

Lies, Coaching, and "I Don't Remember"

Handle defiant deponents and uncooperative attorneys with these innovative discovery tactics and weapons

Use Ashley Lipson's **Guerrilla Discovery** to strike and parry quickly and painfully during your next discovery confrontation. This battle-proven, 650-page tactician's guide offers dozens of creative forms, checklists, arguments, and strategies. For example:

Initial Steps

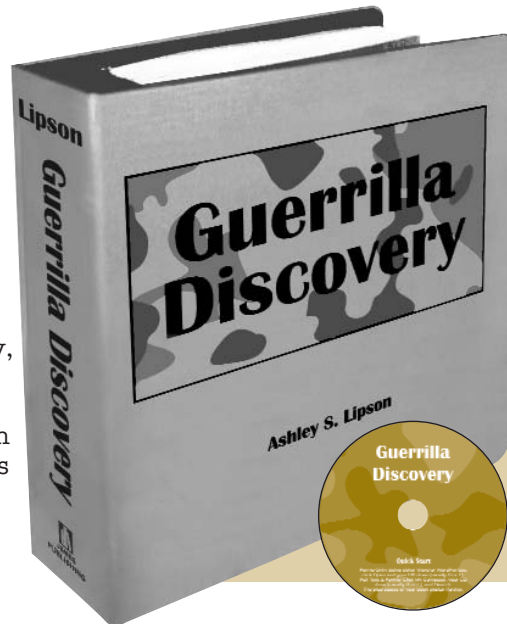
- ★ "Getting the truth out of your own client can be difficult. I have found a trick that always works. After your client has told you his side of the story, look him in the eye and say, 'I believe everything you told me. But in order to be ready for the enemy, I need you to tell me something else. When that #!\$?&! comes into court, what...?' The truth is sure to follow this question." §1.51
- ★ "Is It Discoverable?" annotated checklist. Here are fast, direct, and detailed answers to the most common discovery questions. Includes "Six Degrees of Discoverability" quick-reference chart. §2.10

Requests for Admissions

- ★ "Countless times practitioners waltz into court, dumb and happy because they have under their arms papers labeled 'business records,' as if those papers were self-authenticating and self-admitting. They are not! This blissful ignorance, however, is counterbalanced by attorneys on the other side who, upon hearing the magic words 'business records,' lay down and assume that there are no defenses to admissibility. Both positions are incorrect." §5.34
- ★ 23 requests for admission that are specifically designed to solve document admissibility problems ignored by discovery rules and universally omitted by forms books and treatises. §5.34

Interrogatories

- ★ "A well-drafted set of interrogatories should never receive fast answers. On the contrary, you know you have done your job when the enemy is forced to duck, weave, squirm and refuse. Take the greatest pride in questions that simply cannot be answered by the enemy." Dozens of artfully-crafted, precisely-focused, and complete sets of interrogatories are provided. They establish elements, identify and locate evidence, attack pleadings, and assail experts. Chapter 6



This \$99 book and its free CD are designed to help you efficiently and with less aggravation get more from your discovery efforts:

- ★ Firmly establish your allegations
- ★ Learn of additional counts or causes of action
- ★ Discover and weaken the enemy's defenses
- ★ Quickly eliminate fictitious and boilerplate defenses
- ★ Obtain concessions and admissions
- ★ Coerce settlement

- ★ How to mix boilerplate and specific facts to create effective objections, with checklist of objections. §6.65

Depositions

- ★ Tricks for catching liars, showing bias, not accepting evasive answers (including "I don't remember"), establishing a range for quantitative information, and generally handling difficult deponents. §10.52
- ★ How to counter verbal and nonverbal coaching, coaching off the record, and obnoxious objections. §10.53

Shields

- ★ Here is the dream responsive pleading ... a Motion for Protective Order that contains every possible challenge to every type of discovery request. Form 12.1
- ★ Before responding, review these 12 grounds for objecting to discovery requests. Then check the lists of objections specific to each discovery device. §12.30
- ★ 16 objections to physical examinations. §9.54

And much more: implementing and countering enforcement methods, how to expose burdensome and abusive tactics, checklist for strategic non-compliance, shifting costs and burdens to the enemy, etc.

Sample pages, list of forms, table of contents, and more inside...

