Everything the Plaintiff's Lawyer Needs to Know About Contention Interrogatories

By Howard A. Kapp

The use of contention interrogatories – that is, interrogatories seeking the facts, witnesses and documents supporting a single contention – has been a feature of California litigation for at least four decades. (*Burke v. Superior Court* (1969) 71 Cal.2d 276, 78 Cal.Rptr. 481.) *Burke* itself demonstrates that such interrogatories were, from the start, intended to be powerful[1] and far reaching.[2] *Burke* has been codified in Code of Civil Procedure § 2030.010(b).[3]

Without this well-established history and express statutory authorization (Code Civ. Proc. § 2018.030(a)), the discovery of an adversary's contention would be absolute work product, since contention interrogatories patently seek discovery of an adversary lawyer's thought processes, either explicitly or by obvious implication. Thus, contention interrogatories are permitted, despite work product doctrine, because the statutes and case law permit them.

It may seem obvious, but contention interrogatories are still *interrogatories*; thus, the defense still has to comply with all of the duties inherent in answering any interrogatories. That means, for example, the defense must provide all information from all available sources,[4] even that obtained from experts,[5] without respect to the burden of proof,[6] and may require investigation.[7] An "unknown" answer is almost always going to be improper.[8]

Likewise, a defendant has no right to answer a contention interrogatory by claiming that the information (or sources of information) is equally available: how could the basis for a defendant's contentions be "equally knowable" to its adversary?

Contention questions are not permitted in deposition, even when the deponent is an attorney who might be able to formulate such answers. (*Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 27 Cal.Rptr.2d 822.) In that case, the court found that such questions were "unfair" at a deposition,[9] which, while true, is hardly a solid ground for a court, acting without any statutory authority, to categorically reject an earlier form of question. *Rifkind*'s focus on "unfairness," rather than work product or statutory interpretation, suggests that it's holding is not limited to contention questions, but rather on the impropriety of forcing a deponent to compile an answer "on the spot."[10]

This is indeed why section 2030.010(b) was adopted: it creates and recognizes a common law exception to work product doctrine, which itself was originally a creature of case law.

The Limits on Contention Interrogatories

There are important limits to contention interrogatories:

1. A party can only discover whether its adversary is "making a certain contention, or to the facts, witnesses, and writings on which a contention is based." (Code Civ. Proc. § 2030.010(b).) By definition, this does *not* permit a party to request a *list of contentions* from its opponent. Indeed, recognition of this limit pre-dates *Burke*, which recognizes and accepts this as a limitation. (*Flora Crane Service, Inc. etc. v. Superior Court* (1965) 234 Cal.App.2d 767, 780-782, 45 Cal.Rptr. 79. See also *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 6, 123 Cal.Rptr. 283.) Thus, an interrogatory asking a party to "identify all contentions that you will be making at trial" or "list all contentions you are making against this defendant" seeks work product. In other words, the *onus is solely on the questioner to specify a specific contention*; the breath and content of the contention is defined by the questioner.

2. The contention interrogatory must explicitly seek facts and not contentions or legal theories or analyses. The distinction between the seeking of "contentions" and "facts" has always been recognized. "[T]he interrogatory in question does not seek to elicit theories but explicitly requests facts. The interrogatory should be taken at face value." (*Burke v. Superior Court* (1969) 71 Cal.2d 276, 286, 78 Cal.Rptr. 481.)[11]

3. A contention interrogatory cannot be phrased in the future tense, e.g., "will you be contending at trial that ...?" The statute uses the present tense: "An interrogatory may relate to whether another party is making a certain contention"; and, as Bill Clinton once famously remarked, "it depends what the meaning of 'is' is." Asking a party to identify the basis for future

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contentions – usually framed as contentions to be made at trial – is patently objectionable as work product. (See, e.g., *Snyder v. Superior Court* (2007) 157 Cal.App.4th 1530, 69 Cal.Rptr.3d 600; *City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 134 Cal.Rptr. 468; Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, §§ 8:84-85.)

4. "Contention interrogatories cannot be used to require a layperson to provide answers to scientific matters on which expert testimony will be required at trial." (Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Discovery," ¶ 8:986.5, citing *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 84, 86 Cal.Rptr.2d 846.) This can be particularly powerful for a plaintiff in litigation where a lay person would not be expected to know the answer, e.g., medical malpractice, products liability, etc.

