

## VII. DISCOVERY

### A. GENERALLY

#### § 49 In general

Plaintiff's discovery tactics will depend on several factors. First, discovery should be conducted with a view to eliminating or adding defendants as more facts are disclosed. Second, plaintiff's attorney should try to gauge the defendants' knowledge of the dangerous propensities of the chemical implicated in the client's injury. Finally, the discovery should attempt to gain an understanding of defense counsel's case through deposition of adverse witnesses.<sup>80</sup>

### B. DEPOSITIONS

#### § 50 In general

Plaintiff's attorney should take only a few depositions.<sup>81</sup> Except for expert depositions, the plaintiff should take most of the depositions with an eye towards establishing liability. Plaintiff's attorney should take the depositions of the foremen for both the general contractor or site manager and the painting contractor. At these depositions plaintiff's attorney should try to show control over the work or worksite by the site manager. Counsel should also consider deposing an official or engineer of the chemical manufacturer.<sup>82</sup>

#### § 51 Deposition Checklist—Chemical Manufacturer

Set forth below is a checklist of areas of inquiry by way of a deposition of an official of the chemical manufacturer.<sup>83</sup> The deposition should do three things: (1) discover information about the chemical or chemicals in the industrial solvent that was involved in the case, (2) seek out information regarding the chemical company's knowledge of the hazardous and toxic

---

<sup>80</sup>Goldsmith, "Pleadings and Discovery" in G. Nothstein, ed., *Toxic Torts: Litigation of Hazardous Substance Cases* §§ 15.01–15.23 (Shephard's/McGraw Hill 1984).

<sup>81</sup>Discovery-Oral Depositions, 4 Am. Jur. Trials 119.

<sup>82</sup>Use of Engineers as Experts, 6 Am. Jur. Trials 555.

<sup>83</sup>For model forms interrogatories propounded by plaintiff against the painting contractor and the chemical manufacturer, see §§ 56–75.

nature of the solvent's active ingredients, and (3) compel the disclosure of other information that may be needed to establish the liability of that defendant.

### CHECKLIST—CHEMICAL MANUFACTURER

- Did defendant supply or sell any products to the painting contractor?
- The trade name of the product
- The chemical composition of the product, including brand names, chemical names and chemical structures
- The place of manufacture of the product
- The place of manufacture of each component or ingredient
- The name of the firm that manufactures or supplies each component or ingredient
- The manufacturing process for the product
- The point of origin of the shipments to the painting contractor
- Whether any studies were undertaken on the effects of the compound, either by the company or of which the company became aware prior to the date of exposure
- The names of each and every organization participating in or sponsoring the study
- The date of the study
- The persons involved in the study
- Date and place of any publication of the study
- Did the chemical manufacturer supply any products for use at the exposure site
- For each chemical named above, request information regarding:
  - Liability
  - Advertisements
  - Instruction booklets
  - Publications
  - Actual physical or verbal instructions regarding its use
  - Warnings given regarding its use
- Additional or amended instructions or warnings supplied after the sale

- Date of above
  - Where above was placed or provided
  - How above was placed or provided
  - Names of those responsible for them
  - Reason for them
- Names of all those who have knowledge of facts relevant to complaint
  - Liability insurance
  - Facts known by the witness
  - Opinions held by the witness as to cause of injury or death

Counsel should note that the last entry on the checklist requests what may be regarded as an expert opinion. Some states permit the deposition of an expert only if he or she has been identified as a trial witness. Some states also require that expert opinions, where discoverable, be updated as to the after-acquired facts, and other states, following the federal rules, may require initial expert discovery to be conducted through written interrogatories.<sup>84</sup>

### § 52 — Painting contractor

If the name of the employee of the contractor who made the application of the sealant which produced the toxic fumes the plaintiff inhaled is known through investigation or other discovery, the deposition of that individual should be taken as soon as possible.<sup>85</sup> In preparing for the deposition of such a witness, counsel may find the following checklist helpful.

#### CHECKLIST—PAINTING CONTRACTOR

- Were you spraying paint on the exposure date?
- State each and every product sprayed on the date
- Source of each product
- Chemical makeup of each product
- Name, source, and chemical makeup of each product sprayed at the exposure site
- Dates of application of each chemical
- Name of foreman on exposure date

<sup>84</sup>See, generally, Am. Jur. 2d, Depositions and Discovery §§ 68–74.

<sup>85</sup>For model interrogatories propounded by plaintiff to the painting contractor in the model trial case, see §§ 56–68.

- Name, address of each person spraying on exposure date
- Name of any site supervisor
- Name of any contractors hired to spray
- Name of anyone else spraying on exposure date
- Name of general contractor
- Name of each representative of general contractor dealt with
- Date spraying terminated
- Reason spraying terminated
- Names of those who have information or facts relevant to allegations in complaint
- Liability insurance
- Expert witnesses
- All other relevant facts known by the witness

### § 53 — Site manager

The third important deposition will ordinarily be of the superintendent or foreperson of the site manager or general contractor. Deposition should be taken to establish the extent of control over the site by the manager or the general contractor. The plaintiff's attorney should attempt to prove that the general contractor or site manager retained some control over the subcontractors and the performance of their work.<sup>86</sup>

### CHECKLIST—GENERAL CONTRACTOR OR SITE MANAGER

- Time spent on site
- When did project begin
- When was defendant hired
- Who was having work done
- Contract for work done at site
- Who were parties
- Who negotiated it for both sides
- Who has custody of contract

---

<sup>86</sup>See § 13.

