Chapter 21—Introduction to Discovery

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[1] Motions to Extend Time or to Reopen Discovery

§ 21.1 Overview

In the past, the parties to civil litigation had a limited choice of methods by which to secure evidence to present at trial. The law left them largely to their own devices, and they had limited means for compelling their opponents to divulge evidence that their opponents wanted to keep hidden. Reformers regarded this state of affairs as unfair on the ground that it reduced civil litigation to a game, the outcome of which depended more on litigation tactics and surprise than on the merits of the case. Accordingly, the legislature has steadily expanded the means and opportunities for securing evidence before trial. The expanded discovery devices have as their purpose:

- to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury
- to provide an effective means of detecting and exposing false, fraudulent, and sham claims and defenses

- to make available, in a simple, convenient, and inexpensive way, facts that a party could not otherwise prove except with great difficulty
- to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements
- to expedite litigation
- to safeguard against surprise
- to prevent delay
- to simplify and narrow the issues
- to expedite and facilitate both preparation and trial.[1]

The discovery statutes have achieved mixed results in achieving these goals. No doubt, they have made it easier for parties to secure evidence, to expose false claims and defenses, to educate themselves concerning the real value of their claims and

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[1] Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 376, 364 P.2d 266, 275, 15 Cal. Rptr. 90, 98 (1961). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY §§ 1.1–.2 (1997); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:1–:2 (1999).

defenses, to prevent surprise, and to narrow the issues. The discovery statutes, however, have failed dismally in achieving their other goals. They are complicated and expensive. They provide the parties opportunities to inflict enormous inconvenience on each other. They delay litigation and complicate trial preparation. They have replaced trial by gaming with trial by ordeal. They have made the resolution of simple disputes so expensive and so time-consuming that litigants often cannot afford a decision on the merits of their claims. The discovery statutes have spawned a new industry of "alternative dispute resolution." They are a disgrace to the law of California.

Recent efforts to reduce the delays in bringing cases to trial, known as the "fast track" rules, have ameliorated to some extent the endemic abuses of the discovery system. Any effort, however, to achieve a truly just system of civil litigation would require radical changes to the discovery process, as well as a radical restructuring of the legal profession. Most citizens manage to live out their lives without having to suffer the ordeal of civil litigation and do not have

a major stake in procedural reform. The legal profession, in contrast, has a strong interest in maintaining the system that enhances attorneys' fees. It is unlikely, therefore, that Californians will ever muster the political will to effect a radical change of the civil litigation system, including the discovery process.

Part I of this volume describes the steps one must take to invoke the discovery methods afforded by the discovery statutes. Part II describes the obligations of a recipient of a discovery request to respond to the request or to resist the request. Part III describes the means by which a party seeking discovery may coerce a reluctant opponent to provide the requested evidence.

§ 21.2 Methods

The discovery statutes provides six devices for securing evidence in a civil case:

- interrogatories
- depositions
- requests for inspection of documents, places, and things

- requests for admissions
- physical and mental examinations
- exchanges of information concerning expert witnesses.[2]

The courts have no power to expand the methods of civil discovery beyond those authorized by statute. In the area of civil discovery, the judiciary has no authority to create or sanction methods of discovery not based on a reasonable interpretation of statutory provisions.[3]

[A] Discovery in Limited Civil Cases

As to each adverse party, a party in a limited civil case (except an action for unlawful detainer[4]) is limited to the following forms of discovery:

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[2] CODE CIV. PROC. § 2019(a). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 1.4 (1997); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:9, :12 (1999).

[3] Holm v. Superior Court, 187 Cal. App. 3d 1241, 1247, 232 Cal. Rptr. 432, 436 (1986).

[4] CODE CIV. PROC. § 91(b).

- any combination of 35 of the following:[5]
  - interrogatories (with no subparts)[6]
  - demands to produce documents and things
  - requests for admissions (with no subparts)
- one oral or written deposition[7]
- deposition subpoenas duces tecum requiring the person served to mail copies of documents, books, or records to the party's counsel at a specified address, along with an authenticating declaration[8]
- physical and mental examinations[9]

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[5] CODE CIV. PROC. § 94(a). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 1.7 (1997); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:1806–:1815 (1999).

[6] In limited civil cases, one may use the Judicial Council Form Interrogatories—Unlawful Detainer and Form Interrogatories—Economic Litigation.

[7] CODE CIV. PROC. § 94(b).

[8] CODE CIV. PROC. § 94(c). The party who issued the deposition subpoena must mail a copy of the response to any other party who tenders the reasonable cost of copying it. **Id.**

[9] CODE CIV. PROC. § 94(d).

- exchanges of information concerning expert witnesses.[10]

The parties may stipulate to additional discovery.[11] The court may, on noticed motion and subject to such terms and conditions as are just, authorize a party to conduct additional discovery, but only upon a showing that the moving party cannot prosecute or defend the action effectively without the additional discovery. The court must take into account whether the moving party has used all applicable discovery in good faith and whether the party has attempted to secure the additional discovery by stipulation or by means other than formal discovery.[12]

The Code of Civil Procedure provides two discovery devices unique to limited civil cases, reciprocal case questionnaires and requests for statements of witnesses and evidence.

There is no discovery in connection with the proceeding in small claims court, in either the small

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[10] CODE CIV. PROC. § 94(e).
[11] CODE CIV. PROC. § 95(b).
[12] CODE CIV. PROC. § 95(a).

claims action itself or the de novo proceeding on appeal.[13]

[B] Use of Technology in Complex Cases

Pursuant to a noticed motion, the court may make orders regarding the use of technology in conducting discovery in certain complex cases.[14] In other cases, the parties may stipulate to the entry of orders for the use of technology in conducting discovery.[15] The court may order that the parties conduct discovery and maintain the product of that discovery in electronic media and by means of electronic communications. The court may prescribe procedures

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[13] Bruno v. Superior Court, 219 Cal. App. 3d 1359, 1362–63, 269 Cal. Rptr. 142, 144 (1990).

[14] CODE CIV. PROC. § 2017(e)(1). Technology orders are available in cases designated as complex pursuant to section 19 of the Judicial Administration Standards, cases ordered to be coordinated pursuant to CODE CIV. PROC. §§ 404 **et seq.**, exceptional cases exempt from case disposition time goals pursuant to GOV. CODE §§ 68600 **et seq.**, and cases assigned to Plan 3 (disposition within 24 months) pursuant to RULES OF CT. 209(b)(3).

