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Owili K. Eison
BD&J, PC

Byron J. (B.J.) Abron
ABRON LAW P.C.

Critical discovery in motor-vehicle collision cases

A REVIEW OF THE COMPONENTS OF YOUR DISCOVERY AND TIPS ON TAKING AND DEFENDING DEPOSITIONS

While a lot of attorneys would contend that discovery begins after a lawsuit is filed, we would argue that the discovery phase of the case commences immediately after the collision occurs and the Plaintiff is retained as a client.

In the aftermath of a motor-vehicle collision, key evidence is often already being documented and collected. As a result, before entering the formal discovery phase of a lawsuit, it is critically important to make use of pre-lawsuit discovery techniques to flesh out any key issues, identify gaps in information, and obtain evidence early on in the case. It is advisable to conduct a thorough investigation of the motor-vehicle collision. This includes, but is not limited to, obtaining and reviewing traffic-collision reports, collecting witness statements, visiting the scene of the collision, retrieving any 9-1-1 audio recordings, and obtaining any and all available surveillance footage.

As a plaintiff's attorney, obtaining and analyzing this evidence in the initial phases of your case gives you a strategic planning advantage, and allows you to determine what other key evidence is needed to advance your case and prepare for trial if a lawsuit is later filed. As a word of caution, delays in obtaining this critical information at the outset of the case can result in the loss of key evidence, relocation of witnesses, and can derail your case in its later stages.

In our experience, getting this information can also result in early-stage case resolution, often before a lawsuit is filed. However, regardless of when a case resolves, adhering to this pre-lawsuit discovery framework will help in formulating precise and impactful written discovery requests should a lawsuit need to be filed and the formal discovery process is initiated.

Written discovery

Written discovery serves as a vital tool in the context of an automobile collision personal injury lawsuit. It allows both sides to uncover critical information not previously discovered in the pre-lawsuit phase of the case. From a Plaintiff's attorney perspective, written discovery can be served on a Defendant 10 days after service of the lawsuit has been effectuated. (Code Civ. Proc., §§ 2030.020(b), 2031.020(b), 2033.020(b).)

Personal injury attorneys typically deploy five primary written discovery devices to effectively map out their cases, streamline issues, and prepare for trial. These devices are as follows:

1) Form interrogatories
2) Special interrogatories
3) Requests for admission
4) Requests for production of documents
5) Demands for inspection

***Form interrogatories* (Code Civ. Proc., § 2030.010 *et seq.*)**

Form interrogatories are a cornerstone of written discovery in personal injury cases. Form interrogatories are a list of questions on a Judicial Council approved court form. Pay close attention to the questions you want the Defendant(s) to answer when checking the question boxes on the form. As a practice pointer, do not forget to check Interrogatory number 4.1 which asks the Defendant to identify any and all applicable insurance policies in effect at the time of the collision.

***Special interrogatories* (Code Civ. Proc., § 2030.010 *et seq.*)**

Special interrogatories allow attorneys to craft targeted and case-specific written questions to the Defendant(s). These questions can cover a range of topics, from the details of the collision to the opposing party's contentions and proffered defenses.

Before propounding special interrogatories, think deeply about what information you need. This includes the types of documents, witnesses, and facts pertaining to different causes of action or affirmative defenses.

Be sure to inquire as to the Defendant's specific contentions. Contention interrogatories help identify how the other party views certain aspects of the case, and moreover, the facts supporting their claims or defenses.

Lastly, use targeted special interrogatories to gather all facts, witnesses, documents, or other key information that the other party is using to support their contentions.

The importance of well-crafted interrogatories cannot be overstated. To be sure, in *Field v. U.S. Bank National Assn. as Trustee, etc., et al.* (2022) 79 Cal.App.5th 703, the court emphasized the importance of thorough and honest responses to interrogatories. The case highlighted that evasive or incomplete answers may result in adverse inferences and other draconian sanctions that could negatively impact the party providing deficient, evasive and/or incomplete responses.

***Requests for admission* (Code Civ. Proc., § 2033.010 *et seq.*)**

Requests for admission enable attorneys to seek admissions or denials of specific facts or the genuineness of documents. Code of Civil Procedure section 2033.010 provides, in relevant part, that "[a]ny party may obtain discovery … by a written request that any other party to the action admit the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of

law to fact." This written discovery tool serves to streamline issues in dispute and narrow down the scope of the case. To be sure, the "primary purpose of requests for admissions is to set at rest triable issues so that they will not have to be tried; they are aimed at expediting trial." (*American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 267-266.)

