chronicle Pub. Co. v. Superior Court, supra, 54 Cal.2d 548, 561. See also page 572 of the same opinion wherein we adopted from United States v. Proctor & Gamble Co., 356 U.S. 677 [78 S.Ct. 983, 2 L.Ed.2d 1077], the phrase that discovery tends to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.") Modern legal authors, also, have accepted this view of the purpose of discovery procedures. In a recent issue the authors of Harvard Law Review have compiled an authoritative analysis, too exhaustive for quotation here (132 pages), but which supports the views expressed above (Developments in the Law--Discovery (1961) 74 Harv.L.Rev. 942).

While the discovery act was thus intended to take the "game" element out of trial preparation, it was not intended to adversely affect the general adversary nature of

litigation under our system of law. As said by Professor David W. Louisell, "... a law suit should be an intensive search for the truth, not a game to be determined in outcome by considerations of tactics and surprise. ... [but there is] nothing in these rules at odds with the fundamentals of the common law method of adversary adjudication. There is nothing in these rules to suggest a retreat from the common law's hard-headed conception of litigation as adversary and competitive, and from its historic notion that a struggle--warfare, if you will--between vitally interested partisans, is most apt to expose the truth. ... The Rules simply develop discovery, which has its antecedents in English chancery practice, into an efficient technique for fact ascertainment, to take its place in the common law's arsenal along with the advocate's other efficient weapons such as testimony in open court, cross-examination, impeachment, forensic skill, and mastery of legal principles. As stated by Mr. Justice Jackson in concurring in the decision of Hickman v. Taylor:

" '... [Counsel for plaintiff] bases his claim to [the conversations of defendants' counsel with witnesses] on the view that the Rules were to do away with the old situation where a law suit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.'

"The author believes, and a study tends to confirm, that the deposition- discovery rules do not minimize the value of true expertness and skill in advocacy. They do minimize the chances for and significance of the trick tactic, but contrariwise they enhance the value of thorough and penetrating advocacy." (Discovery and Pre-Trial, 36 Minn.L.Rev. 633, 639.)

In order to accomplish the various legislative purposes set forth above, the several statutes must be construed liberally in favor of disclosure unless the request is clearly improper by virtue of well- established causes for denial. As we stated in the Chronicle case (supra, 54 Cal.2d at p. 572), "Only strong public policies weigh against disclosure."

There are several District Court of Appeal decisions also announcing this doctrine of liberal construction. "The Legislature obviously considered the discovery procedures desirable and beneficial. Their action merits liberal construction of the act by the courts." (Grover v. Superior Court, 161 Cal.App.2d 644, 648 [327 P.2d 212].) "In determining whether or not there has been an abuse of discretion it should be borne in mind that the Discovery Act is to be liberally construed." (Smith v. Superior Court, 189 Cal.App.2d 6, 10 [11 Cal.Rptr. 165].) "The statute is to be liberally interpreted so that it may accomplish its purpose." (Caryl Richards, Inc. v. Superior Court, supra, 188 Cal.App.2d 300, 303.) See also Rolf Homes, Inc. v. Superior Court, 186 Cal.App.2d 876, 882 [9 Cal.Rptr. 142]; Grand Lake Drive In v. Superior Court, 179 Cal.App.2d 122, 129 [3 Cal.Rptr. 621]; Pettie v. Superior Court, supra, 178 Cal.App.2d 680, 689; Clark v. Superior Court, 177 Cal.App.2d 577, 580 [2 Cal.Rptr. 375]; and Laddon v. Superior Court, 167 Cal.App.2d 391, 395 [334 P.2d 638].

There are, however, quite a number of appellate court opinions that have adopted a strict rather than liberal attitude towards the discovery statutes. The result has been the filing of a large number of applications for writs to test such rulings. This, in itself, by arresting the trial while such writs are pending, militates against expeditious litigation. For the guidance of the trial courts the proper rule is declared to be not only one of liberal interpretation, but one that also recognizes that disclosure is a matter of right unless statutory or public policy considerations clearly prohibit it. Even in those instances wherein the statute requires a showing of good cause, that showing must be liberally construed. fn. 6

Discretion of the trial court:

In the instant case, as in the other cases decided this day, the party in whose favor the trial court has ruled urges that the ruling was within the "discretion" of the trial court. This concept requires some discussion.

Undoubtedly the discovery statutes vest a wide discretion in the trial court in granting or denying discovery. The appellate courts in passing on orders granting or denying discovery should not use the trial court's discretion argument to defeat the liberal policies of the statute. The courts should be careful to impose the burden of showing discretion or a lack of it on the proper party. As already pointed out there are several situations where the litigant starts the discovery process without prior court intervention. The burden is then on the party seeking to deny that right. fn. 6a On the other hand, where the party must show "good cause" for the disclosure, obviously the burden is on the one seeking disclosure.

There are several appellate court cases that have discussed the issue of discretion of the trial court. Their language in this respect correctly states the law. (See Grover v. Superior Court, supra, 161 Cal.App.2d 644, 649; Heffron v. Los Angeles Transit Lines, 170 Cal.App.2d 709, 713 [339 P.2d 567, 74 A.L.R.2d 526]; Crummer v. Beeler, 185 Cal.App.2d 851, 860 [8 Cal.Rptr. 698]; Caryl Richards, Inc. v. Superior Court, supra, 188 Cal.App.2d 300, 303-304; Smith v. Superior Court, supra, 189 Cal.App.2d 6, 10; DeMayo v. Superior Court, 189 Cal.App.2d 392, 394 [11 Cal.Rptr. 157].) But the problem is one that requires a more definite statement.

Some discretion is undoubtedly conferred on the trial courts. Section 2031 provides that the order requiring a party to produce documents and other things for inspection shall be based on a motion "showing good cause." Similarly, section 2032, relating to physical or mental examinations, requires that the order be based on "good cause." Discretion is obviously involved here. Moreover, each of the discovery procedures is subject to the provisions of section 2019, subdivision (b) (1), quoted above, which requires the trial court to make orders, by limiting the scope and manner of the discovery procedures, in certain specified manners. That section would be entirely without meaning if it were not construed to grant the court discretion in the matter of limiting attempted discovery which, while it may come within the rules established by the other code sections, offends the sense of justice and reason. For the same purpose section 2031 authorizes the court to

prescribe conditions which shall apply to the production of things for inspection.

We have no doubt that the Legislature intended to bestow a fairly broad discretion upon the trial court in these matters. We agree with the general rules interpreting that discretion as announced in the several District Court of Appeal opinions cited above. Those decisions state the well-recognized rules concerning the limitation upon the power of the appellate courts to disturb an exercise of discretion by the trial court. They properly hold that such exercise may only be disturbed when it can be said that there has been an abuse of discretion. The difficulty is that not all of these cases agree as to what specific act or omission constitutes an abuse of discretion under the discovery statutes.

For example, in the Heffron case (supra, 170 Cal.App.2d 709) it was properly pointed out that it is not an abuse of discretion to deny discovery when the party seeking the information had been so dilatory that allowance of discovery would hinder rather than expedite the trial. [24] Both in Singer v. Superior Court (supra, 54 Cal.2d 318), and in the Chronicle case (supra, 54 Cal.2d 548), it was noted that the trial court is granted great discretion in making its orders under the provisions of section 2019, subdivision (b) (1), for the protection of parties and witnesses from embarrassment and oppression. The inference to be drawn from these decisions is that the court should, where possible, utilize its power to make such order as "justice requires." This does not mean that disclosure must be denied in every case in which annoyance or oppression may be demonstrated. Rather, it means that the trial court should attempt to arrive at a just result by the application of its powers to make such order as justice requires. In those situations wherein the only valid objection to disclosure is that it entails an undue burden on the other party, the trial court should give consideration to various alternatives provided in the statute. Requiring such party to pay the costs of disclosure is not the only such method. In many instances justice might be served by approving such portion of the request which appears to the court to be of sufficient importance to override the considerations of burden, while disapproving such portions which do not.

There are other situations in which too little consideration is given to a proper exercise of the wide discretion of the trial court. One such is exemplified by those cases in which technical objection is made that the party seeking discovery has proceeded under one discovery statute when another provides the proper vehicle. For example, the case of Rust v. Roberts, 171 Cal.App.2d 772 [341 P.2d 46], arose out of a condemnation action in which the only issue was the value of the land sought to be taken by the state. The landowner sought disclosure of various facts by interrogatories served under the provisions of section 2030. The trial court sustained objections to all of the interrogatories, and on proceedings in mandamus, the District Court of Appeal sustained the trial court except in regard to one interrogatory, only. The reasons given by the appellate court are now unimportant. The case is cited at this point to indicate that in regard to several of the interrogatories the District Court of Appeal overlooked the fact that, regardless of the technical objection which it sustained, the information was clearly discoverable under one or more discovery statutes other than section 2030. An interrogatory seeking the exact acreage of the land (which was described in the complaint

by metes and bounds) was found improper because defendant, who owned the land, was deemed to be familiar with the total acreage thereof. The court obviously overlooked the fact that total acreage, if not admitted, would be a triable issue, and hence discoverable by a demand for an admission of fact under the provisions of section 2033. Similarly, the court disallowed an interrogatory seeking the names and addresses of the state's appraisers, together with their reports. Regardless of the discoverability of the appraisers' reports, their names and addresses were clearly discoverable by deposition, and should have been discoverable by interrogatory. Certain interrogatories seeking the state's contentions as to the highest and best use of the land were held to be improper. Even if the state's contention as to use be deemed as nondiscoverable (which premise is questionable) there can be no doubt that plaintiff would have been entitled to an answer to a series of demands for admissions that each of several hypothetical uses was the highest and best use. Thus, in the Rust case the decisions of the trial court and of the District Court of Appeal combined to stultify the purposes of discovery. They not only suppressed the effort to obtain information, but they required a delay while plaintiff sought a writ of mandate, as well as a further delay in order that plaintiff might commence new discovery proceedings for the sole purpose of obtaining information to which he would have been entitled had he originally proceeded under a different section. A proper exercise of discretion by the trial court would have obviated such a situation. If the trial court felt that the objections to the interrogatories, as such, were proper it could have made use of the power granted to it to make such order as justice requires, thereby sustaining the objections only on condition that the state volunteer such portion of the requested information as would be obtainable in another form.

We cannot suggest even a small percentage of the particular situations which might develop wherein the lower courts may utilize discretion to reach the result intended by the Legislature. The examples we have cited underscore the point that in discovery proceedings discretion is not exercised (as several District Courts of Appeal imply) merely by denying or granting the request. To predicate appellate review on the hypothesis that such an exercise of discretion may not be disturbed, is to overlook the purpose of the discovery statutes. If discovery is to serve its intended purpose, the manner of exercising discretion must be given greater consideration at both the trial and appellate level. Certainly, in some cases, consideration should be given to the purpose of the information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances. With such considerations in mind, the court may grant the request in full or in part. It may grant subject to specified limitations which it finds proper to impose. And it may, when necessary, deny in toto. These powers are implicit in the provisions of section 2019. fn. 8 Were it not that the Legislature desired that discovery be allowed whenever consistent with justice and public policy, it would not have enacted that provision.

It would be comforting were it possible to announce a definitive set of rules which would guide all concerned in the future determination of what is or is not an abuse of discretion in the denial, limitation or granting of discovery. It is apparent, however, that each exercise of discretion will occur under a differing set of facts, and that each case must, of necessity, be decided in light of those particular facts. But it is possible to lay down certain general rules based upon the nature and purpose of the discovery statutes which can be used in determining the proper exercise of discretion in all discovery cases. To constitute a proper exercise of discretion, the factual determination of the trial court should clearly and unequivocally be based upon the following legal concepts:

1. The legislative purposes above set forth are not to be subverted under the guise of the exercise of discretion;

2. Those purposes are to be given effect rather than thwarted, to the end that discovery is encouraged;

3. When disputed facts provide a basis for the exercise of discretion, those facts should be liberally construed in favor of discovery, rather than in the most limited and restrictive manner possible;

4. Although the statutory limitations on discovery must be applied when the facts so warrant, exercise of discretion does not authorize extension thereof beyond the limits expressed by the Legislature;

5. There is no room for judicial discretion in those situations not included in the statutes but asserted as general limitations on the privileges conferred. fn. 10 Such situations, however, may be subject to judicial discretion under the statutory power to prevent abuse and advance the ends of justice;

6. The power to prevent abuse which is bestowed on the trial court by the provisions of section 2019, subdivision (b) (1), is the power to exercise discretion based upon the factual showing made. When the record indicates facts on which the court exercised its discretion, that exercise will not be disturbed on appeal; when the facts are undisputed, or there is but one reasonable interpretation thereof, the question ceases to be fact, and is one of law;

7. The trial courts in exercising their discretion should keep in mind that the Legislature has suggested that, where possible, the courts should impose partial limitations rather than outright denial of discovery;

8. In the exercise of its discretion the court should weigh the relative importance of the information sought against the hardship which its production might entail, and it must weigh the relative ability of the parties to obtain the information before requiring the adversary to bear the burden or cost of production, keeping in mind the statutory admonition of entering an order consistent with justice.

