

***ANATOMY OF A CALIFORNIA PRODUCT
DEFENSE CASE***

AN ADAMS | NYE | BECHT LLP
WHITE PAPER FOR INDUSTRY

MAY 2010

adams | nye | becht

LLP • ATTORNEYS AT LAW

222 Kearny Street

San Francisco, CA 94108-4521

415.982.8955

www.adamsnye.com

© 2010 adams | nye | becht llp



WHAT THIS WHITE PAPER IS AND IS NOT ABOUT

Litigation should always involve creative planning and innovative strategy. The surest way to lose a case is to surrender to predictable routines and stale ways of thinking. Clients pay us to think, not to work by rote.

Still, there are some typical touchstones for the defense of a product liability case. Few clients expect to pay for counsel to reinvent the wheel. So the subject of this white paper is this: what are the normal, logical steps in the defense of a product liability suit in California. Many of the steps are similar to what a company could expect of its lawyers in just about any other state. But this white paper includes those factors dictated by peculiarities of California law, California courts, and California culture.

This white paper is not a summary of California product liability law. We've covered that in our California Product Liability Law White Paper, available for download at www.calbizlit.com.

This also is not a guide to managing complex or mass litigation. How to handle a product under attack nationwide or a toxic tort or pharmaceutical case with 500 or 5000 (or more) plaintiffs is not a subject amenable to a 20 page summary, and is way beyond the scope of this discussion.

Instead, the premise is this: while every case may be different from every other cases, and it is dangerous, unimaginative and slovenly to rely too much on routines, there is such a thing as a “garden variety” product liability case, and there are some elements that lend themselves to efficiencies and common ways of organization. And this white paper addresses some of those in the context that is uniquely California.



So here we have the basic steps for a manufacturer, or other defendant at the top of the American marketing stream, who faces a personal injury or large property damage involving an appliance, a motor vehicle, a power tool, or some other product alleged to be defective in manufacture or design.

Most of what we describe here will take place in a remarkably compressed period of time. California courts are under substantial pressure from the State's Judicial Council to dispose of most cases within twelve months of filing and nearly all of them within two years. Court statistics indicate that 68% of all civil cases are disposed of by our courts less than twelve months after the complaint is filed, 85% in less than eighteen months, and 92% in less than two years. Judicial Council of California, 2008 Court Statistics Report, Statewide Caseload Trends 1997–1998 Through 2006–2007. And since the Judicial Council's measurement starts the day the complaint is filed, and defendants don't normally even see the complaint for days, or sometimes weeks after that event, their processing time is even shorter. Bottom line message: In California, at least in most counties, all the things we talk about here are going to happen quickly.

THE FIRST STEP IN EVERY CASE: THE STUPID CALL

This first step is not unique to California, and not unique to product liability cases. In fact, the phrase “stupid call” wasn’t even invented in California. As far as I know, the phrase was invented by a client of ours or one of its national counsel.

The elements of the stupid call are incredibly simple:

1. Pick up telephone;



2. Dial number of plaintiff attorney;

3. Engage him or her in pleasant, or at least civil, conversation;

4. Act stupid about his or her case; and

5. Try to get him or her to tell you as much about the case as possible.

The theory of the stupid call is simple: first of all, more information is almost always better than less information. And while you can expect that the other side is going to posture, exaggerate, and, dare we say it, confabulate, the odds are that they are also going to tell you some things about the case that you wouldn’t otherwise know. And since the California complaint may have told you very little – in fact, if it’s a Judicial Council Form Complaint, it told you nothing at all – this is your chance to at least learn something about the injury and how much the plaintiff’s attorney knows.

Now, it may be that the other side won’t give you any useful information. It may be that he or she won’t even talk to you; there are plenty of jerks in this world, and many of them are lawyers. But the other side isn’t going to give you any useful information if you don’t call, either, so you aren’t going to be any worse off for trying.