- How was firm selected
- Who selected firm
- Other similar work
- When and for whom work was done
- Selection of subcontractors
- How selection handled
- Who negotiated contracts for both sides
- Alterations of agreements by whom and for what reason
- Who has custody of contract
- Written guidelines for subcontractors
- Describe date, source, issuing party, author, contents, etc.
- Oral guidelines
- Dates, source, issuing party, issuing person
- Parties to oral guidelines
- Name and address of all foremen or managing personnel at site
- Name and address of all personnel at site during exposure
- Written duties for supervisors
- Did defendant attend or hold safety meetings
- Who attended
- Who ran meeting
- Dates or frequency of meetings
- Reason for meetings
- Records or minutes kept
- By whom
- Custody
- Names and addresses of all those who have knowledge of or witnessed incident

#### § 54 Defense Discovery Preparation—Checklist

In addition to conducting discovery, counsel must prepare the client for discovery conducted by the defense, whether by deposition or by written interrogatories. The checklist below identifies some of the areas to which attention should be directed.

- Personal Facts

- Name, address, and age
- Spouse's name, age, year of marriage
- Names, ages of children or other next of kin who may be eligible to recover for damages, and relation
- Complete work history
- Use of pesticides, spray paint, cigarettes
- Complete medical history, including doctors, hospitals
- Past illnesses, especially problems with infected area
- Family history of condition and related illnesses
- Present injuries and symptoms
- Name of treating physician
- Dates and sites of treatment
- Bills for treatment
- Date condition diagnosed
- Diagnosing physician
- Date, place of death, if applicable
- Circumstances of exposure
- Date and site of exposure
- Location within site of exposure
- Names of fellow workers
- Name of foreman
- Length of time exposed
- Length of time and dates of work at site
- Other exposures
- Protective devices issued and by whom
- Name of chemical exposed to
- Distinctive markings on container of chemical
- Other times the chemical was sprayed
- Items of damages
- Each and every person with knowledge regarding case
- Medical expert's name
- Facts known and opinions held

**Cases**

**Plaintiffs' medical records:** Defendants in toxic tort case were entitled to discovery regarding plaintiffs' medical records, though

plaintiffs sought to recover only medical monitoring costs and were not contending that they had as yet sustained any personal injuries as result of their exposure to hazardous substances allegedly released from defendants' facilities; court could not say that interrogatory was not reasonably calculated to lead to discovery of relevant information as to other risk factors that might bear on plaintiffs' claims. *O'Connor v. Boeing North American, Inc.*, 185 F.R.D. 272 (C.D. Cal. 1999); West's Key Number Digest, Federal Civil Procedure ¶1598.

### C. REQUESTS FOR PRODUCTION OF DOCUMENTS

#### § 55 In general

The plaintiff's attorney should request production of the documents identified and inquired about in the interrogatories or at the depositions of employees of the defendants.<sup>87</sup> Counsel should also request the production of various work reports, contracts, and studies that may be needed to prove the underlying facts of liability or otherwise bolster the case.

#### DOCUMENT PRODUCTION CHECKLIST

##### *Chemical Companies*

- Warning labels, instruction booklets, flyers, updates, warnings, etc.
- All studies done by or for the company
- All studies done regarding the chemical in their possession within their knowledge at exposure date
- All internal documents regarding chemical
- All advertisements, technical journals, articles regarding the chemical
- Bills of sale, invoices from manufacturer to painting contractor
- Packaging materials

##### *Painters and Site Managers*

- Contracts, or written understandings
- Any written instructions, duties, etc.
- Safety manuals, etc.
- Work records showing dates of spraying
- Notes and minutes of safety meetings

<sup>87</sup>Motions for Production and Inspection, 4 Am. Jur. Trials 223.

## D. INTERROGATORIES

1. *To Painting Contractor*

## § 56 In general

This division of the article<sup>88</sup> consists of a set of interrogatories propounded by plaintiff to the defendant painting contractor, who it was determined was the principal defendant in the model trial case. These interrogatories are quite extensive and are intended to explore all aspects of the case against defendant painting contractor. For convenience, the interrogatories have been separated into sections. It should be kept in mind, however, that the sections are but parts of an entire set of interrogatories.<sup>89</sup>

## § 57 Definitions

The use of a prefatory section in the interrogatories to define particular terms used throughout the interrogatories is highly recommended to avoid the overuse of qualifications and repetitive subparts and to simplify and enhance the intelligibility of the questions posed.

## DEFINITIONS

A. The word “person” means any natural person, firm or corporation, partnership, joint venture or any other form of business entity.

B. A request for the location of documents constitutes a request to state the present address at which such documents are kept, if known, and, if not known, the last address known and information as to their disposition.

C. A request for the identity of a person constitutes a request for his or her name, his or her present business address, if known, and if not known, his or her last known business and residence address.

D. “Custodian” means the person who has possession or control of documents and a request for the identity of a custodian constitutes a request for his home and address.

E. “Defendant” refers to \_\_\_\_\_ [*painting contractor*].

F. The words “you” and “your” refer to the party to whom these interrogatories are addressed and to its agents, representatives, and attorneys.

<sup>88</sup>See §§ 56–68.

<sup>89</sup>For illustrative interrogatories to the manufacturer of the sealant that was being sprayed at the time of the plaintiff’s exposure, see §§ 69–75.

**§ 58 Capacity in Which Work Was Performed**

Following the definitions, interrogatories respecting preliminary identification matters are normally set forth. In the illustrative set below the interrogatories are numbered consecutively throughout the subdivision.

## INTERROGATORIES

1. Plaintiff alleges in his complaint that he was injured during the course of his work at \_\_\_\_\_ [*name of construction site*] in \_\_\_\_\_ [*location*] on \_\_\_\_\_ [*date*]. Were you engaged in business on those premises on that date?