[15] CODE CIV. PROC. § 2017(e)(1).

for the use of electronic technology in conducting discovery, including orders for the service of requests for discovery and responses; service and presentation of motions; production, storage, and access to information in electronic form; and the conduct of discovery in electronic media.[16] "Technology" includes telephone, e-mail, CD-ROM, internet web sites, electronic documents, electronic document depositories, internet depositions and storage, videoconferencing, and other electronic technology that may improve communication and the discovery process.[17]

The court may not make an order for the use of technology in discovery unless it finds that the procedures to be adopted

- promote cost-effective and efficient discovery or discovery motions
- do not require undue expenditures of time or money

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[16] CODE CIV. PROC. § 2017(e)(3).
[17] CODE CIV. PROC. § 2017(e)(6).

- do not impose an undue economic hardship on anyone
- promote open competition among vendors and providers of services in order to facilitate the highest quality service at the lowest reasonable cost to the litigants,[18] and
- do not require parties or counsel to purchase exceptional or unnecessary services, hardware, or software.[19]

The statute explicitly preserves the role of court reporters in depositions.[20]

§ 21.3 Scope of Discovery

Unless otherwise limited by court order, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably

[18] The statute provides detailed rules concerning the use of "service providers." **See** CODE CIV. PROC. § 2017(e)(5).
[19] CODE CIV. PROC. § 2017(e)(2).
[20] CODE CIV. PROC. § 2017(e)(7), (8).

calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of 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, land, or other property.[21]

[A] Discovery Relevance

The concept of "relevance to the subject matter" for purposes of discovery is broader than the evidentiary standard of relevance for the admission of evidence adduced at trial.[22] For discovery purposes, information is relevant if it "might reasonably assist a party in evaluating the case, preparing for trial, or

➡Physical Examination: Physical Condition in Controversy
➡Mental Examination: Mental Condition in
➡Expert Witnesses: Information Exchanged

[21] CODE CIV. PROC. § 2017(a); Stewart v. Colonial W. Agency, Inc., 87 Cal. App. 4th 1006, 1013, 105 Cal. Rptr. 2d 115, 119 (2001). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 11.1 (1997); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:65, :80 (1999). Physical and mental examinations and expert witness disclosures are limited to issues in controversy.

facilitating settlement."[23] Admissibility is not the test. One may discover inadmissible information if it might reasonably lead to admissible evidence.[24] A witness's lawyer should not even object to a question he believes will elicit irrelevant testimony at the deposition. Relevance objections should be held in abeyance until an attempt is made to use the testimony at trial.[25]

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[22] Laddon v. Superior Court, 167 Cal. App. 2d 391, 395, 334 P.2d 638, 640 (1959). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY §§ 11.2–.3 (1997); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:66–:69, 8:72.2–:73 (1999).

[23] Anti-Defamation League of B'nai B'rith v. Superior Court, 67 Cal. App. 4th 1072, 1095, 79 Cal. Rptr. 2d 597, 611 (1998); Lipton v. Superior Court, 48 Cal. App. 4th 1599, 1611, 56 Cal. Rptr. 2d 341, 347 (1996) (**quoting** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 8:66.1 (1999)).

[24] Davies v. Superior Court, 36 Cal. 3d 291, 301, 682 P.2d 349, 356, 204 Cal. Rptr. 154, 161 (1984); **accord** Smith v. Superior Court, 189 Cal. App. 2d 6, 12, 11 Cal. Rptr. 165, 169 (1961) (upholding interrogatory calling for hearsay).

[25] Stewart v. Colonial W. Agency, Inc., 87 Cal. App. 4th 1006, 1014, 105 Cal. Rptr. 2d 115, 120–21 (2001).

The phrase "reasonably calculated to lead to the discovery of admissible evidence" makes clear that discovery extends to any information that reasonably might lead to other evidence that would be admissible at trial. These rules are applied liberally in favor of discovery.[26] If the court errs in ruling on a discovery motion, it should err in favor of granting discovery of the nondiscoverable rather than denying discovery of information vital to the preparation or presentation of a party's case or to settlement of the dispute.[27]

If, however, the information sought to be elicited relates to matters of little or no practical benefit to the party seeking disclosure, the court must sustain a timely objection on the grounds that the question asked is not relevant to the subject matter in the pending action and not reasonably calculated to lead to admissible evidence.[28] Although the mere inadmissibility of material is not, of itself, a bar to

[26] Lipton v. Superior Court, 48 Cal. App. 4th 1599, 1611–12, 56 Cal. Rptr. 2d 341, 347–48 (1996).

[27] Norton v. Superior Court, 24 Cal. App. 4th 1750, 1761, 30 Cal. Rptr. 2d 217, 223 (1994).

discovery, the court, in the exercise of its discretion, may find such inadmissibility to be a factor to weigh in determining a claim of {undue burden}. The inadmissibility of the material may indicate that the burden that disclosure will entail outweighs the advantage from disclosure.[29]

If the court sustains the defendant's demurrer to the plaintiff's complaint and the plaintiff has not filed an amended complaint, there is no active pleading by which the court may determine discovery relevance.[30]

Although as a general rule the court has broad discretion in permitting or denying discovery, when a party seeks discovery as to a nonprivileged matter that is directly relevant to the issues before the court, there is no room for the exercise of discretion, for the party seeking discovery is entitled to it as a matter of right.[31]

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[28] Covell v. Superior Court, 159 Cal. App. 3d 39, 42–43, 205 Cal. Rptr. 371, 373 (1984).

[29] Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 392, 364 P.2d 266, 285, 15 Cal. Rptr. 90, 109 (1961).

[30] Wellpoint Health Networks, Inc. v. Superior Court, 59 Cal. App. 4th 110, 129, 68 Cal. Rptr. 2d 844, 856 (1997).

In the **Pacific Telephone** case, the supreme court suggested that relevancy to the subject matter might vary with the size of the case.[32] In a small case dealing with facts and issues of moderate quantity, the court might adopt a relaxed view of relevancy and still keep the discovery under control; in a large, complex case dealing with numerous and diverse issues, the court might adopt more restrictive standards to contain discovery within manageable limits.[33]

Courts show greater deference to the interests of nonparties when determining whether a discovery request seeks relevant information. As between parties to litigation and nonparties, the burden of discovery rests on the latter only if the former do not possess the material sought to be discovered. An

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[31] De Mayo v. Superior Court, 189 Cal. App. 2d 392, 394, 11 Cal. Rptr. 157, 159 (1961).