PROCEDURAL EVALUATION

The first three procedural issues are these: removal, removal and removal. While this paper is not a treatise on removal jurisdiction or procedure, just about every defendant in every product liability case wants to remove the case if possible, for a number of reasons. Defendants want Federal court because of (a) stricter judges; (b) more conservative juries; (c) a bench more favorably disposed toward summary judgment and other dispositive motions; (d) a unanimous verdict requirement for both liability and damages (nine out of twelve jurors must agree on each issue in California state courts); and the most overriding issue of all, (e) judicial gatekeeping of expert opinion testimony under *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579. California still theoretically follows *Frye v. United States* (DC Cir., 1923) 293 F. 1013. But *Roberti v. Andy’s Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893 holds that *Frye* is limited to “scientific techniques,” so we don’t even have the limited gate-keeping of *Frye* for scientific and medical opinions not based on “techniques.”

So even before making that “Stupid Call,” and even before assigning to defense counsel, the California defendant will want to evaluate the case for diversity of citizenship or other removal grounds, figure out what its time constraints are (i.e., whether it has at least has thirty days, or whether some other defendant has chewed up some of the time by failing to remove) and round up anybody needed to join in the removal.

All the other procedural issues pale by comparison, but this is a good time to at least look at the following:

- **Demurrer:** The demurrer is California’s equivalent of a FRCP 12(b)(6) motion, and is available, in general, when the complaint fails to state a cause of action or is fatally flawed because of facts that can be judicially noticed. Because the court will almost always allow amendment even if it “sustains” the demurrer, demurrers are usually a waste of client money and lawyer time. But they may be a good idea if they can result in a mortal blow to the case (i.e., when the case is time-barred¹ or there is some other incurable flaw).

- **Motion to Strike:** Code of Civil Procedure section 436 authorizes a motion to strike out “any irrelevant, false, or improper matter inserted in any pleading” or “all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule or an order of the court.” Most often these motions are used to dispose of punitive damage allegations in the circumstances where the plaintiff cannot adequately allege a basis for them.

- **Potential motion for summary judgment:** As touched on above, both the law and culture in California are antagonistic to the granting of summary judgment, particularly in personal injury cases. But if this is a case where summary judgment may succeed, counsel should be mindful of that potential from the start. Summary judgment motions must be made on a minimum of seventy-five days notice and must be heard at least thirty days before trial. This means that (a) the motion must be served and filed at least 105 days before trial – in a jurisdiction where there may well be less than 300 days between the time counsel is retained and the trial date; and (b) when the court sets the trial, counsel must be sure that sufficient time remains to allow the motion to be noticed and heard. The court has no authority to shorten the notice time no matter how exigent the circumstances, and can allow the hearing within the thirty day period only upon a finding of good cause.



¹ California’s statutes of limitations rival the tax code for complexity, and there are, in addition, some fairly complex appellate decisions on when a cause of action accrues for purposes of whatever the applicable statute of limitations may be. But in general, oversimplified terms, the statute of limitations for personal injury actions is two years, and for property damage three years. California has no statute of repose for product liability cases.

LEARNING ABOUT THE PRODUCT

As with the “stupid call,” this isn’t unique to California, and it isn’t rocket science, either. No matter what jurisdiction you are in, it’s pretty hard to defend a product liability case without understanding how the product works. Certainly, as soon as you’ve had that stupid call (and hopefully learned the mechanism of the fire, or flood, or accident, or whatever it is you’re dealing with), you need to be finding out how the relevant parts of the product work, what drawings and specifications are available, and who within the company is sufficiently knowledgeable that he, or she, can give you guidance and answer questions. In addition, this would be a good time to be finding out the following:

- Does the client have a history of alleged prior similar incidents involving products that are substantially similar in relevant ways? Often, these incidents are admissible in product liability cases, both to show product defect and to prove entitlement to punitive damages. (*Hassan v. Ford Motor Company* (1982) 32 Cal.3d 388.)
- Have there been post-accident, or post-manufacture modifications that may be relevant to the product defect claim? *Ault v. International Harvester Co.* (1974) 13 Cal.3d



113 holds that while Evidence Code section 1151 makes post-accident precautions inadmissible in cases based purely on negligence, in strict product liability cases, such modifications are admissible to prove defect.

