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# USE OF LONG INTERROGATORIES IN AVIATION CASES

BY NED GOOD†

## I. INTRODUCTION

**E**ACH AIRCRAFT ACCIDENT involves three areas: man, machine and environment. Each may play a contributory or non-contributory part.

In the search for causation, detailed investigation of each of these three areas is absolutely essential. Those who specialize in the search for causation have long recognized the necessity of pedigreeing man, machine and environment.

The National Transportation Safety Board organizes the accident investigation by "groups." These groups are as follows:

- A. The operations group. The operations group is responsible for developing the facts concerning the history of flight. This includes flight planning, dispatching, weight and balance, weather, weather briefing, radio communications, air traffic control, navigation facilities, en route stops and fuel.
- B. The witness group. The witness group is concerned with persons who may have seen or heard some portion of the flight or who may have knowledge concerning the flight.
- C. The structures group. The structures group deals with the airframe and flight controls including structural integrity.
- D. The powerplants group. The powerplants group deals with engines, including their controls, the fuel and oil systems, propellers and propeller controls. Included herein is powerplant failure or malfunction.
- E. The systems group. The systems group deals with the hydraulics, electrical, electronics, radio communications, radio navigation, air conditioning, pressurization, oxygen, ice and rain protection, instrumentation, automatic pilot and fire detection systems.
- F. The maintenance records group. The maintenance records group deals with aircraft maintenance facilities and maintenance records. This includes maintenance history, including inspections and prior malfunctions.
- G. The human factors group. This group deals with the medical and crash injury aspects of the accident. Involved herein is crew incapacitation, psychological aspects and environmental factors which may have affected the crew. Consideration is given to the coroner's report and pathological studies.

International Civil Aviation Organization also recommends exhaustive, detailed analysis of the three cardinal factors: man, machine and environment. The United States Military follows similar procedures in seeking

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the cause of aircraft tragedy. The Air Line Pilots Association also recognizes this approach to investigation.

The National Transportation Safety Board investigates and reports on civilian aviation accidents. Frequently, they spend many thousands of dollars doing so. People may wonder why it is necessary to use extensive discovery in aviation cases when the investigation is available to counsel "in a silver platter."

Experience has taught us that defendants in these aviation cases make objections to the use of these reports and their contents. Unless you discover, you lose!

Section 701(e) of the Federal Aviation Act,<sup>1</sup> purports to preclude the use of the Board's report in any suit or action for damages arising out of such accident. The Government has administratively construed Section 701(e) to prohibit use in tort litigation, either at the discovery or trial level, of the Board's expert's opinions, conclusions, evaluations and recommendations. Pursuant to that interpretation, the Board promulgated a regulation which presently authorizes its employees to testify "only as to facts actually observed by them," but prohibits them from giving "opinion evidence as expert witnesses."<sup>2</sup> Furthermore, it is the Government's position that the employee is not subject to civil subpoena for discovery or for trial and may not testify in any action whatsoever unless an appropriate showing has been made to the Board that the facts desired to be adduced are not reasonably available to the party seeking such evidence *by any other method*, including the use of discovery procedures *against the opposing party*.<sup>3</sup> A request for testimony of a Board employee must be addressed to the general counsel who may approve or deny the request.<sup>4</sup>

There is a great deal of misunderstanding and controversy about these aspects of the law.<sup>5</sup> Even though the aviation industry knows that most aviation accidents are due to carelessness, when it comes to proving the case in court the defense seldom is willing to admit on the record what their clients will concede in private, and consequently plaintiffs are put to their burden of proof. Jury-wise this may require the plaintiff to negate other or intervening causes and trace the chain of evidence.

Verdicts prove that superficial discovery is the sure road to defeat in the jury room. Mere reliance upon *res ipsa loquitur* unfortunately is frequently not enough. Experience demonstrates that all of the discovery tools frequently should be employed.

## II. INTERROGATORIES HAVE SOME DISTINCT ADVANTAGE OVER ORAL DEPOSITIONS

At the 1967 California State Bar Convention, Judge Robert S. Thompson, of the Los Angeles Superior Court, presided over a seminar entitled

<sup>1</sup> Aircraft Accident Investigation Act, 49 U.S.C. § 1441(e) (1958).

<sup>2</sup> 14 C.F.R. § 185 (Supp. 1969).

<sup>3</sup> 14 C.F.R. § 135.4 (Supp. 1968).

<sup>4</sup> 14 C.F.R. § 435.4a (Supp. 1968).