Any record which indicates a failure to give adequate consideration to these concepts is subject to the attack of abuse of discretion, regardless of the fact that the order shows no

such abuse on its face. A difficulty arises, however, when the record is devoid of any clue as to the reasoning of the trial court. There is nothing in the discovery statutes which requires the trial court to make findings as a basis of an order either granting or refusing the right to have information disclosed. In many instances which have come to our attention the trial court has filed a memorandum opinion which adequately serves this purpose. In other instances the order includes certain sanctions which, of themselves, indicate the reasoning behind the exercise of discretion. More often the appellate court has been faced with a bare order which includes no suggestion of the reasoning behind it. While there is no requirement that the trial court make such a record, and admittedly such is not always necessary to a review, a careful trial judge, faced with a questionable request for discovery, will find some way to let the record show the basis of his determination.

There is another factor connected with this discussion of discretion that should be mentioned. Throughout the cases decided this day appears the objection that the requested discovery is a mere "fishing expedition." This is a concept constantly referred to in the legal literature on the subject. Apparently the phrase is intended to mean that the party seeking discovery does not know precisely what he seeks, but is attempting to obtain all possible information for the purposes of his case. This is no basis for holding, per se, that the request is improper. Inasmuch as discovery of all relevant material during the time of preparation is the aim of the statute, and since the statute intends that each party shall divulge, within limits, the information in his possession, there is nothing improper about a fishing expedition, per se. The method of "fishing" may be, in a particular case, entirely improper (i.e., insufficient identification of the requested information to acquaint the other party with the nature of information desired, attempt to place the burden and cost of supplying information equally available to both solely upon the adversary, placing more burden upon the adversary than the value of the information warrants, etc.). Such improper methods of "fishing" may be (and should be) controlled by the trial court under the powers granted to it by the statute. But the possibility that it may be abused is not of itself an indictment of the fishing expedition per se.

There can be no question but that the Legislature had before it, when adopting the discovery statutes, all of the arguments against discovery predicated on the theory that a fishing expedition is improper. The report of The State Bar, referred to above, pointed out that the then existing discovery provisions were too restrictive, and specifically made mention of the fact that various judicial decisions interpreting those statutes had attempted to hinder discovery on the alleged ground that it was a mere fishing expedition. Particularly, the report included reference to the concurring opinion in MacLeod v. Superior Court, 115 Cal.App.2d 180, 185 [251 P.2d 728], wherein it was said: "The statute, as written [referring to presuit discovery by deposition], permits a proceeding brought for the sole purpose of annoying, harassing or embarrassing another, or for some ulterior object. It permits one who does not have a cause of action to indulge in a meddlesome fishing expedition. ... It should not be permitted. But the remedy lies in the field of legislation. ..." (Emphasis added.)

The Legislature has now acted. It has authorized the fishing expedition which the opinion castigated. It did so with the full knowledge that the federal procedure which it was adopting had already been interpreted by the United States Supreme Court as authorizing fishing expeditions. In Hickman v. Taylor, supra, (1947), 329 U.S. 495, 501, 507, that court had said: "The various instruments of discovery now serve (1) as a device ... to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. ... No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. [Here, by footnote, the opinion points out that a valid argument against the objection to fishing expeditions is the mutuality of the procedure whereby a party who must disclose his case to the "fisher" may also require his opponent to do likewise.] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure ... [reduces] the possibility of surprise." (Emphasis added.)

Although the Hickman case is not binding upon us, its reasoning is sound. It follows that the claim that a party is engaged upon a fishing expedition is not, and under no circumstances can be, a valid objection to an otherwise proper attempt to utilize the provisions of the discovery statutes. Should the so-called fishing expedition be subject to other objections, it can be controlled as indicated hereinabove.

PRODUCTION OF THE WITNESS STATEMENT GRANTED BY TRIAL COURT AND WRIT DENIED

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GOOD CAUSE
Sufficiency of the showing:

Petitioner contends that the order of respondent court was made without a sufficient showing of good cause. Such an order would be beyond the jurisdiction of the court if no cause were shown because the language of section 2031 clearly requires such a showing as the basis of any order for inspection. Subdivision (a) thereof, quoted in full above, provides that "[u]pon motion of any party showing good cause therefor" the court may order the production, inspection or copying of any specified document. Petitioner argues at great length that good cause was not shown in the instant case.

The code section is silent on both the nature of good cause and the manner in which it is to be shown. This being so, the legislative intent can be ascertained only by a consideration of the general legislative intent, already discussed. The discovery act, as already pointed out, authorizes some vehicles of discovery (depositions, interrogatories and requests for admission) as a matter of right and without prior court order. Only in the

cases of production of material for inspection and physical examination does the statute specifically provide that a prior order be obtained, based on a showing of good cause. It thus appears that the Legislature deemed the two latter vehicles to be of a type which might be abused if not controlled in advance. It follows that the good cause which must be shown should be such that will satisfy an impartial tribunal that the request may be granted without abuse of the inherent rights of the adversary. There is no requirement, or necessity, for a further showing. There is nothing in the entire act, other than protection against possible abuse, which indicates that the Legislature has differentiated between the inherent right to one method of discovery and another. The very incorporation, by reference, of various provisions of several sections into the others (scope of examination as defined in § 2016, subd. (b); orders for protection of parties as set forth in § 2019, subd. (b)(1); sanctions on refusal to make discovery as provided in § 2034) indicates a legislative intent that the right to each of the various vehicles of discovery, and the basis for the use of each, is inherently the same.

Petitioner also urges impropriety in the manner in which the cause for inspection was shown herein. It appears that plaintiffs filed their motion for inspection simultaneously with their complaint, and without supporting affidavits. However, affidavits were served and filed prior to the date of the hearing of the motion. Those affidavits, identified the documents desired, showed them to be in the possession of petitioner, and showed plaintiffs' need for inspection. They did not include the allegations of the facts (set forth above) that plaintiffs had diligently attempted to obtain the information from other sources, and were frustrated in such attempt. There being no record, there is no way of knowing whether those facts were presented to the trial court orally, or at all. We do know that plaintiffs (as the real parties at interest herein) alleged these facts in full in their verified reply to the petition in this court. Furthermore, at oral argument petitioner admitted these facts to be true, but nevertheless contends that the showing before the trial court was fatally defective.

There is no merit to this contention. Since the statute does not prescribe the method of showing good cause, such may be shown in any manner consistent with the established rules of pleading and practice. Ordinarily, when a motion is filed seeking an order of court, the moving party serves and files supporting affidavits. Such was done herein prior to the date of hearing. Often the showing made therein is complete; sometimes it is not. In such instances (and even when no such supporting affidavits are filed) good cause may be found in the pleadings theretofore filed in the action. Often the cause for granting the motion is shown orally at the time of hearing, either by testimony or by argument of admitted facts. The latter method may be quite adequate insofar as the trial court is concerned (although it provides little record if the ensuing order is to be reviewed). Since the trial court must pass upon the cause shown, it is obvious that good cause should be shown at the time of making the motion or before. But if it is shown at any time before that court loses jurisdiction, it would be futile to disturb a proper exercise of discretion just because the court acted prematurely. To do so would be contrary to what has been previously said regarding the purpose of the discovery statutes. Evidently the respondent

court here felt that the showing was sufficient, even in the absence of any claim that plaintiffs had attempted, and failed, to procure the information from other sources. The facts that the scene of the accident was an interstate highway, that petitioner obtained the witnesses' statements at the time of the accident, and while plaintiffs were physically incapacitated, as well as the other surrounding circumstances, were all before respondent court. This would seem to support the implied finding of good cause. But, even if we were to hold such showing was insufficient, it now appears that additional facts, not presented to the trial court (but admittedly supporting the right to inspect) are true. Were it to be held that the failure to present those facts to the trial court requires us to grant the writ sought herein, needless litigation would result. This is so because although we would thereby prohibit the trial court from enforcing its order for inspection, nothing would prohibit plaintiffs from making a new motion, in support of which they would produce all of the facts which were first produced, together with those that have been presented since, and admitted to be true. Thereupon the respondent court would make a new order granting inspection, which order would not be subject to the present claim. Such procedure would not promote the efficient and expeditious disposition of this litigation.

Inherent in the claim that there was an insufficient showing of good cause (in this proceeding, as well as in the other discovery matters now before us), is the contention that no material is discoverable under the statute unless it is shown to be relevant to the issues in the case. Such contention is not new. It has been considered and found untenable by this court and by several District Courts of Appeal. In Chronicle Pub. Co. v. Superior Court, supra, 54 Cal.2d 548, this court approved the language of Pettie v. Superior Court, supra, 178 Cal.App.2d 680, where it was pointed out that the statute (subd. (b) of § 2016) expressly provides that discovery may be had as to any matter which is relevant to the subject matter involved in the pending action. The Pettie opinion then points out the wide divergence between the "subject matter of" and the "issues in" such action. Holding that relevancy to the subject matter is a broader concept than relevancy to the issues, it concludes that if the legislative intent had been to limit discovery to those matters which were relevant only to the issues, the Legislature would have so stated. The same concept was stated in Rolf Homes, Inc. v. Superior Court, supra, 186 Cal.App.2d 876, 881, and to some extent in Laddon v. Superior Court, supra, 167 Cal.App. 391, wherein (at p. 395) the court expressed the view that relevancy as applied to pretrial examination (discovery) is more loosely construed than it is when applied at the trial.

Without any showing of what the statements of the witnesses might include, the trial court was justified in finding that those statements, obtained at the scene of the accident, were the factual accounts of eye witnesses, and hence relevant to the subject matter of the pending action. We conclude that the plaintiffs in the original action made a sufficient showing of good cause to support the order of respondent court.

Admissibility of the evidence:

An objection made in the instant case and running through most of the other cases now

pending, is that the material sought to be disclosed would be inadmissible at the trial of the action and is therefore not discoverable. The claim runs contra to an express provision of the discovery act. Subdivision (b) of section 2016 defines the scope of examination allowable in the taking of depositions, and its provisions are incorporated, either by express reference or by implication, in each of the sections providing for the remainder of the vehicles of pretrial discovery. Included therein is the provision that "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." In spite of this language several opinions of the District Court of Appeal have held that such language is an invalid part of the statute. These cases are wrong and should be disapproved insofar as they hold that the material sought (be it by deposition, interrogatory, inspection, demand for admission or examination) is not subject to the discovery statutes because the same material would be inadmissible at the trial of the action. The provision quoted above leaves no doubt of the legislative intent. Insofar as the material sought is in aid of any one or more of the many purposes of the discovery statutes, it makes little difference that such material is inadmissible per se. (Chronicle Pub. Co. v. Superior Court, supra, 54 Cal.2d 548, 560; Pettie v. Superior Court, supra, 178 Cal.App.2d 680.) The cases last cited also point out the desirability of allowing discovery of material which may not be admissible on direct examination, but which will be admissible on cross-examination.

Of course, while the mere inadmissibility of the material is not, of itself, a bar to discovery, it is possible that the trial court, in the exercise of its discretion, may find such inadmissibility to be a factor which should be weighed in determining a claim of undue burden. It may be that the inadmissibility of the material indicates that the advantage to be gained from disclosure is outweighed by the burden which disclosure will entail. In such event the trial court may make such protective order as may be consistent with justice.

In several of the cases now pending before us the claim of inadmissibility is also predicated upon the alleged incompetency of the testimony, rather than upon its irrelevancy or immateriality. Such incompetency is alleged in terms that normally are used to attack the admissibility of evidence at the time of trial (e.g., hearsay, assuming facts not in evidence, opinion and conclusion, etc.), including those usually addressed to the form of the question. Inasmuch as the Legislature has intentionally provided that the inadmissibility at the trial is not, of itself, a bar to disclosure on pretrial discovery, none of these objections to disclosure are sound. It should be noted that the Legislature has carefully provided a method whereby inadmissible material allowed on discovery may be prevented from reaching the ear or eye of the fact finder at the time of trial. Subdivision (d) of section 2016 (expressly incorporated in § 2030, and by implication in § 2031) provides that at the time of trial only so much of the disclosed material as may be "admissible under the rules of evidence" is to be used by the parties. fn. 16

In all cases where inadmissibility for whatever reason is urged as a bar to discovery, it is the duty of the trial courts to consider such contention in the light of all of the facts,

including both the purposes of the discovery act and the purposes which disclosure of the objectionable material might serve. It is as equally improper to blindly grant disclosure of incompetent material as it is to deny the same merely because the material may be inadmissible at the time of trial. For example, the opinion and conclusion of a witness or party may serve no useful purpose whatsoever, or it may be a prime source of other factual and competent evidence. The same is true of hearsay. When the only objection urged is such type of incompetency, and no other factor is present, it would be improper to deny the right to disclosure. But when such objection is urged in connection with burden, oppression, or other matters going to the justice and equity of the situation, it is incumbent on the trial court to weigh all such factors. No hard and fast rule can be made. Only when the court has before it the "subject matter of the pending action," together with facts from which it can determine the need for disclosure, the ability of the respective parties to obtain the information, and the hardship which may be entailed by an order granting or denying, can it make an order which will be consistent with justice and the purposes of the discovery act.