In addition, besides the risk that other incidents and post-accident modifications may be admissible, there is an even greater risk that they will be, at minimum, discoverable. The standard for allowable discovery is often more liberal than that for admissibility. See, for example, *Perkins v. Superior Court* (1981) 118 Cal.App.3d 761.

So, yes companies can and should take good faith positions about what other products are “substantially similar” and the scope of discovery that makes sense. But they need to know that the California courts aren’t always receptive to the arguments used to support restrictive and limited discovery responses in this area. The defendant’s best hope may often be Code of Civil Procedure section 2019.030:

(a) The court shall restrict the frequency or extent of use of a discovery method provided in Section 2019.010 if it determines either of the following:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive,

(2) The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount

in controversy, and the importance of the issues at stake in the litigation.

This section of California's discovery act potentially provides some protection against overly intrusive discovery, at least in smaller to medium cases.

There are a couple of other things that should be considered and analyzed at this point. Is the case going to present e-discovery issues? If you have been successful in removing the case, how will you respond to the client's obligations under Rule 26? If the case is to be venued in California state court, you may need to deal with California's new electronic discovery statute, Code of Civil Procedure section 1985.8 (effective January 1, 2010). California recognizes no separate cause of action for spoliation of evidence. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1.) But spoliation can be grounds for severe sanctions, including a "terminating" sanction. (*Williams v. Russ* (1998) 167 Cal.App.4th 1215.)

And, of course, this is the time – in California as everywhere else – to review and evaluate what other investigation to put in place, the applicable science, and make initial recommendations to the client for the game plan.

DISCOVERY – ROUND ONE

In most cases, your first round of discovery consists of paper discovery: interrogatories, inspection demands and requests for admissions. But here are the unique California twists: the form interrogatories and requests for admissions used all over the country, the ones with subparts, introductions, definitions, etc.? They don't work in California. There's an extensive discussion of this in our firm's discovery white paper. But here's a handy shortcut: for the routine, garden-variety product liability personal injury or property damage case, start with California's Judicial Counsel form interrogatories. At the same time, serve an inspection demand seeking, at a minimum, (a) all documents disclosed in the interrogatory answers; (b) any relevant medical records, bills, doctor reports, property damage back-up, photographs, etc. What you won't get, and shouldn't bother asking for at this point, is expert information, which generally isn't discoverable until fifty days before trial.

This "round one" discovery should, if properly responded to by the other side, get you background information on the plaintiff and her case that will allow you and the client to begin to determine what the case is about, how big it is, and what your plan of attack should be from then on.

Defendants and their counsel often lose track of the fact that the California Discovery Act gives them priority of written discovery over the plaintiff. Defendants can serve written discovery at any time – i.e., the day after service of the summons and complaint – while plaintiffs cannot serve written discovery until ten days after the summons and complaint are served. See, for example, Code of Civil Procedure sections 2030.020 and 2031.010. While there are many cases where priority is overrated, there are others where it truly matters, and this is something that counsel should at least evaluate. Too often, the first discovery served is by the plaintiff, who serves the agent for service of process ten days after serving the summons and complaint, and defense counsel doesn't even evaluate what discovery to send until weeks or months later.

DISCOVERY – ROUND 1.5



Before we get to Discovery Round Two, we need to address the question of records in the possession of others. While the initial inspection demand will seek all medical records, bills, reports, etc. in the hands of the plaintiff or his attorneys, all you're going to get – at most – is those documents the attorney got around to obtaining before filing suit. They almost certainly won't be complete or current, and you do need to satisfy yourself that nothing is being held back. So you need records authenticated by, and produced by, the doctors, hospitals and other medical providers. This is also the time to obtain employment records and any others that are in third-party hands and may be relevant.