[32] Bridgestone/Firestone, Inc. v. Superior Court, 7 Cal. App. 4th 1384, 1391, 9 Cal. Rptr. 2d 709, 712 (1992).

[33] Pacific Tel. & Tel. Co. v. Superior Court, 2 Cal. 3d 161, 173 n.15, 465 P.2d 854, 862 n.15, 84 Cal. Rptr. 718, 726 n.15 (1970) (dictum).

exception to this may exist where a showing is made that the material obtained from the party is unreliable and may be subject to impeachment by material in possession of the nonparty.[34]

The remedy of the recipient of an unreasonably burdensome discovery request is to seek a protective order from the court. The court will limit the scope of discovery if the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.[35]

[1] Identity of Witnesses

One may obtain discovery concerning the identity and location of persons having knowledge of any discoverable matter.[36] One cannot, however, force the disclosure of the persons one's adversary intends to call as witnesses unless one can overcome the adversary's work product objection.[37] An exception to this limitation exists for expert witnesses. The Code

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[34] Calcor Space Facility, Inc. v. Superior Court, 53 Cal. App. 4th 216, 225, 61 Cal. Rptr. 2d 567, 573 (1997).

[35] CODE CIV. PROC. § 2017(c).

➡Chapter: Expert Witnesses

of Civil Procedure provides a special procedure by which to force one's opponent to disclose the persons whom he intends to call to testify as to their expert opinions. Until a party designates a witness as an expert witness, the opponent cannot force disclosure of the witness's expert opinion.[38]

Local rules sometimes provide that the parties must exchange witness lists on the eve of trial.[39] These rules have survived challenges that they violate the work product rule.

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[36] CODE CIV. PROC. § 2017(a). This includes the person who allegedly assisted a former employee by stealing photographs from their employer's files relating to employee's sexual harassment proceeding, and who allegedly gave photographs to the employee. Gonzalez v. Superior Court, 33 Cal. App. 4th 1539, 1546–47, 39 Cal. Rptr. 2d 896, 901 (1995).

See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:80–:82, :84, :86–:88 (1999).

[37] City of Long Beach v. Superior Court, 64 Cal. App. 3d 65, 79, 134 Cal. Rptr. 468, 477 (1976).

[38] County of Los Angeles v. Superior Court, 224 Cal. App. 3d 1446, 1457, 274 Cal. Rptr. 712, 719 (1990).

➡Limited Civil Cases: Requests for Statements of Witnesses and Evidence

The identities of the persons one intends to call as witnesses are freely discoverable in limited civil cases.

[2] Location of Property

If the court issues a {right to attach order}, a plaintiff may discover the identity, location, and value of property in which the defendant has an interest.[40]

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[39] ALAMEDA SUPER. CT. R. 4.4(2)(P); BUTTE SUPER. CT. R. 3.10(b)(2); CONTRA COSTA SUPER. CT. R. 5(k)(2)(b); EL DORADO SUPER. CT. R. 7.12.11; GLENN SUPER. CT. R. 5.3(I); HUMBOLDT SUPER. CT. R. 4.1(b)(1); IMPERIAL SUPER. CT. R. 2(13)(D); INYO SUPER. CT. R. 12(I)(2)(b); KERN SUPER. CT. R. 330(a)(3); LOS ANGELES SUPER. CT. R. 7.9(d); MARIN SUPER. CT. R. 1.27(C)(4); MENDOCINO SUPER. CT. R. 5.3(j); MONO SUPER. CT. R. I(2)(b); MONTEREY SUPER. CT. R. 6.09, App. C; NEVADA SUPER. CT. R. 4.03(2); ORANGE SUPER. CT. R. 450(D); PLACER SUPER. CT. R. 20.1.13(A); SAN BERNARDINO CONSOL. R. 411; SAN DIEGO SUPER. CT. R. Div. 2, App. B; SANTA CLARA SUPER. CT. R. 1.1.11(E); SANTA CRUZ SUPER. CT. R. 2.2.02, 2.2.06(a); SIERRA SUPER. CT. R. 2.3.7; SONOMA SUPER. CT. R. 3.1; THIRD APPELLATE DIST. SUPER. CT. R. 5.1(a)(1); TUOLUMNE SUPER. CT. R. 1.11; VENTURA SUPER. CT. R. 8.12(I).

[40] CODE CIV. PROC. § 485.230. **See generally** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 8:108.5 (1999).

[3] Hypothetical Questions

A question ought not, in principle, to be objectionable on relevancy grounds merely because it calls for an answer based on facts that are merely assumed to be true. In **In re Bongfeldt**[41] the court affirmed an order jailing an insurance adjuster for contempt based on the adjuster's refusal to answer hypothetical questions. The opinion, however, did not directly address whether the hypothetical nature of a question somehow renders it not relevant to the subject matter of the action.

[4] Proof of Preliminary Issues

As a general rule, discovery with respect to all triable issues of fact should be completed before the case goes to trial. This rule applies even though the finder of fact may not reach one issue because of the determination of another issue adversely to the party seeking discovery. It does not lie within the court's discretion to postpone a party's response until his

[41] **In re** Bongfeldt, 22 Cal. App. 3d 465, 99 Cal. Rptr. 428 (1971). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 11.14 (1997).

opponent has first established some preliminary issue.[42]

[5] Refreshing Recollection

If a deposition witness professes an inability to answer a question for lack of memory and testifies that certain documents in his custody would refresh his recollection, the examiner may require that the witness produce the documents and read them in order to refresh his recollection.[43]

[6] Impeachment

One may discover evidence relevant to the credibility of a witness or of a hearsay declarant.[44] In

[42] Coffelt v. Superior Court, 254 Cal. App. 2d 884, 887, 62 Cal. Rptr. 636, 638 (1967). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 11.14 (1997).

[43] Filipoff v. Superior Court, 56 Cal. 2d 443, 451, 364 P.2d 315, 319–20, 15 Cal. Rptr. 139, 143–44 (1961). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 11.14 (1997).

