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Preface

For more than 30 years, CEB has published a practice book devoted exclusively to discovery. First printed in 1975, California Civil Discovery Practice has assisted both veteran and less experienced attorneys in managing this vital stage of pretrial litigation. A new edition appeared soon after the legislature passed and finalized amendments to the Discovery Act of 1986, and a decade later the third edition offered in-depth coverage of the important statutory changes and judicial interpretations of the Act's provisions. In this fourth edition, CEB integrates the wisdom of 20 years of practice experience under the Discovery Act with the 21st century reality that information is stored electronically and that technology influences how attorneys approach and conduct discovery. CEB intends to update the text annually.

This fourth edition includes new and updated chapters on creating a discovery plan; evaluating privilege, work product, and other protections; managing discovery in an electronic world (electronic data and discovery); using discovery in limited civil cases; handling discovery motions and sanctions; and seeking writs and appeals from discovery orders. The new edition expands the discussion of discovery in federal court. All six discovery methods are thoroughly covered: oral and written depositions; interrogatories; demands for inspection; requests for admission; medical examinations; and exchange of expert witness information.

The book's authors have filled each chapter with practical advice, sharing their own strategies on how to manage difficult opposing counsel and to resolve or to win discovery disputes. Their names appear on the contents page, with biographical information in "About the Authors." As consulting editor, the Honorable Curtis E. A. Karnow reviewed virtually every chapter, sharing his expertise about electronic data and discovery and contributing to the book's continuity and accuracy. A brief biographical statement about Judge Karnow appears in "About the Consulting Editor." Members of the state and federal bench reviewed and commented on one or more chapters, offering practitioners unique insight into how judges throughout California view and handle discovery issues. Their names appear on the title page, with biographical information in "About the Judges." In addition, numerous practicing attorneys have reviewed and commented on one or more chapters of the book. Their contributions have made the book more accurate and more reflective of current discovery practice in California. See "About the Consultants."

The format is designed to provide practitioners with ready access to information. Detailed chapter outlines and a thorough index help readers find topics quickly. "Practice Tips," "Notes," "Cautions," and "Judge's Perspectives" call attention to significant points in discovery practice.

A laminated 8½" by 11" card that lists all of the available objections to evidence, along with the corresponding chapter number of California Trial Objections (11th ed Cal CEB 2006), accompanies this edition. Counsel may include this sheet in a deposition binder for quick and easy reference to objections as to form in the heat of a deposition, and later use it as a checklist for evidentiary objections to deposition testimony at trial.

A companion computer disk of the book's sample forms, derived from actual documents drafted by the authors and other litigators, illustrates the notices, demands, objections, and responses, as well as motions and other court papers commonly filed during discovery.

This publication is also available on OnLAW, CEB's web-based practice library, enabling litigators to conduct word searches and to immediately view the exact language of citations through online links.

CEB legal staff who worked on this title were Publications Attorneys Elizabeth M. Johnson and Karen Frasier-Kolligs and Legal Editors Elizabeth Allen, Julie Hammel Brook, Susan Kelley, Matthew Mandelbaum, Margaret O'Neill, Cathy Daly, Enrique DeAnda, Ken Scudder, and Andy Rosner. Dorie Riepe, Richard Dempewolf, and Paul McBrearty were responsible for copyediting and production. Robert W. Burke, Jr. and Kathryn Te Selle wrote the index. The book was designed by Grier Thornburg. CEB's Electronic Publishing Staff performed composition.

May 2010 Update

CEB wishes to thank Robert C. Wright for his work as author and consultant on this 2010 update. Mr. Wright acknowledges Alexander T. Gruft, a senior associate at Wright & L'Estrange, for his valuable assistance on this year's update. CEB also wishes to thank Mitchell E. Abbott and Ginetta L. Giovinco of Richards, Watson & Gershon for their

work updating chapter 3. In addition, CEB thanks the Honorable Curtis E. A. Karnow, Judge of the San Francisco County Superior Court, for his contributions as consultant on this update.

CEB Attorney Editor Karen Frasier-Kolligs and Legal Editors Roberta Klein and Enrique De Anda contributed to this update. Administrative support was provided by Kenya Denman and Nila Kanzaria. Joseph Curran handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

Linda A. Compton
Practice Group Manager
Civil Litigation

Pamela J. Jester
Director

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About the Authors

MITCHELL E. ABBOTT serves as chair of the Appellate Practice Group of Richards, Watson & Gershon in Los Angeles, where his practice focuses on the representation of municipalities and other public entities. He has handled writ matters, civil rights actions, land use cases under the California Environmental Quality Act, public financing cases, taxpayers' actions, and election contests. Mr. Abbott is a Certified Specialist in Appellate Law (State Bar of California Board of Legal Specialization), a member of the State Bar's Appellate Law Advisory Commission, a member of the California Academy of Appellate Lawyers, and a past chair of the State Bar's Committee on Appellate Courts. He was a contributing author of California Civil Appellate Practice (3d ed. Cal CEB 1996) and of California Administrative Mandamus (3d ed Cal CEB 2003). Mr. Abbott received his A.B. (magna cum laude) in 1972 from the University of California (Davis) and his J.D. in 1975 from the University of Virginia Law School.