In the instant proceeding it is far from clear that the statements sought to be inspected are inadmissible. But even if they were, such fact would not bar their disclosure under the considerations set forth above. This is particularly true in light of the fact that respondent court had sufficient information on which to base its order requiring disclosure.

Unreasonable search and seizure:

Petitioner next argues that the Legislature was without constitutional power to enact a statute which provides that a party or witness must disclose material without reference to its admissibility. The argument is based upon the rule announced in Twin Lock, Inc. v. Superior Court, supra, 171 Cal.App.2d 236. There the court reasoned that in spite of the express provision of section 2031, the right to the production and inspection of documents is not as broad as the right to examine a party under the provisions of section 2016. It based this conclusion upon a review of several Supreme Court cases (particularly McClatchy Newspapers v. Superior Court, 26 Cal.2d 386 [159 P.2d 944]) which had interpreted the right to inspect documents as such right existed under section 1000 of the Code of Civil Procedure (since repealed by the discovery act). The Twin Lock case relied upon and quoted the following language used in McClatchy (26 Cal.2d 386, at p. 396): "The right to have an inspection of papers and documents in the hands of a party to the action or a third person is governed by different rules from those applying to depositions. A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon the one seeking an inspection to show clearly that he has a right thereto and that the constitutional guaranties will not be infringed." Based upon that quotation, the court in Twin Lock concluded that any deviation from the rules previously announced for the protection of parties under the old section 1000 constituted an unreasonable search, and that the Legislature was powerless to provide any method not consistent with those rules. Such reasoning is unsound. At the time of McClatchy, inspection was governed by the provisions of section 1000, and depositions by the provisions of sections 2020 et seq., all since repealed. Those sections

did not spell out, as does the present discovery act, the various procedures which protect the parties from the unfairness of an unreasonable inspection. It was therefore necessary for the courts to apply rules which would guarantee such constitutional protection. The present statutes, however, provide that an order requiring a party to submit to inspection of material in his possession or control may only be made for good cause, shown on motion heard after notice to such party. It is further provided that in making such order the court shall exercise a wide discretion in the application of any number of procedures intended to protect the parties against abuse, oppression or any other alleged injustice. Thus, the statute has adequately provided for protection against the unreasonableness of the search or seizure. The California Constitution only prohibits "unreasonable" seizures. Reasonable searches are permitted. One such "reasonable" search is by means of a search warrant. But just as search warrants are justifiable on the showing of good cause (and the provision of other protective procedures), so an order for the inspection of material in a civil case is reasonable when similar provision is made. The Twin Lock decision is in conflict with the specific legislative enactment, is wrong, and is for those reasons, overruled.

THE ATTORNEY-CLIENT PRIVILEGE:

Petitioner further contends that it may not be compelled to produce the statements of the independent witnesses for the reason that such statements come within the attorney-client privilege. It no longer contends that such privilege extends to the names and addresses of such witnesses because, as has been noted above, it has already delivered a list of the names and addresses of such witnesses to plaintiffs.

The privilege contention is based upon the fact (alleged in the affidavit of its attorney filed in opposition to the motion for inspection) that upon learning of the accident petitioner caused an investigation to be initiated for the sole purpose of acquiring information to be transmitted to its attorneys (unnamed), that such information was to be used by said attorneys in preparing a defense to any claims arising out of the accident, and that the statements of the witnesses (together with all other information thus obtained) were so transmitted and are in the possession of petitioner's attorneys for such purpose. It has already been noted that petitioner's counsel was not retained until after the statements were secured. This, of course, casts some doubt on the credibility of the affidavit. However, accepting the affidavit at face value, it is our opinion that the statements of these witnesses were not privileged.

Section 2031 expressly limits inspection to matters that are not privileged. In addition, it extends the scope of inspection to that expressed in subdivision (b) of section 2016. That section, after providing an extremely wide scope of examination, concludes with the following language:

"All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to

incorporate by reference any judicial decisions on privilege of any other jurisdiction."

By this provision it is clear that the Legislature intended to express three distinct concepts not found in the earlier law of discovery. These are: (1) nothing contained in the new act should be deemed to change the statutory rules of privilege as set forth in section 1881 of the Code of Civil Procedure, which rules were made applicable to discovery; (2) the adoption of the act should not be deemed to alter the effect of any existing judicial decision of this state interpreting or defining privilege; (3) the adoption of the act should not be deemed to be a legislative acceptance of the judicial interpretations of privilege in any other jurisdiction having similar discovery provisions. In other words, the Legislature expressly waived all implication that it was familiar with and adopted the judicial decisions of other jurisdictions, and provided that the passage of the act should have no effect, one way or the other, on California decisions interpreting privilege. Thus, the question here presented is whether the attorney-client privilege, as the same is delineated by California statute and case law (without reference to the discovery act, and not as such act has been interpreted in other jurisdictions) extends to the statements of independent witnesses obtained by a party for the purpose of preparing a defense against possible claims.

The attorney-client privilege is one of several statutory privileges provided for by section 1881 of the Code of Civil Procedure. Subdivision 2 thereof provides:

"An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity."

The purpose of this privilege is to encourage the client to make complete disclosure to his attorney without fear that others may be informed (City & County of San Francisco v. Superior Court, 37 Cal.2d 227 [231 P.2d 26, 25 A.L.R.2d 1418]; Holm v. Superior Court, 42 Cal.2d 500, 506 [267 P.2d 1025, 268 P.2d 722]). [61] It has been held that it is still the client's communication to the attorney even when it is given to an agent for transmission to the attorney, and it is immaterial whether the transmitter is the agent of the client, the attorney, or both (San Francisco Unified Sch. Dist. v. Superior Court, supra, 55 Cal.2d 451, citing City & County of San Francisco v. Superior Court, supra). But, because the privilege tends to suppress otherwise relevant facts, it is to be strictly construed (City & County of San Francisco v. Superior Court, supra, at p. 234; Grover v. Superior Court, supra, 161 Cal.App.2d 644, 646; City & County of San Francisco v. Superior Court, 161 Cal.App.2d 653 [327 P.2d 195]; Grand Lake Drive In v. Superior Court, supra, 179 Cal.App.2d 122, 128). Based on this well-settled rule of construction it has been held that what an attorney observes and hears from his client is not necessarily privileged (Grand Lake Drive In v. Superior Court, supra), and that nonprivileged matter which comes into the attorney's possession via a privileged document may be subject to disclosure even though the entire document is not (idem; Unger v. Los Angeles Transit Lines, 180 Cal.App.2d 172 [4 Cal.Rptr. 370, 5 Cal.Rptr. 71]). Moreover a party may not

silence a witness by having him reveal his knowledge to the litigant's attorney (City & County of San Francisco v. Superior Court, supra, 37 Cal.2d 227, 238). In the Grand Lake opinion (supra, at p. 127) this proposition was stated as follows: "Knowledge which is not otherwise privileged does not become so merely by being communicated to an attorney. [Citation.] Obviously, a client may be examined on deposition or at trial as to the facts of the case, whether or not he has communicated them to his attorney. [Citation.] While the privilege fully covers communications as such, it does not extend to subject matter otherwise unprivileged merely because that subject matter has been communicated to the attorney." This court approved and adopted this language in San Francisco Unified Sch. Dist. (supra, 55 Cal.2d 451) in which it was said, at page 457: "We hold that the forwarding to counsel of nonprivileged records, in the guise of reports, will not create a privilege with respect to such records and their contents where none existed theretofore."

These rules clearly demonstrate that the petitioner's action of gathering and transmitting the witnesses' statements to its attorney did not create an attorney-client privilege unless such privilege existed, ab initio. That no privilege attached to those statements ab initio is demonstrated by the often-repeated proposition that the privilege created by subdivision 2 of section 1881 does not attach to matters communicated in the absence of a professional relationship or not intended to be confidential (City & County of San Francisco v. Superior Court, supra, 37 Cal.2d 227, 234-235; Grand Lake Drive In v. Superior Court, supra, 179 Cal.App.2d 122, 125-126; Clark v. Superior Court, supra, 177 Cal.App.2d 577, 580; Price v. Superior Court, 161 Cal.App.2d 650, 652 [327 P.2d 203]). The witnesses, whose statements petitioner has been ordered to disclose for inspection, did not intend their remarks to be confidential, and they were not in any sense parties to an attorney- client relationship. To attach privilege to the facts and matters which they voluntarily divulged to petitioner's investigators would run contra to the rule expressed in Chronicle Pub. Co. v. Superior Court, supra, 54 Cal.2d 548, at p. 565: " '... no new or common law privilege can be recognized in the absence of express statutory provision. ...' The burden of establishing that the evidence is within the terms of the statute is upon the party asserting the privilege." Inasmuch as the witnesses' statements were not, of themselves, privileged, and since the inclusion of them in what may have been a confidential report fn. 19 did not extend any privilege to them, petitioner's claim must fail.

But petitioner contends that the rule of Holm v. Superior Court (supra, 42 Cal.2d 500) demands a contrary conclusion. The Holm case, of course, had been decided when the California Legislature enacted the discovery act. But, as pointed out above, the Legislature expressly provided that mere adoption of the act should have no effect on existing judicial decisions interpreting privilege. Examination of Holm indicates that it does not support a claim that statements of independent witnesses, gathered for the purpose of trial preparation, are within the extent of the privilege. The Holm decision dealt with three specific pieces of material all of which were, as here, included in the report which defendant transmitted to its attorney in confidence. One was a photograph of the scene of the accident taken by defendant's investigators; the second was plaintiff's

statement obtained from her by defendant's bus driver; the third was the driver's own report, including his version of the accident, alleged to have been intended as a confidential report to his employer's attorney. The Holm decision held that the photograph and the driver's report were privileged, and that the plaintiff's statement was not. fn. 20 In its opinion the court had no occasion to discuss the privileged or nonprivileged nature of statements made by independent witnesses who were not parties to the litigation and who had no concern in the outcome. In fact, its language leads to the conclusion that if such statements of independent witnesses had been included in the communication the court would have held them to be discoverable along with plaintiff's statement.

In this connection, we agree with the holding of Trade Center Properties, Inc. v. Superior Court, 185 Cal.App.2d 409 [8 Cal.Rptr. 345]. There the attorney for defendant, in order to prepare himself for trial, took a statement from one Files, an independent witness to the transaction. The opposing party attempted to obtain the statement via deposition of the attorney. Although holding that it was contrary to public policy to allow the deposition of an attorney representing a litigant to be taken by his adversary in a pending action, the court refused to deny the right to discovery on the ground of privilege. In this connection the court, at page 411, stated: "The contention [that the information was subject to the attorney-client privilege] reveals a gross misunderstanding of that privilege. It extends only to 'any communication made by the client to' his attorney. Files ... is not a party to the pending action nor the client of defendants' counsel. No conceivable extension of the broadest view of the language of ... Holm v. Superior Court ... can extend the attorney-client privilege to the communications of the independent nonparty witness here involved."

For these reasons it must be held that the statements here involved were not privileged.

The "work product" rule:

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Gibson, C. J., Traynor, J., White, J., and Dooling, J., concurred.

Schauer, J., and McComb, J., concurred in the judgment.

FN 3. For a single example, see comparison of proposed (and subsequently adopted) section 2016 with federal rule 26, as reported in the above committee report at page 213 of the Journal. The committee recommended, and the Legislature accepted, far more liberality in the use of depositions than was provided in the federal system which represented, at that time, the most liberal system yet evolved.

FN 4. Each of these purposes was generally expressed in the case of Hickman v. Taylor, 329 U.S. 495 [67 S.Ct. 385, 91 L.Ed. 451], which interpreted the federal rules of discovery in 1947, and of which the California Legislature is deemed to have been cognizant when adopting those rules. Similar concepts of the purposes of discovery were expressed in Pettie v. Superior Court, 178 Cal.App.2d 680, at p. 689 [3 Cal.Rptr. 267],

and in Caryl Richards, Inc. v. Superior Court, 188 Cal.App.2d 300 [10 Cal.Rptr. 377].

FN 6. Several District Court of Appeal opinions, which otherwise have reached proper results, contain language implying that a party who is required to show good cause will be denied disclosure if he fails to show a specific need for the requested information, or does not have a special or proprietary interest in the document sought to be inspected. (For example, see Atchison, T. & S. F. Ry. Co. v. Superior Court, 191 Cal.App.2d 489 [12 Cal.Rptr. 788].) Such tests go beyond the statutory intent of "good cause," may often place the burden on the wrong party, and are disapproved.

