

## Strategy and Planning in the Defense of an Employment Case: What to Do before and during the First Thirty Days and Discovery Strategy\*

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[*Author's Note:* Although this article is geared toward practice in California state and federal courts, the principles stated herein are of general applicability.]

### I. What to Do before and during the First Thirty Days

#### A. Overview of Initial Considerations

Defense counsel is faced with a number of initial considerations before and during the first thirty days of an employment case, including advising the defendant prior to termination, conducting a preliminary investigation, and evaluating the possibilities of insurance coverage, conflicts of interest, and removal to federal court.

#### 1. Counseling Defendant Prior to Termination

In contrast to plaintiff's counsel, defense counsel often already has an established relationship with the client, which may include having advised the client as to the policy or personnel action that is now being challenged.

#### 2. Importance of Preliminary Investigation

A timely and thorough preliminary investigation can lay the groundwork for a successful defense or an early and satisfactory settlement in several ways. First, it can develop evidence that undermines the factual and legal bases for the plaintiff's claims. Second, it can identify and take care of potential problems before they come to the other side's attention. Third, it enables counsel to take an early and effective deposition of the plaintiff.

#### 3. Insurance Policies

Counsel or the client should adequately review any comprehensive general liability, professional liability ("errors and omissions"), employer's liability and

workers' compensation, and umbrella or excess liability insurance policies in order to determine if coverage exists. There are several considerations in this regard.

- a. An insurer [in California] is generally not liable for loss caused by the insured's willful act, *see* Cal. Ins. Code § 533, but may have a duty to defend if the insured reasonably expects the policy to cover the types of acts involved in the suit. This may be the case when the policy's insuring clause or an exclusion does not preclude a defense to such an action. Although most insurance companies have tightened up the language which, five years ago, permitted an insured to claim at least a defense coverage, there are still loopholes (*e.g.*, how has the carrier defined "occurrence" or "accident"?).
- b. Are there any special endorsements providing coverage for claims arising from the administration of an employee benefit program?
- c. Does an umbrella or excess liability policy define personal injury favorably?
- d. In a suit against the corporate officers or directors, does the policy liberally define "wrongful act"?
- e. In addition to the standard policies, does the employer also carry a directors and officers liability policy whereby the employer is insured against loss caused by the wrongful acts of corporate officials?

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- f. Is there a possibility of coverage under an individual defendant's homeowner's policy? (Probably not, since most such policies exclude intentional acts and acts arising from business pursuits.)

#### 4. Potential and Actual Conflicts of Interest

Before taking a potential new case, defense counsel should obtain sufficient information about the employer, the plaintiff, and the allegations of the complaint to make sure there are no conflicts of interest precluding representation.

If individual defendants (*i.e.*, managers, supervisors, co-workers, etc.) are or may likely be named in the suit, counsel must determine the extent to which there are potential or actual conflicts of interest between the employer and such individual defendants. For example, if it turns out that a named supervisor acted outside the scope of his or her employment, the employer may not be liable for that supervisor's acts. In this context, defense counsel must assess whether and to what extent he or she can represent both the employer and the individual defendants, even with a waiver, without independent counsel advising the individual defendants with respect to tactical and strategic decisions made throughout the case.

- a. Where a *potential* conflict exists only, the employer and individual defendant should execute a waiver in which the individual defendant acknowledges that a potential conflict exists; that if it materializes into an actual conflict in the future, he or she may retain independent counsel; and that in such event, defense counsel who formerly represented the employer and the individual defendant may continue to represent the employer.
- b. If an *actual* conflict arises, counsel may not concurrently represent the employer and the individual defendant. Indeed, counsel should withdraw from representing *all* clients in the action, especially if continued representation of some clients would risk breaching the confidences of formerly represented clients.

#### 5. Possibility of Removal

Upon receiving the complaint, counsel must make an immediate determination as to whether it is in the employer's interest to remove the case to federal court

and, if so, whether the case is removable. Removal must be effectuated within thirty days of the *receipt* (not service) of the complaint or other paper which shows that the case is or has become removable. The subject of removal will be covered in greater detail below.