5. There is a question of whether contention interrogatories can seek discovery regarding pure "legal theories." Weil and Brown call this "doubtful" (stating that that would be unqualified work product, i.e., for an attorney's thought processes; Code Civ. Proc. § 2018.030(a)); although Form Interrogatory No. 14.1 is precisely the type of question that these distinguished jurists condemn.[12] But see *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 5, 123 Cal.Rptr. 283.)

I suggest that both categorical approaches are wrong: as long as a question seeks the "facts, witnesses and documents" supporting a contention, it does not matter if the question implicates a matter of law; however, a question which simply seeks a legal brief is not permitted. The responding party must list the "facts, witnesses and documents" but is under no legal obligation to supply case authorities.

Thus, for example, Form Interrogatory No. 14.1 – which asks, in essence, for a party to identify any statutes that it contends anybody violated and to identify the statute – does not seek "facts, witnesses or documents" (permitted) or "whether another party is making a certain contention" but rather seeks *a list* of violated statutes (not permitted) and is therefore facially invalid.

If an interrogatory in the format of Form Interrogatory No. 14.1 were to be permitted, there would be nothing to prohibit the opposing party from forcing the opponent to prepare legal briefs exposing that attorney's thought processes.

On the other hand, if the contention question *includes* a specific statute, pleading allegation, jury instruction or legal doctrine and asks for identification of "facts, witnesses or documents"[13] supporting that contention, that is generally permissible.

Form Interrogatory No. 15.1

An essentially "perfect" contention interrogatory is Form Interrogatory No. 15.1,[14] which is, in my experience, treated with disdain by the defense and largely overlooked by the plaintiffs' side. This is a huge mistake for the plaintiff's attorney.

Form Interrogatory No. 15.1 is largely patterned after the classic "wide-ranging" interrogatory approved in *Burke v. Superior Court* – "'all the facts upon which you have based your denial of ... all ... the allegations contained in plaintiffs' complaint'"[15] – but with a twist: it not only seeks all of the facts, but "Identify each denial of a material allegation and each special or affirmative defense in your pleadings and for each [set forth the facts, witnesses and documents] ....." As this question is compound, it would violate the statutory prohibition against compound questions (Code Civ. Prod. § 2030.060) which does not apply to form interrogatories. This single question, which is essentially a dream question for the plaintiff,[16] thus requires that the defendant:

1. *Identify* which material allegations (in the complaint) are denied.
2. *Identify* each special or affirmative defense to the complaint; and then, separately as to each item denied:
3. Set forth all the facts supporting the denial. (Subpart (a).)
4. Set forth all the people who have knowledge of those facts; and, finally,
5. Identify all the supporting documents.

Drafting Contention Interrogatories

Contention interrogatories are discussed at Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Discovery," ¶¶ 8:984 - 990.2. Although, in certain ways, I recommend slightly different formats from their suggestions, you should be thoroughly familiar with this authoritative discussion before drafting contention interrogatories.

Prior to the adoption of the "Rule of 35" and the new technical requirements of the 1986 Discovery Act, it was common to ask four questions for each contention, specifically:

1. Do you contend that ...?
2. If you contend that ..., then identify all facts that support that contention.
3. If you contend that ..., then identify all witnesses that support that contention.
4. If you contend that ..., then identify all writings that support that contention.

With the new technical requirements adopted in 1986, and carried into the current Discovery Act, the first and second question have generally been combined into a single question beginning with the word "if," e.g., "If you contend that ..., then state all facts on you base that contention." Weil and Brown use the following suggested format at 8:990, "State *all facts upon which you base* the contention that .... If you make no such contention, you need not answer this interrogatory." (Emphasis in original.) Either format should be fine although most practitioners seem to prefer the first "if" format since it is in keeping with ordinary English.

Give the Contention Interrogatories Context

A very common mistake is to serve contention interrogatories without consideration of the stage of your opponent's discovery and investigation. Invariably, the defense will add to its response a boilerplate tag line such as "discovery and investigation is continuing." While such material is not necessary (since interrogatories are always directed to current knowledge, including available knowledge), it is rarely worthwhile to challenge this language (as non-responsive or evasive). The better practice is to anticipate this claim in the questions themselves.