ARTHUR J. CASEY is a shareholder of Robinson & Wood, Inc., in San Jose, specializing in civil litigation with an emphasis on defense of product liability actions, insurance litigation, and insurance fraud. He also serves as a judicial hearing officer for the City of Campbell. Mr. Casey has been a CEB contributor and lecturer for several years. He received his B.A. in 1981 from the University of San Diego and his J.D. in 1985 from the University of Santa Clara.

WILLIAM A. DANIELS is a principal of Schwartz, Daniels & Bradley in Agoura Hills. Mr. Daniels practices in the areas of employment and consumer class actions, insurance bad faith, catastrophic personal injury, and employment discrimination. He received his B.A. in 1982 from San Francisco State University and his J.D. in 1994 from Loyola Law School of Los Angeles.

MARTIN L. FINEMAN is Partner in Charge of the San Francisco office of Davis Wright Tremaine LLP and handles complex litigation and dispute resolution in the corporate, securities, professional liability, and intellectual property fields. Mr. Fineman also acts as a Judge Pro Tem and judicial arbitrator for the San Francisco County Superior Court, and as a judicial mediator for the First District Court of Appeal. He received his B.S. from the University of California (Berkeley), his M.B.A. from the Haas School of Business at the University of California (Berkeley), and his J.D. from the University of California, Berkeley, School of Law, where he was an editor of the California Law Review.

GINETTA L. GIOVINCO is an associate in the Los Angeles office of Richards, Watson & Gershon and represents public entities and private sector clients in litigation matters. She received her B.A. (summa cum laude) in 1997 from American University and her J.D. in 2003 from the University of California, Los Angeles, School of Law.

JOSHUA S. GOODMAN is a founding partner of Jenkins Goodman Neuman & Hamilton LLP in San Francisco, specializing in personal injury, professional liability, insurance coverage, commercial, and construction litigation. Mr. Goodman also litigates insurance coverage matters on behalf of insurers, policyholders, and businesses seeking coverage for third-party claims. He has authored articles published in CEB's California Civil Litigation Reporter and serves as an arbitrator for San Francisco, Alameda, and Marin Counties. Mr. Goodman received his B.A. in 1978 from Pomona College, his M.Phil. in 1981 from the University of London, and his J.D. in 1984 from the University of California, Hastings College of the Law.

GAYLE L. GOUGH is a partner in the San Francisco office of Sedgwick, Detert, Moran & Arnold LLP, concentrating on class actions, personal injury, product liability, and warranty and contract actions. She also serves on the panel of court-appointed arbitrators for the San Francisco County Superior Court. Ms. Gough received her B.S.F.S. in 1981 from Georgetown University (School of Foreign Service) and her J.D. (summa cum laude) in 1991 from the University of San Francisco School of Law, where she was a member of the University of San Francisco Law Review.

KYLE KVETON is a member of Robie & Matthai in Los Angeles and focuses on legal malpractice, business, and insurance litigation. He also serves as a mediator and arbitrator for the Los Angeles County Superior Court. He has spoken at numerous continuing legal education conferences and teaching programs. Mr. Kveton is a member of the Los

Angeles County Bar Association, the Business Law section of the American Bar Association, the Association of Southern California Defense Counsel, and the Defense Research Institute. Mr. Kveton received his B.A. in 1980 from the State University of New York at Binghamton and his J.D. in 1983 from the University of Southern California.

JANET H. KWUON is a partner of Reed Smith LLP, where she has served as managing partner of the firm's Los Angeles office and head of the Los Angeles office's Product Liability Practice Group. Ms. Kwuon focuses on both complex civil litigation and non-litigation client counseling in the areas of risk assessment, regulatory compliance, electronic data management, e-discovery, and investigations. She is also a former Los Angeles County Deputy District Attorney. Ms. Kwuon received her B.A. in 1985 from the University of California (Berkeley) and her J.D. in 1989 from the University of the Pacific (McGeorge School of Law).

NATHAN LANE III is a partner of Squire, Sanders & Dempsey LLP in San Francisco and leads the firm's Intellectual Property Practice Group. Mr. Lane represents clients in disputes and business transactions involving intellectual property, antitrust and trade regulation, and commercial transactions as well as in domestic and international arbitrations. He has regularly litigated cases involving the discovery of evidence located outside of the United States. He is a past chair of the San Francisco Bar Association Antitrust Section. Mr. Lane received his A.B. in 1968 from Duke University and his J.D. in 1971 from the University of Pennsylvania, where he was a member of the Order of the Coif and of the Board of Editors of the University of Pennsylvania Law Review. Mr. Lane gratefully acknowledges the invaluable assistance of Michelle M. Full, an associate at Squire, Sanders & Dempsey LLP, in the preparation of chapter 13, Discovery in Other Nations.

MARJORIE E. MANNING is a shareholder of Bolling, Walter & Gawthrop in Sacramento, specializing in civil litigation with an emphasis on appeals, professional malpractice, employment law, and civil rights. Ms. Manning heads the firm's appellate department and is admitted to practice before the United States Supreme Court. She was a contributing author of the previous edition of California Civil Discovery Practice (3d ed Cal CEB 1998) and has lectured on civil litigation techniques. She is also a member of the American Bar Association, the Sacramento County Bar Association, and the Northern California Association of Defense Counsel. Ms. Manning received her B.A. (with honors) in 1980 from California State University (Sacramento) and her J.D. in 1984 from the University of the Pacific (McGeorge School of Law).