California has a complicated and detailed set of procedures for obtaining records, and particularly “personal information” such as medical records, from non-parties. For anyone interested, the ponderous code sections are Code of Civil Procedure section 1985 and following. For more normal people, what you need to know is this: there are records companies who, acting as attorneys' agents, specialize in preparing and serving the notices, subpoenas and other documentation necessary for obtaining such documents and complying with the intricacies of the code. They also follow up with doctors, hospitals, etc. who ignore the original notices, make copies of all documents for all parties, obtain declarations from the providers authenticating the records, etc. Few lawyers do this themselves.

Once all, or at least most, of these records have arrived, you are ready for Discovery, Round 2.

DISCOVERY – ROUND 2

So now we get to what most trial lawyers consider the heart of discovery, depositions. Depositions at this point will be of the parties, of witnesses, company people, doctors, investigating officers, and just about anybody else who is a non-expert witness. And here we are in an area where, believe it or not, California practice isn't all that much different than practice in the federal courts and other states. The most significant California procedural rules are as follows:

- The party taking the deposition has to give ten days notice to all parties if the notice is served by hand, twelve days if served by fax or overnight service, and fifteen if served by mail. (Code of Civil Procedure § 2025.270(a).)
- The deposition of a natural person can be taken within 75 miles of the deponent's residence or in the county where the suit is pending and within 150 miles of the deponent's residence. (Code of Civil Procedure § 2025.250.)



- California generally uses certified stenographers to record testimony, unless the court orders otherwise. (Code of Civil Procedure § 2025.330(b).) A noticing party may also use video, audio, “Livenote” or other electronic transmission, or some combination of these, but has to indicate his or her intent to do so in the notice, and follow a series of rules appearing in Code of Civil Procedure section 2025.340.
- If the witness is a party (or the officer, director, managing agent or employee of a party), all it takes to compel his or her appearance is a notice, and the notice can also require the witness to bring documents. (Code of Civil Procedure § 2025.280(a).)
- If the witness is a non-party, he or she must be served with a subpoena, which can also compel the production of records. (Code of Civil Procedure § 2025.280(b).)
- California has its equivalent of FRCP 30(b)(6), the “Notice or Subpoena Directed to an Organization.” Under Code of Civil Procedure section 2025.230, the deposition notice may name a deponent who is “not a natural person.” In that case, the notice

. . . shall describe with reasonable particularity the matters on which examination is requested. In that event, the deponent shall designate and produce at the deposition those of its

officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent.

- Based on section 2025.230, plaintiffs can, and often do, list a very comprehensive set of subjects, and it is the defendant company's obligation to (a) produce the person "most qualified" to testify on those subjects and then make available to that most qualified person the sum of the company's known or reasonably available information. Furthermore, the "person most qualified" must generally show up in California, regardless of where that person lives or works.

In addition, the deponent must be identified in the notice by name only if the noticing party knows the deponent's name. Otherwise, a description is all that is required. (Code of Civil Procedure § 2025.220(a)(3).) Thus, it is common for a plaintiff attorney to notice the deposition of the defendant's "custodian of records," and list a large number of documents to be produced. This is sufficient to require the company to produce the "custodian" of the documents in question, as well as the documents themselves.



Earlier in this White Paper, we pointed out that the world is full of jerks, and a proportional number of them are lawyers. While that's true, there are also lots of reasonable people in the world, and some of them are lawyers also. For this reason, the deposition process, and the portions of California's Discovery Act dealing with depositions, usually work reasonably well. But where they don't work as well is where one

party decides to be obstructive. Here are some of the applicable code sections, and the corresponding problems:

- California allows the parties and their counsel to attend depositions (Code of Civil Procedure § 2025.420(b)(12)), but has no provision for either the attendance or non-attendance of non-parties. Accordingly, counsel or deponents may invite family members, consultants, staff or others to attend the deposition. Arguably, the press has a right to attend, although there are practical problems presented by the fact that depositions are normally conducted in private offices. If one side or the other wishes to have anyone excluded from the deposition, counsel must file a motion for a protective order and show good cause why designated persons should not be allowed in. (Code of Civil Procedure § 2025.420(b)(12).)
- Any party may object to the "form" of a question (e.g., that it is ambiguous, compound, argumentative, leading or suggestive in a situation where such questions are not permissible, calls for narration or lengthy explanation, calls for speculation and conjecture). And any

party may object that the question seeks privileged matter, or that the question lacks relevancy to the subject matter. (Code of Civil Procedure § 2025.460(b).) But that's about it. Furthermore, nearly all such objections can be made for the record, but the witness must then be allowed to answer. As in the Federal courts, the only grounds for instructing a witness not to answer are grounds of privilege. (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1015.)

- Probably the two most common obstruction problems in deposition practice are these: (a) the lawyer who objects constantly and instructs the witness not to answer on impermissible grounds; and (b) the lawyer who uses objections as a means of coaching the witness in problem areas. Although there is no statute or case law in California specifically prohibiting this latter practice, most lawyers consider it to be improper. However, the options for counsel who encounter either of these problems are limited. Counsel can suspend the deposition and seek a protective order from the court. (Code of Civil Procedure § 2025.470.) But conduct which seems abusive and improper in the heat of battle often looks trivial, or at least not so serious, in the cold black and white of transcript. And the other side may take the position that the suspending party has waived the right to proceed further with the deposition, so there is a risk the deposition may never be completed.

This is not to say that California's weapons against abusive deposition conduct should never be used. Rather, in deposition, as in the rest of life, it often pays to save your big guns until you need them.



WORKING THE ANGLES OF DISCOVERY CLOSURE

Stating the rules on discovery closure is simple. Working with them is often complicated and confusing.

Here's the first rule: Non-expert discovery closes thirty days before the first trial date. Unless the parties agree otherwise, or the court orders otherwise, or the case mis-tries, is given a new trial, or goes up on appeal and comes back down, it doesn't ever open again. If the trial is continued, discovery remains closed. Code of Civil Procedure § 2024.020.

For all of the examples here, we will assume that the case has been assigned a trial date of Monday, February 2, 2009. Thirty days back would be Saturday, January 3, 2009. But under Code of Civil Procedure § 2016.060, if the last day to perform an act falls on a weekend or court holiday, then the time is extended to the next court day. So discovery in this hypothetical will remain open until Monday, January 5.

The simplest operation of the thirty day rule involves non-expert depositions, which must, at least, be started by January 5. As we've discussed previously, deposition notices have to be served ten days in advance by personal service, twelve days by overnight or fax service (if the parties have agreed in writing to fax service) or fifteen days by mail. So the last day to serve a notice of deposition by personal service is December 26; the last day for overnight or fax service is Christmas Eve, December 24. And if you are serving by mail, fifteen days before January 5 is Sunday December 21. So as a practical matter, the actual service will likely be the preceding Friday, a full seventeen days before your deposition. And if you mail your notice later than Sunday, your proposed deposition on January 5 is barred for failure to give adequate notice, and it can't go forward any later because discovery is closed.

Then there is written discovery. As we discussed earlier, a party who receives interrogatories, requests for admissions or an inspection demand has thirty days to respond if these discovery pleadings are personally served, thirty-two days if service is by overnight or fax service or thirty-five days if service is by mail. Nobody has to respond to written discovery after discovery has closed. So any written discovery that would be due, in our hypothetical, later than January 5, 2009 can be ignored. This means the last day to serve interrogatories or the other common forms of written discovery is December 5 if personally served, December 3 if served by overnight delivery or fax, and, because the intervening weekend extends the five additional mailing days to seven, November 28 for service by mail. If you want to mail "last minute" written discovery and get a response, you have to get it out there as much as sixty-six days before the initial trial date, or the other side won't have to respond to it.