FN 8. For an exhaustive analysis of the power of the trial court to protect against the possible abuse of discovery procedures, see Louisell, Discovery Today, (1957) 45 Cal.L.Rev. 486, 512.

FN 9. For an example of the trial court's unwarranted attempt to extend the statutory limitation on privilege, see San Francisco Unified Sch. Dist. v. Superior Court, supra, 55 Cal.2d 451.

FN 10. Examples: claim that the moving party is engaging in a "fishing expedition," or that privilege extends beyond the statutory definition thereof, or that the material sought is subject to an objection which is only applicable to time of trial, all discussed later.

FN 16. What is here said in regard to competency is not applicable to questions propounded on deposition. Depositions are governed by subdivision (c) of section 2016 which provides that examination shall "proceed as permitted at the trial. ..." The fact that this provision was not incorporated into the sections dealing with other forms of discovery indicates that the Legislature recognized a distinction between oral examination and other forms of discovery. In the former, the witness requires the protection afforded by those rules which prohibit questions which cannot be answered without admission of facts assumed therein, or which require lengthy explanation, or which cannot be readily understood. Such protection is not necessary in the other forms of discovery in which the party is not confronted by the requirement of immediate answer, and is entitled to the aid of counsel in framing an explanatory reply.

FN 19. It is not necessary to a decision herein that we pass upon the question of the privileged nature of this particular communication as affected by the fact that the attorney-client relationship did not exist at the time that the information was gathered.

FN 20. The opinion expressly recognized that the driver's statement, containing his version of the accident, would not have been privileged had it been made in the regular course of business as a report to his superiors for the purpose of studying methods of accident prevention or other administrative matters. The Holm doctrine thus makes a factual distinction between reports of the participants on the basis of whether they are made for the sole purpose of trial preparation. In both the Holm case and the instant proceeding there were conflicting contentions as to the original purpose of the report. Ordinarily, such must be deemed to present a factual issue for determination by the trial court.

The basis of the Holm determination that the photograph was privileged is not as clear as is the balance of the decision, in light of the fact that the picture was a representation of public highways which any person may have obtained. However, we are not here concerned with that phase of the case.

METHODS OF DISCOVERY

California Code of Civil Procedure ("CCP")	**Federal Rules of Civil Procedure ("FRCP")**
C.C.P. §2019.010 list Oral and written depositions. Interrogatories to a party. Inspections of documents, things, and places. Physical and mental examinations. Requests for admissions. Simultaneous exchanges of expert trial witness information.	FRCP Rule 26(a)(5) list Oral depositions or written questions Written interrogatories; Production of documents or things or entry upon property Physical and mental examinations; Requests for admission. FRCP26(a)(2) re experts
Depositions CCP 2025	FRCP 30 re depositions FRCP 28 deposition officers FRCP 32 use of deposition
Nonparty discovery by deposition CCP 2020	FRCP 45 re subpoena
Interrogatories CCP 2030	FRCP Rule 33 FRCP26(e) duty to correct
Production and Inspection CCP2031	FRCP 34 FRCP26(e) duty to correct
Physical and Mental Examinations CCP 2032	FRCP35
Admissions of Facts & Documents CCP2033	FRCP 36 FRCP26(e) duty to correct
Expert disclosure and discovery CCP 2034 detailed and lengthy provisions	FRCP 26(a)(2) 90 days before trial Require written report from retained expert

California Code of Civil Procedure ("CCP")	Federal Rules of Civil Procedure ("FRCP")
50 days before trial if demanded Discoverable reports if any Expert deposition fees paid by opponent	FRCP 26(b)(4) If report, depose after report Consulting expert if exceptional circum. Pay reasonable expert fee FRCP 26(e) duty to correct
ENFORCEMENT Sanctions CCP 2023 plus each discovery device section	FRCP 37

A brief review of the discovery tools reveals their advantages and disadvantages and may assist in formulating a strategy and plan that will enable you to conduct discovery in the most effective and efficient manner. There are many alternatives available including the alternative of not conducting or limiting discovery in the appropriate case. Every decision involves a cost / benefit analysis and a judgment call. That is one contribution that lawyers provide in the resolution of disputes.

DEPOSITIONS. Although depositions may be conducted on written questions, they are normally conducted by oral examination of witness who may be parties, non-parties, or spokesperson for an organization. Generally they proceed as an examination would proceed at trial but without the presence of a judge; however, objections are normally limited to privileges and the form of the question. The witness may be required to produce documents at the deposition.

Advantages: spontaneity and lack of attorney affect on response; opportunity to evaluate witness as to how they will appear at trial; follow-up questions allow the party conducting the deposition to pin down witness or party, to clarify and augment answers, and to pursue new areas; only means for discovery from nonparties; use at trial in lieu of live witness if the witness becomes unavailable or if proper notice is provided; can video tape deposition for more effective presentation or evaluation later.

Disadvantages: only one person's knowledge and testimony; no investigation by

the witness and may fail to remember at the time; may not have "possession or otherwise fail to bring important documents to deposition for examination; may be limited in time and may be restricted to one deposition of a witness so need to be well prepared

Corporate depositions achieve some of the advantages of written discovery such as investigation and production of persons who can testify on more than one person's knowledge and witnesses that can bind the corporation

INSPECTIONS: inspect, copy, test, sample; documents, things & land;

Advantages: may provide objective contemporaneous record of facts and events; often prepared without contemplation of litigation; prior examination may enable more effective oral deposition; provide structure for further discovery and elaboration on issues.

Disadvantages: overbroad requests may produce boilerplate objections and qualified responses; an attempt to be too thorough in the request may produce the proverbial document dump; a precise request may miss the key documents; the process can be delayed; lack of opportunity for follow up, clarify or make sure key documents have not been overlooked is only available if combined with a deposition; some cases suggest preliminary discovery should be conducted to identify and establish the existence of discovery before a request is made.

Alternatives: by deposition of any witness or written request for production to party; some jurisdictions allow interrogatories that request a party to attach identified documents to the answers or to answer interrogatories by attachment of documents that answer the interrogatories

INTERROGATORIES: written questions & answers for parties;

Advantages: totality of knowledge; investigation required to answer; good for

background material, contentions, identification of witnesses & documents, obtaining basic undisputed facts; the more specific the question the more likely it is to elicit the desired information.

Disadvantages: lack spontaneity of deposition, no opportunity for quick follow-up or ability to evaluate credibility; delay; answers normally drafted by attorneys; answers may not be responsive or factual, particularly if the questions lack specificity, may be equivocal or qualified or preceded by objections that

ADMISSIONS: admit facts, issues and genuineness of documents

Advantages: determine whether facts or issues are disputed; eliminate undisputed issues and establish facts and documents; investigation required to answer; Can be combined with interrogatories that discover basis for failures to admit;

Disadvantages: will only obtain admission if the request is clear, unequivocal and undisputed; denials can be made with little or no justification; sanctions are cumbersome and may be delayed until after trial; courts may be reluctant to deem matters admitted or provide any windfall

MEDICAL EXAMINATIONS when condition in controversy & good cause is shown; reports. Most commonly and almost exclusively involving defense medical examinations in personal injury cases.

EXPERT disclosure, discovery & deposition close to trial

Discovery has purposes beyond obtaining facts and evidence for one side. It can

Preserve evidence for trial that might be otherwise properly destroyed or lost
Flush out the legal allegations and contentions of the pleadings,

Provide the factual and evidentiary basis for allegations in the pleading,
Establish that there is no factual basis for some allegations
Limit the opponent to specific contentions or a version of the facts,
Prepare and enable the taking or more effective future discovery
Allow parties to evaluate their cases for settlement
Enable parties to obtain evidence, a fair hearing and due process
Eliminate surprise at trial so that both sides are fairly presented and a determination can be based on the merits rather than gamesmanship
Eliminate factual disputes and narrow or eliminate issues so as to expedite the trial
Educate you and your opponent of the weaknesses of the respective cases
Present evidence at trial that would otherwise be unavailable, too expensive or too time consuming

Discovery can also be used to

Educate your opponent and force it to prepare better
Encourage your opponent to use the same discovery on your client
Exacerbate and increase the cost of litigation and dispute resolution
Harass non-party witnesses
Bury the opposition in paperwork that is unproductive and expensive
Force settlement by propounding burdensome or embarrassing discovery
Prevent an opponent from preparing for trial by imposing last minute burdensome discovery
Divert the lawyers and parties from dispute resolution

Discovery can be frustrated and made more expensive by

Seeking extensions or filing objections for the purpose of delay
Serving frivolous, boilerplate objections

Serving evasive and equivocal responses

Failing to respond and forcing opponents to seek court intervention to obtain responses

See CCP 2023(a)

OBJECTIONS & PRIVILEGES

Objections must be timely raised in response to a discovery request. Objections to discovery requests are directed to discoverability rather than admissibility. Consequently, objections such as hearsay or assuming facts not in evidence are not proper. *Greyhound Corp. v. Superior Court* (1961), 56 Cal.2d 355, 392. *West Pico Furniture v. Superior Court* (1961), 56 Cal.2d 407, 421. Most discovery objections involve a balancing of interests and a cost/benefit analysis; and, are not favored in the abstract. Burden and oppression objections may be weighed against the importance and value of the evidence and consider other factors such as alternative sources of information and cost shifting. *West Pico Furniture Co. v. Superior Court* (1961), 56 Cal.2d 407, 417-18. [Burden must be quantified and result in injustice.] Highly technical or obstructive objections are not favored. Discovery is supposed to be self-executing and take place outside of court. Since the involvement of the court is supposed to be the exception, the system does not work if rulings are continually required. Some objections that are appropriate to one form of discovery such as depositions are not appropriate to other forms of discovery.

Normally, privileged material is not discoverable and such issues are often resolved in discovery motions since the value of a privilege is destroyed upon disclosure. Privileges are based on public policy that considers certain values to be more important than the production of evidence: e.g. the right to counsel and the need to communicate freely with counsel to have effective representation. Privileges include attorney-client, work product, physician-patient and Constitutional rights such as the privilege against self-incriminations. An appellate court is more likely to consider a trial court decision overruling a privilege objection than other objections. The procedural details of

objections, waivers, and relief may vary from jurisdiction to jurisdiction and also from discovery device to discovery device.

WAIVER OF OBJECTIONS & RELIEF

A well established general principle is that the failure to object on a specific ground within the time provided by law is a waiver of that objection. *West Pico Furniture Co. v. Superior Court* (1961), 56 Cal.2d 407, 414. *Coy v. Superior Court* (1962), 58 Cal.2d 210, 216-217. A failure to object at all in a timely fashion is a waiver of all objections. The timing of discovery is critical and it is important that the proper dates are noted and properly calendared. In calculating due dates, consider whether the form of service will extend the due and for how many days. See *Sheets v. Superior Court* (1967), 257 Cal.App.2d 1, 8.(Code Civ.Proc. 1013 extends time by five days if interrogatories served by mail; See also *California Accounts Inc. v. Superior Court* (1975) 50.) Cal.App.3d 483; *Shell Oil Co. v. Superior Court* (1975) 50 Cal.App.3d 489

Because of the harshness of inadvertent waivers, relief from waiver may be obtained pursuant to statute, rule or case law. The burden of proof for relief is on defaulting party. *West Pico Furniture Co. v. Superior Court* (1961), 56 Cal.2d 407. Normally, a showing or good cause for relief, prejudice, lack of detrimental reliance or prejudice to the propounding party, lack of delay or estopple etc. must be shown and the relief is within the discretion of the court. *Fuss v. Superior Court* (1969), 273 Cal.App.2d 807. ["An objection to an interrogatory must be interposed within the statutory time for response and, absent a showing of good cause for relief from default, cannot be considered, if made thereafter. (Coy v. Superior Court, 58 Cal.2d 210, 216 [23 Cal.Rptr. 393, 373 P.2d 457, 9 A.L.R.3d 678)] Naturally, one does not want to be in the position of asking the court to grant relief to a party who failed to comply with the law. *Mannino v. Superior Court* (1983) 142 Cal.App.3d 776,779 [abuse of discretion to allow late objections when weak excuse for being 6 days late in filing boilerplate objections after prior extension of time was granted & no further extensions were sought from counsel or the court.]