BROWNING E. MAREAN III is a partner in the San Diego office of DLA Piper Rudnick Gray Cary. He specializes in complex business litigation, technology matters, and professional responsibility. Mr. Marean is chair of the San Diego County Bar Association Technology Committee. He lectures frequently on computer technology and its applications to law practice management as well as on legal ethics and the selection and use of expert witnesses. Mr. Marean received his A.B. in 1964 from Stanford University and his J.D. in 1969 from the University of California, Hastings College of the Law.

JAMES C. MARTIN is a partner in the appellate department of the Los Angeles and Pittsburgh, Pennsylvania, offices of Reed Smith LLP, specializing in civil appeals, writs, and posttrial motions. He is a fellow of the American Academy of Appellate Lawyers and a past president of the California Academy of Appellate Lawyers. Mr. Martin is certified as a specialist in appellate law by the State Bar of California Board of Legal Specialization. A frequent author and consultant for CEB, Mr. Martin has written on a variety of subjects involving civil litigation and was a contributing author of California Civil Appellate Practice (3d ed Cal CEB 1996), California Civil Writ Practice (3d ed Cal CEB 1996), and California Expert Witness Guide (2d ed Cal CEB 1991). He received his B.A. in 1974 from Colorado College and his J.D. (summa cum laude) in 1978 from the University of Santa Clara, where he was Editor-in-Chief of the Santa Clara Law Review.

PETER J. MESSROBIAN is special counsel in the San Francisco office of Sedgwick, Detert, Moran & Arnold LLP, where his practice focuses on products liability, personal injury, and environmental regulatory matters. Mr. Messrobian received his B.A. in 1989 from the University of California (San Diego) and his J.D. in 1993 from the University of San Francisco School of Law.

MARK A. NEUBAUER is a civil business trial lawyer in Los Angeles, with an emphasis on securities, real estate, entertainment, unfair competition, and employment law. Mr. Neubauer is a past chair of the California State Bar Litigation Section and a past president of the Association of Business Trial Lawyers. He has written numerous articles

for the American Bar Association Litigation Journal and was a contributing author of California Civil Procedure Before Trial (3d ed Cal CEB 1990). Mr. Neubauer received his B.S.J. (with distinction) in 1972 and his M.S.J. in 1973 from Northwestern University, and his J.D. in 1976 from the University of California, Los Angeles, School of Law, where he was an associate editor of the UCLA Law Review.

FARLEY J. NEUMAN is a founding partner of Jenkins Goodman Neuman & Hamilton LLP in San Francisco. His practice focuses on business and commercial litigation, with an emphasis on employment law, accounting malpractice, contractual disputes, real estate issues, and securities law. He is the author of articles published in CEB's California Civil Litigation Reporter and is a frequent speaker for continuing legal education programs on complex commercial trials, expert witnesses, and accounting malpractice claims. Mr. Neuman, who is also a certified public accountant, is a member of the Pacific Stock Exchange's panel of arbitrators. He received his B.S. in 1978 from the University of Illinois and his J.D. in 1981 from Loyola University of Chicago School of Law.

MICHAEL R. OVERLY is a partner in the Los Angeles office of Foley & Lardner LLP and a member of the firm's Information Technology & Outsourcing Practice Group. He specializes in drafting and negotiating software licenses, outsourcing agreements, information security agreements, e-commerce agreements, and technology use policies. He has written numerous articles and books on multimedia law, online law, and the admissibility of electronic documents. Mr. Overly received his B.S. in 1982 and his M.S. in 1984 from Texas A&M University, and his J.D. (cum laude) in 1989 from Loyola University of Los Angeles School of Law, where he was a member of the Order of the Coif and Articles Editor of the Loyola of Los Angeles Law Review.

MARY PAT POTEET is the west coast litigation support manager for DLA Piper Rudnick Gray Cary LLP. In this capacity, she coordinates the administrative and technical support for the firm's west coast litigation group and provides in-house consultation on litigation support issues such as discovery data management and electronic evidence processing. Ms. Poteet has extensive experience in database creation and administration, including data storage and warehousing. She is the Litigation Support Peer Group Vice President of the International Legal Technology Association and a committee member of the National Association of Litigation Support Managers. She is also a past president of the Bay Area Association of Litigation Support Managers. Ms. Poteet is a frequent speaker at industry seminars and conferences. She received her B.A. in 1987 from San Diego State University.

TAMI S. SMASON is a partner in the Los Angeles office of Foley & Lardner LLP, focusing on business, administrative, and healthcare litigation, including lease and partnership disputes, unfair competition, fraud, medical staff, and employment litigation. She is a former California office chair of the firm's litigation department. Ms. Smason serves as a Judge Pro Tem for the Los Angeles County Superior Court. She received her B.S. (with honors) in 1981 from the University of California (Berkeley) and her J.D. in 1985 from the University of California, Berkeley, School of Law.

