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Construction Attorneys--It Is Time to Check the Box!!

By Katherine Gallo

In May of 2007, I received a phone call from Peter Glaessner, a member of the Discovery Committee and Civil and Small Claims Committee of the Judicial Council. He asked me if I could put together Judicial Council Form Interrogatories for construction litigation. I told him that I probably could get him a working draft by the end of that summer. Little did I know how extensive of a project this would be.

I began the process by creating a statewide committee with three plaintiff counsel, three developer counsel, three subcontractor counsel, two insurance coverage counsel, one architects and engineer counsel and one public entity counsel. Each of these members are prominent lawyers in construction litigation and many have spoken at West Coast Casualty's Annual Construction Defect Seminar.

Two years and ten drafts later we submitted our final version of the *Form Interrogatories--Construction Litigation* to the Discovery Committee of the Civil and Small Claims Advisory Committee. The final draft had approximately 90% consensus with various members having issues with certain parts. The goal of the final version of the *Form Interrogatories--Construction Litigation* was to be all-inclusive with the idea that once vetted through the Civil and Small Claims Committee and the comment period some of the proposed interrogatories may be removed.

In 2011, the Judicial Council formed a second committee to work on the final version of the *Form Interrogatories--Construction Litigation*. Included in that committee were two construction litigation attorneys from Consumer Attorneys of California, two construction litigation attorneys from California Defense Council, and myself. The five of us worked for more than six months negotiating, rewriting and finalizing the final draft, which was provided to the Civil and Small Claims Committee of the Judicial Council in November of 2011.

Five years, twenty drafts and hundreds and hundreds of non-billed attorneys later, the Civil and Small Claims Committee of the Judicial Council is recommending the *Form Interrogatories -- Construction Litigation* be adopted and has invited the public to comment.

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The Civil and Small Claims Committee states in their **Invitation to Comment** that:

The proposed *Form Interrogatories—Construction Litigation* (form DISC-005) will follow the same format as the other Judicial Council form interrogatories. The instructions at the beginning are essentially the same as in the other form interrogatories, with two exceptions.

First, the use of the form will be limited to smaller cases, except with leave of court. In residential construction cases, the proposed form interrogatories are not intended for use in actions that involve more than five residential units, and in complex cases, they are not to be used until after a court has found good cause. Specific comments are requested on these limitations (see the box at the end of this invitation).

Second, the instructions recognize that in many construction cases a document depository is created, so they permit responses in the form of identifying those documents in such a depository that contain the information sought in an interrogatory.

Other notable aspects of the proposed form interrogatories include the following:

As with other civil form interrogatories, parties will be able to attach additional individually crafted interrogatories should they wish.

The definitions in the construction form interrogatories parallel those in the general form interrogatories but add terms specific to construction litigation. In addition, because the use of “Incident” as a defined term would be confusing in these interrogatories, that term has been replaced with “Construction Claim” and “Construction Defect Claim.”

The proposed construction interrogatories are intended to serve as a single integral set of interrogatories rather than as a discrete set of specialty interrogatories for use in addition to or as a supplement to other form interrogatories. Hence, they include interrogatories on several topics included in the general civil form interrogatories, with some tailored to more specifically address construction cases.

None of the questions concerning personal injury from the general form interrogatories are included in the proposed form. Such interrogatories would only infrequently be applicable in a construction case, and the committee concluded that their presence in this set would unnecessarily complicate the form.

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The **Invitation to Comment** also is requesting comments on the following:

Does the proposal appropriately address the stated purpose?

Would the proposed form interrogatories be appropriate and helpful in construction litigation as limited in the instructions? That is, in residential construction cases involving no more than five units, in commercial construction cases not deemed complex, and in complex construction cases only with permission of the court?

Should the instructions allow the form interrogatories for use in somewhat larger residential construction cases as well? Would they be appropriate and useful in actions involving up to 10 residential units? Would some other number—higher or lower—be more appropriate?

Should the defined terms remain formatted as in the attached, in boldface and all capital letters or, in order to make the form more readable, be changed to just boldface, without the capitals? An example of such formatting of defined terms can be seen in *Form Interrogatories – Family Law (form FL-145)*.

I want to thank each of the committee members for their hard work and dedication. Despite their differences with one another on various issues, as a whole we worked hard as a team and were proud of our end product. I also want to thank Anne Ronan, staff Attorney for the Judicial Council who too worked endless hours on this project. Most of all I want to thank the Civil and Small Claims Committee for recognizing all the hard work the attorneys have dedicated to making the *Form Interrogatories–Construction Litigation* a reality by recommending the interrogatories and inviting the public to comment.

If you have any questions regarding the *Form Interrogatories–Construction Litigation*, please do not hesitate to contact me.

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