2. If so, state:

- a. the nature of the business;
- b. whether you conducted business as a sole proprietorship, partnership, or corporation;
- c. the name under which you conducted business.

3. Were you performing services as an independent contractor on \_\_\_\_\_ [*date of accident*] on the premises where plaintiff alleges he was injured?

4. If so, state:

a. whether the services were being performed in the capacity of a general contractor, and if so, state:

- (1) the name, address, and business status of each person for whom the services were to be performed;
- (2) the property interest of each such person in the premises in question;
- (3) the exact nature of the services to be performed;
- (4) the time designated for performance of the services;

b. whether the services were being performed as subcontractor, and if so,

- (1) the name, address, and business status of each general contractor for whom the services were being performed;
- (2) the exact nature of the services to be performed;
- (3) the time designated for performance of the services;

c. whether you had any agents or employees on the premises engaged in performance of the services on \_\_\_\_\_ [*date of accident*], and if so, state:

- (1) the name, address, and general job title of each such agent or employee;
- (2) the exact nature of the work performed by such employee on the premises in connection with rendition of the services on \_\_\_\_\_ [*date of accident*].

5. In regard to any agreement under which you were to perform the services, state:

- a. the name and address of each party to such agreement;
- b. the date on which each such agreement was made;
- c. whether each agreement was oral or written.

6. In regard to each written agreement enumerated in your preceding answers, give the name, address, and position or job title of each person who has custody of the written agreement.

7. Attach a copy of each such agreement to your answers to these interrogatories.

### § 59 Notice of Presence of Plaintiff

The defendant's knowledge of plaintiff's presence at the place where the injury occurred is an important consideration in proving the negligence of the painting contractor in a fact situation such as in the model trial, and the following interrogatories are designed to inquire into that fact.

#### INTERROGATORIES

8. Did you, or any of your agents or employees, have notice or knowledge that persons would be working generally on the premises in question on \_\_\_\_\_ [*date of accident*]?

9. If so, state:

- a. the name, address, and position or job title of each person who had such notice or knowledge;
- b. the means by which each person received such notice or knowledge;
- c. which of the persons had notice or knowledge that plaintiff would be working on the premises on \_\_\_\_\_ [*date of accident*].

10. Did you, or any of your agents or employees, have notice or knowledge that persons would be working on the premises in question on \_\_\_\_\_ [*date of accident*] at the location on the premises where plaintiff alleges he was injured?

11. If so, state:

- a. the name, address, and position or job title of each person who had such notice or knowledge;
- b. the means by which each person received such notice or knowledge;
- c. which of the persons had notice or knowledge that plaintiff would be working on \_\_\_\_\_ [*date of accident*] at the location on the premises where he alleges he was injured.

**§ 60 Method of Applying Product Containing Toxic Chemicals**

The following interrogatories inquire into the method of application followed by the defendant's employees in spraying the sealant that produced the toxic fumes in the model trial case. The answers to the questions were correlated with defendant contractor's written application instructions, which were obtained by other discovery.<sup>90</sup>

**INTERROGATORIES**

12. Were any of your employees involved in the application of \_\_\_\_\_ [*product containing toxic chemicals*] or any other similar products at the \_\_\_\_\_ [*construction site*] on \_\_\_\_\_ [*date of accident*]?

13. If so, state:

- a. the exact product name and chemical composition of each product used;
- b. the name, address, and position or job title of each employee involved;
- c. the exact nature of the responsibilities and duties of each employee with respect to the product.

14. Please describe in detail the method, including equipment used, by which your employees applied \_\_\_\_\_ [*product containing toxic chemicals*].

15. Did your employees ever use any different method for the application of \_\_\_\_\_ [*product containing toxic chemicals*]. If so, please describe.

16. What methods of training did you provide your employees for the application of \_\_\_\_\_ [*product containing toxic chemicals*]?

17. Were any warning labels or other cautionary information or instructions provided for the use of the \_\_\_\_\_ [*product containing toxic chemicals*]?

18. If so, state with specificity:

- a. the exact content of each warning label or cautionary instruction;
- b. the source of the warning or information;
- c. the means by which such information was conveyed;
- d. the name, address, and position or job title of each of defendant's employees or agents having knowledge of each

---

<sup>90</sup>See § 6.

warning immediately prior to or at the time of plaintiff's injury.

19. Did you, or any of your agents or employees issue any safety regulation, rule or order which was in effect on \_\_\_\_\_ [*date of accident*] which related to type of hazard to safety which plaintiff alleges caused his injury?

20. If so, for each such regulation, rule or order, state:

- a. the date on which issued;
- b. the name, address, and position or job title of each person who issued the regulation, rule or order;
- c. the title and number by which the regulation, rule or order may be identified;
- d. the name, address, and position or job title of each person on the premises where plaintiff was injured who had notice of the regulation, rule or order on \_\_\_\_\_ [*date of accident*];
- e. the name, address, and position or job title of each person who has custody of a copy of the regulation, rule or order.

21. Attach a copy of each regulation, rule or order to your answers to these interrogatories.

22. Was there any statute, ordinance, regulation, rule or order enacted or promulgated by a governmental authority in effect on \_\_\_\_\_ [*date of accident*] which related to the type of safety hazard that plaintiff alleges caused his injury?

23. If so, for each such statute, ordinance, or regulation, rule or order, state:

- a. the name of the governmental entity or agency which enacted or promulgated it;
- b. its identifying name and number;
- c. the name and address of each entity or agency charged with enforcing it;
- d. the name, address, and position or job title of each person on the premises where plaintiff was injured who had notice of the statute, ordinance, regulation, rule or order on \_\_\_\_\_ [*date of accident*].