PROTECTIVE ORDERS

Protective order provisions appear throughout discovery laws and are the bases for the court exercising discretion to control abuses and facilitate the discovery process. See *Day v. Rosenthal* (1985), 170 Cal.App.3d 1125 [Protective order upheld for oppressive last minute discovery involving 9 sets of interrogatories and several depositions in 5 yr. litigation when issues had been known for 5 yrs.] In some cases, they are an alternative means of raising an objection to or imposing a limitation on discovery. They incur the expense of a motion and hearing when a simple objection might have accomplished the same result; however, they can raise and resolve a key issue early in the process which could save time and money. Protective orders cover a broad range of remedies and have been the legal basis for cost shifting in recent cases dealing with electronic discovery. See *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Multitechnology Services v. Verizon Sowthwest (N.D.Tex.2004), 2004 WL 1553480

ENFORCEMENT

Discovery rules are enforced by motions seeking orders compelling compliance with the discovery rules such as orders compelling responses or further responses to discovery requests. In addition, evidence at trial may be limited or precluded based on discovery responses or conduct. As an additional incentive to comply with discovery obligations, motions may include a request for sanctions: monetary compensation for the cost of compelling the discovery, issue determination or evidence preclusion sanctions for failure to provide discovery, dismissal or actions or entry of defaults for failures to comply in extreme circumstances. Normally, discovery sanctions are not employed to punish or to provide windfalls but to achieve the purpose of discovery and to place persons in the same position they would be in had they obtained discovery as requested. Persons can be punished by contempt with fines or imprisonment for failure to comply with court orders. Spoliation remedies of a similar nature exist for the destruction of evidence.

BASIC FORMAT & STRUCTURE OF DISCOVERY RULES

The following chart compares the Federal and California provisions on discovery with regard to the basic format and structure and should facilitate access to the respective texts for comparison as well as highlight the similarities and differences. Despite the many similarities or even identical provisions there are some items that are only covered in one jurisdiction and some differences in the approaches when the same subjects are covered.

CALIFORNIA **Civil Discovery Act** **California Code of Civil Procedure** **C.C.P.** **Sections 2016-2036**	**FEDERAL** **Federal Rules of Civil Procedure** **FRCP** **Rules 1, 16, 26-37**
Scope of Discovery CCP 2017.010 "not privileged" "relevant to the subject matter... or to the determination of any motion made in that action"	FRCP 26(b)(1)"any matter, not privileged, that is relevant to the claim or defense" scope narrowed in 2000
Trade secrets identification CCP 2019.210	
Insurance CCP 2017.210	FRCP 26(a)(1)
Plaintiff's sexual conduct CCP 2017.220	
Elder abuse settlement agreements and protective orders CCP 2017.310	
Methods of Discovery CCP 2019.010 (1) Oral and written depositions. (2) Interrogatories to a party. (3) Inspections of documents, things, and places. (4) Physical and mental examinations. (5) Requests for admissions. (6) Simultaneous exchanges of expert trial witness information.	FRCP26(a)(5) oral depositions or written questions written interrogatories; production of documents or things or entry upon property physical and mental examinations; requests for admission. FRCP26(a)(2) re experts
	Discovery Conf. & Planning FRCP 26(f) Discovery Case Mgmt. Order FRCP16(b)

CALIFORNIA **Civil Discovery Act** **California Code of Civil Procedure** **C.C.P.** **Sections 2016-2036**	**FEDERAL** **Federal Rules of Civil Procedure** **FRCP** **Rules 1, 16, 26-37**
Use of Technology in Conducting Discovery CCP 2017	
Sequence & timing CCP 2019.020 Any sequence; no delay by pending discovery Court can vary sequence & timing	FRCP 26(d) any sequence; no delay by pending discovery; court can vary
Form discovery as requested CCP 2033.710 et seq. Form Interrogatories Employment law form interrogatories Requests for Admissions See expert discovery below	**Mandatory, early, automatic, disclosures** FRCP26 Initial disclosure of witness, document, damages, insurance (a)(1) Expert & reports 90 days before trial (a)(2) Witness & documents 30 days pretrial(a)(3)
Supplemental discovery if served Interrogatory CCP 2030.070 Document Request CCP 2031.050	FRCP 26(e) **Duty to supplement / correct** Materially incorrect or incomplete if not made known during discovery or in writing
Hold on plaintiff 10-20 days (each device) Completion of Discovery CCP 2024	FRCP 26(d) hold on all parties until 26(f) conference
Stipulations of counsel to vary procedures CCP 2016.030	FRCP 29
Limits on Discovery / Protective Orders CCP 2017.020, 2019.030	FRCP26(b)(2) FRCP 26(c)
Discovery before and after action CCP 2035-36	
Work Product CCP 2018.	FRCP 26(b)(3)
Manner of asserting privilege or work product See specific sections especially 2031.240(b) re document production	FRCP 26(b)(5) express + identify

SOURCES OF DISCOVERY LAW

Discovery has been around for some time. See *The FORTUNA--Krause, et al. Claimants* (March 17, 1817) 15 U.S. 161, 4 L Ed. 209, 2 Wheat 161. *Valentine v. Stewart* (1860) 15 Cal. 387, 404. However, modern discovery is based on the Federal Rules of Civil Procedure adopted in 1935 which, in turn, were adopted in whole or in part by state jurisdictions. Much care must be exercised in reviewing the rules of the jurisdiction in which a case may be pending because of the detail, the differences, and the many traps for the unwary. However, the purposes, principles, procedures and basic devices for discovery are common.

The basic rules are derived from statute or from court rules from each jurisdiction such as the Federal Rules of Civil Procedure. State statutes may be supplemented by jurisdiction wide court rules as with the California Rules of Court. Local rules may be adopted by a particular trial court in a local jurisdiction or by a particular judge within that court. Always check for written, or even unwritten, local rules, policies, practices, or standing orders. Extensive case law exists in many jurisdictions.

At the federal level the primary sources are the Federal Rules of Civil Procedure, the case law and the local district court or judge rules. However, the case law often is limited to non-binding trial court decisions and is spread among different Circuits. Many federal trial courts or individual judges adopt local rules that are critical. In contrast, California has a detailed statute, court rules and extensive decisional law of statewide applicability. It prohibits local rules except as expressly authorized. CRC Rule 981.1.

In addition to the basic Civil Discovery Act, CCP §§2016-36, California discovery may involve the following code sections:

Production of Evidence CCP §§ 1985-1997 re depositions, subpoena, consumer notice, sanctions
Evidence Code re privileges Evid. C.§§ 900-1070 [privileged matters are not

discoverable]

Constitutional issues: Free speech, assembly, Unreasonable searches & Right to Privacy

Discovery of financial info for punitive damages: Civil Code §3295

Trade Secrets: Civil Code §3426

References to private judges: CCP §638 et seq,

Statement of damages in personal injury cases CCP §425.11

Bill of Particulars in collection cases CCP §454

California Rules of Court ("CRC") are of increasing importance due to the preemption of local rules by the California Judicial Council effective July 1, 2000.

Rule 981.1 preempts local rules on law and motion as of 7/1/00

Rule 244.1 &.2 references to private judges by consent or over objection

Rule 298 telephonic appearances at motion hearings

Rule 301-324 Law & Motion

Rule 331-337 Discovery

Rule 335 separate statement

Rule 337 personal service on non-party deponent

DISCOVERY RELEVANCE

The general rule is that discovery is liberal or broad in scope and that one should error on the side of permitting discovery. This is often referred to as "subject matter relevance" or "discovery relevance". The major exception to that rule is when privilege objections are raised. The scope of discovery is defined in the rules or statutes of the jurisdiction. See FRCP Rule26(b)(1) and California C.C.P. §2017.010. Footnote 15 in the Pacific Telephone case, *infra*, provides a practical guideline:

> "Commentators have suggested that in recognition of the practical operational problems involved, the "relevancy" test should perhaps expand and contract

> according to the size and complexity of the case. Thus in a small case dealing with facts and issues of moderate quantity, the trial court could adopt a very relaxed view of relevancy and still keep the discovery under control; in a large, complex case dealing with numerous and diverse issues, a court could adopt more restrictive standards to contain discovery within manageable limits. (See Developments in the Law--Discovery (1961) 74 Harv.L.Rev. 940, 1008; The Practical Operation of Federal Discovery (1952) 12 F.R.D. 131, 143 (remarks of Mr. Connelly).) Under such an approach, in which the size of the litigation and the amount of prior discovery constitute important factors, we would, then, substantially defer to a trial court determination that certain inquiries should be permitted."

At commencement of the litigation no one knows what evidence may be available or admissible. No one knows if there is a "smoking gun" memo, e-mail or test result---- or who may have it or where it might be. No one knows what information, though itself inadmissible, may lead to further information that is admissible. Causes of action, defenses, or parties may be added to or dropped from the law suit. What is or may be relevant to the ultimate trial or to settlement may not be clear at the beginning. However, the general facts and circumstances out of which a claim has been alleged can be identified. And that is the general guideline that is applied.

That does not mean that discovery is without limit. Only that one should be cautious and serious about raising and pursuing a relevancy, burden, or similar objection that reduces the scope of discovery. Throughout the years, concern about the costs and abuses of discovery have resulted in proposals to limit discovery in various ways including the scope of discovery.

FRCP Rule 26(b) was amended in 2000 to reduce the scope to "relevant to the claim or defense of any party" rather than relevant to the subject matter. Recent litigation involving electronic discovery where compliance expenses can reach hundreds of thousands or millions of dollars has revived and focused attention on the need to apply a cost / benefit analysis, to limit discovery or to shift the costs of discovery.

CALIFORNIA AND FEDERAL RELEVANCE STANDARDS

CALIFORNIA **C.C.P. §2017.010**	**FEDERAL** **FRCP Rule 26(b)(1)**
Unless otherwise limited by order of the court	Unless otherwise limited by order of the court
any matter, not privileged,	any matter not privileged
relevant to the subject matter involved in the pending action or to the determination of any motion made in that action	relevant to the claim or defense of a party
if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.	need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.
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, tangible thing, or land or other property.	including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter
	If good cause shown matter relevant to the subject matter involved in the action

Pacific Tel.& Tel. v. Superior Court

(1970), 2 Cal.3d 161, 172

TOBRINER, Acting C.J.

[Plaintiff sued the phone company based on alleged illegal wiretaps. Defendants sought a writ after the trial court ordered defendants to answer 97 deposition questions over relevancy objections: (1) questions relating to the procedure used in making unauthorized taps of phone conversations (training of personnel, equipment, authority among employees); (2) questions relating to the deponent's knowledge of the illegality of unauthorized monitoring; (3) questions relating to a possible working relationship between the San Diego Police Department and the Security Division of PT & T; and (4) questions relating to the monitoring of telephone conversations of subscribers other than plaintiff, including the frequency of such monitoring and the experience of deponent in such monitoring generally.]

We have concluded that in light of the liberal and necessarily flexible standard of

"relevancy" delimiting the arena of discoverable matter, the trial court did not abuse its discretion in ordering the deponents to answer the contested inquiries.

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Section 2016, subdivision (b), which parallels rule 26(b) of the Federal Rules of Civil Procedure, states in pertinent part: "Unless otherwise ordered by the court as provided by subdivision (b) or (d) of section 2019 of this code, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party .... It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." Although the second sentence of section 2016, subdivision (b) ("reasonably calculated to lead to the discovery of admissible evidence"), gives some guidance for determining what is "relevant to the subject matter" "[n]o precise or universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience." [citations]

Although we have not been able to articulate a single, comprehensive standard of relevancy, we have established a few guidelines. Past cases make clear that the "relevancy of the subject matter" criterion is "a broader concept than `relevancy to the issues,'" [citation] the test which prevailed prior to the enactment of the current discovery scheme. Matters sought are properly discoverable if they will aid in a party's preparation for trial. [citation] In addition, because all issues and arguments that will come to light at trial often cannot be ascertained at a time when discovery is sought, courts may appropriately give the applicant substantial leeway, especially when the precise issues of the litigation of the governing legal standards are not clearly established [citation]; a decision of relevance for purposes of discovery is in no sense a determination of relevance for purposes of trial.

In sum, the relevance of the subject matter standard must be reasonably applied; fn. 15 in accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should generally be resolved in favor of permitting discovery (cf. Chapin v. Superior Court (1966) 239 Cal.App.2d 851, 855-859 fn. 16 Given this very liberal and flexible standard of relevancy, a party attempting to show that a court abused its discretion in finding material relevant for purposes of discovery bears an extremely heavy burden. An appellate court cannot reverse a trial court's grant of discovery under a "relevancy" attack unless it concludes that the answers sought by a given line of questioning cannot as a reasonable possibility lead to the discovery of admissible evidence or be helpful in preparation for trial.

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1. Relevancy of questions dealing with general monitoring procedures

First, the defendants erroneously assume that by admitting participation in the

eavesdropping in their pleading, and thereby ostensibly narrowing the issues for trial, they have also narrowed the scope of permissible discovery. Although one of the purposes of discovery is to permit the parties to learn the issues on which they are in agreement and thereby simplify the trial [citation], one party, by conceding some matters, cannot unilaterally close the door to all discovery concerning that concession. ... "[t]he relevancy [of the subject matter of the action] is to be determined ... by the potential as well as actual issues in the case." [citations] Even if, by concession in a pleading a party removes, perhaps temporarily, a given issue from the case, the scope of discoverable information will not necessarily be narrowed.

