



# Written discovery in auto cases

## A guide to what information you need in written discovery and how to get it

BY DIANA ZEESMAN

Congratulations, the lawsuit has been filed, you have propounded the first set of discovery and you finally receive the responses back. *Do not* simply save the responses and forget about them until later.

This is a great time to work on your discovery plan if you have not already. The plan needs to be tailored to the particular case or type of case. Think about the type of case you are dealing with and the issues that you anticipate flowing from those factual and legal issues. While you cannot anticipate all, you can generally get a good sense if you review your intake, listen to your client, and scrutinize them both in the context of the legal/factual landscape.

A non-exhaustive list of the various types of discovery plans may include (in no order):

- Is this a single vehicle crash?
- Is this a two-vehicle crash?
- Is liability admitted?
- Was any other person or property/vehicle involved or struck?
- Are you dealing with an automobile used for commercial purposes?
- Was Uber/Lyft involved?
- Was the defendant working for someone?
- Was your client a passenger or driver?
- Is this more than a two-vehicle crash?
- Is there a (potential) claim against a non-party (including government)?
- Is this an Uninsured matter?
- Is this an Underinsured matter?
- Is this an “open policy”?
- Is there a colorable defense related to a

third party (i.e., manufacturer, police chase, liability)?

- Are there multiple Plaintiffs?
- Do you represent all of them?
- Has your client been named as a Defendant related to the same event?
- Is there not a lot of visible property damage?
- Is there a viable claim for punitive damages?

Once you have your plan and your “objections and responses” to your “Set 1” of the discovery propounded, you are now ready to dig in deeper, advance your claims and dismantle their defenses. Decide what information you need per your discovery plan (based on what you need to prove (i.e., liability, causation, damages). This can (and should) be dynamic and evolving, but the discovery plan must be a conscious



decision. What documents do you need? What admissions can you get?

A non-exhaustive list of the various types of information and documents for the above-described cases may include some or a combination of the following:

- All photos and videos of the vehicles, involved persons and scene;
- EDR (event data recorder) or other vehicle-generated data within Defendant's vehicle;
- Property damage estimates, transfers, ownership, total loss documentation;
- Driver's records, logs, notes, diary, hours of work, login info;
- Insurance information (policy, insureds, limits, types of coverage);
- Location, GPS information, policy/procedures and purposes of travel;
- Dash camera footage/specs;
- Videos of the incident and your client (sub rosa) and witness information and statements (including of your client);
- Cell phone records.

Generally, you will find the responses to be salted with objections and often do not even provide you with basic "code-compliant" information you are entitled to. Let's talk about how to get what you need for your case, using the tools and processes available. You have several mechanisms to help you receive the information that you need.

Some motions to consider include:

- Motion to compel discovery
- Motion to compel further discovery
- Motion to compel compliance
- Motion to deem requests for admissions admitted
- Motion for contempt (not discussed in this article)

Go through the information you have and decide which is the appropriate motion for you. If you do not review the responses or purported responses which were made to you "after a diligent investigation and reasonable inquiry," then you will have a difficult time planning ahead. Don't let this happen. Even if it does, you may have options.

### Motion to compel discovery

If you do not receive any discovery responses back, you can file a motion to compel. This may be brought at any time. If you did receive responses, the proper motion is a motion to compel further responses. (Code Civ. Proc., §§ 2030.290, subd. (b) (Interrogatories), 2031.300, subd. (b) (Requests for Production) and 2033.280 (Requests for Admission).)

When you are choosing which motion is the correct one, confirm that signed (and fully executed) verifications are served with each respective responsive pleading. You should be able to read the name, confirm the date and location and have a mark or signature. Some of these formalities can be quickly corrected. If not, those are tantamount to no response and the proper motion is a motion to compel. (*Appleton v. Sup. Ct.* (1988) 206 Cal.3d 632, 636.)

If you receive responses before the motion is heard (which you likely will), you may still be entitled to sanctions for bringing the motion, however, a judge may find that the entirety of the motion is moot and moot out or even deny your sanctions request (along with the motion).

Don't forget to meet and confer. Make reasonable efforts to resolve the issue informally, not just a single effort. It is best to document the efforts and be reasonable.

### Motion to compel further discovery

If you received the responses and they have a signed verification, the time starts to bring any necessary motions. You only have 45 days to bring your motion to compel further responses. (Code Civ. Proc., §§ 2030.290, subd. (b) (Interrogatories), 2031.300, subd. (b) (Requests for Production) and 2033.280 (Requests for Admission).)

Note that objections need not be verified under oath. (*Golf & Tennis Pro Shop, Inc. v. Superior Court* (2022) 84

Cal.App.5th 127, 135-136.) So a response that includes only objections need not be verified. But a response containing both objections and responses must be verified. (*Ibid.*) If the response containing both objections and responses is served without a verification, the time to bring a motion to compel does not start to run until the verification is provided. (*Id.* at p. 136.)

### Notice of motion without supporting papers

The provisions in the code that trigger the 45-day period to move to compel are framed in terms of the "notice of motion." Does this mean that a party can get around the 45-day limit by filing a "notice of motion" by itself without the supporting memorandum of points and authorities and other supporting papers? No. As the *Golf & Tennis Pro Shop* decision explains, "Even if it was sufficient for petitioner to file a notice of motion without any supporting documentation with it, the notice itself simply did not 'give notice' as required by sections 2030.300, subdivision (c) and 1010 or common English usage." (*Id.* at p. 138.)

