



Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

THE 1986 DISCOVERY ACT

Is It Working?

By Katherine Gallo

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July 1, 2007 marked the 20th anniversary of the effective date of the 1986 Discovery Act (“Act”). The Act was intended to codify then-current case law and statutes as well as curb perceived abuses in the discovery process.

This legislation dramatically changed the practice of law in the civil arena. In the last two decades, discovery has assumed increasing importance in litigation and with that importance came sky rocketing costs. Lawyers and judges now dread wading into the morass of pre-trial discovery. With 20 years of experience with the Act under our belts, I ask the question: Is the 1986 Discovery Act working or does it need another overhaul?

The 1986 Civil Discovery Act is an amazing piece of legislation -- it giveth and taketh. Although it is self-executing, it depends on the professionalism and ethics of counsel. It allows for liberal exchange of information, but there are restrictions to curb abuse. It’s got teeth, but the courts must affirmatively exercise their power to for the Act’s sanctions to be effective.

The basic purpose of the Act was to take the “game” element out of trial preparation by enabling the parties to obtain evidence necessary to evaluate and resolve their dispute beforehand. Weil and Brown, *Cal Prac. Guide: Civil Procedure Before Trial* (TRG 2006) ¶ 8:1, citing *Greyhound Corp. v. Superior Court* (1961). Unfortunately, now it appears the call of the wild is “Let the games begin” as the dreaded process unfolds. Counsel and the court have the ability to stop this madness by rethinking the way they perceive discovery and how discovery disputes can be handled.

1. Do You Have a Discovery Plan?

As a discovery referee, I normally come into cases when there already is a problem. Either discovery in the case is out of control, or the antagonism among counsel is so great that the Law and Motion Judge is done dealing with the parties. In many instances, I see an all out war between counsel, with discovery being used as a weapon. There is no rhyme or reason to

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 klgallo@discoveryreferee.com



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the 105 special interrogatories that were served, the 200 categories of documents being demanded or the 20 depositions that have been noticed. The meet and confer process has broken down into a

rampage of insults. Yet nobody has bothered asking the demanding party the fundamental question “Why do you need this?” When that question is finally posed by me, too frequently that counsel cannot answer the question. In such circumstances, it is clear to me that the attorneys have no idea where they are taking the case, no plan of attack and no idea what they are trying to accomplish. In other words--no discovery plan.

It is at the *beginning* of a case that you need to plan your litigation strategy. Before you propound discovery you need to go through three steps.

First, you need to determine your goal: Are you obtaining discovery to evaluate the case for mediation, to file a motion for summary judgment/adjudication, or to prepare for trial? Each goal has a different strategy and certain discovery devices are better suited for each goal. In evaluating the case for mediation, form interrogatories, a preliminary set of requests for production of documents and an informal exchange of information between the parties may be all you need. If you are going to trial, you are going to need admissible evidence, so the formal exchange of information with verification and authentication is going to be necessary as well as testimony under oath. The discovery is going to have to be even more pinpointed if you are planning to file a motion for summary judgment/adjudication. The evidence is going to have to be verified, authenticated and uncontroverted. You are going to have to make sure that any declaration being filed by the opposition will not create a *triable issue of fact*. The discovery devices most effective to elicit “motion-ready” responses that can be attached to your MSJ are requests for admissions and depositions. Requests for admissions allow no wiggle room. Also, you can use them to have the opposing party authenticate documents you will need to make or oppose your MSJ, or for trial [C.C.P. §2033.010]. Depositions allow you to nail down the testimony – and a declarant’s subsequent declaration attempting to disavow his uncorrected deposition testimony will not defeat the motion. *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.

Second, you need to determine the essential elements of each of the causes of action and the evidence you need to prove or defeat that cause of action.

Finally, you need to determine what discovery device is best suited to obtain the evidence to achieve your goal. After this three-step analysis, serve your discovery.



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2. Are You Proactive or Reactive?

I see many lawyers just reacting to the litigation versus taking control of the litigation. This is most evident in the way lawyers handle discovery. Below are a few examples:

In most cases, it seems that one side goes on the offense and propounds a slew of written discovery and deposition notices and the other side goes on the defense. It usually is the plaintiff that goes on the offense and then the defense then reacts. It may take months if not years for the defense to then become proactive. This is a role that the parties assume, not one that the Code requires. There is no priority in discovery. C.C.P. §2019.020. Both sides need to be proactive and implement their discovery plan.

