HONORABLE MICHAEL S. BERG
U.S. MAGISTRATE JUDGE
DISCOVERY GUIDELINES FOR
PRO SE LITIGANTS

The information included in this handbook is not intended as legal advice or representation, and you should not rely upon it as such. It is simply meant as a guideline for *pro se* litigants.

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The Jailhouse Lawyers Handbook, 6th Edition.
Revised in 2021. Published by:
The National Lawyers Guild,
National Office
P.O. Box 1266
New York, NY 10009

DISCOVERY IN GENERAL

The Federal Rules put very few limits on the kind of information and materials you can get through discovery and the number of requests you can make. Federal Rule of Civil Procedure 26(b)(1) states that you can get discovery about any "*nonprivileged"* matter that is "*relevant*" to any party's claim or defense and "*proportional"* to the needs of the case. "Nonprivileged" means not subject to a legal privilege such as attorney-client privilege or work-product privilege. (The issue of "privilege" is explained more below.)

"Relevant" means somehow related to what you are suing about. You have a legal right to anything "relevant" to any party's claim or defense. You will need to spend some time thinking through what you need to prove your case and what kind of evidence you may be able to get. Describe what you want as specifically as possible in all your discovery requests or defendants are likely to object.

A judge will decide whether a discovery request is "proportional" by considering the importance of the issues in your lawsuit, the amount of money at issue, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

You can demand information that the rules of evidence would not allow you to use at a trial if the information "appears reasonably calculated to lead to the discovery of admissible evidence." This means that the information could possibly help you to find other information that you could use at trial. The people you are suing must give you all the "nonprivileged" information that is available to them.

Rules 26-37 of the Federal Rules of Civil Procedure explain "discovery" tools that both parties in a lawsuit can use. You should begin by reading through those rules. Local rules or court orders may modify the Federal Rules as they apply to unrepresented prisoners. For example, Rule 26(f) generally requires parties to meet and confer to come up with a discovery plan, but the Advisory Committee notes recognize that this requirement may be impracticable to some parties and may be adjusted as such by local rule or court order.

DISCOVERY TOOLS

There are four main discovery tools:

- Depositions
- Document production
- Interrogatories
- Inspection

A **deposition** is a very valuable discovery tool. You may ask to depose the defendant or other potential witnesses to ask them questions relevant to your case. You meet with a defendant or the potential witness, that person's lawyer, and usually a court reporter. You or your lawyer ask questions that the "deponent" (the person being deposed) answers under oath. Because the witness is under oath, they can be prosecuted for perjury if they lie. The questions and answers are recorded or taken down by the stenographer. A deposition is like testimony at a trial. In fact, you can use what was said at a deposition in a trial if the deponent (1) is a party (plaintiff or defendant), (2) says something at the trial that contradicts the deposition, or (3) can't testify at the trial.

Despite these benefits, you should BEWARE: a deposition is very hard to arrange while in prison because it can be expensive and involves a lot of people. Federal Rule of Civil Procedure 30 gives instructions for how to properly take a deposition. It requires you to provide a deposition notice to anyone you wish to depose, and for some witnesses, you may need to issue a subpoena. It also allows each party to conduct ten depositions. If you want to take more, you must ask the court for permission.

The next discovery tool is **document production**. If you want to read documents such as letters, photos, or written rules that the prison officials have, ask for production of those items under Federal Rule of Civil Procedure Rule 34. There are no limits to the number of document requests you can make, but you should be reasonable in what you ask for or the defendants will object.

You can use the following example for requests for production:

REQUEST FOR PRODUCTION OF DOCUMENTS EXAMPLE:

IN THE UNITED STATES DISTRICT COURT FOR

_____x	
)	PLAINTIFF'S FIRST REQUEST FOR
Name of first plaintiff in the case, et al.,)	PRODUCTION OF DOCUMENTS
)	Civil Action No._____
Plaintiff[s],)	
)	
v.)	
Names of first defendant in the case, et al)	
)	
Defendant[s])	
_____x	

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff requests that Defendants [**insert full names here**] produce for inspection and copying the following documents:

[**List the documents you want here. Some examples:**]

1. Plaintiff's complete prison records.

2. All written statements (originals or copies) identifiable as reports about the incident on __(date)__, made by CDCR employees and/or witnesses.

3. Any and all medical records of Plaintiff from the time of his incarceration in __(name of correctional facility)__ through and including the date of your response to this request.

4. Any and all rules, regulations, and policies of the California Department of Corrections about treatment of prisoners with __(insert condition, e.g., diabetes)__.

Dated: _____

Signed:_____

Interrogatories are written questions that must be answered in writing under oath. Under Federal Rule of Civil Procedure 33, you can send up to 25 questions to each of the other parties to the lawsuit. If you need more than 25, you must ask the court for permission to serve more. PRACTICE TIP: You can use interrogatories to discover what kinds of records and documents the prison has, where they are kept, and who has them as well as work history and reprimands. This information can help you prepare a request for production. However, you may want to start discovery with document requests, as they tend to provide the most helpful evidence. Interrogatory responses are written by defense lawyers and are frequently less helpful.

Remember, you can only use interrogatories against people you have named as defendants.

As an example, if you have a guard brutality case, you may want to ask questions about how long the specific guard has worked at the prison, where they are assigned, what their duties are, what they remember of the incident, what they wrote about the incident in any reports, whether they have ever been disciplined, and more. You may also use an interrogatory to try to find out who else might be a helpful witness. A person who is just a witness, but not a party, cannot be made to answer interrogatories.