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... frequently, as in the instant case, the nature of the facts that will be relevant and admissible at trial cannot accurately be determined at the pretrial stage of application for discovery. ....

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2. Relevancy of questions involving the deponents' knowledge of illegality of actions
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3. Relevancy of questions inquiring into the telephone company's communications with police
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4. Relevancy of questions relating to the monitoring of other subscribers

A representative question of this category inquires: "How many times have you monitored telephone calls without the knowledge or permission of the subscriber?" [NOTE. In presenting many interrogatories to a busy judge it is often effective to select truly representative items, particularly with the stipulation from opposing counsel that a decision one interrogatory will govern several and that the judge need not rule on each. Of course, all would interrogatories would be submitted to the court.]

****That the answers to such questions may not prove helpful and may not uncover admissible evidence does not preclude a party from posing them. [citation]

****Since the discoverability of information does not depend on its admissibility at trial, doubts as to the appropriateness of a given line of inquiry, in view of the liberal policies underlying the discovery statutes, should generally be resolved in favor of permitting discovery. We certainly cannot say that the conclusion of the trial court that the questions in the fourth category are relevant to the subject matter of the action constitutes an abuse of discretion.

We therefore conclude that the order of the trial court compelling the deponents to answer 97 questions propounded at a deposition does not constitute an abuse of discretion.

The order to show cause is discharged and the petition for writ of prohibition is denied.

McComb, J., Peters, J., Mosk, J., Burke, J., and Fleming, J., concurred.

FN 16. Cf. Greyhound Corp. v. Superior Court, supra, 56 Cal.2d 355, 383 ("When disputed facts provide a basis for the exercise of discretion, those facts should be liberally construed in favor of discovery, rather than in the most limited and restrictive manner possible.")

A liberal application of the relevancy criterion should also contribute to the efficiency of the entire discovery process. The draftsmen of our statutory reform of discovery contemplated that, except in a few designated areas, the discovery procedure would operate extrajudicially and that generally a deponent will not refuse to answer questions relating to unprivileged matter, on the grounds of irrelevancy, but will save such objections for trial. (See, e.g., § 2021, subd. (c)(1).)

The efficacy of this extrajudicial operation can be significantly undermined if the party who is the subject of discovery continually refuses to answer questions on the ground of irrelevancy; each refusal requires the party seeking discovery to go to the courts for aid and thus works a significant delay in the discovery process. A strict, rigid interpretation of the relevancy requirement of section 2016, subdivision (b), would probably lead recalcitrant parties to attempt to construct an "irrelevancy" barrier to discovery more frequently; on the other hand, a more fluent, liberal interpretation may discourage resort to this kind of delaying tactic.

Blankenship v. Hearst Corp 519 F2d 418, 429 9th cir 1975
Pettiway v. American Cast Iron Pipe Co. 576 F2d 1157 5th cir 1978

Admissibility Most lawyers and courts focus on the relevancy to the subject matter but the scope of discovery has a two prong test: relevancy and admissibility. The latter requires that the relevant matter be either itself "admissible in evidence" or appear "reasonably calculated to lead to the discovery of admissible evidence". C.C.P. 2017.010. FRCP Rule 26(b)(1) uses the same language in a different form. The requirement that discovery be at least "calculated to lead to... admissible evidence" may be more difficult to meet; so, when opposing discovery on relevancy grounds, that aspect of the test should be stressed. How can the person seeking discovery show that documents may lead to admissible evidence if they have not seen them?

Norton v. Superior Court (Ein)

(1994) 24 Cal.App.4th 1750 , 30 Cal.Rptr.2d 217

JOHNSON, J.

In this action, plaintiffs are suing petitioner for legal malpractice in the settlement of their suit for property damage against the City of Palos Verdes (hereafter the City). Petitioner demanded production of all documents containing the terms and conditions of plaintiffs' recovery from their own insurer for the same property damage that was the subject of the suit against the City. Citing the collateral source rule and other grounds, plaintiffs refused to produce the requested documents. The trial court denied petitioner's motion to compel production. Petitioner seeks a writ of mandate directing the trial court to vacate its ruling and to issue an order compelling plaintiffs to comply with his discovery demand.

We will issue a writ ordering the trial court to vacate its ruling and to reconsider the question whether the demanded material could be admissible or could reasonably lead to the discovery of admissible evidence and, if it could, to order plaintiffs to produce the material.

Facts and Proceedings Below

Plaintiffs Zack and Ellen Ein, real parties in interest, owned a home in the City. A series of landslides did substantial damage to the Eins' home and they brought an inverse condemnation action against the City. Defendant Richard Norton, petitioner, represented the Eins in the Palos Verdes lawsuit.

While the Palos Verdes lawsuit was pending, the Eins brought an action against State Farm Insurance Company for failing to indemnify them for the same property damage at issue in the Palos Verdes suit. A different attorney represented the Eins in the State Farm lawsuit.

In October 1989, the Eins settled their suit against the City by transferring title to the property to the City in return for $1.85 million and a "limited life estate." In May 1990, the Eins settled their lawsuit against State Farm for an undisclosed sum.

Following settlement of their suits against the City and State Farm, the Eins initiated the present legal malpractice action against Norton. The Eins allege Norton was negligent in negotiating the settlement terms with the City resulting in adverse tax consequences and that he pressured the Eins into accepting the amount of the settlement.

Norton served a demand for production of documents on the Eins. (Code Civ. Proc., § 2031.) The demand called on the Eins to produce "any and all documents, including but not limited to a complete copy of the settlement agreement, setting forth the terms and conditions of settlement of the [State Farm lawsuit]."

The Eins response to this demand for production stated the only document containing the terms and conditions of the settlement agreement was the agreement itself and that they would not produce this document. They based their refusal to produce the document on

the following grounds: (1) the settlement agreement with State Farm is irrelevant to any matter in the present malpractice action against Norton; (2) the settlement agreement will not lead to the discovery of any admissible evidence in this action; (3) discovery of the Eins' private financial information contained in the settlement agreement would violate their right to privacy; and (4) discovery of the settlement agreement is barred by the attorney-client privilege and the attorney work product rule.

Norton moved for an order compelling production of the State Farm settlement agreement. The trial court denied the motion and Norton filed this petition for writ of mandate. We issued an alternative writ in order to consider the application of the collateral source rule to a legal malpractice action and the question whether the settlement agreement could be discoverable even if the collateral source rule applies.

Discussion

I. The Amount of the Eins' Settlement With State Farm Is Not Admissible for the Purpose of Mitigating the Damages the Eins Would Otherwise Recover From Norton.

Code of Civil Procedure section 2017, subdivision (a) provides in relevant part, "[A]ny party may obtain discovery regarding any matter not privileged, that is relevant to the subject matter involved in the pending action ... if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." Thus, in order to be discoverable, the information sought must meet a two-pronged test. It must be (1) relevant to the subject matter involved in the pending action, and (2) either admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence.

Although Norton's discovery demand was for documents containing the "terms and conditions" of the Eins' settlement with State Farm, the parties have primarily focused on the narrow question whether the amount of the settlement would be admissible at trial and, therefore, discoverable.

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Thus, the collateral source rule applies indirectly in a way which makes evidence of payments from a collateral source irrelevant on the question of damages.

II. The Trial Court Should Determine Whether the Terms and Conditions of the Settlement Agreement Are Admissible in Evidence or Whether Their Discovery Appears Reasonable Calculated to Lead to the Discovery of Admissible Evidence.

Our holding the amount of the Eins' insurance settlement is not admissible for purposes of reducing their damages only eliminates one possible theory supporting discovery. We must still determine whether the terms and conditions of the settlement agreement, including the amount of the settlement, are discoverable under some other theory. The

answer to this question depends on whether the terms and conditions of the settlement agreement are relevant to the subject matter of the pending action and whether they are directly admissible or could reasonably lead to the discovery of admissible evidence. (Code Civ. Proc. § 2017, subd. (a).)

Relevancy to the subject matter of the litigation is a much broader concept than relevancy to the precise issues presented by the pleadings. [citation] "The 'subject matter of the action' is the circumstances and facts out of which the cause of action arises; it is the property, contract, or other thing involved in the dispute; it is not the act or acts which constitute the cause of action, but describes physical facts in relation to which the suit is prosecuted." [citation] Information is "relevant to the subject matter" if its discovery will tend to promote settlement [citation] or assist the party in preparing for trial [citations] Clearly, discovery of the terms and conditions of State Farm's settlement of the Eins' property damage claim could assist in reaching a settlement or preparing for trial in the present action. Therefore, the first prong of the discoverability test is met.

The second prong of the discoverability test can be satisfied by showing the information sought to be discovered is itself admissible in evidence.

The admissibility of evidence often turns on the purpose for which it is offered. ... [If inadmissible for one purpose] it does not necessarily bar introduction of such evidence for some other purpose. [citation]

Furthermore, in a discovery dispute over admissibility of evidence, the issue is the admissibility of the evidence vel non. The possibility evidence otherwise admissible might be excluded at trial under Evidence Code section 352 or some other evidentiary objection is not a relevant consideration for purposes of ruling on a discovery motion. [citation]

Information which is not directly admissible in the action is nevertheless discoverable if it is reasonably calculated to lead to the discovery of admissible evidence.

In accordance with the liberal policies underlying the discovery procedures, California courts have been broad-minded in determining whether discovery is reasonably calculated to lead to admissible evidence. [citations] As a practical matter, it is difficult to define at the discovery stage what evidence will be relevant at trial. Therefore, the party seeking discovery is entitled to substantial leeway.[citations] Furthermore, California's liberal approach to permissible discovery generally has led the courts to resolve any doubt in favor of permitting discovery. In doing so, the courts have taken the view if an error is made in ruling on a discovery motion, it is better that it be made in favor of granting discovery of the nondiscoverable rather than denying discovery of information vital to preparation or presentation of the party's case or to efficacious settlement of the dispute.[citations] The courts have also taken the view that wherever possible objections to discovery should be resolved by protective orders addressing the specific harm shown by the respondent as opposed to a more general attack on the "relevancy" of information the proponent seeks to discover. (Pacific Tel. & Tel., supra, 2 Cal.3d fn. 11 at p. 171; Greyhound Corp. v. Superior Court, supra, 56 Cal.2d at p. 392; West Pico Furniture Co.

v. Superior Court (1961) 56 Cal.2d 407, 418 [15 Cal.Rptr. 119, 364 P.2d 295].)

Bearing these principles in mind, we conclude it is possible the terms and conditions of the State Farm settlement agreement could be, or could lead to, admissible evidence. The requested information could result in evidence of the extent of the Eins' injury from the alleged malpractice, their motive in bringing the malpractice action, or their bias and credibility as witnesses. For example, the settlement agreement might provide State Farm would make a future payment to the Eins up to a certain amount depending on the amount they recover from Norton. In the settlement with State Farm the Eins might acknowledge the two settlements together constitute a complete satisfaction for all their injuries. Or, the settlement agreement might provide that in return for State Farm's payment of their property damage claim the Eins agree to sue Norton for malpractice in obtaining an inadequate settlement with the City and to subrogate State Farm to that claim or turn over the proceeds of any recovery to State Farm.

Not having seen the settlement agreement we can do no more than suggest hypotheticals in which the agreement would be discoverable. However, the trial court did not view the document either and therefore could not make an informed decision about whether some or all of it was discoverable. The appropriate remedy, we believe, is to remand this matter to the trial court with directions to review the State Farm settlement agreement in camera and determine, consistent with the views expressed in this opinion, whether some or all of it should be produced to Norton and under what restrictions, if any.

Disposition

Let a peremptory writ of mandate issue directing respondent court to vacate its ruling denying petitioner's motion to compel production of documents and ordering the court to reconsider its ruling in light of the views expressed in this opinion and an in camera inspection of the settlement agreement between respondents and the State Farm Insurance Company and to determine whether some or all of said settlement agreement should be ordered produced to petitioner and under what conditions or restrictions, if any.

Lillie, P. J., and Woods (Fred), J., concurred.

Other than the more narrow terminology of "relevant to the claim or defense", is there any significant difference in the California and Federal scope of discovery?

DISCOVERY DUTIES

DUTY TO PRESERVE EVIDENCE / SPOLIATION

See below where this duty is discussed in detail. Destruction of evidence strikes at the heart of any judicial or dispute resolution system and the legal concepts of preservation and spoliation are well established. This issue received increased attention with the advent of electronic discovery in the mid nineties due to the nature of computer data and the destruction of potential evidence in normal operations. These duties impact on the duty to search and produce data in response to discovery.

DUTY OF INVESTIGATION

Some indication of the duty to search, investigate and respond in full is reflected in the statutes and rules.