It should also be noted that "since requests for admissions are not limited to matters within personal knowledge of the responding party, that party has a duty to make a reasonable investigation of the facts before answering items which do not fall within his personal knowledge." (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 634.)

In *Brooks v. Am. Broad. Co.* (1986) 179 Cal.App.3d 500, 509, the court reaffirmed the significance of requests for admission in motor vehicle collision cases. The court opined that properly framed requests can simplify the trial process, encouraging parties to acknowledge undisputed facts and focus on the genuine areas of disagreement.

Additionally, pursuant to section 2033.420, if a party fails to admit the truth of a relevant matter in response to a valid pretrial request for admission and requires the requesting party to elicit the truth at trial, the requesting party may, in turn, seek a court order requiring the responding party to pay the reasonable expenses incurred in making that proof at trial, including reasonable attorney's fees.

***Requests for production of documents* (*Code Civ. Proc.*, § 2031.010 *et seq.*)**

The production of documents necessitates the exchange of relevant records, documents, and materials in collision cases. Requests for production can be used to inspect, examine, and copy documents or tangible items in the possession, custody, or control of another party. This can include employment records, incident reports, photographs, call logs, property damage estimates, and any other documents pivotal to the case.

In responding to requests for production of documents, a party generally has only three viable options: (1) agree to produce pursuant to Code of Civil Procedure section 2031.220; (2) state that after a diligent search and a reasonable inquiry the responding party has no documents responsive to the request pursuant to Code of Civil Procedure section 2031.230, or (3) object to the request pursuant to Code of Civil Procedure section 2031.240.

If the responding party elects the third course of action, and objects on the basis of privilege or fails to produce a document or tangible thing claiming that it is protected work product, the responding party must provide sufficient factual information for the other party to evaluate the veracity of those claims, and potentially, produce a privilege log. (Code Civ. Proc., § 2031.240.)

The Court in *Greyhound Corp. v. Superior Court* underscored the duty of parties to produce all relevant documents, even those that may be unfavorable to their case. The court emphasized the importance of transparency and the obligation to provide complete and honest disclosures during the discovery process. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355.)

***Demand for vehicle inspection* (*Code Civ. Proc.*, § 2031.010 *et seq.*)**

Similar to document production, a party can also make a request to another party to inspect tangible things and other physical evidence. As a practical matter, in our larger cases, we almost always make demands on Defendants to inspect the vehicle(s) involved in the collision.

A Plaintiff can serve the inspection demand 10 days after the service of the summons and complaint. However, be very clear and precise with respect to what you are requesting to be inspected as Code of Civil Procedure section 2031.010 requires the demand to be "reasonably particularized." If you intend to conduct testing, measuring, data recording, and/or photographing, make sure the demand is clear and unequivocal as to the nature and extent of the inspection to avoid unnecessary motion work and delays in collecting your desired evidence.

Depending upon the manner of service of the demand, generally, the responding party must respond within 30 days and indicate whether or not they will comply with the demand for inspection. As a practice pointer, it is advisable to set the date for the actual inspection out more than 30 days after service of the demand for inspection.

Effect of Senate Bill (SB) 235 on motor-vehicle collision cases

Senate Bill 235 has reshaped the discovery landscape in California, introducing limitations and requirements that impact the practice of written discovery in motor-vehicle collision cases. Specifically, the new law amends Code of Civil Procedure section 2016.090 and implements a requirement for initial disclosures of information and documents that mirrors initial-disclosure requirements rule 26 of the Federal Rules of Civil Procedure. The changes apply to civil actions, including personal-injury lawsuits, filed on or after January 1, 2024.

Prior to SB 235, Code of Civil Procedure section 2016.090 authorized the court to order the parties to provide initial disclosures within 45 days of the court's order. Senate Bill 235 now amends Code of Civil Procedure section 2016.090, mandating that each party in a personal-injury lawsuit provide initial disclosures within 60 days of a demand by any party to the action.