#### B. Preliminary Investigation

The preliminary investigation should focus on whether the plaintiff's claims can be defeated without reaching their factual merits and, if not, whether a jury can be convinced that the challenged personnel action was taken in good faith for a legitimate, nondiscriminatory business reason and in a fair and reasonable manner.

##### 1. Analysis of Complaint

Counsel should first analyze the plaintiff's complaint to determine the legal theories upon which the claims are based, the facts alleged in support of each claim, and the chronology of events. Counsel should also determine whether any individuals mentioned in the complaint are current employees and whether they are likely to be friendly or hostile. Based on this analysis, counsel should be able to answer several key questions:

- a. Is the case removable to federal court?
- b. Are any of plaintiff's claims barred by the applicable statute of limitations?
- c. Are any of plaintiff's claims preempted?
- d. Has plaintiff exhausted his or her administrative remedies?
- e. Has plaintiff alleged sufficient facts in support of each claim to survive a demurrer?
- f. Who should be interviewed before the response is filed, and what questions should they be asked?

##### 2. Role of In-House Counsel

In-house counsel or a member of the employer's personnel office will frequently act as a liaison between defense counsel and the employer. Although such a contact can be effectively used to gather documents and arrange witness interviews, defense counsel should personally review the key documents in the case and interview the key witnesses in order to evaluate their demeanor and the credibility of the employer's explanation for the personnel action that is the subject of the lawsuit.

### 3. Key Documents

Among the key documents that defense counsel should personally review at this stage of the litigation are the following:

- (a) the plaintiff's personnel file and the documentation of the reasons for the challenged action;
- (b) any informal files maintained by supervisors relating to the plaintiff;
- (c) any departmental files, such as human resources files, EEO files, compensation and benefits files, etc.;
- (d) the relevant personnel policies of the employer;
- (e) if the action involves a challenge to a neutral policy or practice such as an employment test, any documentation, such as validity studies, relating to the business justification for the policy or practice;
- (f) any employment contract, union contract, stock option plan, or bonus plan concerning the plaintiff;
- (g) all correspondence with the plaintiff;
- (h) any documentation relating to any application by the plaintiff for workers' compensation or unemployment benefits; and
- (i) copies of any charges filed with the Equal Employment Opportunity Commission (EEOC), [California] Department of Fair Employment and Housing (DFEH), or other government agency relating to the challenged action.

### 4. Key Witnesses

Defense counsel should determine who the key witnesses are and interview them personally. Likely witnesses include supervisors and co-workers, including peers and subordinates. There are several relevant considerations here:

- a. Pay particular attention to those individuals who participated in the decision to take the challenged action.
- b. Do not underestimate the significance of the testimony of subordinates and peers. While juries tend to assume that management employees toe the party line, they are not so ready to assume that peers or subordinates do so. In particular, locating former employees who were at a peer or subordinate level of the plaintiff can frequently be fruitful. Those individuals tend to be extremely credible in the eyes of a jury.

- c. Advise any employees who are interviewed that all discussions with the company's attorney are privileged and confidential. In order to avoid any risk of waiver, advise employees not to repeat what is said during interviews, except in the presence of the company's attorney or, if instructed to do so, for the purpose of preparing the company's defense. In addition, employees should be advised that information relating to activities performed in the course and scope of employment is not privileged as between the *employee* and defense counsel (absent a contrary agreement) and will be shared with the appropriate internal representative of the company.
- d. Try to win the confidences of potential witnesses in order to obtain a complete and forthright statement of their knowledge.
- e. Play devil's advocate in order to test the demeanor and credibility of potential witnesses.
- f. Determine whether it is likely that potential employee witnesses will remain under the employer's control in the future. For example, a potential witness may be of an advanced age, or may become a former employee, or may have a motive to change his or her testimony in the future. Counsel should give immediate consideration to locking in such witnesses' testimony through declarations, or, better yet, affidavits (which are self-authenticating and, thus, more likely to be admitted if the witness is unavailable for trial). This serves the dual function of preserving the testimony if the witness becomes unavailable for trial and allowing defense counsel to impeach any witness who tries to change his or her story at trial.
- g. Be especially sensitive to co-workers who may be sympathetic to the plaintiff.