JEFFREY A. TIDUS is a partner in the civil trial firm of Baute & Tidus LLP in Los Angeles and handles complex civil trials in a variety of business and real estate disputes, including cases involving fraud, insurance coverage issues, professional negligence, construction defects, and intellectual property. Mr. Tidus has tried a number of lengthy complex matters, including a 240-day trial in a securities and real estate fraud case. He also has an active practice as an arbitrator and mediator over a wide range of civil disputes. Mr. Tidus is a graduate of the Straus Institute for Mediation's Basic and Advanced Mediation training programs and is a member of the American Arbitration Association's Complex Litigation Panel. He has also testified as an expert witness in matters involving construction defects, legal ethics, and billing practices. Mr. Tidus received his B.A. in 1976 from the University of California (San Diego) and his J.D. in 1979 from the University of California, Berkeley, School of Law.

SHIRLEY K. WATKINS is a member of Law Offices of Michels & Watkins in Los Angeles, specializing in medical malpractice and catastrophic personal injury cases. She is the author of numerous articles on discovery and is a frequent lecturer on trial techniques. She serves as a Judge Pro Tem, arbitrator, and settlement officer for the Los Angeles County Superior Court. Ms. Watkins is an emeritus member of the Board of Governors of the Consumer Attorneys Association of Los Angeles. She has served on the Board of Directors of Trial Lawyers for Public Justice, the Board of Trustees of the Los Angeles County Bar Association, and the Board of Governors of Women Lawyers Association of Los Angeles, where she is a Life Sustaining Member. She received her B.A. in 1979 from the University of California (San Diego) and her J.D. in 1982 from the California Western School of Law.

THE HONORABLE MARY E. WISS currently has a civil assignment at the San Francisco Superior Court. Before her appointment to the bench, Judge Wiss was a sole practitioner in San Francisco, specializing in personal injury, wrongful death, medical negligence, and product liability law. She is a past president of the San Francisco Trial Lawyers Association and of Queen's Bench. Judge Wiss frequently lectures for CEB on torts, evidence, and trial practice topics and is the co-author of California Tort Damages (2d ed CEB 2002). She received her B.A. in 1972 from the University of San Francisco, her M.S. in 1976 from the Lone Mountain College, and her J.D. in 1981 from the University of San Francisco School of Law.

ROBERT C. WRIGHT is a founding member of Wright & L'Estrange in San Diego and specializes in business litigation. Mr. Wright is an adjunct professor at the University of San Diego School of Law and a life member of the American Law Institute. He received his B.A. in 1968 from Occidental College and his J.D. in 1971 from the University of California, Hastings College of the Law. Mr. Wright acknowledges Jennifer A. Noble, an associate with Wright & L'Estrange, for her valuable assistance on this edition.

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About the Consulting Editor

THE HONORABLE CURTIS E. A. KARNOW serves on the San Francisco County Superior Court. He was a member of the California Judicial Council's Committee on Civil and Small Claims, which oversees aspects of the state's civil litigation system, and chaired the subcommittees on discovery and rules reform. He is a member of the Judicial Council's task force on temporary judges. Judge Karnow has assisted in the creation of rules on case management, discovery, sealing records, summary judgment, and uniformity of local trial court rules. While in private practice, he specialized in antitrust, intellectual property, and computer and internet law. Judge Karnow has lectured widely, including at the University of Michigan Business School, Yale Law School, and the Haas School of Business at the University of California (Berkeley). He is a contributing co-author of California Civil Procedure Before Trial (4th ed Cal CEB 2004), a co-author of How the Courts Work: A Plain English Explanation of the American Legal System (2008), and the author of Future Codes: Essays in Advanced Computer Technology and the Law (1997) as well as law review articles on subjects ranging from game theory to bail to summary judgment. Judge Karnow has contributed to, among other volumes, eBusiness and Insurance (2001); International eCommerce (2001); Network Security: The Complete Reference (2004); and California Civil Procedure (West 1991). Judge Karnow received his A.B. (cum laude) in 1974 from Harvard University and his J.D. in 1977 from the University of Pennsylvania, where he was an editor of the University of Pennsylvania Law Review.

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About the Judges

THE HONORABLE ARTHUR GILBERT is Presiding Justice of the California Court of Appeal, Second District, Division Six. Before his appointment to the Court of Appeal in 1982, he served on the Los Angeles County Superior and Municipal Courts. Before that, he was in private practice, specializing in civil litigation. Justice Gilbert has written numerous articles for various publications, including the *California Lawyer*, the *Pepperdine Law Review*, the *Los Angeles Times*, *California Courts Review*, and the *American Bar Association Judges' Journal*. Justice Gilbert was named "Appellate Justice of the Year" by the Consumer Lawyers of California in 1984, 1993, and 1997. He is a past recipient of the Bernard S. Jefferson Award given by the California Judges Association. He has lectured to judges throughout California and to judges in Eastern Europe on American jurisprudence. Justice Gilbert received his B.A. in 1960 from the University of California (Los Angeles) and his J.D. in 1963 from the University of California, Berkeley, School of Law.

THE HONORABLE MARY THORNTON HOUSE serves on the Los Angeles County Superior Court. Through appointment by Chief Justice Ronald George of the California Supreme Court, Judge House served a 3-year term as a member of the Administrative Office of the Court's Civil and Small Claims Advisory Committee and chaired the Small Claims and Limited Cases subcommittee. Judge House was also chair of a state-wide working group, co-sponsored by the Judicial Council and the California Law Revision Commission, to explore legislative and policy changes to the current Three Track Civil System following trial court unification. She is an instructor at the B. E. Witkin Judicial College of California and at the Center of Judicial Education and Research (CJER). Judge House received her B.A. (cum laude) in 1975 from the University of California (Los Angeles) and her J.D. in 1978 from the University of San Diego School of Law, where she was a member of the University of San Diego Law Review.

