

DISCOVERY BASICS

Under the Family Law Act, the court is required to divide community assets and community liabilities equally between the parties, unless the parties have entered into a property settlement agreement which sets forth a different arrangement. Therefore, the attorney must identify and place a value on all community assets and liabilities. If this information is not readily available or if for some reason the information is suspect, the law permits various procedures of investigation which are commonly called "discovery".

Discovery can be formal or informal. In the case of informal discovery, each side voluntarily exchanges information with the other side. Formal discovery may consist of any or all of the following:

1. Depositions
2. Interrogatories
3. Subpoenas
4. Request for Production of Documents
5. Court-ordered examination of persons or property
6. Request for Admission

1. **Depositions.** Depositions take place in an attorney's office. Only the attorneys in the case, the witness and a court reporter are required to be present. The parties may be there. The witness is asked questions under oath, and the questions and answers are later transcribed. Depositions give you the opportunity to have the other party or witnesses placed under oath and cross-examined. The examination is subject to certain rules of evidence and may be used in trial. The major disadvantage is one of cost. You incur the expense of your attorney preparing for and taking the deposition, the expense of the deposition itself, and the attorney's review and analysis of it after it is transcribed. The court reporters who take the deposition charge for their services. When an expert is deposed, in addition to the attorney's fees and deposition fees, you must pay the expert a reasonable fee for his or her time attending the deposition.

2. **Interrogatories.** Interrogatories are written questions that are mailed to the opposing party. The answers must be in writing and mailed back to the party propounding the interrogatories. Interrogatories are far less expensive than depositions, although time has to be spent preparing the interrogatories and reviewing the answers. Interrogatories can only be sent to the opposing party -- they cannot be sent to experts or other witnesses. The disadvantage of interrogatories is that the answers to the interrogatories are prepared by the attorney rather than the client. By way of contrast, in a deposition, you are able to ask the questions directly to the client, and the client does not have the opportunity to consult with his or her attorney to frame the answers.

In Family Law cases there is a standard discovery document called Form Interrogatories – Family Law. This form asks questions about the general issues that are in family law cases. The answers that are provided will allow the attorney to determine if any further specific discovery requests need to be made, if documents need to be obtained from third parties, or if any depositions need to be taken. If your attorney serves the Form Interrogatories on the other side, it is always a good idea for you to answer the questions yourself, since it will be very likely that the other attorney will serve the same Form Interrogatories asking for your answers. This is an inexpensive discovery method and should be done in the majority of cases.

3. **Subpoenas.** A subpoena is a court order directing parties and witnesses to appear at a certain time and place, or to appear with documents at a certain time and place, or simply to produce documents at a certain time and place. A subpoena is a very effective way to obtain documents. The drawback is that a subpoena must be personally served upon the person or the

custodian of the record that you are seeking. This can be a problem if the person does not want to be served. It also can be costly if a process server has to spend time looking for the person to be served.

4. **Request for the Production of Documents and/or Inspection of Places or Things.** This is a very effective means of discovery. It permits us to obtain documents from a party to the action, or to inspect places or things (for example, real property, stamp collections, coin collections, etc.). If we cannot obtain the other party's cooperation in our need to appraise assets, we can always resort to a request for access to documents. This is an inexpensive means to discovery, but it is limited to parties; a subpoena allows us access to documents and things belonging to any person or entity. The time limitations are much stricter for request for production of documents than they are for subpoenas. Whether documents are produced in this manner or by subpoena, time has to be spent reviewing and analyzing them.

5. **Motions for Physical and Mental Examinations.** In certain instances, we may wish to have the other party examined by a doctor or mental health professional. Like request for production of documents, requests for inspection of things, and interrogatories, this form of discovery is limited to parties. Unlike the other forms of discovery, we need to have the court's permission in order to proceed with this form of discovery. We have to file a motion and show good cause to have a physical or mental examination of the other party. In the right case, this can produce significant information; however, it is a costly form of discovery in that the examining physician or mental health professional has to be paid. There are some further ramifications in terms of waivers of privilege which need to be considered before one proceeds with this form of discovery.

6. **Request For Admission.** A request for admission is a written request asking the other party to admit that a document is genuine, that a fact is true, that an opinion relating to a fact is true, or that the application of law to a fact is true. These requests are asked to establish whether a fact is true or not. It is not intended to be used to look for facts. It is also intended to authenticate a document. This discovery request is used to help narrow the issues that need to be litigated, which helps reduce the cost of litigation to the parties. This form of discovery can be useful if the other party denies a fact and at trial that fact is proven to be true. The Court can order sanctions (money being the most common one) for the cost to the asking party of proving the fact to be true. This type of discovery request is more complicated and should be discussed further with your attorney.

7. **Vocational Evaluation.** This is another form of examination available only in dissolution cases. Again, unless there is a stipulation, we must file a motion and show cause to have a vocational evaluation of the other party. The evaluation is performed by a vocational consultant who provides testimony regarding the other spouse's ability to work or earning capacity. This is especially useful when a major issue in the case is spousal support.

8. **Other Experts:** Further discovery can include the hiring of *appraisers* to evaluate property, *investigators* to locate property, *accountants* to examine books and records (including bank accounts, stock, and business records), *pension actuaries* to value deferred compensation, and other special consultants as the facts may require to assist us in conducting the case and preparing for trial.

What forms of discovery to use in a given case is a judgment call based upon the facts of the case and the cooperation of the other side. Before engaging in any expensive forms of discovery, you and your attorney should meet to discuss how best to handle the discovery issue along with the costs and benefits of the different forms of discovery.

The degree to which discovery is necessary in any given case will depend in part upon the complexity and size of the community property "estate". There is no guarantee that any amount of discovery will reveal facts sufficient to prove a positive case on behalf of the client. Also, discovery can be expensive to conduct. On the other hand, without discovery, the client risks entering into a settlement which may not be in his/her best interest.