IV. DISCOVERY TECHNIQUES FOR THE DEFENSE

A. Interrogatories

Interrogatories are the bane of a lawyer's existence, both from the standpoint of preparing the questions to the plaintiff party and of preparing answers to interrogatories from the plaintiff. They are time intensive to prepare (assuming one follows the bar against "canned interrogatories" contained in the 1973 Committee Comments to A.R.C.P. 33), often meaning that the defense lawyer puts off preparing them, in favor of working on more pressing business.

This inclination runs contrary to the proper use of interrogatories. They should be served, along with requests for production, with the Answer. Plaintiff's attorneys issue their written discovery with the Complaint. Defendants should do the same. After all, the plaintiff has likely filed the suit near the end of the statutory period, thereby permitting nearly two years of investigation between the claim denial and the filing of the suit for bad faith.

You must start your efforts to learn what the plaintiff knows as soon as you can. interrogatories and requests for production should be issued early in order to receive the responses back early so that you will have time to issue subpoenas for documents, contact witnesses, and perform such other investigation as may be needed before you depose the plaintiff. Considering the schedules today's under which trial courts work, the defense lawyer does not have much time before he needs to depose the plaintiff. Therefore, you have even less time to issue your written discovery.

A second problem affecting the preparation of written discovery is that defense clients, in particular insurance companies, do not like to pay the lawyer's hourly rate for their preparation. In fact, many companies, under their Litigation Management Guidelines will only pay a paralegal's hourly rate for their preparation. In some ways, this practice is counterproductive to the proper preparation of a defense. One's paralegal simply will not see nor understand all of the issues you would. This practice encourages the preparation of interrogatories and requests for production that do not address all of the issues that could be addressed. In fact, one could argue that it encourages generic, form interrogatories that do not gather all of the information the defense lawyer needs to get before any depositions are

taken.

It is, therefore, the purpose of this section to provide examples of both the areas of discovery the defense lawyer should focus on at the interrogatory stage and to provide specific examples of questions which the lawyer or his paralegal can use to draft the majority of the questions and requests for documents. Perhaps this will enable you to overcome the inertia and tendency to incompleteness described above.

Whether you are in state court or federal court, you are going to have a limit on the number of interrogatories you can use. A.R.C.P. 33(a) limits you to forty (40) including sub-parts to "any other party without leave of court." The federal rules limit a party to twenty-five (25) interrogatories. Rule 33(a) provides a special definition of the word "party". Under A.R.C.P. 33(a), "the word party includes all parties represented by the same lawyer or firm." Further, it instructs that "when the number of interrogatories exceeds forty (40) without leave of court, the party upon whom the interrogatories have been served need only answer or object to the first forty (40) interrogatories." F.R.C.P. does not contain a similar provision.

In issuing interrogatories to the plaintiff(s), the defense lawyer should comply with every aspect of the forty (40) interrogatory rule. If you do not want to answer more than forty (40), then do not ask more than forty (40).

A second consideration to take into account when preparing interrogatories are the provisions of A.R.C.P. 33(b) related to "contention" interrogatories. F.R.C.P. 33(b) does not contain a similar provision. As is discussed in more detail below, contention interrogatories are essential in a bad faith or fraud suit against an insurance company. A.R.C.P. 33(b) provides that "an interrogatory is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time." While this rule has more direct application to a defendant's answers to contention interrogatories, it also impacts defendant's interrogatories to the plaintiff. You should use "contention" interrogatories, but recognize that you might not get answers within 30 days.

Finally, in preparing your interrogatories to the plaintiff, keep in mind the provisions

of A.R.C.P. Rule 33(c) allowing the answering party the option of producing business records. [F.R.C.P. 33(c) contains a similar provision.] This article argues that the defense lawyer should use pointed and specific questions that require specific answers. Therefore, you do not want the plaintiff to be able to use Rule 33(c) to avoid providing the specific answer you have asked for. Rule 33(c) provides as follows:

> **(c) Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

[emphasis added.]