THE HONORABLE ELIZABETH D. LAPORTE serves as a United States Magistrate Judge on the United States District Court for the Northern District of California. Before her appointment to the bench in 1998, she was a partner of Turner & Brorby, specializing in civil litigation at the trial and appellate levels, and chief of special litigation at the San Francisco City Attorney's Office. She has also served as an administrative law judge for the California Department of Insurance. Magistrate Judge Laporte serves on the Board of Governors for the Northern California Chapter of the Association of Trial Lawyers, the Executive Committee of the Litigation Section of the Bar Association of San Francisco, and the Jury Trial Improvement Committee of the Ninth Circuit Court of Appeals. She is a former chair of the Ninth Circuit Executive Board of Magistrate Judges and is a frequent speaker and panel participant in programs concerning various litigation and settlement topics. Magistrate Judge Laporte received her B.A. in 1975 from Princeton University, her M.A. in 1977 from St. Anne's College in Oxford, England, and her J.D. in 1982 from Yale Law School.

THE HONORABLE HOWARD LLOYD serves as a United States Magistrate Judge on the United States District Court for the Northern District of California, San Jose Division, where he presides over a wide variety of civil and criminal matters. Before his appointment to the bench in 2002, he was an independent provider of alternative dispute resolution services and the founder and managing director of Mediation Works, a Silicon Valley mediation service. Before that, he was a litigator at Hoge, Fenton, Jones & Appel, Inc., in San Jose, where he specialized in intellectual property, complex torts, employment, and business disputes. He frequently participates as a panelist in continuing education programs. Magistrate Judge Lloyd received his A.B. in 1963 from the College of William and Mary (Phi Beta Kappa) and his J.D. in 1968 from the University of Michigan School of Law.

THE HONORABLE PATRICIA M. LUCAS serves on the Santa Clara County Superior Court. Before she took the bench in 2003, Judge Lucas practiced complex civil litigation for over 20 years, most recently at the Silicon Valley firm of Fenwick & West LLP, where she served as litigation group chair. Her judicial assignments have included a year of managing discovery disputes. Since 2004, she has taught the civil discovery class at the B. E. Witkin Judicial College of California. Judge Lucas also frequently teaches at the National Institute of Trial Advocacy and at law schools. She serves on the boards of the William A. Ingram Inn of the American Inns of Court and the Association of Business Trial

Lawyers Northern California Chapter. Judge Lucas received her B.A. from Rice University and her J.D. from the University of California, Berkeley, School of Law.

THE HONORABLE DEANNE SMITH MYERS serves on the Los Angeles County Superior Court and currently handles civil matters, including limited jurisdiction cases. Before her appointment to the bench in 1990, Judge Myers was a partner of Munger & Myers (formerly Baird, Munger & Myers), specializing in civil business litigation. From 1981 to 1984, she was a litigation associate in the Los Angeles office of Reavis & McGrath (now known as Fulbright & Jaworski). From 1975 to 1981, Judge Myers was an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office in Los Angeles. She received her B.S. in 1966 and her M.B.A. in 1970 from the University of Southern California, and her J.D. (cum laude) in 1974 from Loyola Law School.

THE HONORABLE GARY NADLER serves on the Sonoma County Superior Court. Currently, Judge Nadler sits in both the Family Law and Appellate Divisions, and he has also sat in the Criminal Division. Before his appointment to the bench, Judge Nadler practiced civil litigation, including contract and consumer remedies, unfair business practices, construction defect, environmental, and employment law. He is an adjunct professor of law at the University of San Francisco School of Law, where he teaches discovery practice, and he is on the faculty of the B. E. Witkin Judicial College of California, where he teaches civil discovery to newly appointed judges. Judge Nadler was co-author of California Civil Discovery Handbook (West 1992) and has been the author of two CEB action guides on discovery. He has also participated as a panel member in numerous seminars on civil litigation. He received his B.A. (magna cum laude) in 1976 from the State University of New York (Buffalo) and his J.D. in 1979 from the University of San Francisco School of Law.

THE HONORABLE FUMIKO HACHIYA WASSERMAN currently serves on the Appellate Division of the Los Angeles County Superior Court, following a 9-year assignment handling civil fast-track trials. Judge Wasserman serves as the chair of the California Center for Judicial Education and Research (CJER) Governing Committee, and has developed curricula and taught judges and lawyers throughout her judicial career on a wide range of topics, from criminal proceedings to managing complex civil litigation. She has taught at Loyola Law School and at the University of Southern California. Before her appointment to the bench, Judge Wasserman was an Assistant United States Attorney, a real estate and corporate associate, a Deputy Los Angeles City Attorney, and a law clerk for the Honorable Terry J. Hatter, Jr., of the United States District Court for the Central District of California. She is a contributor to CEB action guides on making and opposing special (anti-SLAPP) motions to strike and on defending clients in misdemeanor cases. Judge Wasserman is a recipient of both California Women Lawyer's Joan Dempsey Klein Distinguished Jurist Award and the National Asian Pacific American Bar Association's Trailblazer Award. She received her B.A. and teaching credential from the University of California (Los Angeles) and her J.D. from Loyola University of Los Angeles School of Law, where she was a member of the law review.