Thus, the set containing the contention interrogatories should also include questions seeking discovery of the responding defendant's "currently available" resources. For example, if the contention related to the defense's position on the plaintiff's injuries, a separate interroga-

tory should be served, in the same set, asking the defense to list all of the plaintiff's medical records or information in their possession, e.g., "identify all of plaintiff's medical records that you currently possess." It is vital that the defense be compelled to answer this interrogatory, without evasion.[17]

A common, and patently improper, form of response is to direct plaintiff's counsel elsewhere, such as the defense's earlier notices of consumer notice and records subpena. Do not accept this evasion: demand fully self-contained answers that leave nothing to chance or ambiguity.[18]

Thus, if and when plaintiff wants to use the defense's contention interrogatories, including the boilerplate claims about continuing efforts, plaintiff will be able to demonstrate – without an onerous, if not impossible, attempt to reconstruct the record – that the defense had all, or "enough," of the medical records to provide either a better answer (e.g., in a motion to compel better answers) or that the defendant had sufficient information at the time of the answers that it should be bound to its answer at trial.

Drafting Contention Interrogatories

The careful drafter will always follow the following guidelines:

1. Always follow the same format, asking three questions (i.e., facts, witnesses and documents). (See, e.g., the format suggested at Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Discovery," ¶ 8:990.)
2. The substance of the contention (i.e., the part represented here and in other works by the ellipsis) is not restricted in any fashion as long as you follow the rules. This allows for a lot of creativity beyond the usual interrogatories seeking a party's contentions as to liability, causation and damages or the pleadings.
3. The substance may be directed to either (1) issues raised in the standard (or other anticipated) jury instructions, (2) clearly definable sub-issues OR, if you are contemplating a dispositive or partial dispositive motion (e.g., a motion in limine), (3) to a lesser issue.
4. Contention interrogatories can always be directed to specific allegations raised in a complaint or answer (i.e., the general denial and each affirmative defense). If you use a pleading, make sure that you quote the precise language in the question (or in your accompanying proper-in-form definition) so that any reasonable person who looks at the question and answer will not have to flip back and forth to decipher its meaning. This should both reduce specious objections and make the answer more useful at trial; e.g., asking "state all facts on which you base your fifth affirmative defense that 'the present action is barred by the statute of limitations'" is simply better than asking "state all facts on which you base your fifth affirmative defense" or, heaven forbid, "state all facts on which you base your affirmative defense at page 16, lines 3 through 18, inclusive, of your fourth amended answer." Make the interrogatory as self-contained as possible.
5. Try to use non-controversial, plain, already-defined or tested language. You can also use words, or terms of art, used by a witness, particularly a party, at a deposition or even a statutorily-defined term.[19]

   If you use statutorily-defined words, then explicitly incorporate that reference into the question;[20] this has the added benefit that the statute may be amended over time to incorporate new forms of writings.

   Also, remember that "the Discovery Act does not prohibit terms being defined in an unusual matter" (Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Discovery," ¶ 8:973.1), so, as long as you define your terms as required by statute, you can, in anticipation of defense objections, create interrogatory-specific definitions that will eliminate technical or definitional objections.
6. Be careful about the timing of contention interrogatories. It is not useful to serve them prematurely; this will invariably generate an objection or, at best, an answer which may be useless. Of course, prematurity varies widely, particularly if the defendant presumably already has knowledge of the subject matter. For example, a defendant in a medical malpractice case should know about the plaintiff, the relevant condition and the applicable medicine; likewise, a products manufacturer should know about its own product. On the other hand, you should not expect that a defendant in a garden-variety auto accident would be demonstrably knowledgeable about the plaintiff's medical treatment early in the case.[21]

Contention Interrogatories vs. Requests for Admission

With Form Interrogatory No. 17.1[22] and the Rule of 35, there is a temptation to use more requests for admission since a single request can be the equivalent of 3 separate contention interrogatories[23] and, of course, requests for admission have the theoretical ability to dispose of issues and/or trigger sanctions for illicit failures to admit. This can be a fool's trap.

Requests for admission rarely result in admissions of anything but the most obvious things, such as the authenticity of documents. Moreover, the award of "prove-up" sanctions is a very rare and cumbersome process. Further, lawyers will tend to have their radar up highest when responding to requests for admission and refuse to admit things on the most specious grounds. Finally, the request for admission statute uniquely permits a party to claim a lack of sufficient information (Code Civ. Proc. § 2033.220(c)), which is a virtual invitation to avoid answering only the most benign requests for admission.

Further, presenting, to a judge or jury, an answer to a request for admission and the companion answer to Form Interrogatory No. 17.1 can be an onerous and unsatisfactory process. Even judges, who rarely have time, may get lost in all of the verbiage; jurors, even if they stay awake during the reading, will rarely "get it." I am not advocating against the use of requests for admission, but you should recognize their similarity to contention interrogatories[24] and the potential presentation of either at trial.