Draft your interrogatories with this rule in mind. If possible, do not ask a question that provides this escape hatch to the plaintiff. You want an answer, not a referral to a stack of documents. When you receive answers that refer you to documents (e.g. medical records), make sure this rule applies. It is the only circumstance where a party can refer to documents rather than answering the question. Make sure that the documents which the plaintiff has referred you to are plaintiff's "business records." It is not sufficient that the records be someone's business records. For Rule 33(c) to apply, they must be plaintiff's business records. Medical records and medical bills are not plaintiff's business records.

Moreover, when you are referred to plaintiff's business records, make sure that the burden requirement of the rule is satisfied. It probably will be, unless the documents require

some special knowledge or expertise to interpret, but make sure just the same.

Finally, when a plaintiff refers you to records that are business records of the plaintiff and the burden requirement is met, make sure the "specification" requirement is met. Under Rule 33(c) the response must specify the records responsive to the question so that you can locate and identify the documents containing the answer. The plaintiff is not entitled to put you in the position of having to guess what documents contain the answers to what questions. You are entitled to be told by the answer, by document labeling (or by some other way) what document contains the answer to your question.

As mentioned above, the most effective interrogatories are those that ask a specific question which requires a specific answer. In other words, use a "rifle" approach rather than a "shotgun" approach. Remember, unlike deposition testimony, the interrogatory answer will be filtered through, if not drafted by, the plaintiff's lawyer. If you are not specific, the plaintiff's lawyer will not be specific. If you ask an open ended, general question, you will get an opened ended, general answer.

Interrogatories should not be prepared as if they will provide you with all of the discovery you will ever need. They cannot. An interrogatory is a scalpel, not a hacksaw. It is not within the nature of the instrument to provide you will all of the information you need to defend the case. Even if it were, you do not want the plaintiff's lawyer's answers to some of your questions, so do not ask those in the interrogatories. Save them for the plaintiff's deposition. With interrogatories, ask the questions that yield specific information without enabling the plaintiff's lawyer to create a jury question as to a specific issue before a single deposition is taken.

Another important precauation is to prepare your interrogatories with the numeric limitation in mind. You should not only comply with the numeric limitation, but you should also draft them so that any motion to compel is easy to file and rule on. Separately identify the sub-parts so that the plaintiff has to separately state his answers. Even if the plaintiff fails to do that, it is far easier to identify for the court a question that has not been answered when you have sub-parts than when you use a multi-part question containing only commas or semi-colons.

The first area of questioning to include in your interrogatories is personal information on the plaintiff. You need this information to issue subpoenas and to do other background research on the plaintiff(s), so get it at your first opportunity. It is suggested that you ask these questions:

1. State (a) your name(s); (b) your date of birth; (c) your social security number; (c) all address(es) at which you have lived in the past [fill in the blank] years, and (d) your spouse's name.
2. List all civil lawsuits to which you have ever been a party, either as a plaintiff or a defendant, including in your answer (a) the style of the case; (b) the case number; and (c) the court in which the suit was filed.
3. Have you ever filed for bankruptcy?
4. If you have ever been convicted of a crime, state (a) when you were convicted; (b) the state in which you were convicted; (c) the crime of which you were convicted.
5. State the name and address of all employers you have had for the past [fill in the blank] years.
6. Describe your educational background.

You are dealing with a bad faith case, so you should ask insurance related questions. In this regard, the following are suggested.

7. List all insurance policies of any type that have been issued to you by any of the defendants, at any time, up to and including the present. Include in your answer (a) the policy number; (b) the name of the insurer; (c) the type of policy; (d) the name and address of the agent involved in the sale of the policy to you.
8. List all insurance policies, of any type, which have been issued to you by any insurer in the past [fill in the blank] years. Include in your answer (a) the policy number; (b) the name of the insurer; (c) the type of policy; (d) the name and address of the agent involved in the sale of the policy to you.