<sup>5</sup> *Lobel v. American Airlines*, 192 F.2d 217 (2d Cir. 1951); *cert. denied*, 352 U.S. 945 (1952); *Berguido v. Eastern Air Lines*, 317 F.2d 628 (3d Cir. 1963); *Ratner v. Arrington*, 111 So. 2d 82 (Fla. Ct. App. 1959).

"Civil Discovery—Tool or Weapon."<sup>6</sup> In discussing the choice and use of discovery tools, his panel had the following to say about the advantages of using written interrogatories:

"II. Advantages of Written Interrogatories to Parties.

- A. Often they are a less expensive mode of procedure.
- B. This mode is better adapted to obtaining underlying and detailed facts.
- C. Written interrogatories put a greater responsibility upon the opposing party, since when a business structure as a partnership or corporation is concerned the written interrogatories are addressed to the business structure itself, without the possibility of evasion on the ground that "someone else in the organization may know these answers, but I do not." C.C.P. § 2030(a).
- D. A number of sets of written interrogatories may be used (C.C.P. § 2030(b)), whereas usually a side is limited to only one deposition of a particular opposing witness. C.C.P. § 2016(a).
- E. Written interrogatories may form a useful basis for later depositions, and for physical examinations under C.C.P. § 2032(a) which requires a showing of good cause.
- F. Written interrogatories are particularly well suited to obtain information as to the contentions of opposing parties and the underlying facts upon which such contentions are based. On the other hand, even if it were permissible to ask "contention" questions of a deponent in an oral deposition, any answer obtained is weak in nature since given by a layman without the benefit of consultation with his attorney. Whereas the trial court ought to hold a party to the answers elicited concerning contentions and underlying facts in the absence of later revision of these in a manner similar to C.C.P. § 473, a trial court is not apt to hold a deponent who is not a lawyer to his own feeble statement concerning the legal contentions in his case. See *Pember v. Superior Court* (1967), 66 Cal. 2d 601; but see *Pember v. Superior Court* (1966), 50 Cal. Rptr. 24, 240 Cal. App. 2d 888.
- G. Because time is allowed for answering written interrogatories, whereas oral deposition questions must be answer on the spur of the moment, there is more justification for allowing changes to depositions (in fact the deposition is not complete until signed, in the absence of waiver or refusal to sign), than in allowing changes to answers to written interrogatories in which the witness has had ample time to think over his answers. C.C.P. § 2019(e)."

Some additional advantages of interrogatories at this stage of the case include:

1. The answer is more binding on the defendant because it represents the "collective" knowledge of defendant, rather than just the knowledge of the "individual" deponent. This ties the part down more completely.
2. In depositions matters are frequently left open to be answered later. In interrogatories since the witness has more time to reflect on his answers and look up the information if he desires, one tends to get more useful answers and get less "I don't know" or "I don't remember" answers.
3. It is frequently very difficult to get anyone to agree upon deposition

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<sup>6</sup> Judge Robert S. Thompson presided over the Civil Discovery Department of the Los Angeles Superior Court for one year. He is presently an associate justice of the California District Court of Appeals.

dates to suit the convenience of the attorneys and their clients and problems frequently arise in this connection. Interrogatories can be answered by the adverse party at home, or at the office, and at times when most convenient for the answering party with less interruption of his personal affairs.

4. Answers that might be time consuming to get can be secured without every attorney having to wait while the deponent thinks about his answers.

### III. THE FACT THAT INTERROGATORIES ARE LONG IS NOT A GROUND FOR OBJECTION

There is no quota system on asking intelligent questions regardless of whether the procedure used is the oral deposition or the written interrogatory. It doesn't make any difference how many questions you ask if they are relevant. If length alone were the determining factor, each case might require court definition of what is "long." No trial lawyer wants the court to substitute its judgment for that of trial counsel as to how many questions should be asked on a particular subject. Who would want the court to have the burden of arbitrarily selecting a number and saying that all below this number are proper and all in excess improper.

Actual experience demonstrates that most cases require a great deal of work, and trial judges all too frequently see inadequate preparation and the disastrous consequences. The consequences of inadequate discovery are severe. They include:

- A. Total loss of the case.
- B. Securing less than an adequate recovery.
- C. Causing many cases to go to trial because the parties do not have enough information to settle, or one side feels there is no reason to settle because the other side hasn't discovered the liability or the defense yet. This wastes time and money of everyone, including courts, jurors, witnesses and parties, and results in clogging the court calendar.
- D. Trials take much longer than necessary because the litigants are on a fishing expedition and poorly prepared.
- E. The Bench and Bar get criticized.

The length of and the number of depositions is not limited. In fact, when a deposition is set on notice, the notice usually states "and continued from day to day until completed."

Long depositions are frequently taken. We have participated in tort cases that require the taking of many depositions involving thousands of pages of testimony. Some of these depositions took several days per single deponent.