[44] **Cf.** EVID. CODE § 62 ("relevant evidence" includes evidence relevant to the credibility of a witness or hearsay declarant). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 11.14 (1997).

determining a witness's credibility the court or jury may consider any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony, including:

- his demeanor while testifying
- the character of his testimony
- his capacity to perceive, to recollect, or to communicate any matter about which he testifies
- his opportunity to perceive any matter about which he testifies
- his character for honesty or veracity
- the existence of a bias, interest, or other motive
- a previous statement consistent or inconsistent with his testimony
- the existence of any fact to which he has testified
- his attitude toward the action or toward testifying
- his admission of untruthfulness.[45]

If the discovery request is burdensome or intrusive, the party seeking discovery must employ those

[45] EVID. CODE § 780.

discovery tools that minimize the burden or intrusion.[46]

For the purpose of attacking a witness's credibility one may show that he has been convicted of a felony.[47] Discovery directed to a witness's felony convictions is reasonably calculated to lead to the discovery of admissible evidence.[48]

[7] Insurance Coverage

A party may obtain discovery of the existence and contents of any insurance policy under which an insurer may be liable for a judgment that the court

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[46] Mendez v. Superior Court, 206 Cal. App. 3d 557, 574, 253 Cal. Rptr. 731, 741 (1988) (court properly refused to allow discovery of potential witnesses' sexual contacts with a party for the purpose of assessing their biases); Allen v. Superior Court, 151 Cal. App. 3d 447, 449, 198 Cal. Rptr. 737, 741 (1984) (court abused its discretion in ordering disclosure of financial records in the absence of a showing that substantially equivalent information could not be obtained by conducting a deposition without production of the records).

[47] EVID. CODE § 788.

[48] Morris Stulsaft Foundation v. Superior Court, 245 Cal. App. 2d 409, 422, 54 Cal. Rptr. 12, 21 (1966).

may enter against another party. This discovery may include the identity of the carrier and the nature and limits of the coverage. A party may also obtain discovery as to whether that insurance carrier is disputing coverage but not as to the nature and substance of that dispute.[49] Insurance policies are subject to requests for production of documents. A request for production of documents is an appropriate discovery vehicle for obtaining insurance information.[50] Unless the insured authorizes release of information about his insurance coverage, a third party claimant does not have a right to know the policy limits of another's insurance policy before filing suit.[51]

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[49] CODE CIV. PROC. § 2017(b). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 11.10 (1997); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:91–:95 (1999).

[50] Irvington-Moore, Inc. v. Superior Court, 14 Cal. App. 4th 733, 739, 18 Cal. Rptr. 2d 49, 52 (1993).

[51] Griffith v. State Farm Mut. Auto. Ins. Co., 230 Cal. App. 3d 59, 72, 281 Cal. Rptr. 165, 172 (1991). **Griffith** suggests that a third-party claimant may obtain insurance information by means of a presuit deposition. **Id.** at 69, 218 Cal. Rptr. at 170.

A nonparty's insurance coverage normally is not relevant to the subject matter of an action between other parties.

Example: **P** files an action against **Hospital**, contending that Hospital was negligent in its selection and retention on its staff of two doctors. She serves on **Hospital** interrogatories inquiring whether **Hospital** required the doctors to carry malpractice insurance. The court denied **P**'s motion to compel **Hospital** to answer the interrogatories.

The court did not abuse its discretion. The question whether a hospital is negligent in investigating a physician's background and competence and in maintaining adequate evaluation procedures is only tenuously connected to the question whether it requires its physicians to carry malpractice insurance. The duty of care owed to patients is to admit and screen doctors in a non-negligent fashion and to provide for ongoing evaluation procedures.

> That has little to do with whether insurance is required as a condition of being a hospital staff physician or acquiring hospital privileges.[52]

In a later case, however, a court disagreed, reasoning that in a suit based on hospital's negligence in screening and evaluating a physician, it is relevant to discover whether the hospital enforced its own by-law requiring malpractice coverage. The court reasoned that a physician's poor record of malpractice claims may be the cause of lack of coverage. Also, the failure of the hospital to inquire as to malpractice coverage, when its own rules require such coverage, may demonstrate a willingness to ignore that the physician is not insurable for reasons that may go to the physician's medical competency.[53]

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[52] Snell v. Superior Court, 158 Cal. App. 3d 44, 50, 204 Cal. Rptr. 200, 203–04 (1984).

[53] Brown **ex rel.** Brown v. Superior Court, 168 Cal. App. 3d 489, 502, 214 Cal. Rptr. 266, 275 (1985).

[8] Reinsurance Coverage

A reinsurance agreement is a contract by which one insurer transfers a risk to another insurer willing to accept that risk in exchange for a premium. Reinsurance diversifies the risk of loss and reduces the ceding insurer's required capital reserves. A reinsurance contract indemnifies the ceding insurance company; the original insured has no interest in it. The reinsurance contract does not alter the ceding insurer's relationship with its policyholder. Nevertheless, documents containing reinsurance information may be relevant to the subject matter of a lawsuit by the insured against the ceding insurer. Correspondence between the insurer and reinsurer that discusses liability, exposure, the likelihood of a verdict in excess of policy limits, or coverage issues may be relevant in discovery for the same reasons reserve information may be discoverable.

If reinsurance documents include attorney-client or protected work product communications, they enjoy the same privilege protection as would similar communications between the ceding insurer and its attorneys handling the insured's claim.

Communications to a reinsurer may contain advice from counsel for the ceding insurer relating to coverage, exposure, and other liability issues. The attorney-client privilege would, in all probability, protect these communications. If the requested documents contain confidential commercial information, a {qualified privilege} would protect the documents unless the party requesting discovery can demonstrate a basis for overcoming such privilege.

The court may not permit discovery of reinsurance documents or communications without conducting an in camera examination of those documents and communications to determine if they have sufficient relevance to the requesting party's case to overcome the insurer's claim of qualified privilege. The trial court must conduct, to the extent permitted by law or the agreement of the party claiming the privilege, a thorough examination of each of the requested documents for the purpose of making specific findings as to the applicable privilege, whether such privilege is absolute or qualified and, if a qualified privilege applies, the reasons for not permitting discovery. If the court denies discovery based upon

relevance, then the court must make specific findings why the documents are not relevant to the subject matter and are not calculated to lead to the discovery of admissible evidence.[54]

[9] Payments Received from Collateral Sources

If an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, the law does not deduct such payment from the damages that the plaintiff would otherwise collect from the tortfeasor.[55] Evidence of compensation from an independent third party is not admissible to mitigate damages.[56] Nevertheless, the defendant may discover information regarding payments received from collateral sources. The requested information could produce evidence of the

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[54] Lipton v. Superior Court, 48 Cal. App. 4th 1599, 1617–19, 56 Cal. Rptr. 2d 341, 351–52 (1996).