These two questions could be combined if need be in order to comply with the

numerical limitations. The insured's experience with and sophistication related to the purchase of insurance, the provisions of an insurance policy, and making insurance claims is going to be relevant to the defense of the case. If you ask these questions only in the deposition, you may not get a comprehensive list simply because the plaintiff cannot remember them all. Therefore, ask them in the context of interrogatories where they have thirty (30) days to answer, have access to all of their records, and have the input of their lawyer. Further, ask these questions at the interrogatory stage so that you can make sure you have certified copies of all of the policies issued by your client along with the claims files and agent files for your client's policies and so that you can issue subpoenas for the policies, claims files, and agent files of all other insurance carriers.

Interrogatories should always cover witnesses. You want to know who has knowledge relevant to the claim and plaintiff's damages. You cannot, however, ask the plaintiff to list all witnesses whom she expects to call at the trial of the case. *Alabama Power Co. v. Courtney*, 539 So.2d 170 (Ala. 1988); *Mitchell v. Moore*, 406 So.2d 347 (Ala. 1981); *Ex parte Dorsey Trailers*, 397 So.2d 98 (Ala. 1981). If you are dealing with the denial of a liability lawsuit, you also want to ask for the names of those persons knowledgeable concerning the issues raised in the underlying case. Finally, you need to ask for the plaintiff's experts with a statement of their opinions. The plaintiff will not answer the expert question to start with, but you want to trigger the obligation to do so at the appropriate time. Further, keep in mind the provisions of A.R.C.P. 26(b)(4)(B) and F.R.C.P. 26(b)(4)(B) allowing you to obtain, under limited circumstances, discovery related to experts who are not expected to testify at trial. In this regard, ask these questions:

9. State the names and addresses of all persons with knowledge of any facts or information relevant to any of the claims, allegations, or facts stated in the complaint.

10. State the names and addresses of all persons with knowledge of any facts or information relevant to any of the claims made in the lawsuit styled [name of the underlying suit which the insurance company declined to defend or indemnify].

11. State the names of all experts whom you expect to call at the trial of this case. For each such expert, state (a) each opinion of the expert; (b) all facts relied upon by the expert in reaching each opinion.

You also want to get a complete listing of the damages claimed by the plaintiff. You need this to issue your subpoenas. If the bad faith claim relates to an underlying liability case and the insured has hired his own lawyer (often the same lawyer prosecuting the bad faith case), you want to ask questions on that issue as well. Additionally, you want to know what the plaintiff says as to what premiums have been paid and when each was paid. In that regard, the following are suggested:

12. List each and every item of compensatory damages which you claim in this case. (a) As to each item of special damages claimed, state the amount you claim in damages.

13. Separately list the amounts of attorneys fees and expenses which have been incurred in the defense of the underlying case. (a) State the amount which has been paid for the attorneys fees and expenses so listed.

14. For each premium you paid for the insurance policy at issue in this case, state (a) the date payment was made; (b) the amount that was paid; and, (c) if the premium was paid to any entity other than the defendant, the name of the entity to whom payment was made.

15. For each premium paid for the insurance policy which is the subject of this suit, to the extent any premium was paid by check, state (a) the name and address of the bank on which the check was drawn; (b) the account number; (c) the name(s) on the account.

Often, the plaintiff will allege that the claim decision in some way affected his income, wages, ability to earn, or his business. Therefore, ask for that information.

16. If you claim that the actions of the defendant at issue in this case in any way affected your income, wages, salary, earnings, or any business in which you had an interest, state (a) in what way defendant's actions so affected these matters; (b) the amount in damages you claim as a result.

17. State the name and address of all banks of similar financial institution in which you or any business in which you have an interest maintained a checking or other account. As to each institution named, include (a) the account number; (b) the name(s) on the account.

18. State the name and address of all persons, companies, firms, or other entities who have at any time prepared a federal or state tax return for you or any business in which you have an interest.