[3] Net Worth

Notably, a defendant's net worth is not relevant to his or her cause of action; such information would therefore be inadmissible and outside the scope of discovery.

[4] Impeachable Conduct or Positions

It is a common discovery related mistake for an attorney to assume that a party is going to lie with respect to a given issue and then fail to pursue it for that reason.

66-37 Enemy Expert Information

In order to pore holes in the enemy's case, you may have to produce an expert. Indeed, courts are particularly vulnerable thanks to the landmark Daubert v. Merrell Dow and its successors.

abuse of discretion?⁷⁵ The term "scientific" include technical knowledge?⁷⁶ Knows out an expert at Daubert hearing may cause the opposition's entire case to fold.

Attacking an expert is often a three-step process to follow:

- 1. First, obtain those pre-trial disclosures if you may be called to without asking.
2. Second, in preparation for the Daubert hearing, submit interrogatories designed to fill in the cracks left by the expert's report.
3. Third, depose the expert for the purpose of attacking his or her qualifications, scientific theories and methodology.

After examining the information provided pursuant to FRCP 26(a)(2)(B) or its state counterpart, the following interrogatories directed to the expert are suggested:

- 1. Identify and define the specific field and opposing expert.
2. Describe all of the qualifications you have in your expertise as it relates to the following information specifically and in detail:
A. Describe how your particular expertise is relevant to the factual issues presented in this litigation.
B. What factual assumptions are you making in your expertise and theories upon?
3. Describe all of the qualifications you have in your expertise. Include each of the following items that apply: EDUCATION,

training, awards, certifications, experience, speeches, lectures and seminars, professional societies, publications including books and contributions to books, articles, and treatises, advisory committees, teaching assignments and professorships, occupations, consultancies, research and research grants.

3. Have you ever been retained as an expert in a case and then failed to qualify as an expert during the course of the proceedings? If your answer is anything other than "unqualified," then for each time that you failed to qualify, please set forth details of your non-qualification including, but not limited to: the name, address of the court and case number of the action, and a summary of the reasons why you failed to qualify.

4. Have you ever been retained as an expert in an action wherein an opinion of yours was excluded? If your answer is anything other than "unqualified," then for each excluded opinion, please set forth details of the exclusion, including, but not limited to:

- A. The name, address of the court and case number of the action, the underlying facts upon which you relied, your opinion, and the grounds upon which it was excluded.
B. Whether or not there was a Daubert hearing (or Daubert challenge). If so, state the ruling.

5. On how many previous occasions, have you ever provided testimony by way of deposition, interrogatories, affidavits, or in court or before any administrative body or tribunal? If your answer is anything other than an unqualified "Zero," then for each time that you provided such testimony during the four preceding years,⁷⁷ please set forth the following information specifically and in detail:

- A. The case title, address of the court, the names and addresses of counsel involved, and the date or dates that you provided the testimony.
B. The type or medium of your testimony (i.e., live in open court, by deposition, affidavit, etc.).

C. State whether or not you qualified as an expert. Also include a brief statement as to the nature of the case, the facts upon which your opinions were based, the opinions that you expressed, and which opinions were included and which were excluded.

6. For all the cases for which you have ever been retained, how many were on behalf of a plaintiff or plaintiffs and how many were on behalf of a defendant or defendants?

7. With respect to your opinion and the theory and methodology upon which it is based, please state the following:⁷⁸

A. Has the methodology or theory been tested? If so, please provide detailed information indicating the individuals or entities that conducted the tests, the number of times it was tested, when the tests occurred, where the tests occurred, and the circumstances surrounding the testing. Also provide statistical information pertaining to the control groups that were subjected to the testing.

B. Has the methodology or theory been subjected to peer review and publication in academic and professional journals?

i. If not, please state why not? Also, provide all unsuccessful efforts to publish, of which you are aware; in this regard, provide the name of the journal or periodical, the name of the author, the date of submission, and the date of rejection.

ii. If, however, the methodology or theory has been published, please state, for each publication, the title, name of the publication, date, author and a summary of the results or conclusions or any review.

C. What is the known or potential rate of error? Please provide supporting information. Also, indicate those safeguards and procedures that maximize the rate of error and those that minimize the rate of error.

D. Has the methodology or theory been generally accepted in the relevant scientific community?

Strategically-annotated forms.