Another failing of lawyers is the standard junk objections to written discovery and the meet and confer process thereafter. The Act requires the parties to make a “reasonable and good faith attempt” to informally resolve their discovery disputes prior to filing a motion. The intent of the meet and confer requirement is to force the lawyers to reexamine their positions and narrow their disputes before bringing the matter to the court. The Act expects that the parties will be professional and will work out most of their differences. But this isn’t what is happening. Written responses full of objections with little or no substantive information put the propounding party into a reactive or retaliatory mode. After receiving the “non-responses” the propounding party then fires off a “give me my discovery or else” letter and the battle begins. The problem is that the dispute isn’t limited to just this discovery motion. It sets the tenor for the entire case and every deposition and every request for discovery becomes a battleground. The hostilities from the discovery disputes permeate into counsel’s mind set and it becomes difficult to resolve the entire case.

It is important to break this cycle of abuse. Junk objections (vague and ambiguous; over broad and burdensome; irrelevant and not likely to lead to admissible evidence, work product; attorney client privilege; calls for an expert opinion when experts have not yet been disclosed) are very rarely sustained when they are ruled on by the court. So why serve them? Second, be professional. Pick up the phone and try to work something out. Better yet, agree to meet in person to try and work it out. Third, consider mediating your discovery dispute by stipulating to the appointment of a discovery referee for the limited purpose of working with you on the pending dispute.

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3. Are stipulations part of your discovery plan?

A useful tool that is too often overlooked is stipulations. Discovery is a very expensive process, especially in complex cases. But there are ways to streamline the process and be cost effective. One is to agree on service. Agree to service by fax. [C.C.P. §1013(e) and (f)]¹ Get everyone's e-mail address and agree to correspond by e-mail. Better yet, agree to accept e-mail service of all pleadings and other documents except for motions.² As for motions, consider agreeing that the moving party only need serve the full moving papers on the party to which the motion is being directed to. All other parties are served with the notice of motion only with the option of requesting a full set of moving papers.³ This procedure, commonly used in Asbestos

¹ Example of text of agreement: **Facsimile Service:** Service by fax is allowed pursuant to C.C.P. Section 1013(e) and (f) but is modified as follows:

- A. Service by facsimile shall not be allowed for any motion/paper greater than 50 pages (including exhibits); such papers must be served by another means allowed by the Code of Civil Procedure, California Rules of Court, and/or local rules.

² Example of text of agreement: **E-Mail Service** The parties have agreed that there shall be service via e-mail except for those documents involving those that are being filed with the court. All e-mails shall have the following format:

Subject line: Name of case, subject matter of e-mail
Body of E-mail: Name of each attachment. Who the attachment is directed to.

³ Example of text of agreement: **Service of Motion Papers** The parties have agreed that service of any motion papers must be in compliance with the Code of Civil Procedure as to the party the motion is being directed to as well as the court.

Any party to which the motion is not directed to, the moving party shall serve via fax (1) the notice of the motion, and (2) a letter advising counsel that they can request a courtesy copy of the motion by signing the letter, requesting service of a copy of the full moving papers, and serving the request on all parties. Courtesy copy of the moving papers shall be sent via hand delivery, fax service, overnight service or U.S. Mail within five (5) court days [of receipt of the request]. If any party requests opposition papers and/or reply papers, those papers are to be sent to the requesting party via hand delivery, fax service, overnight service or U.S. Mail within five (5) court days [of receipt of the request].



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litigation, saves hundreds if not thousands of dollars on copying costs and service charges in multiparty litigation.

Prior to the commencement of discovery, meet and confer with opposing counsel to agree on a discovery time line (i.e., exchange of documents within 90 days, written discovery commences on Day 91, depositions commences on Day 150). If the case involves the exchange of sensitive information (i.e., privacy or trade secret materials), agree to a protective order before you commence discovery. If you need a neutral third party to help with all this, consider stipulating to a discovery referee to case manage your case and to rule on any discovery disputes that may arise.

If the case is document intensive, agree on a document depository and a document handling and processing protocol. Come into the electronic age – require the documents be scanned (OCR) so that you and your experts can do more efficient and effective searches. Consider using document companies that will make the depository internet-accessible. These services allow you to decide which parties have access to which documents. Such a feature gives you, anyone in your office and your experts access to the documents 24/7 and you are not hunting around for the CDS.

Also, consider agreeing on an early disclosure of experts. Many complex cases are ones in which evidence from experts will determine the outcome of the case. An early disclosure will enable the parties to evaluate their case for settlement, and prepare for trial. There is nothing or beneficial or cost-effective to your case when you are double-tracking depositions up to and during trial.