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About the Consultants

The following individuals who served as consultants for this book are practicing lawyers in California. Many of the consultants reviewed and commented on one or more chapter manuscripts. Without exception they provided astute and thoughtful advice, generously supporting the efforts of the CEB attorneys who edited each chapter. Their suggestions have made the book more accurate and more reflective of current California discovery practice.

Merri A. Baldwin, Chapman, Popik & White LLP, San Francisco

Craig S. Barnes, Sedgwick, Detert, Moran & Arnold LLP, Los Angeles

Randall G. Block, Sedgwick, Detert, Moran & Arnold LLP, San Francisco

James H. Broderick, Jr., Squire, Sanders & Dempsey LLP, Los Angeles

Mark E. Burton, Jr., Hersh & Hersh, San Francisco

Michael C. Denison, Towle, Denison, Smith & Tavera LLP, Los Angeles

Matthew A. Fischer, Sedgwick, Detert, Moran & Arnold LLP, San Francisco

Gayle L. Gough, Sedgwick, Detert, Moran & Arnold LLP, San Francisco

Mark J. Hancock, Sedgwick, Detert, Moran & Arnold LLP, San Francisco

James J. S. Holmes, Sedgwick, Detert, Moran & Arnold LLP, Los Angeles

Peter J. Messrobian, Sedgwick, Detert, Moran & Arnold LLP, San Francisco

Kara Rohe, Sedgwick, Detert, Moran & Arnold LLP, San Francisco

John F. Stephens, Sedgwick, Detert, Moran & Arnold LLP, Los Angeles

Mary-Christine (M. C.) Sungaila, Horvitz & Levy LLP, Encino

William M. White, Baker, Manock & Jensen, Fresno

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CEB gratefully acknowledges The Honorable Curtis E. A. Karnow, Judge of the San Francisco Superior Court, for reviewing virtually the entire book and providing us with the perspective of both a judge and an experienced litigator. Judge Karnow was always willing to make time in his already full schedule to assist CEB with the new edition. See "About the Consulting Editor." CEB also wishes to acknowledge the generosity of the members of the state and federal bench who reviewed and commented on one or more chapters and added their perspectives to this book. For biographical notes about these jurists, Justice Arthur Gilbert, Judge Mary Thornton House, Magistrate Judge Elizabeth D. Laporte, Magistrate Judge Howard Lloyd, Judge Patricia M. Lucas, Judge Deanne Smith Myers, Judge Gary Nadler, and Judge Fumiko Hachiya Wasserman, see "About the Judges."

CEB also wishes to recognize the enormous contributions of Robert C. Wright, of Wright & L'Estrange in San Diego. Not only is he an author of this edition, writing two chapters, he also served as the update author during the entire life of the second and third editions. In this 18-year period, Mr. Wright faithfully tracked statutory developments and case decisions, called attention to salient judicial interpretations, and generously shared his insights with other members of the California bar.

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CEB wishes to thank Christina J. Imre of Sedgwick, Detert, Moran and Arnold in Los Angeles for her invaluable contribution in recruiting attorney consultants from her firm's Los Angeles and San Francisco offices for many of the chapters in this book.

CEB also wishes to thank Judge Richard A. Kramer of the San Francisco Superior Court for his helpful suggestions for judge consultants, for offering comment on CEB's plan for the treatment of electronic evidence in this new edition, and for providing the title for the new chapter on discovery in an electronic world.

Commissioner Richard E. Best (Ret.) provided valuable recommendations for authors and judge consultants. CEB appreciates Commissioner Best's continued support of CEB's products and programs.

In addition, CEB wishes to thank Judge Charles W. McCoy, Jr. of the Los Angeles County Superior Court for his helpful suggestions for judge consultants.

CEB wishes to acknowledge its debt to the authors of the previous three editions, which California litigators have relied on for so long. Their excellent work provided a solid foundation for each successive edition of this book. The authors of the original edition, as their names appeared in 1975 in the book's contents, were Carol S. Brosnahan, Allan Browne, Alan G. Buckner, Larry R. Feldman, Ian Herzog, Jon A. Rantzman, Anthony E. Shafton, Jr., C. Gordon Taylor, Justice Robert S. Thompson, and Kathryn Mickle Werdegar.

In his foreword to the 1988 edition, Justice James D. Ward of the Fourth District Court of Appeal (then Chair of the State Bar-Judicial Council Joint Commission on Discovery), stated: "CEB was the only continuing legal education program to demonstrate such an impressive interest in the proposed legislation. Their working knowledge of the new Discovery Act led CEB legal staff and individual authors of Civil Discovery Practice in California to make numerous suggestions concerning its provisions. CEB gave particularly valuable input during the stage in which clean-up legislation was being drafted for passage as an urgency statute before the operative date of the new law.... CEB's new discovery book and the law are products of many able minds. Both represent the best that the legal profession can offer in the area of discovery." The authors of the 1988 edition, as listed in its contents, were Paul Alexander, Michael J. Andelson, Carlos Bea, Diane L. Becker, Dominic J. Campisi, Annette P. Carnegie, Howard A. Herman, Nathan Lane III, Harold J. McElhinny, Mark A. Neubauer, Jack I. Samet, Ann Taylor Schwing, Linda E. Shostak, David M. Stern, James D. Ward, and Robert C. Wright.