### 5. Settlement or Alternative Dispute Resolution

Once defense counsel has reached an early assessment of the merits of the case, counsel should encourage the employer to consider the extent to which settlement or alternative dispute resolution processes are viable options.

- a. The employer should consider several factors with regard to settlement, including

- (i) the cost of defense;
  - (ii) the likelihood that a pretrial dismissal can be obtained through a motion to dismiss or a motion for summary judgment;
  - (iii) the "ripple effect" a settlement could have on the intentions of other plaintiffs and the likelihood that any settlement could be kept confidential; and
  - (iv) the likelihood of eventual success at trial.
- b. Assuming that the employer has an interest in settlement, defense counsel should consider whether some attempt at settlement in the early stages of the litigation could result in an early resolution. (However, unless the parties are interested in considering a nuisance-value settlement, defense counsel frequently prefers to lock the plaintiff's testimony down during the plaintiff's deposition before discussing settlement.)

### C. Exhaustion of Administrative Remedies

#### 1. General Requirement

Before filing a civil action under the FEHA, plaintiff must exhaust the FEHA's administrative remedy by filing a timely complaint or charge of discrimination or retaliation with the DFEH and receiving a notice of right of civil action (right-to-sue letter) from the DFEH. (An exception to this is found in *Rojo v. Kliger*, 52 Cal. 3d 65, 276 Cal. Rptr. 130 (1990), under which exhaustion is *not* required prior to filing a civil action for damages alleging a nonstatutory cause of action, *e.g.*, a tort cause of action for wrongful termination in violation of public policy.)

#### 2. Defense Considerations

Defense counsel should take into account the following considerations with regard to the exhaustion requirement:

- a. Has plaintiff failed to comply with the above procedure? (When was plaintiff informed of the challenged action? When did the action become effective? Did plaintiff file an administrative complaint, and if so, when? When was plaintiff's civil action filed?) If plaintiff has failed to exhaust his or her administrative remedies, the complaint is subject to summary judgment or demurrer on that basis.
- b. Are all individual defendants in the civil action also named in the administrative complaint? In

order to be held individually accountable in a subsequent civil action, any individual agents of the employer must be named as respondents in the administrative complaint and given an opportunity to participate in the administrative proceedings.

- c. The administrative complaint must include allegations that are sufficiently "like or related to" the allegations in the civil complaint such that the DFEH investigation might reasonably have extended to the latter allegations. If plaintiff simply fails to include with specificity all discrimination charges in an administrative complaint, evidence of discriminatory acts that could have been discovered may be admissible, and leave to amend the complaint may be granted.
- d. Note the date on which plaintiff's DFEH complaint was filed in order to determine whether plaintiff has delayed service of the complaint so that discretionary or mandatory dismissal is appropriate under Cal. Code Civ. Proc. § 583.110 *et seq.* prohibiting delay in prosecution.
- e. At the closure of the administrative case and with the issuance of a right-to-sue letter, it is critical for defense counsel to obtain the DFEH and EEOC files, which are a necessary component of discovery. Frequently, the information contained in these files will be useful in obtaining admissions from the plaintiff in depositions or in impeaching the plaintiff.
- f. The charge or administrative complaint may also be extremely useful in obtaining admissions from the plaintiff in a deposition or in impeaching the plaintiff. In other words, plaintiff's story may have changed in ways which may be of value to the employer.
- g. Remember that some California courts of appeal have held that no cause findings are admissible later in trial.

### D. Statute of Limitations for Filing Civil Action

#### 1. General Requirement

After exhausting administrative remedies and receiving a right-to-sue letter, the plaintiff has one year from the date of the letter to file a civil action against the employer. This is not a jurisdictional requirement, but

a statute of limitations subject to equitable tolling. (Note that EEOC right-to-sue letters are valid for only ninety days, so a plaintiff must file his or her civil action within that period in order to preserve his or her Title VII claims.)