[55] Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 6, 465 P.2d 61, 63, 84 Cal. Rptr. 173, 175 (1970).

[56] Norton v. Superior Court, 24 Cal. App. 4th 1750, 1755, 30 Cal. Rptr. 2d 217, 219 (1994).

extent of the plaintiff's injury malpractice, his motive in bringing the action, or his bias and credibility.[57]

After a jury has returned against a public entity a verdict that includes damages for which payment from a collateral source has already been paid or is obligated to be paid for services or benefits that were provided prior to the commencement of trial, and the total of the collateral source payments is greater than $5,000, the defendant public entity may move the court for a reduction of the judgment against the defendant public entity for collateral source payments paid or obligated to be paid for services or benefits that were provided prior to the commencement of trial.[58]

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[57] Norton v. Superior Court, 24 Cal. App. 4th 1750, 1762, 30 Cal. Rptr. 2d 217, 224 (1994). **See generally** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:96–:97, :1002.1, :1805.16 (1999).

[58] GOV. CODE § 985(b). The $5,000 threshold is increased five percent compounded on January 1, 1989, and each January 1 thereafter. **Id.**

➡Pre-Filing Procedures: Claims Against Governmental Entities and Employees

A defendant public entity may, by interrogatory or in writing at the trial-setting conference, request from the plaintiff

- a list of the names and addresses of all providers of collateral source payments directly to or on behalf of the plaintiff
- the amount provided to the plaintiff from each collateral source.

➡Propounding Interrogatories: Continuing Interrogatories

The plaintiff must produce the requested list within 30 days of the request. The plaintiff has a continuing duty to disclose to the public entity defendant the name and address of any provider of a collateral source payment not disclosed in the plaintiff's original response if that provider pays or owes collateral source payments to or on behalf of the plaintiff between the time of plaintiff's response and the commencement of trial.[59]

[10] Party's Finances

Whether one party may obtain discovery of financial information relating his opponent depends on the purpose for which he seeks that information.[60]

[59] GOV. CODE § 985(c).

[a] Relevance to the Merits of the Claim

When financial information goes to the merits of the plaintiff's cause of action, a litigant may obtain discovery concerning his opponent's financial condition.[61]

Example: **P** brings an action against **D Investment Co.** and related individuals, alleging that they siphoned profits from limited partnerships in which **P** had interest, failed to distribute profits to the limited partners, and received excessive compensation for management of the limited partnerships while misleading **P** concerning the amount of compensation. **P** moves to compel production of documents relating to **D**'s finances. The court denies the motion,

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[60] **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 11.9 (1997); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:92.1, :108.6–.7 (1999).

[61] Rawnsley v. Superior Court, 183 Cal. App. 3d 86, 91, 227 Cal. Rptr. 806, 809 (1986).

The court abused its discretion. The documents **P** sought were fundamental to his case. The only way **P** could prove his case was to obtain **D**'s financial records.[62]

Example: **P** initiates a will contest and notices the deposition of **W**. **P** contends that **W**, in conspiracy with the beneficiary of the will, prepared, wrote out, and witnessed the disputed will. **W** refuses to answer **P**'s questions regarding his financial condition and walks out of the deposition. The court denies **P**'s motion to compel.

The court abused its discretion. Evidence of **W**'s financial condition may be relevant to show motive and therefore falls within the broader compass of relevancy to the subject matter of the action. It is certainly pertinent to explore his financial condition in order to ascertain whether he might have

[62] Rawnsley v. Superior Court, 183 Cal. App. 3d 86, 91, 227 Cal. Rptr. 806, 809 (1986).

> had some motive of personal profit for so doing because of his own financial condition. Such evidence is "reasonably calculated to lead to the discovery of admissible evidence."[63]

The unconscionability of a lawyer's fees is determined according to the going market price for given services, not the lawyer's profit margin. Thus, the hourly wages paid to the lawyer's employees are not relevant to the subject matter of the action.[64]

The standard of living to which a child is entitled is measured in terms of the standard of living attainable by the income available to the parents, not the manner in which the parents' income is expended and the parents' resulting life-style. It does not matter whether the noncustodial parent miserly hoarded his $1 million per year income and lived the life of a pauper or whether he lived the life of a prince, spending every cent of the available income.

[63] Morris Stulsaft Foundation v. Superior Court, 245 Cal. App. 2d 409, 420 54 Cal. Rptr. 12, 19 (1966).

[64] Shaffer v. Superior Court, 33 Cal. App. 4th 993, 1003, 39 Cal. Rptr. 2d 506, 513 (1995).

Evidence of detailed life-style and net worth is relevant only in those situations in which the unwise expenditure of income may affect the noncustodial parent's ability to make adequate support payments, to the detriment of the supported minor. If the noncustodial parent has an unquestioned ability to pay any reasonable support order, evidence of his life-style is irrelevant to the issue of the amount of support to be paid and thus protected from discovery.[65] Discovery of a parent's income and assets is rendered truly irrelevant only if the court makes the least beneficial assumptions to the extraordinarily high earner. Discovery limited to only that information from which the court may make the least beneficial assumptions about the high earner's income does not require the detail of disclosure in the normal child support case. [66]

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[65] White v. Marciano, 190 Cal. App. 3d 1026, 235 Cal. Rptr. 779 (1987). The enactment of FAM. CODE §§ 4056 & 4057 did not abrogate **White v. Marciano.** Estevez v. Superior Court, 22 Cal. App. 4th 423, 431, 27 Cal. Rptr.2d 470, 475 (1994).

[66] Johnson v. Superior Court, 66 Cal. App. 4th 68, 74–75, 77 Cal. Rptr. 2d 624, 628 (1998).