The statutes and case law do not limit the number of interrogatories which may be included *within* a single set. Multiple sets of interrogatories are also permissible. This is because it is recognized that the number of interrogatories which is appropriate will vary with the nature of the matter. In tort cases, attorneys representing plaintiff and defendant frequently ask page after page of interrogatories with the questions being broken down into many sub-parts.

#### IV. THE FACT THAT INTERROGATORIES ARE PRINTED IS NOT A GROUND FOR OBJECTION

The propriety of the questions should be determined by their content and not by whether they are printed or typed or by quill pen. In this age of mechanization law office practices are being streamlined. Time-saving devices and systems are being utilized more and more. Law office management courses and reputable legal journals suggest liberal use of the printed form, the rubber stamp, computers, and other labor-saving ideas. Records are microfilmed, Xerox copies are vogue, and "robot" typewriters are popular. Lawyers are not compelled to practice office inefficiency while the rest of the business world is taking advantage of time and labor-saving opportunities. The discovery statutes do not prohibit the printed form.

Printed or form interrogatories in personal injury cases have been used by almost every busy defense firm. Plaintiffs' offices use them too. A list of the law offices that have used printed or form interrogatories in personal injury cases includes just about every well known office.

If the content of the question is proper, why should a law office be compelled to practice by the antiquated methods of typing each question out when the printed question is equally legible. Lawyers use printed leases, printed deeds, printed mortgages, printed bills of sale, etc. The printed interrogatory should not be treated as a stepchild.

In recognition of time-saving devices, IBM has promoted for use in law offices and courts the automatic typewriter. Its usage is based upon the theory that the work can and should be mechanized so that ideas can be recorded and reused.

The courts also recognize the wisdom and economy of the printed form. Jury instructions, Subpoena and Subpoena Duces Tecum concerning deposition and trial are just a few illustrations. Think of how horrible it would be if each of these forms had to be typed out specially each time they were needed. The rule should be uniform. Either all printed forms, including printed interrogatories, are improper, regardless of whether used by a plaintiff or a defendant, or they are proper. It should be noted that there is no statute or case that states form interrogatories are improper per se.

#### V. INTERROGATORIES—THE STEPCHILD IN THE DISCOVERY SYSTEM

If a lawyer takes a three-day deposition, he is frequently looked upon as a candidate for the Heisman Trophy of discovery. However, if the same lawyer were to announce in his next case that he had his secretary type each question from this earlier deposition and use those questions as written interrogatories some persons would be ready to give him the Harvard Lampon Award. Why should written interrogatories initiate such a visceral response?

Corporate lawyers can use their forms books. Probate lawyers can use their form wills. Real estate lawyers can use their form leases. Contract lawyers can use their standard contracts. But tort lawyers are criticized if

they preserve and use their past efforts. Why should the tort lawyer be discriminated against, and his attempts at efficiency be condemned?

Long interrogatories seem to initiate a reflex response of "boilerplate" and quality assassination by labelling. Such intolerance and prejudice is unjust. What is so wrong with interrogatories? Are they disliked because they are more efficient? Is it because they have their clients the costs of court reporter's transcripts? Is it because attorneys do not charge their clients the same fee for answering interrogatories as they do for attending depositions? Is it because well-drawn interrogatories smoke out the truth in a lawsuit? Is it because a well organized law office can preserve its past efforts in similar cases and use their work product over and over again in similar cases?

Sensibly drawn and used, interrogatories present an excellent vehicle for storage, retrieval and re-usage of past legal efforts. For those offices who know how to form their interrogatories to suit categories of cases, they save their clients several thousands of dollars. They should be given a hero's medal rather than a court martial.

Why should the proponent of written interrogatories have to spend from 9:00 a.m. to 5:00 p.m. day after day in deposition in order to get information which he can secure by the more efficient, time-saving, inexpensive method of written interrogatories? If the information is necessary for the case and can be secured by multiple depositions or by a single set of written interrogatories, why should the seeker of the information be forced to adopt as the discovery vehicle to obtain this information the deposition route merely because his adversary prefers it? Shouldn't the trial lawyer be skipper of his own ship?

Eliminating the camouflage, what is the real objection to interrogatories? The biggest objection to well-drawn interrogatories is that they force the answering party to disgorge all relevant information. They help remove from the lawsuit that "sport" known as hide-'n-seek the truth. They help take the game out of the lawsuit. Surprise is eliminated. The nitty gritty is smoked out quickly and the wheat eliminated from the chaff. The case is set up for summary judgment. Most importantly, all of this is done in an orderly, systematic, inexpensive manner without tying up counsel for days and days. The only other "real" objection to interrogatories is that they force the opponent to do some work. In some circles perhaps this is considered as unsportsmanlike conduct. But there is no substitute for success—the formula is just plain old hard work and lots of preparation!