## 2. *Rojo* Public Policy Claims

The statute of limitations question for an action for wrongful termination in violation of public policy remains unresolved by the California courts. *Newfield v. Insurance Co. of the West*, 156 Cal. App. 3d 440, 203 Cal. Rptr. 9 (1984), suggests in *dictum* that the one-year tort provisions of Cal. Code Civ. Proc. § 340(3) apply, and the Ninth Circuit squarely so held in *Funk v. Sperry Corp.*, 842 F.2d 1129, 1133 (9th Cir. 1988). Note, however, that *Rojo* suggests that discrimination-type facts may be pled in any common law claim. Thus, one can argue that *Rojo*-type facts may be pled in a written contract claim which has a four-year statute of limitations.

## E. The Appropriate Forum

For a number of reasons, most employers prefer to litigate discrimination claims in federal court if possible. The advantages of federal court include the requirement of a unanimous jury verdict (as opposed to a three-fourths majority in state court), better and more resources for the resolution of dispositive pretrial motions, more conservative juries, and the possibility that federal judges may be less sympathetic to state-law claims. In order to litigate in federal court, however, the employer must almost always remove the case. Removal can be achieved through either diversity jurisdiction or federal question jurisdiction.

### 1. Opportunities for Removal under Diversity Jurisdiction

A case can obviously be removed under the diversity jurisdiction when there is complete diversity of citizenship and no defendant is a citizen of the state in which the action is brought. However, opportunities for removal also frequently exist when only the principal defendant, the employer, is a diverse party (and not a citizen of the state in which the action is brought).

- a. If the only other defendants are fictitiously named Doe defendants, the federal court will disregard them for purposes of determining diversity jurisdiction.

- b. If named defendants are pled, diversity of citizenship jurisdiction may still exist if, as a matter of well-settled state law, the causes of action alleged cannot be asserted against the individual defendants. In particular, with respect to discrimination counts, the fraudulent joinder doctrine, which permits removal of diversity matters, may be employed when the alleged individual defendants were not named in the administrative complaint.

### 2. Opportunities for Removal under Federal Question Jurisdiction

A case can obviously be removed under federal question jurisdiction when the plaintiff's state court complaint asserts a cause of action under the federal equal employment opportunity laws, such as Title VII, the Age Discrimination in Employment Act (ADEA), or the Americans with Disabilities Act (ADA). Opportunities for removal may also exist under the following circumstances:

- a. **Preemption.** Although a case generally may not be removed based on a federal defense, there are a select group of claims as to which Congress has preempted that area of law so completely that any civil complaint raising such claims is necessarily federal in character and, therefore, removable. An example of a federal statute that has been held to have such preemptive force in the employment law area is § 301 of the Labor Management Relations Act, which has been held to provide the *exclusive* remedy for the enforcement of collective bargaining agreements. Thus, any case that includes claims arising under a collective bargaining agreement may be removed.
- b. **Merrell Dow.** Plaintiffs frequently attempt to state public policy claims under *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839 (1980), or *Rojo* by making specific reference to federal statutes that provide for a private right of action. For example, a plaintiff may allege that a public policy claim under *Tameny* or *Rojo* exists because the employer violated the public policy concerns embodied in the ADA. Under these circumstances, a case may be removed from state to federal court under the Supreme Court's decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986).

### 3. Time for Removal

A defendant must file a notice of removal within thirty days of the *receipt* (not service) of the complaint or other paper which shows that the case is or has become removable (subject to the rule that a case may not be removed based on diversity of citizenship more than one year after the commencement of the action). Thus, defense counsel must make an immediate determination at the outset of the case whether it is in the defendant's interest to remove and, if so, whether the case is, in fact, removable.

### 4. Binding Arbitration

In addition to investigating the possibility of removal to federal court, defense counsel should determine whether any collective bargaining agreement or individual employment contract to which plaintiff is subject requires binding arbitration of plaintiff's claims.

## F. Defense Pleadings and Motions

### 1. Answer

The defendant must either answer or demur to the complaint within thirty days after the date the complaint was served. Generally, the defendant files a general denial in state court, and the chief issue confronting defense counsel is the formulation of affirmative defenses.

- a. Typical affirmative defenses, if applicable in the particular case, include failure to state a cause of action; contributory negligence; assumption of risk; a legitimate nondiscriminatory business reason for the adverse action; statute of limitations; failure to exhaust administrative remedies; laches, waiver, estoppel, and unclean hands; failure to mitigate damages; § 301 preemption; etc.
- b. More specialized affirmative defenses include a *bona fide* occupational qualification defense or *bona fide* seniority system in an age case, or a business necessity defense or reasonable accommodation defense in a handicap case.