24. State the name, address, and position or job title of each person on the premises where plaintiff was injured who had responsibility for compliance with or enforcement of any safety warnings, precautions or regulations.

25. Did any of your employees or agents determine whether adequate ventilation existed in the area in which the \_\_\_\_\_ [*product containing toxic chemicals*] was used prior to its use on the date in question?

26. If so, state:

- a. the name, address, and position or job title of each person who made this determination;
- b. the facts upon which that person relied in making the determination.

27. Were your employees ever warned or reprimanded for improper or unsafe use of \_\_\_\_\_ [*product containing toxic chemicals*]?

28. If so, please state, for each such incident:

- a. the date(s);
- b. the place(s);
- c. the employee(s) involved;
- d. the nature of the incident;
- e. what punishment or sanction was meted out;
- f. who (name and job title) discovered the incident;
- g. what damage or injury was caused.

29. Has \_\_\_\_\_ [*product containing toxic chemicals*] (or any similar chemical) or its use ever been the subject of a government investigation?

30. If so, for each such investigation, please state:

- a. the government agency conducting such investigation;
- b. the date(s);
- c. what prompted the investigation;
- d. the city and state of the government agency;
- e. the results of the investigation.

31. On the date of the injury to \_\_\_\_\_ [*plaintiff*], what weather conditions prevailed at \_\_\_\_\_ [*construction site*]?

32. Have any of your employees ever complained about adverse physical or mental effects from the use of \_\_\_\_\_ [*product containing toxic chemicals*]?

33. If so, please state for each such complaint:

- a. the employee, employee's address and telephone number;
- b. the date;
- c. the symptoms complained of;
- d. any medical treatment given;
- e. what measures taken to prevent recurrence.

## § 61 Use of Product Testing Procedures

Product testing is normally a subject of discovery with respect to the chemical manufacturer in a toxic exposure case. However, testing may also be done by the painting contractor,

particularly with respect to especially hazardous substances. The following interrogatories inquire into whether or not this was done in the model trial case.

#### INTERROGATORIES

35. Did you perform any tests conducted with respect to \_\_\_\_\_ [*product containing toxic chemicals*] to determine whether there was a change in its toxicity or action when combined with other chemicals?

36. If so, for each such test, state:

- a. the date it was performed;
- b. the place at which it was performed;
- c. the name, address, telephone number, and job title or capacity of each person who participated in its performance;
- d. the number of samples of \_\_\_\_\_ [*product containing toxic chemicals*];
- e. the common or trade name, chemical formula, and scientific name of each chemical with which it was combined;
- f. the description of the method of combination, including quantities which were combined;
- g. the description of any testing equipment used;
- h. the description of the testing procedure;
- i. the reason for such testing;
- j. the results of the test;
- k. the method by which results were computed;
- l. the cost of the test;
- m. the name, business address and business telephone number and job title or capacity or the person who has custody of any records pertaining to such test.

37. Please attach any and all records pertaining to each test described in response to the previous interrogatory.

38. Did you perform any tests with respect to \_\_\_\_\_ [*product containing toxic chemicals*] to determine whether there was a change in its toxicity, chemical nature, or action, when exposed to heat or electromagnetic radiation?

39. If so, please state for each such test:

- a. the date it was performed;
- b. the place at which it was performed;
- c. the name, address, telephone number, and job title or capacity of each person who participated in its performance;
- d. the number of sample of \_\_\_\_\_ [*product containing toxic chemicals*];

- e. the wavelength and intensities of electromagnetic radiation used, or temperature used;
- f. the description of any testing equipment used;
- g. the description of the testing procedure;
- h. the reason for such testing;
- i. the result of the test;
- j. the method by which results were computed;
- k. the cost of the test;
- l. the name, business address and business telephone number and job title or capacity or the person who has custody of any records pertaining to such test.

40. Please attach copies of any and all tests described in your response to the previous interrogatory.

### § 62 Quality of Supervision at Work Site

The liability of a general contractor, site manager, or supervising architect frequently depends upon the quality of supervision exercised by that party at the work site in a construction accident case.<sup>91</sup> The following interrogatories broadly inquire into this area.

#### INTERROGATORIES

41. Please describe in detail to the best of your knowledge the nature of the duties of \_\_\_\_\_ [*engineering contractor*] with respect to work at \_\_\_\_\_ [*construction site*].

42. Please describe in detail, to the best of your knowledge, the nature of the duties of \_\_\_\_\_ [*electric contractor*] with respect to work at \_\_\_\_\_ [*construction site*].

43. What is the name of each person, natural or artificial, who in the performance of work at the \_\_\_\_\_ [*construction site*] determined or directed:

- a. what work was to be done;
- b. the details and method of work;
- c. when work was to be done.

44. For each such person, please state:

- a. the person's name and job title;
- b. business address;
- c. the extent to which said person determined or directed performance of the work.

45. Did any person, natural or artificial, have any power to

---

<sup>91</sup>See § 12.

direct or control the work performed by any workman employed by you?

46. If so, for each such person state:

- a. name;
- b. job title;
- c. which workman directed or controlled such person;
- d. why that person had such power.

47. Did any other company, person, or firm perform any supervisory or organizational role with respect to measures taken to assure safety of workers at the \_\_\_\_\_ [*construction site*]?

48. If so, please state:

- a. the company, person, or firm;
- b. address;
- c. nature of supervisory or organizational role with respect to worker safety;
- d. whether said company, firm, or person had any responsibility for spraying of \_\_\_\_\_ [*product containing toxic chemicals*].