The Use of Contention Interrogatories at Trial

One inherent problem with contention interrogatories is that they can be bulky and rather difficult for a lay jury to assimilate, especially since they tend to be read to the jury. It is simply not a question-and-answer format which is in common usage.

Certainly, lay jurors can be expected to understand a question asking a party's date of birth or other concrete fact, but contention interrogatories can be difficult for laypeople to "get their hands around."

Moreover, contention interrogatories are rarely used simply to uncover hard facts, but are generally used to force the other side to lay out its case regarding specific issues.

Thus, all contention interrogatories should be written with one or two objectives in mind: (1) the answers to contention interrogatories can be used to support a summary judgment or other limit on trial, i.e., to limit the defense to the facts, witnesses and documents set forth in their answers to interrogatories – that is, for the judge; and (2) they should be directed to contentions that the jury will understand. In the latter category, this means that the question should either focus on issues, even technical issues, which will eventually be familiar to the jury as the trial progresses, or framed precisely in the same language used in the standard, or other anticipated, jury instructions. The substance should never be beyond this level of complexity (or language) or you will never be able to use it effectively, unless your objective is to confuse the jury.

Conclusion

Contention interrogatories can be a powerful tool that force an adversary to not only disclose facts, but to present those facts in a way which conforms with your needs at trial or in other pre-trial matters. This forces your opponent to think and, ultimately, for you, the judge and the jury to see their approach to the case and the specific dispositive issues in your case.

If you follow the directions here – and familiarize yourself with the requirements as set forth in such authoritative authorities such as Weil and Brown – this can be a powerful tool to force your opponent to lay out the entire defense case, both in manageable pieces and even in the larger sense of forcing them to address every issue in their pleadings (as in Form Interrogatory No. 15.1). ■

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[1] "'Contention' interrogatories are one of the most formidable discovery tools because they can force disclosure of your adversary's case!" (Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Discovery," ¶ 8:990.)

[2] As held in *Burke* at 285:
"The interrogatory demanding that the [defendant] state 'all the facts upon which you have based your denial of ... all ... the allegations contained in plaintiffs' complaint' is obviously wide-ranging. However, interrogatories are designed to permit discovery of all facts 'presently known to a defendant upon which it predicates its defenses' [citation], and no reason appears why such an interrogatory should not be permitted under this principle where, as here, the answer consists solely of a disfavored overbroad general denial which gives the plaintiff no guidance whatsoever regarding what specific matters legitimately are at issue and warrant discovery. ... [T]he court's basis for sustaining the objection, that it was a 'shot gun question and in effect seeks to have the defendant divulge its entire theory of defense' is equally unsupportable."

[3] "An interrogatory may relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which a contention is based. An interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation of trial."

[4] In *Southern Pacific Co. v. Superior Court* (1969) 3 Cal.App.3d 195, 199, 83 Cal.Rptr. 231, it is noted, in the context of contention interrogatories, that "[t]he facts sought, those presently relied upon by plaintiffs to prove their case, are discoverable no matter how they came into the attorney's possession."

As stated in Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, ¶ 8:1054:

"Information available from sources under party's control: In answering interrogatories, a party must furnish information available from sources under the party's control: 'A party cannot plead ignorance to information which can be obtained from sources under his control.' [*Deyo v. Kilbourne* (1979) 84 Cal.App.3d 771, 782, 149 Cal.Rptr. 499]"

[5] This does NOT require the disclosure of the identity of consultant and/or as-yet-undisclosed experts, which is exclusively discoverable under other provisions. The fact, however, that certain facts or documents, or even eyeball witnesses, may be responsive to a expert-assisted question, does not make that information work product or protected; only the identity of the expert, by statutory design, is protected. Of course, defense medical examiners are not protected at all. (*Kennedy v. Superior Court* (1998) 64 Cal.App.4th 674, 75 Cal.Rptr.2d 373.)

[6] "[T]he fact that one party has, under the rules of evidence, the burden of persuasion on a particular issue does not preclude him from demanding information on that issue from his opponent in discovery proceedings." (*Burke v. Superior Court* (1969) 71 Cal.2d 276, 283, 78 Cal.Rptr. 481.)

[7] Code of Civil Procedure § 2030.220.

[8] As stated in Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, ¶ 8:1061:

"Another consequence of the duty to attempt to obtain information is that 'I don't know' or 'Unknown' are *insufficient* answers to matters presumably known to responding party....