### 2. Demurrer

The defendant may demur based upon certain defects or defenses that appear on the face of the complaint.

- a. Common bases for demurrer include failure to exhaust administrative remedies, failure to file within the applicable statute of limitations period, and failure to state a cause of action.

- b. **Defense Considerations.** While demurrers are popular devices in some quarters, they are rarely helpful in the context of employment discrimination cases and, indeed, are frequently employed with results that are harmful to defense interests. Demurrers take time and money and, because they are filed before the defendant has had an opportunity to depose the plaintiff, can serve to educate the plaintiff and plaintiff's counsel with respect to the weaknesses in their case. There is almost no defect that plaintiff's counsel cannot cure once he or she has received notice of the defect (even an apparently incurable defect, such as the running of the statute of limitations, might be cured through allegations of equitable estoppel or tolling). If the complaint is facially defective, the better practice may be to answer, take the plaintiff's deposition quickly, and then file a motion for judgment on the pleadings, which has the same effect as a demurrer but which can be made after the plaintiff has been pinned down in his or her deposition.

### 3. Motions for Summary Judgment

This motion is the bread and butter of any self-respecting defense attorney and may be used either to obtain a complete dismissal of the case or at least to whittle down the number of claims that can be asserted. On the other hand, it is time-consuming, helps to educate the opponent, and requires careful planning. There are several tactical considerations in formulating an effective summary judgment motion.

- a. Defense counsel should take care to limit the number of asserted, undisputed facts. The undisputed facts that are presented should include only those facts which are truly material. In this regard, consider providing those background facts necessary to give the court a complete picture in the memorandum of points and authorities while excluding such background facts from the statement of undisputed facts.
- b. Virtually every undisputed fact must be obtained from admissions by the plaintiff either in the complaint, documents drafted by the plaintiff, requests for admission, interrogatory answers, or, most frequently, from the plaintiff's deposition. Thus, the deposition should be conducted with a view toward obtaining concessions that

weaken the plaintiff's case (*e.g.*, in a disparate treatment case, that plaintiff has no personal knowledge of facts that support the allegedly discriminatory conduct).

- c. The chief source or ground for a motion for summary judgment relates to proof that a legitimate, nondiscriminatory reason motivated the adverse personnel action. This defense can be successfully asserted on a motion for summary judgment when the defendant is able to provide uncontroverted evidence along the following lines:
- (i) an absence of racial, sexual, or ethnic slurs;
  - (ii) an absence of evidence showing that the plaintiff was replaced by an individual in a nonprotected category;
  - (iii) an absence of evidence that similarly situated minorities were treated as the plaintiff was;
  - (iv) evidence that similarly situated nonminorities were treated as the plaintiff was;
  - (v) evidence that the adverse decision was made or reviewed by an individual who was not tainted by discriminatory motive or who acted independently of those who allegedly had discriminatory motives (even if a "smoking gun" discriminatory statement by one individual is established, summary judgment may still be appropriate if a different individual made or reviewed the decision); or
  - (vi) an absence of facts establishing causation between the alleged discriminatory motive and the adverse personnel action.
- d. Summary judgment motions on liability issues should be made far in advance of the trial. Thus, even if the motion is unsuccessful, defense counsel can still bring a second motion for summary judgment on damages issues before trial. In particular, such motions are appropriate when the defendant has made an unconditional offer of rehire to the plaintiff or when the plaintiff has been successful in mitigation efforts. The upshot of a successful damages summary judgment motion could be to radically lower the case's settlement value.
- e. Defense counsel should be careful to request summary adjudication of individual causes of

action or defenses as an alternative to summary judgment. Otherwise, the court may deny the entire motion even if only one triable issue of fact is raised regarding only one cause of action. Counsel should also carefully specify the issues that are claimed to be without substantial controversy, and frame the issues no more broadly than the evidence will support.