But actually, you probably have to get it out quite a bit sooner than that. Because there is a second discovery cut-off. And that's our second rule:



The last day a party can have a hearing concerning a discovery motion is fifteen days before the initial trial date. As with the discovery cut-off, this doesn't reopen unless the parties stipulate to it, the court orders it, the case is mis-tried, ordered re-tried or sent back for another trial after appeal.

Let's suppose the other side gets your "last minute" interrogatories, and decides not to answer them. Or worse yet, she decides to respond, but give meaningless, inadequate responses and meritless objections. She mails those responses on the last day – January 5 – and you receive them in the mail the next day, January 6.

Before you can make a motion to compel further answers, you have to make a good faith effort to meet and confer with the other side under Code of Civil Procedure § 2016.040. Let's assume that somehow you manage to accomplish that by the next morning, the meet and confer process fails, and you're ready to file your motion the afternoon of January 7. Your last day to have the motion heard is supposed to be fifteen days before the February 2 trial date. But that's Sunday,

January 18, so you actually have until Tuesday, January 20 to have the motion heard (Monday is Martin Luther King Day, a court holiday).

Under Code of Civil Procedure section 1005, you need to give at least sixteen court days notice of your motion if you serve it personally. But to get sixteen court days back from your last available hearing day, January 20, you need to skip not just through four weekends, Martin Luther King Day and New Years, but Christmas Day as well. Your motion needed to be served by hand no later than Christmas Eve, almost two full weeks before you received the inadequate answers. So it doesn't much matter how lousy the responses were: your remedy for lousy answers is barred by the discovery motion cut-off.

And that is the basis for the third rule:

Your practical deadline for serving written discovery in a case of any complexity – such as a product liability case – is really ninety to a hundred days before trial. While the court might give you leave to have your discovery motion heard closer to trial, or on shortened time, it might not. As in much of life, there are no guarantees.

But there is one exception: supplemental discovery, and that's the subject of the next part of our discussion of our next section.

DISCOVERY ROUND THREE – FOR ONCE, SOMETHING IS EASY

First, here's what you don't get in California: you don't get continuing discovery obligations. If Plaintiff Jones gives an answer to an interrogatory, and either (a) he learns later it isn't correct; or (b) it later becomes incorrect, incomplete or out of date, she doesn't have to make a correction.

But here's what you get instead: you get the right to serve "supplemental" interrogatories and inspection demands and requests for admissions. These are as simple as they can be. For example:

A supplemental interrogatory, as permitted by Code of Civil Procedure §2030.070, might say "If any answer you have given to any interrogatory in this case has changed, or is not presently current, complete and up-to-date, please supplement your response with any additional information."

A supplemental inspection demand, as permitted by Code of Civil Procedure §2031.050, might say: "If any response you have given to an inspection demand in this case has changed, or is not presently current, complete or up to date, please supplement your response with any additional information, and produce any supplemental responsive documents at the Law Offices of _____ on [date] at [time]."

While supplemental discovery has to be served so that responses are due on or before the closure of discovery, you don't need to worry about the motion cut-off. There is no provision in the Discovery Act for motions related to supplemental discovery. But if a responding party fails to provide responsive information when served with supplemental discovery, the propounding party has every right to move at trial to prohibit introduction of undisclosed evidence

ROUND FOUR DISCOVERY: EXPERTS AND THE TWENTY-FOUR DAY FIRE-DRILL

Non-California lawyers are usually surprised when they hear about our expert discovery system, which crunches almost all expert activity into a tiny time window just before trial. The rules can be easily described. Designing a rational expert discovery plan that follows them to the letter, however, is something else again.

Here are the expert rules (yes, it's more rules -- but hey, that's what lawyers do, right?):

1. The identity, qualifications, work conducted by and opinions of the parties' experts are all protected by the work product doctrine until and unless the procedures for expert disclosure are followed.

