Your discovery plan requires that you consider the following:

- What are the opposition's attitudes, opinions and views regarding the facts?
- What claims or defenses is the opposition asserting?
- What proof do they have or need?
- What proof do you need to counter them?
- Do you need stipulations to nail down uncontested facts/issues?
- What documents do you need before you depose a particular person or entity?

As far as strategy goes, your discovery plan should allow you to:

- Seek documents as early as possible so that they are not lost or destroyed.
- Move from broad information requests to specific information requests.
- Consider the advantages and disadvantages of each discovery tool.
- Coordinate different discovery tools, e.g., interrogatories and inspection demands may be coordinated so that all documents identified in the interrogatories are demanded; depositions may be coordinated with document demands so that the deponent is questioned about the documents at the deposition; requests for admission may be coordinated with interrogatories so that interrogatories seek all facts upon which denials are based.

There is no single way to create a discovery plan. It is a matter of personal style, a style which may change with your experience level, and/or may vary depending upon the type of case with which you are dealing. The discovery plan discussed below is but one example.

This discovery plan contains four columns. The first column lists the elements of each cause of action in the complaint. The second identifies the facts which have already been established. The third identifies the facts which need to be pinned down. The fourth identifies the methods used to obtain relevant facts, and lists their sources.[1/]

[1/] Note that the discovery plan includes information you can obtain informally as well.

BATTERY HYPOTHETICAL - A disabled tenant (P) living in an apartment complex was walking with his groceries by the apartment swimming pool, when the defendant (D) struck him with his arm, shoved him to the ground, and spat on him in front of other apartment residents. P, having been attacked by D before, had a hidden videotape of the incident.

ELEMENTS OF CAUSE OF ACTION	FACTS ESTABLISHED	FACTS TO INVESTIGATE	DISCOVERY METHOD TO USE/SOURCES OF INFORMATION
Voluntary act or omission	P was struck by D's arm (which was in a cast) P was shoved by D to the ground and spat on Source = P's testimony	Any evidence D was intoxicated, insane, provoked by P, forced to strike P, or evidence that the act was accidental? If yes, why was he in such condition?	Informal - review P's video recording; interview witnesses and neighbors. Formal - Form and special rogs and RFA's to D's; depos of D's and witnesses
Intent[2/]	D approached P w/purpose of hitting him with his arm and making him fall down D pushed P to the ground so he could spit on him D acted w/desire to touch P. Source = P's testimony	Are there witnesses who heard D say that he wanted to cause harm to P or that he acted accidentally? Source = P, D and witnesses	Informal - Watch P's video recording; interview witnesses and neighbors. Formal - Rogs to defendants; depos of D's and witnesses.
Causation[3/]	P suffered bruises, humiliation, and developed anxiety as a direct result of D's actions Source = P's testimony	Review P's medical records re psychological and physical condition before and after the incident. Did P take photos of his physical injuries? Did P keep a diary where he recorded the incidents? Check for any other factors that could cause him to sustain injuries which could be used as a defense.	Informal - obtain P's medical records and doctor's bills; interview doctors; interview P's mother about P's behavior before and after such incidents, and whether injuries could have been due to any other cause. Formal - depo of P's mother? depo of doctor?

[2/] The intent element means that the defendant acted with the intent to bring about the desired results or knew with substantial certainty that the results would occur.

[3/] The causation element means "but for" the defendant's action, the plaintiff would not have suffered the injuries, or that the defendant's actions were a substantial factor in plaintiff having suffered injuries.