In oral depositions the propounder of a question has great latitude in what he may ask and does not have to prove good cause for the asking of the questions. Even though the discovery rules do not require that the propounder of a written interrogatory demonstrate good cause as a condition precedent to the asking of a question, the attitude of some is to put the burden of persuasion on the proponent of the question rather than upon the resister.

Let us stop treating the interrogatory as a stepchild. Let us stop criti-

cizing interrogatories just because they are printed. Let us stop getting emotional about long interrogatories. If as much effort was used to answer the interrogatories as is used to fight them, the court and the litigants would be better off.

#### VI. DEPOSITIONS DO NOT COME CHEAP

In aviation cases when depositions are taken, frequently the parties must incur substantial costs for transportation, food and lodging of their counsel, in addition to appreciable court reporter's fees. Court reporter's charges for a full day's transcript, may run approximately \$250.00. Most plaintiffs cannot afford to pay out several thousands of dollars for deposition and related discovery costs, plus costs of expert witnesses and trial costs. When multiple counsel are involved in a case the costs multiply.

The public would be just in criticizing the legal profession for using an expensive discovery procedure when the same thing can be accomplished by a fraction of the costs through written interrogatories. Disfavor and dis-use of the interrogatory system puts an unfair economic burden upon the plaintiff in tort litigation.

#### VII. DEFENDANTS IN AVIATION CASES HAVE IMPORTANT ADVANTAGES OVER THE PLAINTIFF

The defendant is usually the aviation business. Its employees include pilots, maintenance personnel and other technically trained people in aviation. Its insurance carrier is experienced in aircraft accident litigation and has experts in its employ available for the preparation of the defense of these cases and has an arsenal of experts who can be regularly called upon to testify.

Usually, it is the defendant and their insurance carrier that are among the first to be notified of an accident, among the first to get to the scene, get the first chance to investigate, gather evidence and contact witnesses. After these aviation tragedies, the National Transportation Safety Board (which is a part of the United States Department of Transportation and is charged with the responsibility for investigating these accidents) conducts the investigation. The NTSB may also hold a public hearing. It should be noted that the defendants are usually invited by the NTSB to participate with the NTSB during these post accident investigations and frequently they are also invited to participate with the NTSB in formulating conclusions as to the probable cause of the accident. The defendants are permitted to be represented at these hearings by counsel and their counsel may ask questions of the witnesses.

By contrast, generally the accident victim or his heirs seldom have aviation expertise. He seldom retains counsel promptly enough. Rarely, if ever, is plaintiff permitted to participate in the investigation or hearings. Even if he was fortunate enough to select counsel before such Board hearings, his counsel are prohibited from participating in those hearings. They cannot even ask one question.

By the time plaintiff's lawyer gets into the case the trail is usually cold. People with first hand knowledge may be dead or gone and plaintiff's council of necessity is frequently forced to rely on circumstantial evidence.

Defendants have the talent, experience, money and first opportunity to investigate, talk to witnesses, gather evidence and prepare their defense while plaintiff does not have any of these advantages, and usually, while plaintiff's are still mourning the loss of a loved one. There is probably no class of cases in which discovery is so important as aviation cases because in no other class of cases is the proof so largely under the control of, or accessible to, the defendant, and so completely unknown to the accident victim or his heirs.

Aviation cases require extensive discovery which includes very detailed interrogatories and many depositions of defendant's personnel. The need to engage in a fully intergraded discovery effort and in part, the need to prove their case out of the mouths of the defendants cannot be overstressed.

#### VIII. MEANINGFUL DISCOVERY REQUIRES USING INTERROGATORIES EARLY

In an aviation case the plaintiff's attorney frequently will not get full value from his depositions unless he has first submitted complete and comprehensive interrogatories covering the whole field of the inquiry and has used motions to inspect records and requests for admissions. Having done all this, he knows whom he wants to depose and what he wants to ask. He is prepared then to cross-examine quite thoroughly on the basis of the information that his interrogatories and his motion for production and requests for admissions have given him.

Interrogatories will help narrow the issues and simplify the proof required. A well prepared case will save days, if not weeks, of court time and will contribute materially to a just result economically secured.

The information sought by comprehensive intrrogatories is of a type and nature that defense counsel knows or should know if they are going to give their client proper representation. Plaintiff's counsel needs this information and should not be penalized for being industrious.