49. For each person, company, or firm engaged in safety supervisory functions as described in your answers to the previous two interrogatories, please state whether you had entered into any agreement with such person, company, or firm.

50. If so, please:

- a. describe the agreement in detail;
- b. attach copies of any written agreements.

51. Did you attend any meetings during which safety and safety-related matters were discussed?

52. If so; please state:

- a. the time and place of all such meetings;
- b. which of your employees or agents attended such meetings;
- c. the names of all other persons in attendance, and their principals;
- d. what substantive proposals were adopted or implemented relating to safety;
- e. what was discussed relating to the use of \_\_\_\_\_ [*product containing toxic chemicals*];
- f. please attach transcripts of all such meetings.

### § 63 Other Accidents Involving Same or Similar Substances

The existence of other accidents involving the same or simi-

lar substances in a toxic tort case is often relevant on the issue of the defendant's state or mind or knowledge. The following interrogatories inquire into this area.

#### INTERROGATORIES

53. Have there been any other injuries to any persons as a result of the use of \_\_\_\_\_ [*product containing toxic chemicals*] or any other similar products?

54. If so, as to each such accident, state:

- a. the date, time, and location of the accident;
- b. the name and address of each person injured;
- c. the nature and extent of each injury sustained;
- d. the cause of the accident.

55. Were any written reports of any such accidents made?

56. Attach a copy of each such accident report to your answers to these interrogatories.

57. Has a lawsuit ever been filed against you for damages as a result of injury sustained by a person in the use of \_\_\_\_\_ [*product containing toxic chemicals*] or other similar products?

58. If so, for each lawsuit, state:

- a. the name of the suit;
- b. the file number;
- c. the court in which it was filed;
- d. the date of filing;
- e. its present status or disposition.

#### § 64 Results of Defendant's Investigation

The extent of inquiry into the nature and details of a party's investigation varies considerably from jurisdiction to jurisdiction, but plaintiff is usually permitted discovery into investigation directly concerning the plaintiff personally and the location of other witnesses.<sup>92</sup> The following interrogatories make such an inquiry. The request for the production of witness' statements may be objectionable on grounds of work product in many jurisdictions, however.<sup>93</sup>

#### INTERROGATORIES

59. Were investigations made, or reports prepared by you or in your behalf as a result of the accident alleged in the complaint?

---

<sup>92</sup>Fed R Civ Proc, Rule 26(b)(1).

<sup>93</sup>See Am. Jur. 2d, Depositions and Discovery §§ 59, 62, 66.

60. If so, for each investigation, state:

- a. the name, address, and job title of each person involving in making or submitting such investigation or report;
- b. the name and address of the person who has present custody of each report.

61. Attach a copy of each such report to your answers to these interrogatories.

62. What is the name and address of:

- a. each person employed by you who was present and witnessed the accident alleged in the complaint;
- b. each other witness to the accident who is known by you.

62. Were any statements obtained from anyone in connection with the accident?

63. If so, for each statement, state:

- a. the name, address, and job title or capacity and place of employment of each person who gave the statement;
- b. the date on which the statement was obtained;
- c. whether the statement was oral, written, or recorded;
- d. the name, address, and occupation of each person who has present control and custody of each statement.

64. Attach a copy of each such statement to your answers to these interrogatories.

### § 65 Identity of Anticipated Trial Witnesses

In addition to lay witnesses, a party may inquire by interrogatory into the identities of the experts that the adverse party expects to call at trial and to obtain disclosure of the expert's qualifications, opinions and conclusions, and the reasons for the opinions and the bases upon which they rest.<sup>94</sup> Further discovery into the facts known and opinions held by experts who are not expected to be called at trial generally requires a special motion for such discovery and is usually conditioned upon a showing of exceptional circumstances.<sup>95</sup> It is also customary in many localities to inquire into the existence of expert's reports. However, the reports of experts, including those expected to be called as trial witnesses, is subject to objections in many jurisdictions on the basis of the

---

<sup>94</sup>Fed R Civ Proc, Rule 26(4)(b)(A)(i).

<sup>95</sup>See Fed R Civ Proc, Rule 26(b)(4)(B).

attorney-client privilege and the attorney's work product doctrine.<sup>96</sup>

### INTERROGATORIES

65. For each employee employed by you, who was at the \_\_\_\_\_ [*construction site*] on the date of the injury to \_\_\_\_\_ [*plaintiff*], please state:

- a. employee's name;
- b. address;
- c. telephone number;
- d. starting date of employment with you;
- e. job title;
- f. nature of job duties in detail.

66. For each non-expert witness you expect to call at trial, please state:

- a. his or her name;
- b. address;
- c. business address;
- d. business telephone;
- e. the subject matter about which they are expected to testify.

67. Identify each expert witness you will call at the trial of this action.

68. As to each witness, state:

- a. the field or specialty of the expert;
- b. the expert's qualifications;
- c. the subject matter on which the expert is expected to testify;
- d. the substance of the facts and opinions to which the expert is expected to testify; and
- e. a summary of the grounds for each opinion.

69. What is the name and address of each expert witness you have ever consulted in regard to litigation involving use of \_\_\_\_\_ [*product containing toxic chemicals*]?

70. Please attach any and all expert reports prepared concerning this litigation.

71. Please attach any and all expert reports prepared concerning \_\_\_\_\_ [*product containing toxic chemicals*].

### § 66 Extent of Insurance Coverage

Most jurisdictions now permit a plaintiff to inquire by inter-

<sup>96</sup>See Am. Jur. 2d, Depositions and Discovery §§ 29, 30, 67, 160.

rogatory or otherwise into the extent of the defendant's liability insurance coverage for the occurrence alleged in the complaint. Such disclosure during discovery does not make evidence of insurance coverage admissible at trial, however.<sup>97</sup>

#### INTERROGATORIES

72. At the time of the accident involved herein, were you covered by any policy of liability insurance which may apply to the accident?