2. Once a case has been set for trial, any party may serve a "Demand for Disclosure of Experts" under Code of Civil Procedure § 2034.230. This demand can also require all parties to produce "expert writings," generally construed to mean reports, notes, files, and other documents having to do with the experts' work and opinions.

3. If any party has served a demand, Code of Civil Procedure § 2034.260 requires that all parties must serve a disclosure with the names and addresses of their trial experts, or, if they have none, a statement that they do not intend to call expert witnesses. The disclosure must be served fifty days before trial.

4. Any party may notice the deposition of a disclosed expert, and, regardless of the location of the expert, the party who has retained an expert, or disclosed a party or party employee as an expert, will, in response, be required to bring the expert to California for deposition. Travel time and expenses will be borne by the disclosing party, not the deposing party.



5. The deposing party will bear the expense of the retained expert's time during the deposition itself, but not travel time, preparation time, etc.

6. Expert depositions must be completed no later than fifteen days before the initially set trial date.

Let's examine this a little more closely. Fifty days before trial, you disclose your experts, and you serve your disclosure by mail. Everybody gets the disclosures the next day, forty-nine days before trial. Deposition notices must be served ten days before the depositions if served personally. So let's suppose all the expert depositions in a complex product liability case get served personally forty-nine days before trial, setting the depositions ten days or more later. And expert discovery must be completed in the interval between thirty-nine days before trial and fifteen days before trial, a twenty-four day period. That's right, as designed, all of the expert depositions get taken in a twenty-four day period ending fifteen days before trial is scheduled to start.

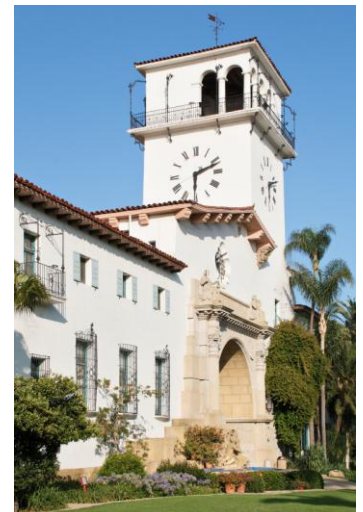
If none of the lawyers has any other cases or anything else to do, and all of the experts are cooling their heels and twiddling their thumbs while they wait for their

expert depositions, this might be possible. In real life, however, for a complex product liability case, the Discovery Act procedures are completely untenable. That brings us to Adams Nye's Practical Rules for dealing with expert discovery in a California product liability Case (yes, even more rules. See comment above):

1. When possible, the parties should negotiate their own realistic schedule for disclosing experts and taking their depositions. Code of Civil Procedure § 2024.060 allows the parties to change the deadlines and cut-offs. In a complicated case, the parties should pick up the telephone and set a schedule that makes sense.

2. If they can't negotiate a schedule because of a lack of cooperation on the plaintiff side, the defense should bend over backward to cooperate, while holding the plaintiff to the code. For example, defense counsel can (a) send out an expert disclosure that tenders experts for specific, available dates for all his disclosed experts; but (b) send a notice immediately upon receipt of plaintiff's disclosure that sets all the experts the tenth day after receipt of the disclosure at one hour intervals. This puts defense counsel in the position of having been completely reasonable – having arranged for real dates and times for depositions of defense experts, while demanding that plaintiff's counsel do her homework, comply with the code and produce experts as required. It also puts defense counsel in the best possible position for demanding priority of discovery, something that is often important when it comes to experts.

Lawyers who defend product liability cases are often reminded that the time to retain experts is “as early as possible.” This is particularly true in California, where most cases are likely to be set for trial 250 to 300 days from when defense counsel is retained, and counsel must be prepared to certify that experts are retained and ready to give meaningful depositions as quickly as 200 to 250 days after counsel's first involvement.