#### IX. SCOPE OF INTERROGATORIES AND BURDEN OF PROOF ON OBPECTIONS

A wise trial judge once said "fundamentals win lawsuits." One should never forget this admonition, and with that in mind, let us review some fundamentals regarding discovery.

The law provides that depositions *and* interrogatories may be used for discovery purposes or as evidence, or for both.

Generally, the scope of discovery includes inquiry into anything relevant to the subject matter of the action, or reasonably calculated to lead to the discovery of admissible evidence or helpful to trial preparation. It includes inquiry into matters pertaining to (1) the claim or defense; (2) the existence, description, nature, custody, condition and location of any books,

documents or other tangible things; and (3) the identity and location of persons having knowledge of relevant facts. Irrelevancy means the answer has little or no practical benefit to the parties seeking the disclosure.

With reference to motions for protective orders there is a vast difference between "burden" and "oppression." Burden alone is not a ground for objection.<sup>7</sup> Some burden is inherent in all the demands for discovery. Burden implies a large quantum of work and expense for the interrogated party. Oppression connotes either an intent to harass the addressee of the interrogatories or an attempt to make the addressee dredge up a large quantity of information of questionable or very speculative relevance or probative value.

The propounder of an interrogatory has the burden of going down to the courthouse. His questions are presumed to be valid and the statutes do not require any showing of good cause for the filing and service of interrogatories.<sup>8</sup>

The discovery statutes are to be construed liberally in favor of disclosure. Even if the court finds that in a given case the interrogatories are burdensome, the court is not at liberty to make blanket orders barring disclosure in total when only part of the interrogatories are burdensome.<sup>9</sup>

The objecting party has the burden of showing facts to prove the interrogatories are improper. In this connection, it might be helpful to review some of the grounds for objecting to interrogatories. They include such things as:

1. Information available to propounder.
2. Fishing expedition. This is a recognized and proper purpose of discovery. Frequently, the plaintiff doesn't know precisely what he seeks, so he fishes for evidence that might prove helpful.<sup>10</sup>
3. Interrogatories calling for the existence and location of documents and their custodian.
4. Questions already answered in deposition.<sup>11</sup>
5. Answer known to the propounder.<sup>12</sup> A party is entitled to obtain an admission of the truth of the facts through the use of interrogatories.

If these same questions were asked by way of oral deposition, presumably no objection would be made on the grounds of length or relevancy. How is it that attorneys can sit in smoke-filled rooms for days at a time taking depositions without anyone claiming the protective order, and yet, if you asked the attorney to sit in his office and relax and help his client answer written interrogatories that very same defense lawyer may claim the questions are now burdensome.

Discovery processes do not stand in isolation. When one is used the others are not to be ignored. A party may use interrogatories, follow them

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<sup>7</sup> West Pico Furniture Co. v. Superior Court, 56 Cal. 2d 407, 15 Cal. Rptr. 119, 364 P.2d 295 (1961).

<sup>8</sup> Coy v. Superior Court, 58 Cal. 2d 210, 23 Cal. Rptr. 393, 373 P.2d 471 (1962); Kramer v. Superior Court, 237 Cal. App. 2d 753, 47 Cal. Rptr. 317 (1965).

<sup>9</sup> Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266 (1961).

<sup>10</sup> *Id.* at 308.

<sup>11</sup> Coy v. Superior Court, 58 Cal. 2d 210, 23 Cal. Rptr. 393, 373 P.2d 457 (1962).

<sup>12</sup> Singer v. Superior Court, 54 Cal. 2d 318, 5 Cal. Rptr. 697, 353 P.2d 305 (1960).

with inspection, depositions, requests for admissions, and summary judgment. He may also use two or more of these procedures simultaneously. DISCOVERY IS A MANY SPLENDORED THING.

The discovery law does not give to the defendant the power to dictate to the plaintiff how and in what manner the plaintiff shall prepare his case.

X. COUNSEL SHOULD NOT BE REQUIRED TO INSPECT RECORDS "BEFORE,  
OR IN LIEU OF" SECURING TESTIMONY BY INTERROGATORIES  
OR BY DEPOSITION

Some of the limitations of inspection of records are:

1. The most you get is the information the entrant wrote down. You don't get the collective knowledge of the defendants, or his agents, under oath, when you inspect records. Seeing the records furnishes no testimonial assurance that the records contain the same information, and all the information, which would be received in answers to interrogatories.
2. You don't get all the entrant's personal or secondary knowledge since most people don't write down everything they know. Records are usually an incomplete source of knowledge.
3. The entrant may not have had any personal knowledge of what he wrote. The records may be second, third, or fourth hand hearsay, opinions and conclusions, and conclusions without competency or foundation. Further, inspection doesn't disclose which part is which.
4. Frequently, the records don't indicate "who" the entrant of each item was, nor "who" was the source of the recorded information. You don't discover the competency, accuracy or truthfulness of the source.
5. Since the records were not made under oath, its contents are not tested by the sanctity of the oath, and not subject to any of the penalties for perjury, or the guarantees of correctness or completeness.
6. Records frequently are in longhand, with abbreviations and scribblings that are hard to read and decipher. Answers to interrogatories are typed and self-explanatory.
7. There are many facts which are discoverable (by interrogatories, or oral deposition) but which are not ascertainable by merely looking at the records. Everything that a party or his employee knows is not automatically reduced to written form. Important information frequently is not in writing. Mere inspection of records is inadequate.
8. Answers to interrogatories commit the part to sworn testimony as of the date of answering and explaining away subsequent changes in testimony is difficult. Inspection of records doesn't bind or commit the defendant to any particular answer under oath. He can easily disavow or explain away the information in the records.
9. Suppose you want to read a particular group of "facts" to the jury during the trial. Its easy to do this if you have specific answers to interrogatories. A trial lawyer should commit his opponent to specific answers in discovery to eliminate trial surprise and know what his adversary's responses are going to be *before* the trial. Looking at records won't accomplish this, but answers to interrogatories will.
10. If we took oral depositions, it would not be sufficient for the deponent to refuse to answer and tell us to "go see the records." There is also case law to the effect that it is not an adequate answer to an interrogatory to

make reference to a deposition given in the same case.<sup>13</sup> There is less reason to force inspection of records in lieu of or before sworn answers to interrogatories. Interrogatories should not be the disfavored stepchild. They should receive the same legal respects as depositions do.

11. Answers to interrogatories frequently help explain and aid in interpreting the records.
12. Past experience has demonstrated that the answers to these interrogatories cannot adequately be derived from inspection of business records.
13. Records usually do not reveal names of all witnesses, whereas answers to interrogatories must. The sanctions for failure to list all witnesses in answers to interrogatories may include striking the answer totally or partially, or barring the testimony of the witness at trial. Since records don't testify, this important safeguard is lost without interrogatories.
14. Some discretion is given to the adverse party to select the records which in his opinion are pertinent, or which he wants to allow us to see or not see, without testimonial assurance these are all the records, and without testimonial assurance that the answers to the interrogatories would be identical with what appears in the records.

#### XI. IT TAKES SOME AVIATION EXPERTISE TO DETERMINE RELEVANCY

It takes a certain amount of expertise in aviation in order to understand the relevancy of many aviation interrogatories. Merely because the layman, or the non-specialist, does not understand the relevancy, does not mean that the question is irrelevant. The propounder of the question should not be required to establish relevancy and good cause for each and every question asked as a condition precedent to asking the question. Otherwise, an unjust burden would be imposed upon the propounder, and his opponent might be cued how to respond. No lawyer should be required to telegraph his punch.

Examples of matters that may seem irrelevant to the untrained eye, but which are actually important, will be illustrated.

1. The question of how many coats of paint were on an elevator section of the aircraft may seem irrelevant to the issue of liability, but an aeronautical engineer knows that under certain circumstances the mere weight of some extra coats of paint may induce a flutter imbalance causing the aircraft to go out of control.
2. Weight and balance. It may be unsafe to carry four passengers and baggage and fuel in an aircraft having four passenger seats. The aircraft may be over gross permissible weight or its center of gravity may be disturbed. In the trade we call this outside the "envelope."
3. Temperature at take-off may demonstrate a density altitude problem and explain sluggish liftoff and stall.
4. Full fuel tanks may cause the aircraft to be over gross. Unequal fuel consumption may create a fuel imbalance condition.
5. When the pilot last flew and the number of take-offs and landings he had within the last 90 days may demonstrate a Federal Air Regulation (generally abbreviated as FAR violation).
6. The equipment on board the aircraft may demonstrate there is an FAR violation for either VFR or IFR weather.
7. Finding out that a particular employee connected with a defendant had an amputated finger and used a tweezers as a work tool during the over-

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<sup>13</sup> *Coy v. Superior Court*, 58 Cal. 2d 210, 23 Cal. Rptr. 393, 373 P.2d 457 (1962).