Previously, initial disclosures were discretionary, and parties had the option to stipulate to initial disclosures. SB 235 now implements a mandatory disclosure requirement and requires courts to impose a $1,000 sanction on any party that fails to act in good faith in compliance with SB 235's new discovery procedures. More aptly, if the court finds that a party "did not respond in good faith to a request for the production of documents…produce[] requested documents within seven days before the

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court was scheduled to hear a motion to compel production of the records… or failed to confer … in a reasonable and good faith attempt to resolve informally any dispute concerning the request," mandatory sanctions will be imposed against the violating party. Additionally, attorneys who violate the new mandatory requirements may also be reported to the State Bar.

Taking depositions

Depositions are an intricate part of the discovery process. Code of Civil Procedure section 2025.210 carves out that while defendants may serve a deposition notice at any time after the defendant has been served or appeared in an action, plaintiffs must wait until 20 days after the service of the summons on or appearance by any defendant. Sending a message to defense counsel that you are organized and ready to move your case forward often starts the footprint that will lead to maximizing the value of your case. Thus, just as it is imperative to move swiftly with written discovery, it is also imperative to notice strategic depositions early.

When preparing for a deposition it is first important to understand what the goal is when taking a particular deposition. While the general purpose of a deposition is to get information and cross-examine witnesses under oath, it is important to be strategic and pointed when taking depositions. To maximize a deposition, you would typically first start with the jury instructions needed to prove your case. Understanding the law helps you shape what facts and information you should be targeting from defendants and other witnesses.

You should also be reviewing all pertinent "hot documents" such as traffic-collision reports, incident reports and witness statements. As a strategy, we usually send a notice of deposition out with the first set of discovery with a deposition date set for a week or two after the Defendant's discovery is due. This will allow for us to receive the discovery responses, review them, and further strategize for the upcoming deposition(s). After reviewing all documents and information produced in discovery by both parties, you should be in a position to create your deposition outline.

You want to head into your deposition organized. Remember your first deposition in many cases is the first interaction that a defense attorney may have with you. Defense counsel typically sends a report to their insurance carrier or corporate representative(s) that includes information about the handling attorney. If you are organized and know what you are seeking to get out of the deposition, you should be able to add value to your case after the initial deposition.

In many cases, attorneys are taught to start depositions by reciting the standard deposition admonitions to the deponent. We find it more advantageous to just get right to it. We typically will start a defendant's deposition in an auto case with a question like, "You agree that you are at fault for causing the subject collision?" We typically are met with objections by defense counsel and the witness starts looking around and gets a little flustered. This puts you in a position of control right out the starting gate.

Additionally, you can save the admonitions and use them as weapons during the course of the deposition. As an example, one of the admonitions that is typically given at the beginning of a deposition is, "You understand that you are testifying under oath and under the penalty of perjury…" Instead of stating this at the beginning of a deposition, we find it more impactful to use for the first time after you have asked the deponent a question and they seem to be trying to avoid giving you a straight answer. Saving this admonition and using it at this time can get you the answer that you want.

During the deposition it is also important to know the rules of depositions and governing case law. The goal is to get answers to the questions you are asking the deponent. Sometimes you will be met with obstacles by deponents who don't want to answer, and Defense counsel who abuse objections and prevent the deponent from answering questions. You must stand your ground and demand answers to your questions.

Stewart v. Colonial Western Agency, Inc. (2001) 87 Cal.App.4th 1006, allows for you to get the answers to many of your questions when the defense tries to object and instructs a witness to not answer questions about fault, opinions, estimations, etc. The only basis for instructing a deponent not to answer a question at deposition is privacy or privilege. If that is not the basis of the objection, then the deponent is required to answer the question. You should take this time to cite cases that are relevant for getting answers to your questions during a deposition.

Emerson Electric Co. v. Superior Court (1997) 16 Cal.4th 1101 is another case that you should be armed with during a deposition. It allows you to make a defendant act out how an incident occurred. This can be a powerful deposition technique to get answers to your questions. Not only does this entitle you to make the deponent re-enact the incident, but you can also have them draw on paper or on the whiteboard. You can then mark these descriptions as exhibits.