Always ask contention interrogatories. You need to know exactly what plaintiff claims your client did so that you can prepare a motion for summary judgement which addresses every claim. The complaint is rarely specific enough. Plaintiff himself will not be able to fully articulate this at his deposition. Therefore, ask it in an interrogatory. These questions are suggested for your consideration and use:

19. State how you claim the defendant committed bad faith.

20. State every fact you rely on in contending that the defendant denied your claim without an arguable basis for doing so.

21. State what investigation you claim defendant should have conducted which it failed to do.

22. [If there is an underlying lawsuit] State which claims in the underlying liability lawsuit, [give the style], you claim fall within which insuring provisions of the liability policy at issue.

23. [If there is an underlying lawsuit] State which claims in the underlying liability lawsuit, [give the style], you claim do not fall within exclusion [name the exclusion] contained in the liability policy at issue.

You want to know of all communications, verbal and written, which the plaintiff has had with your client or any defendant. Like the insurance policy issue, you do not want to leave this issue solely to the plaintiff's deposition testimony.

24. As to each verbal communication you or anyone acting on your behalf has had with any defendant, state (a) the date of each communication; (b) who was talking to whom; and, (c) the substance of the communication.

You want to make sure that the plaintiff received the policy at issue. You also want to know when the plaintiff received it. Therefore, ask this:

25. State when you received the insurance policy at issue in this case.

You want to know whom the plaintiff has statements from, even if the plaintiff objects to producing the statements to you. Requiring the plaintiff to name those persons is entirely separate from production of the statements and should not be subject to an attorney work product objection. If you have the names, you can get a signed authorization from the witness to secure a copy of the statement. Therefore, simply ask:

26. State the name and address of all persons from whom you or your attorney has obtained a statement.

It is usually the case that the plaintiff is claiming that the insurance company's actions caused her to sustain mental anguish. You need to find out if that is being claimed. You also need to find out if the plaintiff has received any medical treatment for that condition. You need to know if the plaintiff has had any similar symptoms in the past. You are entitled to know the names of all of the plaintiff's medical care providers in order to learn what treatment she has received for this mental anguish, whether she has had mental anguish unrelated to the insurance company's actions, and whether she has received treatment in the past for mental anguish. The following questions are suggested in this regard:

27. If you are making a claim for mental anguish, state the names and addresses of all hospitals, medical providers, mental health care providers, therapists, counselors, or others from whom you have received any treatment for that mental anguish.

28. Had you ever suffered from mental anguish, emotional distress, or other similar or related conditions before the actions of the defendant described in the complaint? (a) If so, describe each such condition and (b) the dates during which you suffered from it.

29. State the name and address of any and all hospitals, medical providers, mental health care providers, therapists, counselors, or others from whom you have received treatment of any type in the past [fill in the blank] years.

30. State the name and address of all health insurers with whom you have had coverage in the past [fill in the blank] years.

If the bad faith allegations arise out of the denial of a property damage claim, such as a fire loss, you need to include interrogatories dealing with damages.

31. State the fair market value of the property immediately before the loss and immediately after the loss.

32. State the cost of any repairs performed on the property.

33. Describe the property damage you allege to have sustained.

34. Describe the extent of any repairs undertaken to date.

If the bad faith allegations specifically arise out of a fire loss where the claim was denied based on evidence of arson, you will need to ask questions concerning the insured's financial condition

35. List all personal and business debts which you had at the time of the fire, including in your answer the name of each debtor and the amount of the debt.

36. List all financial or investment institutions in which you or any business in which you have an interest have maintained any type of account in the last five (5) years.

The questions listed above are certainly not all inclusive. You should pick and chose among them as the requirements of your case dictates. You should also consider including specific questions related to your individual case for which you want specific answers. There are usually a few. Review your claim file, underwriting file, and agent's file to determine what they are. An early conversation with the claims representative will help in this regard as well.

There are a few questions that one sees from time to time that do not seem to be helpful, particularly when they are weighed against the fact that they take up one question of your numeric limit. These questions would include asking the plaintiff if he knew that his answers were under oath, asking what documents have been reviewed in preparation of the answers (just ask for this in your request for production), and asking for a recitation of all facts, witnesses, documents and the legal basis for allegations contained in enumerated

paragraphs if the complaint. These questions should be avoided.