The third edition included new and expanded chapters on planning discovery in order to meet client objectives and to implement litigation goals; understanding key discovery principles; and evaluating privileges, work product and other protections. The authors of the 1998 edition, as listed in its contents, were Mitchell E. Abbott, Arthur J. Casey, Joshua S. Goodman, Janet H. Kwuon, Nathan Lane III, Marjorie E. Manning, James C. Martin, Edith R. Matthai, Mark A. Neubauer, Farley J. Neuman, Michael R. Overly, Daniel L. Pines, Arnold W. Schwartz, Ann Taylor Schwing, Roman M. Silberfeld, David M. Stern, Shirley K. Watkins, Mary E. Wiss, and Robert C. Wright.

The members of the bench who contributed Judicial Perspectives to the third edition, as listed in its "From the Bench" section, were the Honorable Florence-Marie Cooper, the Honorable Charles R. Hayes, Commissioner Everett A. Hewlett, Jr., the Honorable Milton Milkes (Ret.), the Honorable Robert H. O'Brien, the Honorable William C. Pate, the Honorable Ronald B. Robie, the Honorable George P. Schiavelli, the Honorable Alice D. Sullivan, and the Honorable S. Charles Wickersham.

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Selected Developments

May 2010 Update

In *Lee v Superior Court* (2009) 177 CA4th 1108, 99 CR3d 712, the court held that subpoenas duces tecum are available in proceedings under the Sexually Violent Predator Act (SVPA) (Welf & I C §§6600-6609.3). See §1.10.

In *McMahon v City of Los Angeles* (2009) 172 CA4th 1324, 92 CR3d 68, the court held that the disclosure obligation under Govt C §3306.5(c) did not include the right to review underlying investigatory materials that were not kept in personnel files or authorized to be used in personnel decisions on mere speculation that they might contain adverse comments. See §2.50.

The Electronic Discovery Act (EDA) (Stats 2009, ch 5), effective June 29, 2009, establishes procedures for discovery of electronically stored information (ESI) that are integrated into the existing framework of the Civil Discovery Act. The EDA adds CCP §§1985.8 and 2031.285 and amends CCP §§2016.020, 2031.010, 2031.020, 2031.030, 2031.040, 2031.050, 2031.060, 2031.210, 2031.220, 2031.230, 2031.240, 2031.250, 2031.260, 2031.270, 2031.280, 2031.290, 2031.300, 2031.310, and 2031.320. For discussion of specific provisions of the EDA, see chaps 3, 4, 5, 8, 15.

Under federal common law, there is no prima facie presumption of privilege when an attorney-client relationship exists. See *United States v Ruehle* (9th Cir 2009) 583 F3d 600, cited in §3.12.

In *McGrath v Everest Nat'l Ins. Co.* (ND Ind., May 13, 2009, No. 2:07 cv 34) 2009 US Dist Lexis 40513, *5, the court held that the attorney-client privilege cannot be asserted against an insured or an insured's assignee in an action against the insurer for materials prepared as part of the insured's defense in the underlying action. See §3.18.

For a case applying the common interest doctrine, see *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 98 CR3d 422, cited in §§3.19, 3.65.

The exception to the attorney-client privilege in Evid C §958 applies only when either the attorney or the client charges the other with a breach of duty arising from their professional relationship. See *Dietz v Meisenheimer & Herron* (2009) 177 CA4th 771, 99 CR3d 464, discussed in §3.47.

In *In re Cole C.* (2009) 174 CA4th 900, 911, 95 CR3d 62, the court held that the holder of a privilege is determined at the time the disclosure of confidential information is sought to be introduced in evidence. See §3.93.

For a case discussing the physician-patient privilege, see *Manela v Superior Court* (2009) 177 CA4th 1139, 99 CR3d 736, cited in §§3.99, 3.106, and 3.160.

The court in *Bains v Moores* (2009) 172 CA4th 445, 91 C R3d 309, applied the factors articulated in *Avant! Corp. v Superior Court* (2000) 79 CA4th 876, 94 CR2d 505 in determining whether a civil proceeding should have been stayed. See §3.128.

In *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 729, 88 CR3d 590, the court held that a public employer may compel answers from its own employee about the employee's job conduct without consulting prosecuting authorities about granting formal immunity. See §3.128.

The Ninth Circuit explained that the state secrets privilege only protects disclosure of communications, not disclosure of underlying facts that can be proved without resort to the privileged materials. See *Mohamed v Jeppesen Dataplan, Inc.* (9th Cir 2009) 563 F3d 992, discussed in §3.155A.

For a case holding that a court need not review all documents claimed as protected work product when the court only needed to determine whether an attorney sought to be disqualified was privy to some confidential work product reasonably shared among defense counsel in furtherance of common interests, see *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 98 CR3d 422, cited in §3.197.

In *Goodman v Praxair Servs.* (D Md 2009) 632 F Supp 2d 494, 511, the court held that receipt of a letter openly threatening litigation triggered the duty to preserve evidence relevant to the dispute. See §4.8.

In *Princess Cruise Lines, Ltd. v Superior Court* (2009) 179 CA4th 36, 101 CR3d 323, the court held that a declaration that is inconsistent with previous deposition testimony may be disregarded for purposes of a motion for summary judgment. See §5.32.