- haul of a tail rudder servo explained the cause of a cut or frayed wire and the cause of a commercial airline disaster.<sup>14</sup>
8. A history of prior aircraft usage, i.e., hard landings, precipitated conditions producing a later wing flutter and failure, resulting in two commercial aircraft disasters.<sup>15</sup>
  9. Pilot's training and experience in the use of flaps in high sink rate situations shed light on the 727 crashes.<sup>16</sup>
  10. The pilot's prior health history, a heart condition, may show an FAR violation and pilot incapacitation as the cause of the accident.<sup>17</sup>
  11. In *Michelmores, et al. v. United States*,<sup>18</sup> tried in 1968, the Government put evidence that the pilot in command had a sore big toe, pain on intercourse, etc., which they said he failed to report on his last FAA medical exam to support their contention of negligence on the part of plaintiff's decedent. This case involved a Beech Baron crash that killed three people. Also involved in the case were questions as to aircraft equipment, i.e., a spill or no spill gyro, a two or three axis auto-pilot, existence of DME, etc.

## XII. PRE-TRIAL DISCOVERY

In 1970 the California supreme court said a court cannot always tell at the discovery level what information will be relevant at trial time so the court should be liberal in allowing pretrial discovery.

In *Pacific Tel. & Tel. Co. v. Superior Court*,<sup>19</sup> the supreme court made the following comments:

In addition, because all issues and arguments that come to light at trial often cannot be ascertained at a time when discovery is sought, courts may appropriately give the applicants substantial leeway, (1) . . . See 1 DeMeo, California Deposition and Discovery Practice, paragraph 2.26, pages 83-84: 'Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy. . . .'

A decision of relevance for purposes of discovery is in no sense a determination of relevance for purposes of trial.

In sum, the relevance of the subject matter standard must be reasonably applied; in accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should generally be resolved in favor of permitting discovery . . . . Given this very liberal and flexible standard of relevancy, a party attempting to show that a court abused its discretion in finding material relevant for purposes of discovery bears an extremely heavy burden. An appellate court cannot reverse a trial court's grant of discovery under a 'relevancy' attack unless it concludes that the answers sought by a given line of questioning cannot as a reasonable *possibility* lead to the discovery of admissible evidence or be helpful in preparation for trial. [Emphasis added.].

When disputed facts provide a basis for the exercise of discretion, those facts should be liberally construed in favor of discovery, rather than in

<sup>14</sup> Grabow v. Bendix, Boeing, et al, Civil No. 791, 794 (Los Angeles Sup. Ct., filed \_\_\_\_).

<sup>15</sup> See the Lockheed Electra crashes.

<sup>16</sup> United Air Lines 727 crash at Salt Lake City Airport, November, 1965.

<sup>17</sup> American Flyers cases.

<sup>18</sup> Michelmores, et al v. United States, 299 F. Supp. 1116 (S.D. Cal. 1969).

<sup>19</sup> 2 Cal. 3d 161, \_\_\_\_ P.2d \_\_\_\_ (1970).

the most limited and restrictive manner possible. In *Greyhound Corp. v. Superior Court*<sup>20</sup> the court said:

A liberal application of the relevancy criterion should also contribute to the efficiency of the entire discovery process. The draftsmen of our statutory reform of discovery contemplated that, except in a few designated areas, the discovery procedure would operate extrajudicially and that generally a deponent will not refuse to answer questions relating to unprivileged matter, on the ground of irrelevancy, but will waive such objections for trial. . . .

The efficacy of this extrajudicial operation can be significantly undermined if the party who is the subject of discovery continually refuses to answer questions on the ground of irrelevancy; each refusal requires the party seeking discovery to go to the courts for aid and thus works a significant delay in the discovery process. A strict, rigid interpretation of the relevancy requirement of section 2016, subdivision (b), would probably lead recalcitrant parties to attempt to construct an 'irrelevancy' barrier to discovery more frequently; on the other hand, a more fluent, liberal interpretation may discourage resort to this kind of delaying tactic.

Although one of the purposes of discovery is to permit the parties to learn the issues on which they are in agreement and thereby simplify the trial . . . one party, by conceding some matters, cannot unilaterally close the door to all discovery concerning that concession . . . the relevancy [of the subject matter of the action] is to be determined . . . by the *potential* as well as actual issues in this case. [Emphasis added.]

. . . frequently, as in the instant case, the nature of the facts that will be relevant and admissible at trial cannot accurately be determined at the pre-trial stage of application for discovery . . . in any case, whether the defense is a valid one or not, the parties are entitled to undertake discovery with reference to the matters *potentially* involved. [Emphasis added.]

That the answers to such questions may not prove helpful and may not uncover admissible evidence does not preclude a party from posing them. (See *Morris Suttsaft Foundation v. Superior Court*, *supra*, 245 Cal. App. 2d 403, 423.)

Since the discoverability of information does not depend on its admissibility at trial, doubts as to the appropriateness of a given line of inquiry, in view of the liberal policies underlying the discovery statutes, should generally be resolved in favor of permitting discovery . . . .