Guerrilla Discovery mixes battlefield-proven tactical advice with discovery works documents and deposition checklists that artfully implement the suggestions. For example, these interrogatories provide Stage 2 of a precision attack on the opposition's expert.

105 Forms

Weapon Selection

Report Outlining Discovery Plan, Combined Discovery Request (Including Requests for Admissions, Interrogatories, and Notices for Production)

Requests for Admissions

Requests for Admissions, Response, Initial Request Letters (Requiring Respondent to Research Document and Conduct Investigation), Motion in Limine to Preclude the Introduction of Evidence Contradicting Respondent's Admissions

Notices for Production

Notice for Production of Documents, Responses (Documents Attached), (Documents Located Elsewhere), (Objections), Motion to Compel Production

Notices for Inspection

Notice for Inspection of Property, Notice for Inspection and Examination of Real Property, Notice for Inspection and Examination of Personal Property, Responses (Acquiescence), (Objections), Motion to Permit Inspection

Notices of Physical and Mental Examinations

Notice of Physical and Mental Examination, Response to Notice for Physical and Mental Examination, Motion to Compel Physical/Mental Examination

Depositions

Notice of Deposition, Petition to Allow Deposition Prior to Commencement of

Action to Preserve and Perpetuate Testimony, Notice of Deposition (Prior to Commencement), Stipulations of Counsel, Notices of Deposition (Business Entity, Agent Identified), (Agent Unidentified), (To Records Custodian), (Non-Stenographic)

Petition to Allow Deposition Pending Appeal, Motion for Deposition Pending Appeal, Motion for Additional Deposition, Application for Commission, Commission, Combined Discovery Request

Notice of Deposition and Notice for Production of Documents, Objections, Motion to Quash Deposition Subpoena, Motion to Terminate Deposition, Motion for Costs for Failure to Issue Deposition Subpoena, Motion to Suppress Deposition, Set-up Letter (Failure to Attend Depositions), Motion to Compel Deposition, Motion to Compel Deposition Upon Oral Testimony

Motion for Contempt Citation and Sanctions and Dispositive Relief, Response to Set-up Letter (Failure to Attend Depositions), Answer to Motion to Compel Deposition, Answer to Motion for Sanctions and Dispositive Relief

Interrogatories

Plaintiff to Defendant

Contract: Comprehensive Attack on Defenses, Breach of Written Contract, Action on Account Stated, Action Based on Quantum Meruit

Tort: Attack Defense Claims of Contributory Negligence, Comparative Negligence, Third Party Negligence, Third Party Intervention, Assumption of Risk,

Failure to Mitigate, Lack of Respondeat Superior, Preemption, Injuries & Damages: Physical Injuries, Emotional Injuries, Loss of Earnings, Hedonic Injuries, Failure to Mitigate, Collateral Sources

Specific Torts: Assault & Battery, False Arrest or Imprisonment, Defamation, Fraud, Professional Malpractice, Premises Liability, Products Liability

Vehicular Negligence: Rear-end, Traffic Light Intersection, Stop Sign Intersection, Head-on, Pedestrian

Other: Divorce or Separation, Spousal Abuse, Testamentary Challenges,

Identification: Business Entity, Potential Agent, Sole Proprietorship, Joint Venture, General Partnership, Limited Partnership, Limited Liability Company, Corporation

Defendant to Plaintiff

Independent Witness

Responses

Answers, Objections, Produce Business Records in Response

Discovery Enforcement

Letter Requesting Additional Answers, Motions to Compel Answers, Motion to Compel Additional Answers, Motion for Sanctions & Dispositive Relief

Response to Discovery Enforcement

Letter Agreeing to Extension, Response to Motion to Compel Answers, Response to Motion for Sanctions & Dispositive Relief, Defendant's Motion for a Protective Order.