"The responding party must make a reasonable effort to obtain whatever information is sought; and if unable to do so, must *specify* why the information is unavailable and *what efforts he or she made to obtain it.* [See *Deyo v. Kilbourne* (1978) 84 CA3d 771, 782, 149 CR 499, 509.]"

[9] "Even if such questions may be characterized as not calling for a legal opinion, or as presenting a mixed question of law and fact, their basic vice when used at a deposition is that they are unfair. They call upon the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot. There is no legitimate reason to put the deponent to that exercise. If the deposing party wants to know facts, it can ask for facts; if it wants to know what the adverse party is contending, or how it rationalizes the facts as supporting a contention, it may ask that question in an interrogatory. The party answering the interrogatory may then, with aid of counsel, apply the legal reasoning involved in marshaling the facts relied upon for each of its contentions." (*Rifkind*, at 826.)

[10] See this author's earlier article, Kapp, "Avoiding Unfair Deposition Questions and the Rule of Rifkind," *Forum* (Consumer Attorneys of California), May 2003, page 12.

[11] A special case arrives when the question seeks to have the answerer describe "how" or "why" something happened. For example, consider, "How (or "why do") you contend that ..." or its close cousin, "Describe your contentions regarding...." Such questions do not ask whether or not the plaintiff is making a *specific* question, but rather calls for a narrative describing the answerer's question. Thus, such a question, while incorporating the "magic words" of a contention interrogatory, is not permissible.

[12] And, of course, form interrogatories are not immune to be found to be improper. (See *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 54

Cal.Rptr.2d 575 [largely invalidating Form Interrogatories Nos. 12.2 and 12.3].)

[13] E.g., "If you that plaintiff violated [such and such law], then identify all of the [facts], [witnesses][documents] on which you base that contention."

[14] 15.1 Identify each denial of a material allegation and each special or affirmative defense in your pleadings and for each:

(a) state all facts upon which you base the denial or special or affirmative defense;

(b) state the names, ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts;

(c) identify all DOCUMENTS and other tangible things which support your denial or special or affirmative defense, and state the name, ADDRESS, and telephone number of the PERSON who has each DOCUMENT.

[15] As stated by the Supreme Court in the seminal case of *Burke v. Superior Court* (1969) 71 Cal.2d 276, 285, 78 Cal.Rptr. 481:

"The interrogatory demanding that the [defendant] state 'all the facts upon which you have based your denial of ... all ... the allegations contained in plaintiffs' complaint' is obviously wide-ranging. However, interrogatories are designed to permit discovery of all facts 'presently known to a defendant upon which it predicates its defenses' [citation], and no reason appears why such an interrogatory should not be permitted under this principle where, as here, the answer consists solely of a disfavored overbroad general denial which gives the plaintiff no guidance whatsoever regarding what specific matters legitimately are at issue and warrant discovery. ... [T]he court's basis for sustaining the objection, that, that it was a 'shot gun question and in effect seeks to have the defendant divulge its entire theory of defense' is equally unsupportable."

[16] While Form Interrogatory No. 15.1 is a wonderful plaintiff's question, the defense has a long list of most specific questions – specifically the "16s" – which are probably more effectively enforced and thus more useful. The usefulness of Form Interrogatory No. 15.1 is, of course, directly proportional to the willingness of plaintiff's counsel to enforce it.

[17] "Interrogatories may be used to discover the existence of documents in the other party's possession. (See e.g., *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 59-60, 166 Cal.Rptr. 274.) If an interrogatory asks the responding party to identify a document, an adequate response must include a description of the document. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783, 149 Cal.Rptr. 499.)" (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 293, 4 Cal.Rptr.2d 883.)

[18] "It is not proper to answer [interrogatories] by stating, 'See my deposition' or 'See the complaint herein.' If the question requires reference to some other document, it should be identified and its contents summarized so that the answer *by itself* is fully responsive to the interrogatory. [*Deyo v. Kilbourne* (1979) 84 Cal.App.3d 771, 783-784, 149 Cal.Rptr. 499]" (Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, ¶ 8:1049.)

Moreover, "The responding party must describe the records from which the compilation or summary can be made with sufficient particularity that they can be easily located. (For example, 'see my files and records' is *not* a proper response.) [*Fuss v. Superior Court* (1969) 273 CA3d 807, 78 CR 583.]" (Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, ¶ 8:1068.)