## II. Discovery Strategy

### A. Special Considerations for Employment Discrimination Litigation from the Defense Perspective

From the defendant's perspective, the paramount discovery concern is to conduct the plaintiff's deposition as early as possible or, failing that, before plaintiff has commenced discovery. Most defense counsel agree that pinning a plaintiff down in his or her deposition early on is the most effective way to avoid educating plaintiff and plaintiff's counsel as to defendant's theory of the case and to prevent plaintiff from adding to or modifying his or her story.

In California, plaintiffs are precluded from noticing their own deposition discovery before the expiration of twenty days after service of the complaint. During this freeze period, the defendant has an opportunity to notice and conduct the plaintiff's deposition on ten days' notice. The defendant should either attempt to take the deposition within this period or obtain the agreement of plaintiff and plaintiff's counsel that if a continuance is needed, it will be granted only upon the condition that plaintiff not attempt to interpose discovery before the deposition has been commenced and completed. Assuming that such a procedure is available, defense counsel should consider appending a document request to the deposition notice requiring production of documents at the time of the deposition.

At the same time, defense counsel should send out a separate request for production of documents. Frequently, counsel will mutually agree to continue the deposition upon the condition that plaintiff not interpose discovery in the interim, with the result that the deposition is continued after the date that this document request response is due. Thus, defense counsel will frequently, if not always, have a complete written response and production of documents before the commencement of plaintiff's deposition.

## B. Depositions

### 1. Plaintiff's Deposition

Obviously the most important deposition from the defense perspective is that of the plaintiff. As mentioned above, defense counsel should seek to notice the plaintiff's deposition before the expiration of the twenty-day freeze period on plaintiff's discovery. Almost all successful summary judgment motions are based on undisputed facts gleaned from the plaintiff's deposition. The deposition also serves to exhaust plaintiff's knowledge and memory of relevant facts, which will eliminate surprise at trial, provide a possible basis for impeachment of plaintiff at trial, and help evaluate the extent of plaintiff's damages.

Although the plaintiff's deposition should address numerous areas, the information that defense counsel should focus on eliciting from the plaintiff includes the following (also mentioned above in connection with summary judgment motions):

- (a) plaintiff's admission that he or she has no evidence of racial, sexual, or ethnic slurs;
- (b) an admission that the adverse decision was made by an individual who is not tainted in any way with discriminatory motive;
- (c) an admission that the plaintiff was replaced by an individual in the same protected category;
- (d) an admission that similarly situated nonminorities were treated as the plaintiff was; and
- (e) an admission that the adverse employment decision was reviewed by an individual who acted independently of those who had the allegedly discriminatory motive.

### 2. Depositions of Other Witnesses

Defense counsel should also consider taking depositions of witnesses who are not within the defendant's control and may provide information at trial that is favorable to the plaintiff. These individuals include the following:

- (a) ex-employees who may be sympathetic to plaintiff or ex-employees who may have information damaging to plaintiff's case;
- (b) plaintiff's spouse (with respect to plaintiff's economic and noneconomic injury);
- (c) all medical providers who treated plaintiff with respect to any injury claimed to result from the defendant's conduct or any injury unrelated to

the defendant's conduct but which could impact or exacerbate plaintiff's claimed injury; and  
(d) plaintiff's prior and subsequent employers.

### 3. Order of Depositions

The order of depositions may be important. For example, a witness who has essential information but might be coerced into changing his or her testimony if others are deposed first should obviously be deposed as early as possible.

## C. Interrogatories

### 1. General Considerations

Early service of interrogatories in employment cases gives the parties an opportunity to gather facts and to identify and locate witnesses and documents early enough to plan depositions and further discovery. The plaintiff may serve interrogatories ten days after service of the summons; the defendant may serve interrogatories at any time. Never pose an interrogatory, however, if the answer may be different when prepared by counsel from what it would be if answered by the plaintiff.

### 2. Defense Perspective

The defendant may wish to employ substantive contention interrogatories to request the following information:

- (a) any and all facts or information pertaining to the discrimination claims, including any witnesses who may have such information and any documents pertaining to such claims;
- (b) any and all facts supporting entitlement to compensatory or punitive damages, including the identification of any individuals who have information relating to such claims;
- (c) the identity of plaintiff's experts; and
- (d) more exhaustive details with respect to information sought in depositions, such as names, dates, places, addresses, telephone numbers, and the like.