Harmful/ offensive	P was battered by action of hitting w/ an arm in a cast, pushing that caused him to fall to the ground, spitting. Any reasonable person would consider these acts harmful or offensive. Source: P's testimony	Find about how D acted. Is this typical behavior for D? Would behavior be viewed as harmful or offensive by a reasonable person of ordinary sensitivity? Were they offensive to P?	Informal - interview P's mother, and P's psychologist
Touching	Hitting, pushing, spitting = touching	////////////////////////////////////// //////////////////////////////////////	////////////////////////////////////// //////////////////////////////////////
Another	P = another	////////////////////////////////////// //////////////////////////////////////	////////////////////////////////////// //////////////////////////////////////
w/o consent	P did not agree, by words or action, to be hit, pushed or spat on Source = P's testimony	Any witnesses to confirm P did not consent? Any prior history that would indicate it was "friendly teasing"?	Informal - interview P's mother, witnesses and neighbors Formal - depos: neighbors, witnesses

Rules Governing Discovery

The Discovery Act, contained in the Code of Civil Procedure, beginning with § 2016.010, sets forth the rules applicable to discovery. There are sections dealing with discovery in general, and each method of discovery is specifically addressed in a separate section. Regardless of the type of discovery, the concepts are basically the same: one side propounds the questions, which must be within the scope of discovery and in the proper format; the other side has a specific amount of time to respond, in the required format, by answering and/or objecting; the propounding party has a specific amount of time to move to compel further responses.

Before propounding discovery or responding to discovery, you need to familiarize yourself with both the general and the specific sections of the code.

Set forth below are a few of the general rules applicable to all methods of formal discovery.

* * *

Protective Orders

A party may ask the court to *"limit the scope of discovery on the ground that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence."* (C.C.P. §2017.020) Thus, to determine whether a protective order should be issued under the circumstances, the court compares: (a) the likelihood that the discovery will lead to the discovery of admissible evidence to (b) the burden,

expense or intrusiveness of the discovery.

In that regard, the party seeking the protective order may seek to prevent inquiries into *particular subject matters* (e.g., privileged communications, trade secrets, or subject matter about which discovery was already propounded), or use of a *particular discovery device* to obtain information.

For example, the responding party might seek a protective order when:

- The propounding party is seeking production of documents covering very broad areas, e.g., by subject or by time period.
- The discovery is unreasonably cumulative or duplicative.
- The response will result in unwarranted annoyance, embarrassment, oppression, or undue burden and expense.
- The information sought is obtainable from another source that is more convenient, less burdensome, or less expensive, e.g., obtaining hospital records directly from the hospital as opposed to requiring the plaintiff to provide them.
- The selected method of discovery is unduly burdensome or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation, e.g., taking the deposition of the CEO of a large corporation, when the information sought is obtainable through an inspection demand.
- The propounding party attempts to exceed discovery limits, e.g., propounds in excess of 35 special interrogatories or requests for admission on the basis that they are warranted.

As is the case with most discovery-related motions, the parties are required to make a good faith attempt to resolve the matter informally, and sanctions may be issued against the losing party.

The court has the power to fashion relief appropriate under the circumstances in a manner which balances one party's right to information against the burden on the other party. Thus, the court may excuse a party from responding to certain parts of a discovery request; require a response, but extend the time in which to do so; require the use of a particular discovery tool in lieu of another; or protect information by ordering it to be sealed, and opened only upon court order, etc.

Abuses of Discovery

As noted above, the Discovery Act contains rules applicable to discovery in general, and rules applicable specifically to each type of discovery. Key among those rules are the ones dealing with abuses of discovery, which include:

- Persisting, without substantial justification, to attempt to obtain information outside the scope of permissible discovery in spite of objections of the opposing party.

- Using a discovery method improperly.
- Using a discovery method so as to cause *"unwarranted annoyance, embarrassment or oppression or undue burden and expense."*

* * *

Contention Interrogatories

Contention interrogatories are intended to elicit information about the bases for the opposing party's allegations or defenses, i.e., what they contend supports their case.

For example, in a battery case, the plaintiff might propound these **contention interrogatories** to the defendant:

> *"State all facts upon which you base your affirmative defense that 'Plaintiff consented to being pushed to the ground by Defendant.'"*
>
> *"State all facts upon which you base your affirmative defense that 'Plaintiff contributed to his own injuries.'"*

In a breach of contract case, the plaintiff might propound these contention interrogatories to the defendant:

> "*Do you contend that you performed your duties under the CONTRACT?"*
>
> *"Identify the statute to which you refer in the affirmative defense in your Answer that 'Plaintiff is, by statute, barred from bringing this lawsuit.'"*