Abbreviated Contents

1. Boot Camp

Client Interrogation, Lay & Expert Assistance, Mandatory Disclosure, Judicially Approved Forms, Attorney Initiated Discovery, The War Begins

2. Strategy & Fast Answers

Universal Orders, The Battle Plan, Pleading Dependent Strategy, Weapon Dependent Strategy, People Dependent Strategy

Is It Discoverable? Immediately Discoverable, Discoverable, Discovery Qualified, Discovery Unlikely, Not Discoverable, Never Discoverable, Every Conceivable Defense

3. Electronic, Digital & Other Media

Preservation & Destruction, Testimonial Evidence, Documentary, Real, Demonstrative

4. Weapon Selection, Attack & Enforcement

Weapons, Range & Scope, Examination of Response, Enforcement, Follow-up

5. Requests for Admission

Strategy, Constructing & Timing Your Attack, Admissions to Target & Capture, Rules, Responding to Requests, Enforcing the Requests

6. Interrogatories

Three Critical Considerations, Tips for Timing Your Attack, Information to Target & Capture, The Rules That You Need, Constructing Your Interrogatories, Responding to Interrogatories, When & How to Object, Enforcing the Requests

7. Notices for Production

Strategy, Tips for Timing Your Attack, Identifying Your Quarry, Rules, Constructing Your Demands, Responding to the Requests, Enforcing Compliance

8. Demands for Inspection

Strategy, Tips for Timing Your Attack, Dealing with Real Evidence, Five Degrees of Inspection, Rules, Constructing Your Demands, Responding to the Requests, Enforcing Compliance

9. Demands for Physical & Mental Examinations

Strategy, Constructing & Timing Your Attack, Targets, Rules, Defenses & Countermeasures, Enforcing Compliance

10. Depositions

Strategy, Parties, Lay Witnesses, Experts, Rules, Client Preparation, The Art of Cross-examination, Dealing with Obnoxious Lawyers, Defending the Deposition, Enforcement

11. Defending & Responding

Strategy & Philosophy, Strategic Compliance, Strategic Non-compliance, Circumvention, Objection, Seeking Protective Orders

12. Defending Discovery's Limits

Threshold Defense Strategy, The Scope of Discovery, Boundary Defense Checklist, Inability to Comply, Jurisdictional Challenges

13. Using the Work Product Doctrine

Instant Answer Chart, The Rules That You Need, Weapon-by-Weapon Defense, Waivers, Counteroffers

14. Using Traditional Privileges

Professional, Business & Administrative, Domestic, Criminal, Work Product Doctrine

15. Exposing Burdensome & Abusive Tactics

Blackmail, Subterfuge, Hostage Trade-off, Aggressive Demands, Excessive Demands, Weapon-Specific Rules, Prepare Your Motion

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About the Book and CD

Guerrilla Discovery contains 650 letter-sized pages in a sturdy 3-ring binder. 400 pages are devoted to tactics and tricks for efficiently obtaining the information you need to obtain a favorable settlement or verdict, and 250 pages offer innovative discovery forms that implement the book's suggestions.

Included at no extra charge is an intuitive, full-text CD which requires no installation before use. It may be searched by key word, case name, or topic. You may open and modify any of the CD's forms simply by using your favorite word processor; you need not work with the CD's search program.

\$99 buys the book and CD. The book is updated annually for \$59 with replacement pages and a new CD. Both the book and its update are sold on a 30-day trial basis, and may be returned if not to your liking. The update service may be cancelled at any time.

2-5 Is It Discoverable? \$2.20

Six Degrees of Discoverability

Degree	Type of Evidence	Generic Description	Chances for Discovery	Sanford
1	Real Evidence & Defined Items of Documentary Evidence	The "raw" or "operative" facts, including the actual physical parts or components of the incident, accident or controversy; the so-called "no contest" elements.	Count on it! Near absolute. Absent some privilege	Information is discoverable immediately
2*	Witnesses (Both Lay and Expert) Who May Testify	Information on all witnesses who may testify at trial, lay and expert. Expert witnesses are required to provide extensive affidavits about themselves and their opinions.	Witnesses are discoverable. It's only a matter of "when" not "if."	Information must be disclosed by pretrial conference.
3*	Ordinary Work Product	Investigative reports; witness statements; information and data generated in anticipation of litigation.	Chances are more likely than most people would anticipate.	Info NOT discoverable absent [1] Substantial Need + [2] Undue Hardship
4*	Advisory Assistance	Information developed or acquired by experts, assistants or attorneys (who will not testify), in anticipation of litigation; demonstrative evidence that won't be used at trial.	Unlikely	Info NOT discoverable absent exceptional circumstances
5*	Opinion Work Product	Personal notes, research, opinions, theories, strategic memos and attorney advice.	Unlikely except in rare situations.	Info NOT discoverable absent extraordinary circumstances
6	Unwritten Work Product	Information contained in the memory of an attorney.	Star-walk's exception to <i>Stovall</i> , CA	Info NOT discoverable

* Within Degrees 2 through 5 fall a host of privileges with varying degrees of strength (see Chapter 15).