B. Requests for Production

Rule 34, unlike Rule 33, does not impose a specific numeric limitation on the number of requests for production that can be asked. Such a limit can be imposed by the scheduling order, particularly in federal court. Where no limit exists, take advantage of this. When you can ask for the production of documents rather than asking an interrogatory, do that and save your interrogatories for another issue.

The issues discussed above in connection with interrogatories are also the issues which you need to cover in your requests for production. However, because requests for production do not yield a written answer, you can ask both for specific documents and for general categories of documents. In that regard, the following are suggested as a starting point for preparing your requests:

1. Produce all documents relied upon or consulted in preparing your answers to defendant's interrogatories.
2. Produce all documents evidencing or related to written communications with any defendant (including emails, correspondence, memoranda, and faxes).
3. Produce all notes, memoranda, correspondence, computer files, tape recordings, videotape recordings, or similar materials evidencing or relating to all verbal communications with any agent, servant, employee, or representative of any of the defendants.
4. Produce all documentation, including electronic data, relating to or evidencing documents sent by you to a defendant or sent by a defendant to you.
5. Produce the insurance policy at issue in this case, including, but not limited to, the envelope which it came in, the declarations page, all policy forms, all endorsements, all amendments, and all other documents in any way evidencing, describing, or establishing the terms of the insurance with the defendant.
6. Produce all insurance policies which you have had with any defendant at any

time.

7. Produce all insurance policies of any kind which you have had at any time.
8. Produce the federal and state tax returns for you and any business in which you have ever had any interest for the past [fill in the blank] years.
9. Produce any and all documents evidencing or related to the premiums charged for the insurance at issue in this case and your payment of those premiums.
10. Produce the complete file and the CV for any expert you expect to call at the trial of this case.
11. Produce any and all documents related to the underlying liability lawsuit, styled [fill in the blank], including, but not limited to pleadings, written discovery and responses, depositions, subpoenas to third parties and responses thereto, motions, orders, or correspondence.
12. Produce all contract or written agreements with the attorneys who are defending you in the underlying liability lawsuit.
13. Produce all documents evidencing or relating to any agreements between you and the attorneys who are defending you in the underlying liability lawsuit.
14. Produce all documents evidencing, relating to, or establishing each item of damages claimed by you in this case.
15. Produce any and all documents evidencing or relating to your claim for mental anguish, including, but not limited to, medical records, mental health care records, charges for medical or mental health care treatment, and prescription medication taken for treatment of your mental anguish or emotional distress.
16. Produce any and all health insurance policies affording coverage to you during the time you claim to have sustained mental anguish or emotional distress.
17. Produce any and all documents evidencing the payment of any medical bills which you claim as damages in this case by any health insurer or other third

party, including, but not limited to any documents evidencing any subrogation interest arising out of such payment.

18. Produce any and all documents establishing, evidencing, or related to your claim that the actions of the defendant affected or impacted your wages, income, earnings, or the operation of any business in which you have any interest.

19. Produce any and all documents in any way evidencing, supporting, or related to your claim that the defendant committed bad faith.

20. Produce any and all documents in any way evidencing, supporting, or related to your claim that the defendant did not have an arguable basis for its decision.

21. Produce any and all documents in any way evidencing, supporting, or related to your claim that the defendant did not properly investigate your claim.

22. Produce any and all documents in any way evidencing, supporting, or related to your claim that the defendant breached its contract with you.

23. Produce any and all documents created by or generated by this defendant at any time.

24. Produce any statements which you or your attorneys have from any employee, agent, or representative of this defendant.

25. Produce any statements which you or your attorneys have from any person.

26. Produce any written communication which you or anyone acting on your behalf has had with any third party concerning the issues raised by your complaint.

27. Produce any and all documents evidencing, related to, or supporting your claim that you have incurred or paid attorneys fees and expenses as a result of the actions of the defendants in this case, including, but not limited to, bills, invoices, statements, cancelled checks, or receipts.