73. If so, for each such policy state:

- a. whether it is primary, secondary, reserve or an umbrella policy;
- b. the name, principal place of business and telephone number of the insurer;
- c. the name, address, and telephone number of the named insured;
- d. the policy number;
- e. the effective dates of coverage;
- f. the total limits of coverage;
- g. the name, address, telephone number, and position of the person who has present custody of the policy;
- h. the dates of premiums paid;
- i. the amounts of premiums paid for each such date;
- j. whether such policy provides coverage for "claims made" or for "occurrences."

74. Please attach a copy of each policy to your answers to these interrogatories.

75. Did you make an oral report or otherwise give notice to any insurance company as a result of the accident involved herein?

76. If so, for each other notification, state:

- a. the date given;
- b. the form of notice;
- c. the name, address, telephone number, and occupation of the person who has the notice;
- d. the manner in which the notice was given;
- e. the name and address of the insurance company to which the notice was given;
- f. the name, address, telephone number, and job title or capacity of the insurance company representative to whom notice was given;

---

<sup>97</sup>See Fed R Civ Proc, Rule 26(b)(2).

g. the name, address, telephone number, and occupation of each other person present when the notice was given;

h. the substance of the notice.

77. Do you have possession of or access to any writing or other form of record evidencing any of the notices referred to in your answer to the preceding interrogatory?

78. Please attach a copy of each writing to your answers to these interrogatories.

### § 67 Contentions Defendant Expects to Make

The defendant will make a variety of claims during the course of a personal injury or wrongful death case, and the more formal contentions will be set out in the defendant's answer as affirmative defenses. It is always important for the plaintiff to know not only the contentions that the defendant intends to make against the plaintiff but also what claims may be advanced against codefendants or unjoined parties. The following interrogatories seek the disclosure of all such matters.<sup>98</sup> Additional interrogatories as to specific defenses and contentions should be added as appropriate.

#### INTERROGATORIES

79. Do you contend that \_\_\_\_\_ [*plaintiff*] was contributorily negligent?

80. If so, please state in detail in what way \_\_\_\_\_ [*plaintiff*] was contributorily negligent.

81. What facts form the basis of defendant's allegation that \_\_\_\_\_ [*plaintiff's*] negligence was a direct and proximate or contributing cause of his injuries?

82. With respect to each fact, state:

- a. a description of the fact;
- b. the date defendant first became aware of it;
- c. the source from which defendant acquired its knowledge.

83. Is there any written document which supports defendant's allegation of contributory negligence?

84. If so, for each writing state:

- a. a description of the document;
- b. the name and address of the person(s) who wrote it;
- c. the date it was written;
- d. the date defendant first became aware of it;

---

<sup>98</sup>See Fed R Civ Proc, Rule 26(b)(1).

e. the name and address of each person who has a copy of it.

85. Do you contend that \_\_\_\_\_ [*plaintiff*] voluntarily assumed the risk of his injury?

86. If so, please state in detail in what way \_\_\_\_\_ [*plaintiff*] voluntarily assumed the risk of his injury.

87. With respect to defendant's contention that plaintiff voluntarily accepted and assumed the risk, state:

a. the risks that plaintiff is alleged to have voluntarily accepted and assumed;

b. the facts upon which defendant relies to show or tend to show that plaintiff voluntarily accepted and/or assumed such risks.

88. Does defendant contend that a person, not a party to this action, acted in such a negligent manner as to cause or contribute to plaintiff's injuries?

89. If so, for each such person, state:

a. the name, or other means of identification and address;

b. the alleged act of such person which caused or contributed to plaintiff's injuries.

90. Do you contend that plaintiff has failed to join necessary or indispensable parties in this litigation?

91. With respect to defendant's contention that plaintiff has failed to join necessary or indispensable parties, state:

a. the necessary or indispensable party of whom plaintiff has failed to include;

b. the facts upon which defendant relies upon to show or tend to show a necessary or indispensable party has not been joined.

## § 68 Financial Resources of Defendant

Generally, discovery into the financial resources of a defendant in a personal injury case is not permitted.<sup>99</sup> Where punitive damages have been claimed by the plaintiff most courts

---

<sup>99</sup>See *Hunter Contracting Co. v Sanner Contracting Co.* (1972) 16 Ariz App 239, 492 P2d 735; *Leidholt v District Court of Denver* (1980, Colo) 619 P2d 768; *Progressive Casualty Ins. Co. v Keys* (1975, Miss) 317 So 2d 396.

permit a disclosure of evidence of the defendant's wealth,<sup>1</sup> although many of them impose restrictions on the discovery and use of such evidence.<sup>2</sup>

### INTERROGATORIES

92. State whether the shares of the defendant are traded on any recognized stock exchange and if so, state:

- a. the exchange upon which such shares are traded;
- b. the number of outstanding shares;
- c. the current selling price of the shares.

93. State whether any person, firm, entity, or corporation owns more than fifty percent of the outstanding stock of the defendant, and if so, state:

- a. the name and address of such entity;
- b. if such entity is a corporation, whether its shares are publicly traded, and if so, on what exchange.