Quick-reference charts.

Find answers to common discovery questions in seconds instead of minutes. Detailed supportive text offers more detail.

3-3 ELECTRONIC, DIGITAL AND OTHER MEDIA \$3.11

The *slip is falling* myth results from overkill occasioned by sanctions imposed upon destroying, falsifying or altering the first myth. This second myth, while possessing some elements of truth, also constitutes an exaggeration. Common sense, as might be expected, suggests a middle ground.

In *Quinn*, with this growing area of concern, the courts can be expected to provide some balance and guidance. With that in mind, let's consider some case-based annotations for both sets of opposing solutions:

§3.11 Arguments and Authority

§3.11(a) For the Discovering Party

- Once notice of duty to preserve evidence is provided, obligation runs first to counsel who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation.¹
- Courts have the authority to sanction a party that destroys relevant and discoverable evidence.²
- Even without a specific discovery order, a district court may impose sanctions for the spoliation of evidence, exercising its inherent power and authority to supervise the litigation before it.³
- Because preservation of documents and availability for production is essential to the orderly and expeditious disposition of litigation, document destruction impedes the litigation process and creates sanctions.⁴
- The willful failure to comply with a discovery demand should be construed as an intentional failure as distinguished from inadvertent noncompliance; no wrongful intent need be shown to impose discovery sanctions.⁵
- Where the destruction of evidence is determined to have been prompted by a malicious intent, and the destruction has caused a high degree of prejudice, severe sanctions are easily appropriate.⁶
- Because of the massive amount of data that can be stored on CD's and DVD's, the costs of storage today is virtually nil. Information should be retained, not because it is expected to be used, but because there is no compelling reason to discard it.⁷

§3.11(b) For the Defending Target

- When no willfulness, bad faith, or fault is shown in connection with a failure to comply with discovery demands, dispositive cross-examination would be improper; however, cross-examination or bad faith is shown by evidence the trial court is not required to order dispositive sanctions.⁸
- Before an adverse inference may be drawn, there must be some showing that there is in fact a actual knowledge that the material is relevant and the information contained in the lost evidence.⁹
- Discovery sanctions, which preclude admission of certain evidence or provide for a negative inference in the place of destroyed evidence, operate in the same fashion as a default judgment. They interfere with a truth-finding process of the trial, and encourage attorneys to file motions for protective orders to avoid sanctions that should only be considered with great caution.¹⁰
- The imposition of dispositive discovery sanctions should be confined to flagrant cases in which it is demonstrated that the materiality affects substantial rights of the adverse party and is prejudicial to the presentation of his case.¹¹

Footnotes:

- See *Quinn* (supra note 1), *Sanford*, *Text*, at 107 n.7 (2007), 1180 F.R.D. 78 (S.D.N.Y., 1986) holding that any sanctions imposed by a district court for spoliation or destruction of evidence should be dispositive.
- (1) does not preclude from imposing a sanction.
- (2) places the risk of an erroneous judgment on the party who wrongfully created the risk, and (3) bestows the prejudicial party in the same position the lawsuit has been absent the wrongful destruction.
- See *Quinn* (300) of the actual *Quinn* of Civil Procedure on an applicable case counterpart. See also *Quinn* v. *Quinn*, 271 F.3d 583, 51 Fed.R.Serv.36 004 (2001).
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\$5.50 GUERRILLA DISCOVERY 5-16

The party requesting the admissions thereafter upon the genuineness of the document or the lack of the same, the requesting party may apply to the court for an order regarding the party to pay the reasonable expenses incurred in making that proof, including no discovery fees. The court shall make the order unless it finds that:

request was held objectionable pursuant to the admission would be of no substantial value, or

party failing to admit had reasonable belief that the party might prevail on its claim or that the failure to admit should become apparent to it from the face of the pleadings.

It would require admissions to avoid payment of the truth, just say "no."