In the instant case, the petition attacking the granting of discovery does not rest on the violation of a privilege or a constitutionally protected interest, but relies solely on the asserted 'irrelevancy' of the questions approved by the trial court. Section 2016, subdivision (b), does expressly require that the information sought by deposition must be relevant to the subject matter of litigation, and we recognize, of course, that under the approach approved in *West Pico* some deponents will be compelled to disclose information which an appellate court might conclude was not 'relevant to the subject matter' of the litigation even under the applicable liberal standards. Nevertheless, the burden on the deponent of disclosing matter which is not privileged but only irrelevant to a particular action will generally not be too onerous; we believe he may be required to absorb this burden if the discovery process is to achieve its purposes of improving the efficiency and integrity of the judicial process.

### XIII. HOW TO PREPARE THE INTERROGATORIES

In order to cover adequately the necessary areas of discovery, the first set of interrogatories addressed to the defendants will generally require

<sup>20</sup> 56 Cal. 2d 355, 383, 15 Cal. Rptr. 90, 364 P.2d 266 (1961).

approximately 100 pages. This is true regardless of whether the defendant is an air carrier, or a private operator. The number and scope of additional sets of interrogatories will be governed by the type of accident involved, and by the probable causes and probable defenses revealed by the answers to this first set of interrogatories.

We have found it helpful in organization and modification of the interrogatories to use the Dewey Decimal System for numbering. The interrogatories should be divided into categories, with each category covering important areas of inquiry. Then, as additional areas of coverage become necessary, they can be given the next consecutive number the appropriate section headings within which they fall.

We use interrogatories 0.0 through 99.0 to ascertain facts relevant to all aircraft accident cases. They are organized to follow the conventional method of investigation of aircraft accidents as taught in the basic aircraft accident investigation course at the University of Southern California Aerospace Safety Division and as used by the National Transportation Safety Board, the Federal Aviation Administration and the Armed Forces. By way of illustration, reference is made to Air Force Regulations 127-4 entitled "Investigating and Reporting USAF Accidents/Incidents" and to the International Civil Aviation Organization "Manual of Aircraft Accident Investigation." This basic approach recognizes that there are three categories of aircraft accident causation, namely (1) the machine; (2) the man; and (3) the media. Each of these categories of causation must be thoroughly investigated to determine the cause or causes of an aircraft accident and each is explored in detail in the written interrogatories.

Interrogatories 0.0 through 99.0 are divided into five sections as follows:

- 0.0 - 0.9 Deals with definitions and is declaratory rather than interrogatory. It is designed to avoid misunderstandings in discovery and at trial.
- 1.0 - 19.0 Deals with introductory matters and is applicable to every kind of tort case.
- 20.0 - 39.0 Deals with the machine, i.e. the material factors contributing or possibly contributing to an aircraft accident.
- 40.0 - 59.0 Deals with the man, i.e., the human factors in aircraft accident causation.
- 60.0 - 79.0 Deals with the media or the environmental factors such as weather, airport, and air traffic facilities.
- 80.0 - 99.0 Deals with flight history and accident facts.

#### XIV. THE DOCTRINE OF "EVASIVE COMPLIANCE" AND ENFORCEMENT OF DISCOVERY

There is a growing trend among certain segments of the Bar to be intentionally evasive in answering interrogatories. They recognize the substantial work load of lawyer and secretary to prepare a motion to compel a comprehensive set of interrogatories which have been inadequately answered, and hope by this repeated maneuver to discourage many lawyers from

making such a motion. If answers are inadequate, discovery is frustrated. If the motion is made (and it should be made every time) it obviously imposes a heavy work burden, not only on the lawyer for the moving party, but also upon the court who must hear these motions.

If the court is required to arbitrate the matter and resolve the dispute, the court should give consideration to awarding costs to the party whose position was "without substantial justification." This is not to say that every person who loses, regardless of whether he is the moving or resisting party, should pay costs. Even where the law has been clearly defined in the past, if an attorney in good faith attempts to have a re-evaluation of an old principle of law and makes a good faith effort to document his position, he should not be penalized for that effort by the imposition of costs. Otherwise, the law would be encouraged to be stagnant. However, there is a clear distinction between what I have just referred to and the situation where the moving or resisting party, out of recalcitrance or a desire to make discovery so difficult to discourage the opposition, puts up a bogus opposition. This should be discouraged at every opportunity, and, unfortunately, up to now most courts have been timid about imposing costs in even flagrant situations.

There is ample statutory and case authority for the imposition of sanctions where the party's position is without substantial justification. Utilization of these existing principles could have a real salutary effect. Well drafted interrogatories are worthless unless they are fully and completely answered. If you don't receive proper answers, file your motion!