94. State the amount of gross income of the defendant for \_\_\_\_\_ [*specific applicable time period*].

95. State the amount of net income of the defendant for \_\_\_\_\_ [*specify applicable time period*].

96. State whether for \_\_\_\_\_ [*specify applicable time period*] the defendant has prepared or had prepared for it, any reports to shareholders; and if so, attach copies of all such reports to these answers.

97. State whether for \_\_\_\_\_ [*specify applicable time period*] the defendant has prepared or had prepared for it any yearly financial statements, or the equivalent by any other title; and if so, attach copies of all such reports to these answers.

#### 2. To Chemical Manufacturer

### § 69 In general

The liability of the painting contractor in the model trial situation would be dependent upon its handling of the sealant be-

---

#### [Section 68]

<sup>1</sup>See *Coy v Superior Court of Contra Costa County* (1962) 58 Cal 2d 210, 23 Cal Rptr 393, 373 P2d 457, 9 ALR3d 678; *Carrick v McFadden* (1975) 216 Kan 683, 533 P2d 1249, 91 ALR3d 708.

Pretrial discovery of defendant's worth on issue of damages, 27 A.L.R. 3d 1375 § 4.

<sup>2</sup>Trial Court Restrictions on Evidence of Defendant's Wealth, 30 Am. Jur. Trials 711.

ing sprayed and its knowledge of the hazardous propensities of the product. Its negligence, therefore, would be determined to some extent by the information about the product involved, which basically would come from the manufacturer. The manufacturer's liability principally rests on whether it had given warnings concerning hazardous chemicals contained in the product and adequate instructions for the safe use of the product.<sup>3</sup> The following interrogatories were designed to compel the disclosure of information relevant to those facts.

### § 70 Product Identification

In a product liability case, whether advanced on a negligence or strict liability claim, the precise identification of the product involved is of paramount importance to the plaintiff's discovery.

#### INTERROGATORIES

1. On or about \_\_\_\_\_ [*date of accident*], product known as \_\_\_\_\_ [*product containing toxic chemicals*] was used during construction work at the \_\_\_\_\_ [*construction site*] in \_\_\_\_\_ [*location*]. Do you manufacture and distribute this product?
2. If so, state:
  - a. the address of each plant at which it is manufactured;
  - b. the name and address of each wholesaler, jobber, manufacturer's representative, or other distributor who distributes this product to retailers or users in \_\_\_\_\_ [*state where accident occurred*].
3. Do you manufacture this product under a license from any other person or firm?
4. If so, state:
  - a. the name and address of each licensor;
  - b. the number of the patent, patent application, or copyright claimed by the licensor.
5. Have you applied for a patent on this product?
6. If so, state:
  - a. the date of each application;
  - b. the number of the application or of any patent that has been granted.
7. Do you claim a copyright on the name \_\_\_\_\_ [*product containing toxic chemicals*]?
8. If so, state:

---

<sup>3</sup>For an illustration of safety information put out by manufacturers of chemical products, see § 8.

- a. each governmental agency (both state and federal) or official, with whom the name has been registered;
- b. the date of each such registration.

9. What are the ingredients that are compounded to produce \_\_\_\_\_ [*product containing toxic chemicals*]?

10. Are any chlorinated hydrocarbons used in the manufacture of this product?

11. If so, state:

- a. the chemical formula or each chlorinated hydrocarbon used;
- b. the common name of each such ingredient.

12. What is the specific gravity of each chlorinated hydrocarbon compound used in the manufacture of \_\_\_\_\_ [*product containing toxic chemicals*]?

### § 71 Negligent Product Testing Procedures

The manufacturer's negligence in a product liability case advanced on that theory may be proven by evidence of shoddy workmanship, inadequate materials selection, faulty construction or assembly, and by showing negligence in the testing of a product. The latter theory is usually the most appropriate in cases involving hazardous chemicals and toxic substances.

#### INTERROGATORIES

13. Did you make any tests to determine whether the fumes from any substance used in the preparation of \_\_\_\_\_ [*product containing toxic chemicals*] were harmful when inhaled?

14. If so, state:

- a. the name and address of the person who was in charge of such testing;
- b. a description of the method used to test the product;
- c. whether the tests were designed to simulate the actual conditions under which the product would be used.

15. Did you employ an industrial toxicologist, or other consultant, to determine whether any ingredient contained in \_\_\_\_\_ [*product containing toxic chemicals*] would constitute a hazard to persons using it?

16. If so, state:

- a. the name and address of each person, or firm, so consulted;
- b. whether any change was made in the original formula for \_\_\_\_\_ [*product containing toxic chemicals*] as a result of any testing or consultation and, if so, state:

- (1) a description of the changes that were made;
- (2) the reason for making each change.

17. Has this product, at any time, been subjected to tests or studies conducted by a state or federal governmental agency or department?

18. If so, state for each:

- a. the name of the agency or department;
- b. the dates of each test or study commenced and concluded;
- c. the purpose of the study or tests;
- d. the description of the test or study procedure;
- e. the results obtained or conclusions reached;
- f. the method by which the results or conclusions were computed or determined;
- g. the source of authority (statutory requirement, agency policy, etc.) for the performance of the test study.

## § 72 Labeling; Warning

In both negligence and strict liability claims against product manufacturers, the existence or nonexistence of proper warnings of hazards with respect to the use of a product may be the critical factor in the determination of the defendant's liability.<sup>4</sup>

### INTERROGATORIES

19. Do you belong to an organization that has as one of its purposes the use of uniform labels to warn of hazards inherent in chemicals or products?

20. If so, state:

- a. the name and address of each such organization;
- b. whether any such organization has adopted, or recommended, a warning label for products that contain any ingredient used in the manufacture of \_\_\_\_\_ [*product containing toxic chemicals*] and if so;
  - (1) the ingredient that the warning concerned
  - (2) the wording of the warning recommended;
  - (3) a description of the hazard that is inherent in the use of the product.