28. Produce any photographs, tape recordings, or videotapes related to any of the issues raised by or allegations stated in your complaint.

29. Produce all documents evidencing or related to the cost to repair the property involved in the claim made the basis of this suit.

30. Produce all repair estimates for repair of the property damage made the basis of this suit.

31. Produce all documents evidencing or related to the fair market value of the property involved in the claim made the basis of this suit immediately before the loss and immediately after the loss.

C. Narrowing the Information Requested for Paper Discovery

This subject matter is discussed under the sub-headings for the specific types of written discovery addressed herein: Interrogatories, Requests for Production, and Requests for Admission.

D. Effective Use of Requests for Admission

Like Requests for Production, there is generally no limit on the number of Requests for Admission that can be asked. Requests for Admission, however, are not frequently used in bad faith litigation. It is difficult to make any general statements concerning their use because requests for admission are in large part driven by the particular facts of the case and the particular needs of the defense attorney. Requests for admission are not often used at the outset of a defendant's discovery. They can be used later in the case as evidentiary needs or tactical trial considerations come into play.

In general, Requests for Admission are most useful in getting a stipulation to the admissibility of a document so that you do not have to take a deposition to establish authenticity and the application of a hearsay exception. In the context of a bad faith suit, this could apply to the insurance policy or medical records, for example.

Requests for Admission can be used to establish facts. One could conceive of a circumstance where a request could be used to force the plaintiff to admit that a particular policy provision, such as an exclusion, applied to the claim. There could also be a particular fact that you would want the plaintiff to admit to. In large part, however, such facts can be established in the plaintiff's deposition. Given this to be the case, the fact which would be the subject of a request for admission is a fact perhaps not known to the plaintiff, but known

to his lawyer. For example, in the context of a fire loss, the fact that there were multiple points of origin for the fire.

Requests for Admission, when used, must be drafted with precision. This is even more true than with Interrogatories. Each request should be short and should contain plain language. Only ask for the admission of a single fact per request. Look particularly closely for any loopholes that might be available to the plaintiff to avoid responding.

The appellate decisions interpreting Rule 36 take a narrow view of the appropriate use of requests for admission. In *Irons v LeSueur*, 487 So.2d 1352 (Ala. 1986), the Alabama Supreme Court held that the purpose of Rule 36 is to expedite trials and to relieve parties of the cost of proving facts not disputed and which can be ascertained by reasonable inquiry. The court held that Rule 36 was not intended as a means of discovery. Rather, it was a device by which material, undisputed facts could be established without the need for formal proof. Similarly, in *Evans v. Ins. Co. of North Am.*, 349 So.2d 1099 (Ala. 1977), the court held that the purpose of Rule 36 is to weed out facts and items of proof over which there is no dispute, but which are difficult and expensive to prove.

The appellate courts have limited the use of requests for admission in the context of genuine issues for trial. While the language of the rule provides that "a party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it." In *Cole v. Cooley*, 547 So.2d 1187 (Ala. Civ. App. 1989), however, the Court of Civil Appeals held that one cannot use requests for admission to conclusively establish a fact obviously in dispute. Further, in *Hanners v. Balfour Guthrie*, 589 So.2d 684 (Ala. 1991), the Supreme Court held that requests for admission were objectionable where they called for legal conclusions.

Finally, it is occasionally incorrectly assumed that the failure to respond to a request for admission within thirty (30) days constitutes an automatic admission of that fact. That is not how the Alabama Supreme Court has interpreted the operation of the rule. In *Hatton v. Chem-Haulers, Inc.*, 393 So.2d 950 (Ala. 1980), the Supreme Court held that it was within

the trial court's discretion whether to find that the failure to respond within 30 days constitutes an admission. Similarly, in *Bradley v. Demos*, 599 So.2d 1148 (Ala. 1992), the court held that a trial court can, in its discretion, allow late responses to requests for admission and that the Supreme Court's review of any such order was limited to an abuse of discretion standard.