CALIFORNIA	FEDERAL RULES
C.C.P. §2030.220 [(f)(1)]	
"...as complete and straightforward as the information reasonably available...permits"	FRCP Rule 26(g) "The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made."
"...answered to the extent possible...."	FRCP Rule 33(b)"Each interrogatory shall be answered separately and fully"
"...make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations...."	
C.C.P. §2030.310 re amended answers	FRCP Rule 26(e) duty to supplement

In responding to written discovery, parties must make a reasonable investigation. Like other discovery concepts the exact parameters have not been defined, will depend on the facts and circumstances, and may involve a cost / benefit analysis. In addition to the statutes and rules, several cases have provided guidance. *Gordon v. Superior Court* (1984), 161 Cal.App.3d 157, 167 [party cannot plead ignorance to information obtainable from sources under its control]. *Holquin v. Superior Court* (1972), 22 Cal.App.3d 812. [Party need not contact an independent party to answer interrogatories.] The lawyer is deeply involved in the process from beginning to end and normally facts and information known to the lawyer are not privileged. In conducting a reasonable investigation, parties must seek and provide the information available to agents and attorneys. See. *Smith v. Superior Court* (1961)), 189 Cal.App.2d 6 [Information known only to the attorney must be disclosed]. *Unger v. L.A. Transit Lines* (1960), 180 Cal.App.2d 172, 175.[Motion for inspection of materials in possession of attorneys for insurance company are in possession of insured.] Party may be bound to incorrect answer if the other party is prejudiced; See FRCP Rule 26(e) re duty to supplement and C.C.P. §2030.310 re amended answers. *Pantzalas v. Superior Court* (1969), 272 Cal.App.2d 499, 504. [Employer of insured under group policy is agent of the insurance company and the insurance company must answer interrogatories by providing information known to the employer.] When a corporation is responding it is the knowledge of the corporation that must be provided. See also *Maldonado v. Superior Court* (2002), 94 Cal.App.4th 1390 [corporate deposition; "…the witness or someone in authority is expected to make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held."]. Experts present unique problems of timing and privilege, but they may be part of a reasonable investigation if they are still retained and subject to inquiry for the party in the normal course of trial preparation. See *Sigerseth v. Superior Court* (1972), 23 Cal.App.3d 427.[Sanctions imposed for party's refusal to obtain information from its own expert.]. *Tehachapi-Cummings County Water Dist. v. Superior Court* (1968), 267 Cal.App.2d 42, 46. [Interrogatories as to facts regarding a common source of ground water and hydrological and geological facts; attorney

declaration re hiring expert before litigation; "What is demanded and what must be furnished is the factual positions taken.... The details of the sources of these viewpoints contained in the reports of the experts are not asked for in this proceeding, but only the asserted facts constituting the general positions upon which the parties base their claimed defenses. Court questions whether this is work product and points out that there is no attempt to discover what the expert told the attorney or the experts report.]. *Chodos v. Superior Court* (1963), 215 Cal.App.2d 318, 322. [may have to consult experts to respond to request for admission.] *Mowry v. Superior Court* (1962), 202 Cal.App.2d 229, 236 [Condemnation action where expert testimony by declaration had occurred. Expert was no longer employed but might be expert witness at trial. Court distinguishes between objective information in corporate possession and subjective information known only to expert and properly part of cross examination. Language suggests that information only available to independent expert should be obtained by deposition but information known to corporation should be provided in answers to interrogatories. Agent for purposes of answering interrogatories doesn't include an expert hired for a particular purpose whose employment has terminated.] Generally, a person need not conduct and provide the fruits of legal research to the opponent yet some legal analysis and judgment is involved in written discovery. See S*av-on Drugs, Inc. v. Superior Court* (1975), 15 Cal.3d 1.[Party need not conduct legal research to answer interrogatories re: legal authority for tax deductions.] See also 1970 Advisory Committee Notes to FRCP Rule 33(b) re no need to answer contention interrogatories re pure question of law. 48 F.R.D 487. Normally, a party does not explain in responses what it did to locate information but courts have required such detail when good cause is shown. See *Deyo v. Kilbourne* (1978), 84 Cal.App.3d 771, 782.[If a party is unable to fully answer it should set forth the efforts made to secure the information.]

ATTORNEY DUTY TO ADVISE, MONITOR, AND SUPERVISE

ABA Civil Discovery Standards 10 and 29 relevant to this issue provide:

10. The Preservation of Documents. When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the possible consequences of failing to do so.

29. Preserving and Producing Electronic Information.
a. Duty to Preserve Electronic Information.
i. A party's duty ... also applies to information contained or stored in an electronic medium or format, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail.

[NOTE. Extensive amendments to both standards were proposed in 2004.]

ZUBULAKE V

[In *Zubulake v. UBS Warburg* Judge Shira A. Scheindlin of the Southern District of New York issued several discovery orders in 2003-04 regarding electronic discovery and dealing with such issues as the duty to preserve evidence including a duty to suspend destruction of electronic documents, cost shifting , and sanctions. In *Zubulake V*, issued in July 2004, she granted sanctions and wrote in detail about the duty of counsel in the discovery process beginning at page 24 of the original court slip opinion. The following are excerpts from that opinion.]

A. Counsel's Duty to Monitor Compliance

In Zubulake IV, I summarized a litigant's preservation obligations:

> Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.[72]

fn 72 "....If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key players" to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.")

[p. 25 slip opinion]

A party's discovery obligations do not end with the implementation of a "litigation hold" — to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant

documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.

1. Counsel's Duty to Locate Relevant Information

Once a "litigation hold" is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," to the extent required in Zubulake IV. To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's [p.26 slip opp] recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information. In this case, for example, some UBS employees created separate computer files pertaining to Zubulake, while others printed out relevant e-mails and retained them in hard copy only. Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected. A brief conversation with counsel, for example, might have revealed that Tong maintained "archive" copies of e-mails concerning Zubulake, and that "archive" meant a separate on-line computer file, not a backup tape. Had that conversation taken place, Zubulake might have had relevant e-mails from that file two years ago.

To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive 75 [fn.75 It might be advisable to solicit a list of search terms from the opposing party for this purpose, so that it could not later complain about which terms were used.]

[p.27 slip opp]

documents. When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as "hits" on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.

In short, it is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such

sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take some reasonable steps to see that sources of relevant information are located.

[p.27 slip opp]

2. Counsel's Continuing Duty to Ensure Preservation

Once a party and her counsel have identified all of the sources of potentially relevant information, they are under a duty to retain that information (as per Zubulake IV) and to produce information....

....The continuing duty to supplement disclosures strongly suggests that parties also have a duty to make sure that discoverable information is not lost. Above all, the requirement must be reasonable. A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the "litigation hold" instruction once and to fully comply with it without the active supervision of counsel.80 [See Telecom International Am. Ltd. v. AT&T Corp., 189 F.R.D. 76, 81(S.D.N.Y. 1999) ("Once on notice [that evidence is relevant], the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation.") (citing Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 18 (D. Neb. 1983)).]

There are thus a number of steps that counsel should take to ensure compliance with the preservation obligation. While these precautions may not be enough (or may be too much) in some cases, they are designed to promote the continued preservation of potentially relevant information in the typical case.

First, counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.

Second, counsel should communicate directly with the "key players" in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these "key players" are the "employees likely to have relevant information," it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.

[p. 31 slip opp]

Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases, it might make sense for relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the

primary reasons that electronic data is lost is ineffective communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.
"While, of course, it is true that counsel need not supervise every step of the document production process and may rely on their clients in some respects," counsel is responsible for coordinating her client's discovery efforts. In this case, counsel failed to properly oversee....
...counsel failed to adequately communicate with Tong about how she stored data.
With respect to making sure that relevant data was retained, counsel failed in a number of important respects. First, neither in-house nor outside counsel communicated the litigation hold instructions to Mike Davies, a senior human resources employee who was intimately involved in Zubulake's termination. Second, even though the litigation hold instructions were communicated to Kim, no one ever asked her to produce her files. And third, counsel failed to protect relevant backup tapes; had they done so, Zubulake might have been able to recover some of the e-mails that UBS employees deleted.
In addition, if Varsano's deposition testimony is to be credited, he turned over "all of the e-mails that [he] received concerning Ms. Zubulake." If Varsano turned over these e-mails, then counsel must have failed to produce some of them.

Counsel failed to communicate the litigation hold order to all key players. They also failed to ascertain each of the key players' document management habits. By the same token, UBS employees — for unknown reasons — ignored many of the instructions that counsel gave. This case represents a failure of communication, and that failure falls on counsel and client alike.

DUTY TO SUPPLEMENT

Federal rules require that a party supplement discovery responses made pursuant to FRCP 26(a) or the individual discovery devices and rules. The duty only arises if a prior response is materially incomplete or incorrect and if the information has not been provided in discovery or in writing. Failure to supplement may result in a preclusion of evidence under FRCP Rule 37(c)(1).

California has frequently considered but rejected a continuing duty to supplement. The California Civil Discovery Act expressly provides:

> §2030 (c)(7) An interrogatory may not be made a continuing one so as to

> impose on the party responding to it a duty to supplement an answer to it that was initially correct and complete with later acquired information.

See also prior case law to the same effect. *Smith v. Superior Court* (1961), 189 Cal.App.2d 6, If a party seeks a supplemental response they need only request one by serving supplemental interrogatories or document requests which clearly request a review and update. C.C.P. §§2030(c)(8), 2031 (e).

The California approach provides clear notice and certainty of an obligation to review and, if necessary, update responses. Nevertheless, there is reason to review, update and correct prior responses to discovery particularly when the other side is likely to rely to their detriment. Interrogatories can be amended without leave of court [C.C.P. §2030.310] but amendment of responses to requests for admissions requires a formal motion and leave of court [C.C.P. §2033.300]. The code is silent as to documents. Evidence may be excluded at trial under California case law based upon discovery responses. *Castaline v. City of Los Angeles* (1975), 47 Cal.App.3d 580 [Medical testimony excluded when opponent relied on interrogatory answers re full recovery and canceled defense medical exam.] *Campain v. Safeway Stores* (1972), [Defendant entitled to new trial on damages for lost wages or earning capacity due to prejudice from interrogatory answer that plaintiff was not claiming such damages.] *Thoren v. Johnston & Washer* (1972), 29 Cal.App.3d 270.[Testimony of critical witness excluded because witness' name omitted from interrogatory answer]. When a lawyer learns that a prior response to discovery was false or misleading there may be an ethical duty to correct it. See ABA Model Rule 3.4 Fairness to Opposing Party and Counsel

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
>
> ****

See also ABA Model rule 3.3a.

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. ****

OBJECTIONS, WAIVERS AND RELIEF

Generally, specific objections are not listed in one place in discovery rules. Nor are they limited. Matters that are not relevant or are privileged are not discoverable and are subject to objection. Work product is protected from discovery. Constitutional protections such as unreasonable search, self-incrimination, privacy or free press may apply. Some objections may be found in the procedural requirements of the discovery rules---limitations on the amount, the form, or the timing of discovery. Objections may differ depending on the type of discovery device employed. For example, what may be an appropriate or even required objection at a deposition may not be appropriate to written discovery where the lawyer plays a major role in preparing the responses and there is no need to protect a witness from abuse. Lawyers and courts look to evidentiary objections while recognizing the difference between discovery and admissibility and the need for liberal discovery. For example, hearsay is not an appropriate discovery objection because it may lead to admissible evidence and because it is often informative and reliable. Sometimes courts treat parties different from non-parties with regard to the

burdens of discovery.

Privileges are the most significant and effective objections. They are well defined, embody a public policy, and often absolute in nature. Other discovery objections are more subjective, ambiguous, and discretionary. If valid they often result in some compromise solution such as limiting discovery rather than prohibiting it.

Normally, objections, including those based on privilege, must be made in a timely fashion or they are waived. See, for examples, FRCP Rule 30(b)(4); C.C.P.2030.290(a)The burden of proof to sustain an objection is on the party making it. *Coy v. Superior Court* (1962) 58 Cal.2d, 210, 220.*Columbia Broadcasting System Inc. v. Superior Court* (1968) 263 Cal.App.2d 12. Relief from waiver may be obtained from the court but cannot be guaranteed. It may require meeting certain specified standards, meeting the burden of proof, and obtaining a favorable exercise of court discretion just to be able to raise an objection and have it considered on the merits. Compare the above cited federal and state rules. Frequently, a motion to compel answers based on a waiver of objection due to untimeliness is countered with a motion for relief from waiver.

If objections are made, it may be necessary to make a motion in a timely manner to obtain discovery. The rules may require that a motion to compel discovery over objections be made within a specified number of days or the right to that discovery may be waived. See C.C.P. 2030.300(c), 45 days. Other jurisdictions may allow motions at any time subject to a possible estopple or laches argument.