21. Did any organization of which you are a member adopt any additional warning labels to be used when dangerous chemicals are applied by the use of pressurized containers?

---

<sup>4</sup>See § 15.

22. If so, state:

- a. the name and address of each such organization;
- b. the exact working of the recommended warning label.

#### Cases

Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the term "label" includes the written material on the actual container, as well as written, printed, or graphic material accompanying the container, to which reference is made. Federal Insecticide, Fungicide, and Rodenticide Act, § 24, as amended, 7 U.S.C.A. § 136v. *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208 (Iowa 1998), reh'g denied, (Dec. 8, 1998).

### § 73 Prior Accidents Involving Toxic Substance

Discovery into prior accidents in the claim against the manufacturer of a product containing hazardous chemicals or toxic substances may be relevant with respect to the defendant's knowledge of the substance's toxicity, flammability or in regard to other dangerous propensities.<sup>5</sup>

#### INTERROGATORIES

23. Did you receive notice that any other person has suffered ill effects following the use of \_\_\_\_\_ [*product containing toxic chemicals*]?

24. If so, state:

- a. the name and address of each such person;
- b. the date of each such notice;
- c. a description of the injuries claimed by such person,
- d. whether you have compromised, or settled any claims for injuries resulting from the use of \_\_\_\_\_ [*product containing toxic chemicals*].

25. Have you been named as a defendant in any lawsuit wherein damages were claimed for injuries resulting from the use of \_\_\_\_\_ [*product containing toxic chemicals*]?

26. If so, state:

- a. the name and address of each plaintiff who has instituted such an action;
- b. the name and address of each person, firm, or entity that has been named as codefendant in such action;
- c. the name of the court in which each action was filed;
- d. the judgment entered in each action that has been tried;
- e. the terms of each settlement reached pending the trial of any case;

---

<sup>5</sup>See § 63.

f. the date set for the trial of an action still pending.

#### Cases

Evidence of safety history of product is admissible where evidence pertains to use of same type of appliance or equipment, and is based on use of product under substantially similar conditions. Purpose of product safety history is to show dangerous character of product and defendant's knowledge thereof or to show that product was not dangerous or that defendant had no prior knowledge of danger. *Emerson Elec. Co. v Garcia* (1993, Fla App D3) 623 So 2d 523, 18 FLW D 1440.

### § 74 Warranties

In the model trial case, plaintiff's complaint contained a count alleging a breach of implied warranty on the part of the chemical manufacturer,<sup>6</sup> and the following interrogatories inquire into that area.

#### INTERROGATORIES

27. Has the defendant, or anyone in behalf of the defendant, ever given a warranty or made an undertaking concerning the use, toxicity, or safety of \_\_\_\_\_ [*product containing toxic chemicals*]?

28. If so, for each such warranty or undertaking, state:

- a. the date it was made;
- b. the name, address, telephone number, and job title or capacity of the person who authorized it;
- c. its substance and wording;
- d. whether it was false in any degree and why;
- e. if false, the date it was withdrawn and the reason thereof.

### § 75 Disclosure of Defendant's Expert Witnesses

The following interrogatories seek to compel the disclosure of the defendant's expert witnesses at trial.<sup>7</sup>

#### INTERROGATORIES

29. Identify each expert witness you will call at the trial of this action.

30. As to each witness, state:

- a. the field or specialty of the expert;
- b. the expert's qualifications;

---

<sup>6</sup>See § 48.

<sup>7</sup>See § 65.

- c. the subject matter on which the expert is expected to testify;
- d. the substance of the facts and opinions to which the expert is expected to testify;
- e. a summary of the grounds for each opinion.

## VIII. TRIAL PREPARATION

### § 76 In general

To prepare for trial the plaintiff's attorney should develop a particular theory of recovery for the case and keep it in mind at all times.<sup>8</sup> Counsel must know what facts need to be proved at trial and what evidence is available to establish them. In order to properly present the case counsel should first outline those provable facts that support each element of the prima facie case.<sup>9</sup>

In mapping the trial,<sup>10</sup> counsel needs to make some judgments about the order of the witnesses that will be called to testify.<sup>11</sup> Four major factors should be kept in mind when setting the order of the witnesses. The first is the character of the plaintiff,<sup>12</sup> the second is the theme of the trial,<sup>13</sup> the third is the relative strength of the witnesses,<sup>14</sup> and the fourth is the coherence of the entire case.<sup>15</sup>

### § 77 Developing a theme for the case

One of the first steps to effectively mapping the case for trial is to develop a short, effective, and saleable theme for the trial.<sup>16</sup> Counsel should plan to organize much of the case around a particular theme or fact pattern of the case. Choosing the theme is essentially a matter of looking at the evidence and picking out the facet of the case that is most likely to impress

---

<sup>8</sup>See § 78.

<sup>9</sup>See §§ 82, 83.

<sup>10</sup>Mapping the Trial—Order of Proof, 5 Am. Jur. Trials 505.

<sup>11</sup>McCown, "Trial Strategy/Case Management" in G. Nothstein, ed., *Toxic Torts: Litigation of Hazardous Substance Cases* §§ 22.00–22.22 (Shephard's/McGraw Hill 1984).

<sup>12</sup>See § 79.

<sup>13</sup>See § 77.

<sup>14</sup>See § 81.

<sup>15</sup>See § 82.

<sup>16</sup>See Kanner, *Trying the Toxic Tort Case*, 23 Trial 32, 33 (Oct 1987).