Preparing plaintiff for deposition

Before you can prepare your client, you must first prepare yourself. It is important to review all documents related to liability and all the medical records. Having a few reports is not enough. You need the complete medical file from all the providers because the defense will have subpoenaed those records. As a matter of practice, any time a defense attorney subpoenas plaintiff's medical records, we always get a copy of the same records. Sometimes doctors' offices forget to send intake notes, or charts to your office when you've requested the records from the facilities. You never want the defense to have something that you do not have. In addition to the medical records directly related to the subject incident, you should review any medical records from before the incident that are

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related to the body parts at issue in your case. It can be extremely beneficial to create a medical timeline of treatment. If you don't have the staff to do this, there are companies that do medical records summaries for very reasonable prices. Having a timeline not only assists you with being able to quickly reference the content within the medical records, but it also allows you to better identify any gaps in medical treatment that may exist.

Once you are keenly familiar with the facts of the case and have reviewed the medical records in depth, you should prepare your client for what to expect in the deposition. I typically start prepping the client by explaining the purpose of the deposition. I talk about our theories of the case and then explain what defendant's likely theories are.

In cases where liability is in dispute, we walk through liability to make sure the client understands, in detail, ways that defense may try to target liability. You should pull Google images of the intersection where the collision occurred and prepare your client with the images and any other photos that depict the collision site.

It is also important to go through the medical treatment and injuries with the client. We always tell our clients that the deposition is not a memory test and that they aren't expected to remember all dates and locations of treatment with doctors. It is OK to say, "I don't remember" or "I cannot currently recall." This is where you can take some time to prepare your client for what their response would be when asked about any gaps in treatment. You should also prepare clients on how to respond to questions about referrals to medical providers.

One of the most important things to discuss with your client is credibility. It is important that they understand we can fix many things, but it is extremely difficult to repair a circumstance where the client tells a lie. You can tell your client to assume that the defense knows everything, so that they are not inclined to try and advocate by misstating things. It is equally important for your client to know that we as their attorneys are here to win the case. It is not the client's job to try to win the case during their deposition. The client is only there to state the facts.

Lastly, when it comes to prepping your client to talk about how the collision has affected their life, it is important to tell the client not to say they can't do something unless they absolutely cannot do it. In most cases clients will say they can't do something when they simply mean they cannot do things without pain. This can be the difference between the plaintiff being impeached at trial or not. In turn, we instruct our clients to always say "without pain" after they say what they cannot do. Many times, the defense is conducting sub rosa and is waiting for a client to say they can't do certain things.

Defending plaintiff's deposition

Defending your client's deposition is equally as important as preparing your client for the deposition. Pay close attention during the deposition so that you can anticipate where the defense is going with their line of questioning. If you need to stop and discuss something with your client, you can do so, despite defense stating that they are entitled to a response to their question before the discussion. It's always better to have a discussion with the client as opposed to the client answering in a way that hurts your case.

Object where appropriate. Objecting for no reason is obnoxious, confuses the client and only drags the deposition out longer. You also can come across as not being a skilled attorney. The only time where it may be advantageous to make an objection that's unwarranted is if defense counsel is on a roll and you see they are getting the best of your client. You can assert an objection to break the defense attorney's rhythm and give your client a break in the question-answer sequence. Don't be afraid to take as many breaks as you need. If your client is not doing well, take a break and tell them what they're doing wrong. Don't be afraid of how it will look taking breaks because it's better than having terrible testimony that dooms your case.

After the deposition we typically have a brief discussion with defense counsel to try and position the case towards a settlement. During this time, we highlight the positive aspects of the deposition so that they really understand how beneficial it was for the case. We also discuss the next steps in the discovery process. If our client's defense medical examination has not taken place, we typically will offer up available dates on shortened notice, urging the defense to schedule it. We want the defense to know that we are not hiding anything and that we really believe in the merits of our case. Lastly, we typically introduce the topic of mediation in the event we have not yet discussed potentially scheduling mediation.

Conclusion

Understanding the tools of discovery and being strategic in implementation of discovery tools will put you in position to maximize the value of your case. Although it does not always guarantee a settlement, in cases that don't settle, it ensures you are in a strong place to take your case to trial.

Owili K. Eison is a Los Angeles-based, personal-injury attorney who focuses on cases involving catastrophic personal injuries. He is a partner at BD&J, PC.

Byron J. (B.J.) Abron is the founding attorney of Abron Law P.C., *and a civil trial attorney focusing on catastrophic spine and brain-injury cases.*