Federal and state rules require than written discovery be answered separately and fully. See FRCP Rule 30(b)(1). Nevertheless, it is not unusual for lawyers to serve general and boilerplate objections to written discovery or to recite every conceivable objection to questions at depositions; but, such practice is not approved. *Hernandez v. Superior Court (Acheson Industries, Inc.)* (2003)112 Cal.App.4th 285, 293-4. [A general

reference to discovery & pleadings or general categories of documents plus boilerplate objections is not particular to each of the special interrogatories. Documents, including privileged documents, must be identified separately and in response to the particular interrogatories.] Objections to an entire set of written discovery, as opposed to individual requests for information, have been disapproved. *United Farm Workers of America v. Superior Court* (1975) 47 Cal.App.3d 334, 347 [Abuse of discretion to strike entire set of interrogatories even though "many. . . appear to have no relevancy and appear intended only to harass."] Cf. *Wooldridge v. Mounts* (1962), 199 Cal.App.2d 620.[abusive last minute discovery; set stricken on eve of trial.] *Cembrook v. Superior Court* (1961), 56 Cal.2d 423, 430. [Objections to entire set of requests for admissions indicates a lack of good faith.] Compare *Korea Data Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513 holding that boilerplate objections raising attorney-client objections are not waivers even though they fail to comply with the requirements of the C.C.P. to specify documents and privileges claimed.

At trial an objections may be made to the form of the question, e.g.compound, both to protect the witness and to clarify the evidence. At deposition, such an objection can be obviated if made. It goes to the form of the question and the question can be rephrased. Therefore, discovery rules require that the objection and similar objections as to form be made at deposition or waived. Other objections such as relevancy need not be made at deposition and are preserved for trial. But with written discovery such objections may serve no purpose except to obstruct discovery since the lawyer will review the question, formulate the answer, and at least have the opportunity to clarify and avoid any unintended responses. Nevertheless, some courts and legislatures have attempted to restrict or prohibit confusing written discovery. In California, "shotgun interrogatories" where the form requires constant reference back to preceding interrogatories were disapproved early by the Supreme Court and are currently prohibited by C.C.P. §2030(c)(5). *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 419.["This type of interrogatory should be avoided and the trial court possesses the power to regulate

them." Trial court can require rephrasing.] In addition, compound, conjunctive or disjunctive questions are prohibited by C.C.P. §2030(c)(5).

Objections that might be appropriate at trial may not be appropriate to discovery: e.g. hearsay [see *Durst v. Superior Court* (1963), 218 Cal.App.2d 460, 464.], question calls for opinion or conclusion [see *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 417. *Greyhound v. Superior Court* (1961) 56 Cal.2d 355, 392-393.], asked and answered at deposition. [see *Coy v. Superior Court* (1962) 58 Cal.2d 210, 218.], assuming facts not in evidence [see *Greyhound Corp. v. Superior Court* (1961), 56 Cal.2d 355, 392. *West Pico Furniture v. Superior Court* (1961), 56 Cal.2d 407, 421], interrogator is conducting a fishing expedition [see *Greyhound Corp. v. Superior Court* (1961), 56 Cal.2d 384-386.

Other non-privilege objections may be valid but usually do not result in a total denial of discovery. To the extent they are valid, they raise the types of issues that should be resolved between counsel. If not, the court may reach its own compromise. Burdensome and oppressive objections or the similar objection of "overbroad" are common and may have some merit; yet, a limitation as to time and scope may resolve issues to everyone's satisfaction especially if the limitation is without prejudice to propounding more extensive or inclusive discovery in the future. *Borse v. Superior Court* (1970), 7 Cal.App.3d 286 [If burdensome and oppressive, the trial court should not totally deny answer but should limit its scope.]. Sometimes, burdensome discovery can be avoided by using an alternative form of discovery. Federal and state rules expressly authorize answering certain interrogatories by production of responsive documents though such an alternative is limited. FRCP Rule 30(d). C.C.P.2030.230. In addition, lawyers for both sides may agree that production of responsive documents are preferable to interrogatory answers even when those specific rules do not apply. Of course, no one should respond to an interrogatory by simply saying "see the documents" or "see the complaint".

Courts have recognized there is burden in all discovery but that it must rise to a level of being "undue" or "oppressive" before it is a valid objection. "Burdensome and oppressive" may be an objection that is easily made but not so easily sustained by declaration providing evidence to support the objector's burden of proof. *West Pico Furniture Co. v. Superior Court* (1961), 56 Cal.2d 407, 417.[Declaration of manager stating search of 78 branch offices was required was insufficient; should show man hours required.]

Corriell v. Superior Court (1974), 39 Cal.App.3d 48 [Conclusionary statements are insufficient.] *Pantzalas v. Superior Court* (1969), 272 Cal.App.2d 499. [Burden must result in injustice.] Some courts have required either a showing of an intent to create an unreasonable burden or a burden incommensurate with the benefit. See *Day v. Rosenthal* (1985), 170 Cal.App.3d 1125. *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407. Of course, such objections have been upheld and this is an area where the facts and the lawyers' preparation and presentation will make a difference. See *Allen v. Superior Court (Sierra)* (1984) 151 Cal.App.3d 447 , 198 Cal.Rptr. 737 [Document production per subpoena to defendant's medical expert reversed as too intrusive and abuse of discretion absent showing that substantially equivalent information can't be obtained via deposition questions or other less intrusive means. Doctor had submitted a declaration re production burden and would resign if ordered to produce documents]; *Stony Brook I Homeowners Ass'n. v. Superior Court (Diehl)* (2000), 84 Cal.App.4th 691 , 101 Cal.Rptr.2d 67 *Durst v. Superior Court* (1963), 218 Cal.App.2d 460.[Interrogatory may be too broad and unreasonable so as to justify protective order.] *Ryan v. Superior Court* (1960), 186 Cal.App.2d 813.[If the interrogatory is too broad, a party doesn't have to answer it and the trial court doesn't have to rephrase it; cf. Borse, supra.) *City of Los Angeles v. Superior Court* (1961), 196 Cal.App.2d 43, 748.[Answer to interrogatory requesting name, etc. of every person who has knowledge of any relevant fact in connection with this lawsuit was denied on grounds it was "as broad as space" and repetitive.]

The objection that information is "equally available" to the requesting party is normally not successful since parties are entitled to know what their opponents know and since the objection often is not supportable. If a third party had information or a document and either party would have to subpoena the document, interview the third party, or go to the public records, the objection might be valid. See *Alpine Mutual Water Co. v. Superior Court* (1968), 259 Cal.App.2d 45.[One party cannot force an opponent to search the public records to answer interrogatories.]. *Ryan v. Superior Court* (1960), 186 Cal.App.2d 813.(Comparison of biographical names in two published volumes.) *Pantzalas v. Superior Court* (1969), 272 Cal.App.2d 499, 503. [Information of employer re group policy is more available to insurance company than to employee-insured since employer is agent of insurance company.] *City of Alhambra v. Superior Court* (1980), 110 Cal.App.3d 513, 521.[Prior lawsuits: ". . . petitioner's own records . . . are . . . more easily accessible to it . . . . "]

If a party diligently obtains documents or information from a third party, should the opponent be able to obtain it by discovery request? Should this be considered work product? Should the costs of obtaining the documents or information be allocated and the discovery shared? Should the production be denied unless it is established that this is the only source?

APPELLATE COURT REVIEW

It is always important to win a discovery motion at the trial court level since that may be the only opportunity. The general rule is that trial courts should be allowed to exercise discretion and that appellate courts will intervene when discovery has been denied or privileges have been disregarded as a result of an abuse of discretion. That approach and the rationale for it were set forth early by the California Supreme Court and reiterated through the years.

Pacific Tel.& Tel. v. Superior Court

(1970), 2 Cal.3d 161, 169

TOBRINER, Acting C.J. at p.169

Initially, we must consider the availability of the prerogative writ sought by the defendants in this setting. We spoke directly to the question of the circumstances that would normally justify the invocation of an extraordinary writ in discovery cases in Oceanside Union School Dist. v. Superior Court (1962) 58 Cal.2d 180, 185-186, fn. 4 [23 Cal.Rptr. 375, 373 P.2d 439]: "The prerogative writs have been used frequently to review interim orders in discovery cases [citations]. But this does not mean that these discretionary writs will or should issue as of course in all cases where this court may be of the opinion that the interim order of the trial court was erroneous. In most such cases, as is true of most other interim orders, the parties must be relegated to a review of the order on appeal from the final judgment. As inadequate as such review may be in some cases, the prerogative writs should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and where general guidelines can be laid down for future cases."

Despite this express declaration of the necessary limitations on the availability of the prerogative writs, and our reaffirmance of this standard in subsequent cases [citations], at least some appellate courts have apparently continued to consider prerogative writs as the normal instruments for reviewing discovery orders. [citations]We realize, of course, that this practice rests primarily on a legitimate concern with the inadequacies of a review of discovery orders after trial, and that even under the approach adopted in Oceanside such inadequacy will inevitably influence a court's evaluation of the "general importance" of the question presented.

Nevertheless, appellate courts must keep in mind that too lax a view of the "extraordinary" nature of prerogative writs, rendering substantial pretrial appellate delay a usual hazard of the use of discovery, is likely to result in more harm to the judicial process than the denial of immediate relief from less significant errors.

FN 11. Indeed we note an additional objection that might properly have been initially raised against the granting of an extraordinary writ to prohibit discovery when the deponent urges as the sole objection the irrelevancy of the sought information to the litigation. In most of the cases in which this court has approved the use of a prerogative writ as a means of contesting a trial court's rulings on discovery matters, objection has been raised to a denial of discovery by the trial court [citations]; challenges to the grant of discovery have only arisen before this court when the trial court order allegedly violated a privilege of the petitioning party. [citations] The objection to the trial court's grant of discovery on "irrelevancy" grounds is of an entirely different nature which generally will not support the issuance of an extraordinary writ.

In West Pico Furniture Co. v. Superior Court (1961) 56 Cal.2d 407, 415 [15 Cal.Rptr. 119, 364 P.2d 295], this court, quoting Ryan v. Superior Court (1961) 186 Cal.App.2d 813, 816-817 [9 Cal.Rptr. 147], declared: "One of the prime purposes of the Discovery Act is to expedite the trial of the action. This purpose will be defeated if appellate courts

entertain petitions for prerogative writs by which a review of the orders of trial courts in discovery proceedings are sought and which do not clearly demonstrate an abuse of discretion where discovery is denied, or a violation of privilege or of the provisions of section 19 of article I of the Constitution of the state where discovery is granted. This court will hereafter refuse to entertain petitions for prerogative writs in discovery matters which do not allege facts which would entitle the petitioner to the relief sought under the principles we have set forth." (Italics added.) (See also Flora Crane Service, Inc. v. Superior Court (1965) 234 Cal.App.2d 767, 776 [45 Cal.Rptr. 79].)

In the instant case, the petition attacking the granting of discovery does not rest on the violation of a privilege or a constitutionally protected interest, but relies solely on the asserted "irrelevancy" of the questions approved by the trial court. Section 2016, subdivision (b), does expressly require that the information sought by deposition must be relevant to the subject matter of litigation, and we recognize, of course, that under the approach approved in West Pico some deponents will be compelled to disclose information which an appellate court might conclude was not "relevant to the subject matter" of the litigation even under the applicable liberal standards. Nevertheless, the burden on the deponent of disclosing matter which is not privileged but only irrelevant to a particular action will generally not be too onerous; we believe he may be required to absorb this burden if the discovery process is to achieve its purposes of improving the efficiency and integrity of the judicial process.

This approach does not leave fundamental interests of the deponent without protection. The procedural guidelines of West Pico permit a deponent to seek a prerogative writ when an order granting discovery violates a privilege (see Nowell v. Superior Court (1963) 223 Cal.App.2d 652, 653-654 [36 Cal.Rptr. 21, 2 A.L.R.3d 853] (attorney-client privilege)) or intrudes upon a constitutionally secured right to privacy. Moreover, section 2019, subdivision (b)(1), grants the trial court broad discretion in formulating protective orders upon the application of a deponent, in response, for example, to a claim that a request is too burdensome, oppressive or embarrassing. By highlighting the specific objectionable nature of a given inquiry, in a motion under section 2019, subdivision (b)(1), rather than raising the more general attack of "irrelevancy," a depondent can focus the trial court's attention on the claimed inequity; this focus should produce a more exact evaluation of the benefits and burdens of permission for the inquiry and may enable the court to fashion a protective order which will remove the onerous aspect of the discovery procedure without unduly narrowing the scope of ascertainable matters. (See Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355, 383 [15 Cal.Rptr. 90, 364 P.2d 266].) Generally, needed protection should be granted on application of a deponent under section 2019, rather than through reliance upon the relevancy concept. (See Wright, Federal Courts (1963 ed.) pp. 310-311.)