[b] Relevance to the Settlement of the Case

The discoverability of a defendant's insurance coverage might suggest that a defendant's assets would likewise be discoverable, as both kinds of information are relevant to the subject matter in the sense that they assist the plaintiff in determining how much to demand to settle his claim. In a discovery proceeding there is, however, a distinction between the defendant's liability insurance and his other assets. A liability insurance policy in force at the time of the tort establishes a special fund to which the injured party may look for the payment of his claim when a judgment establishes the defendant's liability.[67] The defendant cannot dissipate that fund during the pendency of the action. This is not true with respect to defendant's other assets. Unlike the defendant's liability insurance, the net dollar value of his other assets before a judgment establishes his liability is not the measure of the collectibility of the judgment. Whether the plaintiff can collect on such a

[67] INS. CODE §§ 11580, 11580.1.

judgment depends on the nature of the defendant's assets at and after the time the court enters judgment against him. Because the law does not require a potential judgment debtor in a tort action to maintain his assets intact from the date of the tort to the date of the judgment establishing his liability, the defendant, through circumstances beyond his control, may not own any assets at the time he becomes a judgment debtor. To require the pretrial disclosure of a defendant's assets, even as an aid to settlement and subject to a protective order against disclosure to others, would invade the defendant's privacy. The threat of having to place a dollar value on one's assets and to disclose that valuation to strangers, might tend to coerce a settlement not warranted by the facts of the case.[68] The law does not permit pretrial discovery with respect to the defendant's financial condition and his assets other than his public liability insurance as an aid to settlement.[69]

➡Resisting Discovery: The Right of Privacy

[68] Doak v. Superior Court, 257 Cal. App. 2d 825, 832, 65 Cal. Rptr. 193, 197–98 (1968).

[69] Doak v. Superior Court, 257 Cal. App. 2d 825, 838, 65 Cal. Rptr. 193, 201 (1968).

[c] Relevance to the Amount of Punitive Damages

Evidence of the defendant's financial condition is a prerequisite to a punitive damages award.[70] The plaintiff, however, may not seek discovery with respect to the profits the defendant earned by means of his misconduct and to the defendant's financial condition unless the court enters an order permitting such discovery. The plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the defendant's profits or financial condition, and the court may require the defendant to identify documents in the his possession that are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts. Upon the plaintiff's motion, supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting discovery of the defendant's financial information if the court finds

[70] Adams v. Murakami, 54 Cal. 3d 105, 115–16, 813 P.2d 1348, 1354, 284 Cal. Rptr. 318, 324 (1991).

that there is a substantial probability that the plaintiff will prevail on the punitive damages claim. The order is not a determination on the merits of the claim or any defense to the claim, and he plaintiff may not refer to it at trial.[71]

[d] Proceedings for Separation or Dissolution of Marriage

The parties to a proceeding for dissolution of marriage or legal separation must make a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest in the early stages of the proceeding, regardless of the characterization of the assets and liabilities as community or separate, together with a disclosure of all income and expenses of the parties. Each party has a continuing duty to update and augment that disclosure to the extent there have been any material changes.[72]

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[71] CIV. CODE § 3295(c).

[72] FAM. CODE § 2100(c). **See generally** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 1002.2 (1999).

[11] Similar Accidents

Information concerning similar accidents in which a defendant may have been involved may be relevant to the subject matter of the accident at issue in the lawsuit, for such information may evidence the existence of a peculiar risk, which the defendant should have foreseen and guarded against.[73]

Example: **P** is seated in a Department of Motor Vehicles building when a motorist crashes into the building, injuring **P**. He sues the **State**, contending that the **State** inadequately designed the DMV building to withstand crashes. **P** serves interrogatories on the **State** seeking information concerning crashes at other DMV buildings. The court declines to order the **State** to answer the interrogatories.

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[73] Davies v. Superior Court, 36 Cal. 3d 291, 300, 682 P.2d 349, 355, 204 Cal. Rptr. 154, 160 (1984); Morfin v. State, 12 Cal. App. 4th 812, 817, 15 Cal. Rptr. 2d 861, 864 (1993). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 11.8 (1997); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:89–:89.2 (1999).

> The court erred. If the answers to **P**'s interrogatories revealed an unusually high incidence of vehicle-building collisions at other DMV facilities, **P** could argue that drivers in DMV parking lots pose a unique risk, which the **State** should take into account in designing such facilities.[74]

Title 23, section 409, of the United States Code protects from disclosure reports and data compiled or collected for the purpose of enhancing the safety of potential accident sites pursuant to sections 130, 144, and 152 of Title 23 or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing federal highway funds. To take advantage of section 409, the Department of Transportation must meet its burden of proving that the reports or data it wishes to protect from disclosure were prepared or compiled pursuant to these federal statutes.[75]

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[74] Morfin v. State, 12 Cal. App. 4th 812, 817, 15 Cal. Rptr. 2d 861, 864 (1993).

[75] Department of Transp. v. Superior Court, 47 Cal. App. 4th 852, 55 Cal. Rptr. 2d 2 (1996).

[12] Subsequent Remedial or Precautionary Measures

When, after the occurrence of an event, a party takes remedial or precautionary measures, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.[76] Evidence of subsequent remedial measures is admissible to prove matters other than negligence or culpable conduct.[77] The limitation on the admission of evidence of remedial measures does not limit the scope of discovery.[78]

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[76] EVID. CODE § 1151. **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 11.7 (1997).

[77] Ault v. International Harvester Co., 13 Cal. 3d 113, 117, 528 P.2d 1148, 1150, 117 Cal. Rptr. 812, 814 (1974).

[78] Bank of the Orient v. Superior Court, 67 Cal. App. 3d 588, 599, 136 Cal. Rptr. 741, 747 (1977).

[13] Settlements and Settlement Negotiations

Evidence Code section 1152(a) provides that evidence of settlement offers and of conduct and statements made in settlement negotiations is not admissible to prove liability for the loss or damage to which the negotiations relate.[79] In general, such evidence is not relevant for discovery purposes.[80]

Example: **P** sues **D** for malicious prosecution. **D** asks **P** questions during **P**'s deposition regarding settlement offers that **P** made during the underlying action. **D** contends that the information is discoverable for the purpose of proving that the earlier action was brought with probable cause and without malice. The court orders **P** to answer the questions.

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[79] EVID. CODE § 1152(a).

[80] Covell v. Superior Court, 159 Cal. App. 3d 39, 43, 205 Cal. Rptr. 371, 374 (1984). **See generally** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:107–:108.1 (1999).

> The court abused its discretion. Defendants often try to buy peace for economic reasons, even in frivolous lawsuits. The issue in a malicious prosecution action is not whether the plaintiff believed that he had probable cause or whether he acted out of malice. **P**'s state of mind being irrelevant, the discovery **D** sought was neither relevant to the subject matter of the malicious prosecution action nor reasonably calculated to lead to discovery of admissible evidence.[81]

If, however, evidence of settlement negotiations is relevant for some purpose other than to prove liability for the loss or damage to which the negotiations relate, then section 1152 does not render such evidence inadmissible.[82] Presumably, evidence concerning settlement negotiations would be discoverable is such cases. A confidential settlement agreement, however, is entitled to at least as much

[81] Covell v. Superior Court, 159 Cal. App. 3d 39, 43, 205 Cal. Rptr. 371, 374 (1984).