CONCLUSION

As we discussed at the outset, routines and unthinking adherence to formulas and outlines are the surest route to losing a case. Thus, the process outlined in this white paper should be seen as a starting point, not a case management plan. Counsel should always be on the look-out for a fresh way of doing things when a fresh way makes sense. We hope, however, that this white paper, and the time line chart that follows on below, provide a good starting point in the context of California procedure.

CALIFORNIA PRODUCT LIABILITY DEFENSE TIME LINE

WHEN	WHAT	COMMENT
As soon as assigned to defense counsel	The “stupid call.”	First contact with opposing counsel to see what he or she claims the case is about.
As soon as received by defendant’s in-house counsel or risk manager	Evaluate for diversity of citizenship or other basis for removal.	Note that case must be removed within thirty days of the date any defendant receives a “paper” indicating facts such that the case is removable (e.g., that there is complete diversity of citizenship and the amount in controversy exceeds \$75,000).
As soon as assigned to defense counsel	Evaluate for demurrer, motion to strike, potential future motion for summary judgment.	Demurrer, motion to strike or answer must be filed with thirty days of service of summons and complaint. Motion for summary judgment must be filed at least 105 days before trial, so the defense will be preparing for that motion in a small time window.
Within thirty days of assignment to defense counsel	Product history education.	In addition to learning how the product works, how it is designed and why it is designed that way, counsel needs to be aware earlier of prior similar incident or modification issues which

WHEN	WHAT	COMMENT
		may be both discoverable and admissible in California. Client and counsel need to confer on how discovery on these issues will be addressed.
Within thirty days of assignment to defense counsel	Preparation and recommendations for game plan, investigation, education re applicable science. Evaluate e-discovery issues.	
As quickly as possible – allowable as soon as defendant is served	Round 1 discovery: form interrogatories, initial inspection demand.	
Promptly after receipt of first written discovery responses.	Round 1.5 discovery: Obtain third-party records.	Note the availability of vendors for this service.
After receipt of medical records, and before close of discovery.	Non-expert depositions.	Timing will vary substantially from case to case, but all non-expert depositions must at least be commenced thirty days or more before trial. Most will be taken long before that.
90 to 100 days before trial	Additional written discovery.	Note the need to allow sufficient time to move to compel, etc. (Discovery motions must be heard at least 15 days before trial, and notice served at least 16 court days before the hearing.

WHEN	WHAT	COMMENT
105 days before trial	Last day for filing motion for summary judgment.	Motion must be heard no later than 30 days before trial, and requires minimum of 75 days notice.
50 days before trial	Expert disclosure	Note that expert information is generally protected work product until disclosure, and that the statutory timing makes the adverse party's expert information generally not useable for summary judgment. Note also that the parties are free to negotiate their own schedule.
15 to 39 days before trial	Expert depositions	As with all discovery timelines and deadlines, the parties are free to negotiate their own. Without such negotiated changes, expert depositions must be commenced no later than 15 days before trial.

About Us

Adams | Nye | Becht is a firm of trial lawyers. We represent manufacturers, retailers, importers and other business throughout California in consumer, product liability, toxic tort and business litigation matters. For more information, contact Barbara Adams or Bruce Nye at

adams | nye | becht | llp

222 KEARNY STREET, 7TH FLOOR

SAN FRANCISCO, CA 94108-4521

Tel: 415.982.8955 • Fax: 415.982.2042 • www.adamsnye.com

Disclaimer

This document constitutes law firm advertising material and does not create an attorney-client relationship with the recipient, and the views expressed herein are informational only, and are not intended to constitute the Authors' legal advice. Adams | Nye | Becht LLP provides legal advice to its clients, and creates attorney-client relationships through the use of mutually executed retention agreements.

adams | nye | becht | LLP

222 KEARNY STREET, 7TH FLOOR

SAN FRANCISCO, CA 94108-4521

Tel: 415.982.8955 • Fax: 415.982.2042 • www.adamsnye.com