Communicating discovery requests to Defendants: The procedure for getting interrogatories and document production is simple. Just send your interrogatory questions and your requests for production to the lawyer for the prison officials, usually the deputy attorney general. Send separate requests and questions for each defendant. Do not send your discovery requests to the court. The prison officials must respond within 30 days unless the court or the parties agree otherwise. The officials may ask the judge for a "protective order," which blocks some of your questions or requests because they are irrelevant, privileged, or not proportional. They must submit a motion to avoid responding to your requests.

You can use the example on the following page to write interrogatories of your own.

INTERROGATORIES EXAMPLE:

IN THE UNITED STATES DISTRICT COURT FOR

_____x

)	PLAINTIFF'S FIRST SET OF
Name of first plaintiff in the case, et al.,)	INTERROGATORIES TO DEFENDANTS
)	Civil Action No._____
Plaintiff[s],)	
)	
v.)	
Names of first defendant in the case, et al.,)	
)	
Defendant[s].)	

_____x

In accordance with Rule 33 of the Federal Rules of Civil Procedure, Plaintiff requests that Defendant [**insert full name here**] answer the following interrogatories under oath, and that the answers be signed by the person making them and be served on Plaintiff within 30 days of service of these interrogatories.

If you cannot answer the following interrogatories in full after exercising due diligence to secure the information to do so, so state and answer to the extent possible, specifying your inability to answer the remainder and stating whatever information or knowledge you have concerning the unanswered portions.

These interrogatories shall be deemed continuing, so as to require supplemental answers as new and different information materializes.

[**List your questions here…and be creative and as detailed as possible.**]

The fourth discovery tool is **inspection** of tangible things, like clothing or weapons, and a chance to "copy, test, or sample" them. You also have a right to enter property under the defendants' control, such as a prison cell, exercise yard or cafeteria, to examine, measure, and photograph it. Defendants may object to these types of requests as creating a security concern, but these are issues that most likely can be worked out between the parties.

You can use any combination of these techniques at the same time or one after the other. If you have new questions or requests, you can always go back to a defendant for additional discovery.

PRIVILEGE

You may not be able to discover material that is protected by a legal "privilege," such as the attorney-client privilege or work-product privilege. A "privilege" is a rule that protects a certain type of information from discovery. If the prison officials claim information is privileged, they have the burden of identifying the specific privilege at issue and proving that the particular information is in fact protected. A judge may order the privileged information to be "redacted" from the documents provided to you. This means that information covered by any privilege mentioned above will be blacked out. Information that would be considered "confidential" under state law may still have to be disclosed if, after examining it privately ("*in camera*" is the Latin term), the judge decides it is very important for your lawsuit. If the material is confidential, the judge may keep you from showing the information to anyone else or using it for any reason besides your lawsuit.

COMPELLING DISCOVERY

If prison officials fail or refuse to answer questions or requests that are not privileged or covered by a protective order, you may want to submit a motion for an order compelling discovery. Our Chambers Rules require the parties to try to work out discovery disputes on their own before filing a motion, through a process called a "meet and confer." This usually involves a written exchange, meeting in person or by phone, and negotiating with the opposing attorney about the requests and answers. Obviously, this may be very hard to do if you are in prison and have no lawyer. You must write a letter to the defense lawyers setting

out your discovery concerns and ask them to respond or schedule a call with you. If this does not work, explain how you tried to "meet and confer" in your motion.

APPOINTMENT OF COUNSEL

The Constitution provides no right to appointment of counsel in a civil case. Appointment is therefore at the "discretion" of the judge. It will usually only be exercised upon a showing of "exceptional circumstances," which is a very high bar to clear. Generally, when deciding whether to appoint a lawyer for you in a case arising under 42 U.S.C. § 1983, the court will consider:

- How likely are you to succeed on the merits in the case?
- How well can you present your own case?
- How complicated are the legal issues?
- Will expert testimony be needed?
- Can you afford to hire a lawyer on your own?

If the court denies your request, you may make it again if you are successful in defeating a Motion for Summary Judgment.

You can use the example on the following page to request Appointment of Counsel.

- In **Part A**, you can include any facts in this motion that you think will help convince the court that you need a lawyer. For example, you could add that you are in administrative segregation, that your prison doesn't have a law library, or that it takes weeks to get a book. If you have limited formal education, you could state that too.
- In **Part B,** you need to describe the efforts you have made to get a lawyer.

REQUEST FOR APPOINTMENT OF COUNSEL EXAMPLE:

IN THE UNITED STATES DISTRICT COURT FOR

_____x	
)	MOTION FOR
Name of first plaintiff in the case, et al.,)	APPOINTMENT OF COUNSEL
)	Civil Action No._____
Plaintiff[s],)	
)	
v.)	
Names of first defendant in the case, et al)	
)	
Defendant[s])	
_____x	

Pursuant to 28 U.S.C. § 1915(e)(1), Plaintiff moves for an order appointing counsel to represent him/her in this case. In support of this motion, plaintiff states:

[Examples below. Be as detailed as possible.]

[Part A]

1. Plaintiff is unable to afford counsel. He/She has requested leave to proceed *in forma pauperis*.

2. Plaintiff's imprisonment will greatly limit his/her ability to litigate. The issues involved in this case are complex and will require significant research and investigation. Plaintiff has limited access to the law library and limited knowledge of the law.

3. A trial in this case will likely involve conflicting testimony, and counsel would better enable plaintiff to present evidence and cross examine witnesses.

[Part B]

4. Plaintiff has made repeated efforts to obtain a lawyer.

WHEREFORE, plaintiff requests that the court appoint counsel in this case.

Dated: _____

Signed:_____