In support of this finding, the Court cited *Kinda v. Carpenter* (2016) 247 Cal.App.4th 1268, 1277 (*Kinda*), stating "The purpose of the notice requirements 'is to cause the moving party to 'sufficiently define the issues for the information and attention of the adverse party and the court.'" Thus, a notice of motion without a memorandum of points and authorities and other supporting papers, does not meet the 45-day requirement. Make sure you file your memorandum with your notice.

### Informal Discovery Conference (IDC) requirement

In the Los Angeles County Superior Court, cases filed in the PI Hub have an IDC requirement. But now that cases are being filed in the venue near the location



of the incident, and not in the PI hub, not all courts have an IDC requirement for a motion to compel. Make sure to check the local rules with each particular department.

### Tolling

Some courts will allow you to toll the time to bring your motion to compel if you reserve an IDC and provide a notice of IDC. This will allow your 45 days to start after the IDC. Check your local rules.

### Requests for production at deposition

If you miss the deadline to bring your motion to compel further responses to a request for production, there is still hope to getting documents and things. Pursuant to Code of Civil Procedure section 2025.480, subdivision (a), “if a deponent fails to answer any question or to produce any document, electronically stored information, or tangible thing under the deponent’s control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may move the court for an order compelling that answer or production (b) This motion shall be made no later than 60 days after the completion of the record of the deposition, and shall be accompanied by a meet and confer declaration under Section 2016.040.”

The completion of the record does not necessarily happen at the end of the deposition, as the deponent may make changes and complete an errata sheet.

You can request more than 35 requests, and don’t forget to include the same 35 from your requests for admission and then anything additional. You can compel under Code of Civil Procedure section 2025 instead of Code of Civil Procedure section 2031.

*Carter v. Superior Court* (Cal. State Auto. Assn. Inter-Ins. Bureau) (1990) 218 Cal.App.3d 996, 997, noted, “[T]he inspection of documents procedure is quite different from a deposition at which a party is required to bring documents. Nothing in either section 2025 or section 2031 suggests

that seeking documents under one statutory procedure bars a litigant from seeking the same documents under the other.”

### Motion to compel compliance

A motion to compel compliance tends to be overlooked and underutilized. Code of Civil Procedure section 2031.320 states: “(a) If a party filing a response to a demand for inspection, copying, testing, or sampling under Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280 thereafter fails to permit the inspection, copying, testing, or sampling in accordance with that party’s statement of compliance, the demanding party may move for an order compelling compliance.”

A motion to compel compliance is different than the motion to compel further discovery. To compel compliance, the responding party has to have provided a response indicating certain documents or things exist, however they fail to produce them. With a motion to compel further discovery, the actual responses are deficient, whether they are not code-compliant (per the specific language of the particular code section) or they are objection ridden, or they simply do not answer the request you propounded. Always check the discovery production to see what was identified and whether production was actually made.

Finally, there is no informal discovery conference requirement and there is no meet and confer requirement for this motion, however the best practice is to always meet and confer to attempt to get the information you need without bringing a motion. You can bring this motion for any production of documents, including those at deposition under Code of Civil Procedure section 2025.

The demanding party may move for an order compelling compliance if the responding party “fails to permit the inspection, copying, testing, or sampling in accordance with that party’s statement

of compliance...” (Code of Civ. Proc., § 2031.320, subd. (a); see also Code of Civ. Proc., § 2025.450, subd. (a) [“If, after service of a deposition notice, a party to the action... fails to appear for examination, or to proceed with it, or to produce for inspection any document or tangible thing described in the deposition notice, the party giving the notice may move for an order compelling the deponent’s attendance and testimony, and the production for inspection of any document or tangible thing described in the deposition notice.”].)

### Motion to deem RFAs admitted

Code of Civil Procedure section 2033.250 provides, in pertinent part, that “[w]ithin 30 days after service of request for admissions . . . the party to whom the requests are directed shall serve the original of the response to them on the requesting party.” (Code Civ. Proc., § 2033.250.) The code further provides, in pertinent part, that “[i]f a party to whom request for admissions have been directed fails to serve a timely response . . . [t]he requesting party may move for an order that . . . the truth of any matters specified in the requests be deemed admitted.” (Code Civ. Proc., § 2033.280.)

This motion can be brought if responses to admissions were not served, just like a motion to compel. However, this motion can be mooted if responses are provided any time before the hearing on the motion.

This motion is effective, but you may need to file a motion to compel further responses should you receive responses and they are not code-compliant.

Mandatory sanctions are required if you are forced to file this motion. The ramification of this motion is powerful and can destroy the adversary’s case. It is because of this, where admissions are deemed admitted, thus not requiring evidence or proof at trial, is tantamount to a default. It is my experience that even when you have this motion heard, the



defense is wise enough to seek to set aside the ruling by providing a response and arguing that the prejudice to the defendant would be impossible to overcome.

This should not persuade you to not file the motion if called for it, but often you are left with a less-than-gratifying feeling with a long road ahead and sneaky defendant. Pin them down and make them play within the rules. Remember, motion practice is a critical part of the discovery process and if you want answers,

be prepared to file motions to get the information you are entitled to.

As a reminder, even if you are entitled to the discovery, determine what you need and why. Just because you do not receive an answer you may be entitled to, does not mean you need to move forward and seek court intervention. Figure out the purpose of what you are seeking. The same point goes to not bringing motions; make sure to bring a motion if it is necessary. Otherwise, you will be stuck nearing trial with no idea what's on the other side.

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