➡Discovery Relevance: Party's Finances

privacy protection as a bank account or tax information. A party seeking discovery of a confidential settlement must show a compelling need for the information to overcome its privacy protection.[83]

Example: **Dr. P** sues **D** for malpractice after his claim against **HMO**, a health maintenance organization, for excluding him from a hospital it had acquired was dismissed. **P** seeks discovery concerning settlements in another action **D** brought on behalf of a group of doctors against **HMO**. The court orders disclosure.

The court abused its discretion. Given the speculative relevance of the other settlements to **P**'s damages, **P** failed to

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[82] **See, e.g.,** White v. Western Title Ins. Co., 40 Cal. 3d 870, 887, 710 P.2d 309, 318, 221 Cal. Rptr. 509, 518 (1985) (EVID. CODE § 1152(a) does not preclude the introduction of settlement negotiations if offered to prove a insurer's failure to process a claim fairly and in good faith).

[83] Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court, 51 Cal. App. 4th 233, 241–42, 58 Cal. Rptr. 2d 791, 796 (1996).

make a sufficient showing of a compelling need to invade the privacy of the other settlements.[84]

A lawyer has a duty to communicate to his client the terms of any written settlement offer made by or on behalf of an opposing party.[85] Any written settlement offer or any required communication of a settlement offer is discoverable by either party in any action in which the existence or communication of the settlement offer is an issue.[86]

An excess insurer may discover the amounts of the settlements paid by its insured's primary insurers and to have those amounts allocated to the various claims and policies so that one can determined whether the excess insurer's coverage obligations have been triggered.[87]

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[84] Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court, 51 Cal. App. 4th 233, 241–42, 58 Cal. Rptr. 2d 791, 796 (1996).

[85] BUS. & PROF. CODE § 6103.5(a).

[86] BUS. & PROF. CODE § 6103.5(b).

[87] Home Ins. Co. v. Superior Court, 46 Cal. App. 4th 1286, 1292, 54 Cal. Rptr. 2d 292, 295 (1996).

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[14] Insurer's Reserves

Evidence of the reserves an insurer has set for the potential liability that a claim poses may or may not be relevant in a subsequent bad faith action, depending on the issues presented. For example, in a case where the insurer has denied coverage and refused a defense, the fact that the insurer set a reserve might be relevant to show that the insurer must have known that a potential for coverage existed. Loss reserve information might have some relevance to the question whether a reasonable likelihood of an excess verdict existed or whether the insurer conducted a proper investigation or gave reasonable consideration to all of the factors bearing on the insured's exposure to the risk of an excess verdict. The insurer's evaluation of a case, whether compelled by law or business prudence, might well lead to discovery of evidence admissible on any number of issues commonly presented in bad faith actions. Such information would assist the plaintiff in evaluating his bad faith case and in preparing it for trial. That is enough to justify discovery.[88]

[15] Claims Manuals

Claims manuals are admissible in insurance bad faith cases.[89] It follows, therefore, that they are discoverable.[90]

[B] Motions

Any party may obtain discovery regarding any matter that is relevant to the determination of any motion made in the action.[91] The right to seek discovery of matter relevant to motions is particularly important to the bringing of a motion to quash service of the summons and complaint and of a motion for change of venue.

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[88] Lipton v. Superior Court, 48 Cal. App. 4th 1599, 1614–16, 56 Cal. Rptr. 2d 341, 349–50 (1996). **See generally** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 8:95.5 (1999).

[89] **See, e.g.,** Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 923 n.8, 582 P.2d 980, 987 n.8, 148 Cal. Rptr. 389, 396 n.8 (1978).

[90] Glenfed Dev. Corp. v. Superior Court, 53 Cal. App. 4th 1113, 1117, 62 Cal. Rptr. 2d 195, 197–98 (1997).

[91] CODE CIV. PROC. § 2017(a). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 11.4 (1997).

[C] Contentions

Discovery serves the function of enabling a party to determine what his opponent's contentions are and what facts he relies upon to support his contentions. One party may require the other to disclose not only the evidentiary facts underlying his claims, denials, or affirmative defenses but also whether he makes a particular contention, either as to the facts or as to the possible issues in the case.[92] The fact that a question calls for an opinion and conclusion is not a proper objection to an interrogatory. One may seek discovery of opinions and legal conclusions as a means of obtaining information that will lead to probative facts.[93]

(Though contention questions are proper in interrogatories, they are not proper in depositions.)

➡Interrogatories: Contention Interrogatories

➡Depositions: Contentions

[92] Burke v. Superior Court, 71 Cal. 2d 276, 281, 455 P.2d 409, 415–16, 78 Cal. Rptr. 481, 487–88 (1969). **See generally** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:77–:79 (1999).

[93] West Pico Furniture Co. v. Superior Court, 56 Cal. 2d 407, 417, 364 P.2d 295, 299, 15 Cal. Rptr. 119, 123 (1961).

[D] Limitations on Discovery

[1] Privileges

A litigant may not obtain discovery of information that is privileged.[94] The Evidence Code defines the privileges that protect evidence from disclosure:

- the attorney-client privilege
- the physician-patient privilege
- the psychotherapist-patient privilege
- the privilege against self-incrimination
- the privilege not to testify against one's spouse
- the privilege for official information
- the privilege for confidential marital communications
- the newsperson's privilege to refuse to disclose sources
- the trade secret privilege
- the clergyman-penitent privilege
- the sexual assault victim-counselor privilege

[94] CODE CIV. PROC. § 2017(a). **See generally** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:109–:110 (1999).

- the domestic violence victim-counselor privilege
- the political vote privilege.

In addition, the attorney work product rule provides qualified protection for the work product of an attorney.

§ 21.4 Timing

[A] Priority

In the absence of a Judicial Council rule, local court rule, or local court policy to the contrary, one may employ the methods of discovery in any sequence. The fact that a party is conducting discovery by any particular discovery method does not require any other party to delay his discovery. On motion and for good cause shown, the court may establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice.[95]

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[95] CODE CIV. PROC. § 2019(c). **See generally** JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY § 2.3 (1997); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:494–:495 (1999).

[B] Initiating Discovery

The parties are subject to separate delay requirements for the initiation of discovery depending on the discovery method in question.