Many defense counsel prefer to propound substantive contention interrogatories to the plaintiff only after plaintiff's deposition has been completed. In particular, contention interrogatories requesting plaintiff to state all facts and theories relating to plaintiff's claims are usually best sent after plaintiff's deposition has been conducted in order to eliminate the possibility of educating plaintiff before his or her deposition.



#### D. Requests for Production of Documents

Because of the significance of documents in employment discrimination cases, initial requests to produce should be served as soon as possible. The plaintiff must wait ten days after the service of summons; the defendant may request documents at any time. (As previously discussed, defendants should serve deposition notices and requests for production prior to the expiration of the freeze on plaintiff's discovery.)

##### 1. Requests for Production Directed to the Plaintiff

Defendant's demand to inspect documents should include the following:

- (a) all documents pertaining to each of the plaintiff's allegations;
- (b) all documents generated in connection with the plaintiff's employment by the defendant;
- (c) all documents relating to the plaintiff's prior and subsequent employments and to the plaintiff's efforts to find employment;
- (d) all documents relating to plaintiff's association or communication with defendant's other employees or agents;
- (e) all documents pertaining to plaintiff's compensation from any source, before, during, and after his or her current employment;
- (f) all documents memorializing the relevant facts;
- (g) all documents relating to plaintiff's medical, psychiatric, or psychological treatment for the injuries alleged, and relating to any such treatment rendered during the ten years prior to the filing of the complaint;
- (h) all documents relating to the preparation of plaintiff's state and federal income tax returns, and all documents pertaining to plaintiff's financial condition, within the last ten years;
- (i) all documents pertaining to plaintiff's education;
- (j) all documents relevant to plaintiff's economic injury;
- (k) all employee work calendars or logs containing information relevant to the employment relationship; and
- (l) all witness statements.

##### 2. Requests for Production Directed to Third Parties

At the outset of a case, defense counsel should consider propounding *subpoenas duces tecum* to third

parties such as plaintiff's medical providers, educators, and prior employers. Subpoenas to medical providers may be useful to help evaluate the source and extent of plaintiff's injuries. Subpoenas to educators and employers may be useful to establish that plaintiff misrepresented facts to defendant employer in connection with his or her job application. Counsel should take care, however, in directing any subpoenas toward plaintiff's current employer, because it is in defense counsel's interest not to disrupt the relationship between plaintiff and his or her current employer.

##### 3. Other Proceedings

If plaintiff has instituted a workers' compensation claim, defense counsel should coordinate with counsel representing the employer in the workers' compensation proceeding in order to make sure that records generated in that proceeding are available for review. Counsel should also obtain any documents or information relating to any proceedings before the California Labor Commissioner.

##### E. Requests for Admission

Although requests for admission are the least used form of discovery, they are especially helpful in employment discrimination cases in establishing back pay and any fringe benefit losses. Otherwise, requests for admission should be used principally to obtain admissions with respect to the authenticity of documents or to clean up deposition testimony for purposes of trial impeachment.

##### F. Medical Examinations of the Plaintiff

###### 1. State Court

Under Cal. Code Civ. Proc. § 2032, a defendant can obtain a medical examination of the plaintiff when the plaintiff is alleging mental and emotional distress over and above that usually associated with an adverse personnel decision. Because plaintiffs typically contend that they are not seeking compensation for injuries beyond that level, however, medical examinations are infrequently granted in employment discrimination cases in state court.

###### 2. Federal Court

In contrast, Federal Rule of Civil Procedure 35 does not require a showing that the alleged injuries are above and beyond those normally associated with an adverse personnel decision. Thus, it is much easier to obtain a medical examination of a plaintiff in federal court than in state court.



### **G. Protective Orders**

Defendants may want to seek protective orders to cover the production of personnel files and similar confidential materials. Defense counsel should consider seeking a protective order limiting the dissemination of

confidential information to plaintiff's attorneys' eyes only. This information includes personal data on defendant's current or former employees and documents relating to defendant's customers and business dealings with third parties. ■