[19] For example, while it is common to refer to documents (as we have done here), the better practice is to use words such as "things," "evidence" (defined in Evid. Code § 140), or "writings" (defined in Evid. Code § 250). Likewise, the term "health care provider" is defined in Code of Civil Procedure section 667.7(e)(3).

[20] E.g., "Identify all writings (as defined in Evid. Code § 250) ...."

[21] This is true even if the defendant's insurer was provided with medical bills and reports prior to the litigation. How are you going to substantiate that the defendant or his lawyer has that information? Further, the defense will invariably want the opportunity to subpena all of the records, not just the supplied bills and reports.

Indeed, this is built-into the preliminary language for the form interrogatories: "The interrogatories in section 16.0, Defendant's Contentions – Personal Injury, should not be used until the defendant has had a reasonable opportunity to conduct an investigation or discovery of plaintiff's injuries and damages."

The key phrase, of course, is "reasonable opportunity," not "whenever you choose to get around to it." If you are particularly anxious to speed up this part of the process, there is no prohibition on your providing your opponent with some sort of document specifying the necessary sources and advising that you will be serving such discovery in 30 or 60 days and that they are invited to use this as their "reasonable opportunity."

In this same context, it may be convenient to suggest that your opponent conduct a prompt defense medical examination. While offering your own client for an earlier DME may seem counter-intuitive, this may have certain advantages, including forcing the defense to engage their doctor when the plaintiff's injuries are at their most obvious, allowing the plaintiff to thoroughly investigate the defense doctor in an unrushed manner or, in the unlikely event that the chosen defense examiner actually tells the truth, it may encourage settlement. There are very specific reasons why the defense, left to its own unfettered discretion, generally waits until late in the case to request a DME. From this perspective, a defendant can hardly claim ignorance or that it lacked a "reasonable opportunity" to investigate if it elected not to conduct a DME for other reasons.

[22] 17.1 Is your response to each request for admission served with these interrogatories an unqualified admission? If not, for each response that is not an unqualified admission:

(a) state the number of the request;

(b) state all facts upon which you base your response;

(c) state the names, ADDRESSES, and telephone number of the PERSONS who have knowledge of those facts;

(d) identify all DOCUMENTS and other tangible things that support your contention and state the name, ADDRESS, and telephone number of the PERSON who has each DOCUMENT or thing.

[23] See Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Discovery," ¶ 8:934.3.

[24] For example, the interrogatory "state all facts on which you base your contention that your conduct was not a legal cause of injury to plaintiff" may elicit the same information as "admit that your conduct was a legal cause of injury to plaintiff," but the presentation of the contention interrogatory and its answer is simply more straight-forward and intuitive, even to jurors.

Drafting Contention Interrogatories

Always use this format:

1. If that you contend that ..., state all FACTS on which you base that contention.
   (Definition: The term FACTS means facts only and excludes "contentions" or "theories." "[T]he interrogatory in question does not seek to elicit theories but explicitly requests facts. The interrogatory should be taken at face value." *Burke v. Superior Court* (1969) 71 Cal.2d 276, 286, 78 Cal.Rptr. 481.)

2. If that you contend that ..., FULLY IDENTIFY all witnesses to the facts on which you base that contention.
   (Definition: The term FULLY IDENTIFY means to give the person's name, relationship to any party in this case, the person's residence and business addresses and telephone numbers and the knowledge that you contend that this person possesses in support of that contention.)

3. If that you contend that ..., please FULLY DESCRIBE all writings (as defined in Evidence Code § 250) on which you base that contention.
   (Definition: The term FULLY DESCRIBE means to identify the writing by its full name or description, its date and, if the document is more than 1 page long, identify precisely and unambiguously, the page(s) which you contend support this contention.)
   NOTE: Ask another interrogatory to establish which relevant sources of information are concurrently available to answer the substantive questions. Optionally, ask the defense to identify what additional writings they contend they need to provide complete answers and why (potentially 2 or more questions).

Potential Sources of "Contentions"

1. The defendant's pleadings, including (1) the general denial and (2) each of the affirmative defenses.

2. The plaintiff's pleadings (e.g., if the defendant denies a specific allegation)

3. The defendant's discovery answers or deposition testimony.

4. Standard jury instructions (e.g., CACI) (individual elements or the entire instruction).

5. The defense medical report.

6. Independent reports (e.g., police reports).

7. Basic elements of the relevant cause of action (e.g., liability, causation or damages).

8. Statutes, regulations, etc., or part thereof (quote the precise statutory language and provide a complete citation to the statute).

9. The defendant's own records or other statements.