If you cannot get the stipulations you need, then turn to the court. It is the court's responsibility to manage complex cases. See Judicial Administration Standard 3.10.

4. Do You File Discovery Motions?

I often hear from litigators “I have never used a discovery referee because I don't file discovery motions.” I find that statement incredible, but not because I don't believe them. Instead, I am wondering whether the other side fears them so much that they roll over and give them everything requested or they are the type of lawyer who doesn't like to make waves. If it is the latter, this attitude and perception can be detrimental to your client, as well as to the adjudicative process

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As mentioned before, the purpose of discovery is to obtain information to determine the good, the bad and the ugly of your case so you can do your evaluation and come to a resolution prior to trial. Not obtaining the information delays the process and has a negative ripple effect. For example, if you can't get the names of the witnesses, you can't depose them. If you can't get the name of the medical treaters, you can't subpoena the medical records and you can't schedule the IME. If you don't know what the construction defect claims are, you can't determine whether or not the defects fall within your scope of work, you can't schedule the site inspection, and you can't hire your expert to be at that site inspection. The delay then affects the trial date. Judges are becoming very unsympathetic to requests to continue trial dates when they determine that counsel has been sitting on the file and not initiating and completing discovery. Claims of "I didn't get the information I need to go to trial" falls on deaf ears when the judge notes that no discovery motions have been filed and the case is three years old.

Filing motions curbs discovery abuse. If a party fails to comply with your discovery requests and you do nothing, that party is going to continue to stonewall you. Taking it on the chin isn't helping your client. You need to bring the motion and start establishing a pattern of opposing counsel's discovery abuse. No court is going to impose a terminating sanction unless a history of lesser sanctions have first been imposed or prior discovery orders have been violated. See Weil and Brown, California Practice Guide: Civil Procedure Before Trial (TRG 2006) ¶ 8:1215 *et seq.*

The court also needs to take discovery motions seriously. Discovery motions can be as dispositive as motions for summary judgment or summary adjudication. An order to produce documents or an order to compel attendance at a deposition many times become a turning point in a case that drives a party to the table to negotiate a settlement. Courts also need to impose monetary sanctions on anyone "engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the **reasonable expenses, including attorneys' fees** incurred by anyone as a result of that conduct." [Emphasis added] C.C.P. § 2023.030(a) Many lawyers are hesitant to file discovery motions because they are expensive to prepare and they assume that they will not be awarded sanctions. Motions to compel further responses that require lengthy CRC 335 statements can cost thousands of dollars to prepare. Yet, the requests for sanctions are either denied outright or only a small fraction of the amount requested is awarded. Courts need to use sanctions as the hammer that they were intended to be.⁴ Parties knowing that the court will

⁴ Discovery sanctions are not reported to the State Bar. See Bus. & Prof. C. §6068(o)(3).



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impose all of opposing counsel's "reasonable expenses, including attorneys' fees" will be less likely to play games during discovery.

5. The Needed Tweaks to the Act

There are needed tweaks to the Discovery Act. C.C.P. §2033.010 et seq. has no relief provision when a party fails to respond to requests for admissions. The Court of Appeal in the case of *St. Paul Fire & Marine Insurance Co. v. Superior Court (Advalloy, Inc.)* (1992) 2 CA4th 843 found that C.C.P. § 473 does not apply as C.C.P. §2033 supercedes it. If this what the legislature intended, then the statute should be amended to make that intent clear.

Disclosing experts 50 days before trial can be a logistical nightmare. Presently, the Act only allows a 25-day window within which to take expert depositions. This doesn't work in multiparty complex cases where there can be dozens of experts. The problems encountered include the finite number of days to take the experts' depositions, the experts' availability, and the jockeying of the parties in having their expert being the last to be deposed. The Act should be amended to require expert disclosure 90 days before trial in multiparty or complex cases. Also, the parties should be required to state in the expert declaration all available dates the expert is available for deposition.

The final tweak concerns documents requested to be produced for deposition. Presently there is no requirement that a party provide a privilege log for any document withheld. The C.C.P. §2025 should be so modified so the deponent party has the same obligations to provide a privilege log as if he had been served with a document request pursuant to C.C.P. §2031.010 et seq.

Conclusion

So, is the 1986 Civil Discovery Act really working as the framers intended? The answer is YES. The structure is there. However, it is up to the lawyers and the courts to make the structure work.