TIP

Keep separate contemporaneous files, notes and e-mails acquired to prove facts the party admissions and prevent them from being destroyed when you win they otherwise enter of hours has been longer.

Responding to the Requests

Respond, even if you must. But make sure you respond to requests. For all failing to respond may cause you to be deemed uncooperative. If you fail to respond to a request, you may be found in contempt of court and your claim in the ongoing trial and being confronted by a responding party, you are

not limited to a choice of "admit or deny." So, the next time you are on your back in a closely contested trial with "Admit it or die," remember that you do have several options, each of which are thoroughly considered in the sub-sections that follow.

As a matter of procedure, unless the party or its attorney must sign the response. The admissions will be equally binding in either event.

WARNING! As in the case with all other requests, you should identify it and sign it. For Admissions, in particular, diligence is critical.

DEFENSIVE OPTIONS CHECKLIST

Option 1 [see §11.51] Deny the Request: Simply take the case's word and break it over your opponent's truth, just say "no."

Option 2 [see §11.52] Admit the Request: "Plausibility" does not mean admitting or conceding. It means that you need to support for your own claims and defenses.

Option 3 [see §11.53] Admit Part/Some Part: Admit the material that is immaterial or helpful to your position. Plead the material that's harmful; i.e., limit the case's only gains that are filled with blanks.

Option 4 [see §11.54] Admit but Qualify: Admit the case's grounds, but make sure it explains in your hand of the case to use it.

Option 5 [see §11.55] Plead Knowledge: State lack of information; i.e. name, rank, and serial number, only.

Option 6 [see §11.56] Object to the Request: In addition to poor or sloppy drafting, do not forget that a number of other "accidental" objections were created for your use and enjoyment.

Option 7 [see §11.57] Take the Offensive: File a motion for a protective order to less common alternative for this particular discovery device, but available, nevertheless.

of 1180 F.R.D. 78 (S.D.N.Y., 1986) and 1243.

\$3.11 GUERRILLA DISCOVERY 3-4

§3.11(b) For the Defending Target

- When no willfulness, bad faith, or fault is shown in connection with a failure to comply with discovery demands, dispositive cross-examination would be improper; however, cross-examination or bad faith is shown by evidence the trial court is not required to order dispositive sanctions.¹
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- See *Quinn* v. *Quinn*, 271 F.3d 583, 51 Fed.R.Serv.36 004 (2001).

Arguments and authority.

Whether you are the discovering party or target, you can benefit from *Guerrilla Discovery's* pattern language and case law for supporting and opposing discovery requests.

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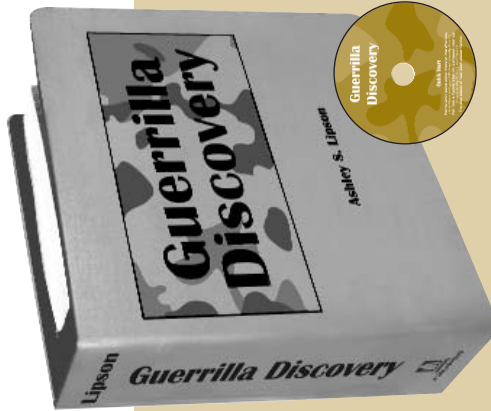
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Battle-Tested Discovery Tactics & Weapons



Most litigation and settlement outcomes are determined in quarrelsome discovery fights. Coercion and confrontation are usually necessary to obtain evidence on the hotly-contested issues.

To help you win more of these important discovery skirmishes, Ashley Lipson's **Guerrilla Discovery** offers dozens of clever strategies, novel arguments, direct answers, cautionary instructions, helpful timelines, tactically-annotated rules, and innovative forms that will help you:

- ★ Capture evidence establishing your claims and defenses
- ★ Secure admissions
- ★ Settle issues and disputes
- ★ Impeach the enemy and its witnesses
- ★ Uncover what the enemy is hiding
- ★ Learn what the enemy has on you

You receive complete and targeted sets of strategically-annotated discovery documents, complete with responses and shields for each weapon: requests for admissions, interrogatories, deposition checklists, notices for production, and notices for inspection.

\$99 brings you 650 pages and a forms-heavy CD delivering comprehensive coverage:

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- ★ Drafting directives
- ★ Forms and sample letters

See front page for "Lies, Coaching, and 'I Don't Remember'"