



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

Do You Have a Discovery Plan?

By Katherine Gallo

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 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 what direction they want to case to proceed, 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

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



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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. §2030.010 \(pdf\)](#)]. 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. Weil and Brown, *Civil Procedure Before Trial* (TRG 2010) §10.155 citing [D’Amico v. Board of Med. Examiners \(1974\) 11 C3d 1 \(pdf\)](#).

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

Third, 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.