[C] Discovery Cut-Off

Each party has a right to take discovery, and to insist that discovery, be completed on or before the 30th day before the date initially set for trial. In addition, each party has a right to insist that all discovery motions be heard on or before the 15th day before trial. Discovery is deemed completed on the day a response is due or on the day a deposition begins. The response time for interrogatories is 30 days. Therefore, one must serve interrogatories no less than 60 days before trial. To be on the safe side, one should file one's last set of interrogatories more than 60 days before trial so that one will have sufficient time to satisfy meet and confer requirements and to file notice of a motion to compel further answers.

➡Responding to Interrogatories: Timing

Any prescribed period for responding within a prescribed period or on a date certain after the service of a document (including a discovery request)

is extended if the document is served by mail, Express Mail, overnight delivery, or fax.[96] In the case of service by mail, the time to respond is extended five days if the place of address is within California, ten days if the place of address is outside California but within the United States, and 20 days if the place of address is outside the United States.[97] In the case of service by Express Mail, by overnight delivery, or by fax, the time to respond is extended two court days.[98] If one serves a discovery request or discovery motion other than by personal delivery, one must take these time extensions into account to make sure that the response is due within the 30-day/15-day discovery cut-off dates. Also, one should note that when the last day to perform or complete any act provided for in the discovery statutes falls on a Saturday, Sunday, or holiday, the time limit is

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[96] CODE CIV. PROC. §§ 1013(a), (c), (e), 2019(e); **cf.** RULES OF CT. 2008(b) (extension of time for response in case of service by fax). **See generally** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:909–:916 (1999).

[97] CODE CIV. PROC. §§ 1013(a), 2019(e).

[98] CODE CIV. PROC. § 1013(c), (e), 2019(e).

extended until the next day not a Saturday, Sunday, or holiday.[99]

A postponement of the trial date does not reopen discovery proceedings,[100] though a mistrial, new trial, or reversal of the judgment on appeal automatically restarts the time limitations on discovery.[101] The Trial Delay Reduction Act[102] does not authorize courts to adopt local rules cutting off a party's right to take discovery up until 30 days before trial.[103] Nevertheless, local rules commonly provide that the

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[99] CODE CIV. PROC. § 2024(g), **referencing id.** § 10.

[100] CODE CIV. PROC. § 2024(a). **See generally** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:445–:450.1, :(1999). The fact that the 30th or 15th day before trial falls on a holiday does not extend the time for discovery or discovery motions pursuant to CODE CIV. PROC. § 12a. Steele v. Bartlett, 18 Cal. 2d 573, 574, 116 P.2d 780, 781 (1941). If one waits until the last minute to schedule depositions, one may find that there is not enough time to notice a motion to compel if the witness refuses to answer questions.

[101] Beverly Hosp. v. Superior Court, 19 Cal. App. 4th 1289, 1291, 24 Cal. Rptr. 2d 238, 238 (1993).

[102] GOV. CODE § 68612.

court will set discovery cut-off dates following the case management conference.[104] The Standards of Judicial Administration encourage courts to hold preliminary trial conferences in complex cases at the earliest practical date to consider, among other things, discovery scheduling.[105]

In unlawful detainer cases, discovery must be completed on or before the fifth day before trial.[106] In condemnation cases one may obtain discovery from the other party and from his expert witness following an exchange of lists of expert witnesses and statements of valuation not later than 20 days before the day set for trial of the issue of compensation.[107]

[103] Wagner v. Superior Court, 12 Cal. App. 4th 1314, 1320, 16 Cal. Rptr. 2d 534, 538 (1993).
[104] MONTEREY SUPER. CT. R. 6.09(3)(E)(6); NEVADA SUPER. CT. R. 4.00.8(F)(8); PLACER SUPER. CT. R. 20.1.8(E)(8); SAN BENITO SUPER. CT. R. 4.8(C)(4); SAN MATEO SUPER. CT. R. 2.3(e)(5)(G); SANTA CLARA SUPER. CT. R. 1.1, § 1.1.6(D)(8); SANTA CRUZ SUPER. CT. R. 2.2.09(e); SHASTA SUPER. CT. R. 4.01(B)(4)(d)(7); SISKIYOU SUPER. CT. R. 4.01(B)(6)(c)(7); SONOMA SUPER. CT. R. 4.9(D)(7).
[105] STANDARDS OF JUDICIAL ADMINISTRATION § 19(g)(3).
[106] CODE CIV. PROC. § 2024(c).
[107] CODE CIV. PROC. §§ 1258.020(a), 2024(c).

The parties to a judicial arbitration have the right to take depositions and to obtain discovery and to that end may exercise all of the same rights, remedies, and procedures, and are subject to all of the same duties, liabilities, and obligations as litigants in other civil cases. They must complete all discovery not later than 15 days before the date set for the arbitration hearing unless the court, upon a showing of good cause, makes an order granting an extension of time within which to complete discovery.[108] After an award in a case ordered to judicial arbitration, no party may seek discovery, other than with respect to expert witnesses, except by leave of court upon a showing of good cause.[109]

The parties may complete discovery proceedings relating to expert witnesses on or before the 15th day before the initial trial date. Motions relating to discovery from expert witnesses must be heard on or before the tenth day before the initial trial date.[110]

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[108] CODE CIV. PROC. § 2024(b); RULES OF CT. 1612.
[109] CODE CIV. PROC. §§ 1141.24, 2024(b).
[110] CODE CIV. PROC. § 2024(d).

[1] Motions to Extend Time or to Reopen Discovery

On the motion of any party, the court may grant leave to complete discovery proceedings, or to have a motion concerning discovery heard, closer to the initial trial date, or to reopen discovery after a new trial date has been set. The moving party must include with the motion a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

➡Motions: Meet and Confer Requirements

In exercising its discretion to grant or deny the motion, the court must take into consideration any matter relevant to the leave requested, including:

- the necessity and the reasons for the discovery
- the diligence of the party seeking the discovery or the hearing of a discovery motion and the reasons that the discovery was not completed or that the discovery motion was not heard earlier
- any likelihood that permitting the discovery or hearing the discovery motion will prevent the case from going to trial on the date set, interfere with

the trial calendar, or result in prejudice to any other party

- the length of time that has elapsed between any previous trial date previously set and the present trial date.

The court must impose a monetary sanction under section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to extend or to reopen discovery unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.[111]

[111] CODE CIV. PROC. § 2024(e). **See generally** ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:457–:460 (1999).