The court in *Terry v SLICO* (2009) 175 CA4th 352, 95 CR3d 900, held that no affidavit or declaration showing good

cause for the production of records is necessary to support the issuance of a deposition subpoena for appearance, testimony, and the production of documents. See §5.61.

To determine whether a plaintiff who was never a class member is entitled to conduct precertification discovery to identify a substitute class representative, the court must expressly weigh the potential for abuse of the class action procedure against the rights of the parties. See *Safeco Ins. Co. v Superior Court* (2009) 173 CA4th 814, 92 CR3d 814, cited in §7.23.

Counsel should not interpose an objection in response to interrogatories that a term is vague when counsel has used that same term in a prior discovery request or response. See *Clement v Alegre* (2009) 177 CA4th 1277, 99 CR3d 791, discussed in §7.98.

A party is not permitted to offer expert testimony at trial on undisclosed subjects. See *McCoy v Gustafson* (2009) 180 CA4th 56, 96, ___ CR3d ___, cited in §11.19.

For a case holding that an expert may not offer trial testimony that exceeds the scope of the expert's deposition testimony if the opposing party lacks notice of the new testimony or if that notice comes at a time when deposing the expert is unreasonably difficult, see *Easterby v Clark* (2009) 171 CA4th 772, 90 CR3d 81, in §§11.49, 11.61, 11.63.

For another case holding that an attorney's travel expenses for taking or attending an out-of-state deposition may be recoverable as an item of costs, see *Gorman v Tassajara Dev. Corp.* (2009) 178 CA4th 44, 100 CR3d 152, in §12.14.

For a case in which terminating sanctions were justified by a history of willful discovery abuse, see *Doppes v Bentley Motors, Inc.* (2009) 174 CA4th 967, 94 CR3d 802, in §15.100.

In *People ex rel DuFauchard v U.S. Fin. Mgmt., Inc.* (2009) 169 CA4th 1502, 1511, 87 CR3d 615, the court held that an order compelling compliance with an administrative subpoena was appealable as a final judgment under CCP §904.1. See §16.37.

In *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595, the California Supreme Court held that the prison-delivery rule applies to a self-represented prisoner's filing of a notice of appeal in a civil case. See §16.39.

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Cutoff Dates and CEB Citation

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The Right to Discovery and Its Scope

Robert C. Wright

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I. INTRODUCTION

§1.1 A. Scope of Book

This book addresses in depth each of the six discovery methods for obtaining information or defining or narrowing issues in civil cases that are authorized by the Civil Discovery Act (CCP §§2016.010-2036.050), *i.e.*:

- Oral and written depositions (chaps 5-6);
- Interrogatories (chap 7);
- Demands for inspection, copying, testing, and sampling (chap 8);
- Requests for admission (chap 9);
- Physical and mental examinations (chap 10), and
- Exchange of expert information (chap 11).

The book also addresses:

- Creating a plan for using the discovery methods in a cost- and effort-efficient manner (chap 2);
- The work product doctrine and privileges that may provide protection from discovery (chap 3);
- The discovery of electronically stored information (ESI) (chap 4; see also chap 8 and other sections throughout the book);
- Depositions in other states (chap 12);
- Discovery in foreign nations (chap 13); and
- Discovery in limited civil cases (chap 14).

Recourse to the court (*e.g.*, to shorten time for a matter to be heard, to obtain an order compelling discovery, or to obtain protection from discovery) is the subject of chap 15, which includes procedural checklists and a table of sanctions under the discovery provisions. See §15.103. Writs and appeals in discovery matters are covered in chap 16.

Most of the chapters in this book also address federal law.

A laminated Checklist of Objections (Cal CEB 2006) is included with this book.

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§1.2 B. Scope of Chapter

This chapter discusses the right to and the scope of discovery under the Civil Discovery Act (CCP §§2016.010-2036.050). The information on the right to discovery includes discussion of:

- Matters in which the Civil Discovery Act applies (see §§1.4-1.12) and does not apply (see §§1.13-1.26);
- The nature of the right to discovery (§§1.27-1.30); and
- Who may request discovery and from whom (§§1.31-1.33).

The information about the scope of discovery includes discussion of:

- Relevance to the subject matter of the case (§§1.34-1.37), including categories of relevant information (see §§1.38-1.54);
- Matters usually considered irrelevant (see §§1.55-1.60);
- Limitations that may exist on the discovery of relevant matter (see §§1.61-1.65), including time limits on discovery (see §§1.66-1.79); and
- Discovery on motions for summary judgment (§1.80) and to strike under the anti-SLAPP law (see §1.81).

The chapter also gives a brief history of the Civil Discovery Act (see §1.3) and explains how the federal law of discovery differs from that of California (see §§1.82-1.83).

On some of the many informal methods of obtaining information, *e.g.,* witness interviews, discussions with counsel in related cases, and Internet searches, see §§2.37-2.41. On statutory procedures outside the Civil Discovery Act which litigators frequently use to obtain information, see §§2.42-2.50.

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§1.3 C. Brief History of Civil Discovery Act

The availability of modern discovery methods in California can be traced to the Civil Discovery Act of 1957 which, with minor changes, was patterned on the Federal Rules of Civil Procedure enacted in 1938. Before 1956, California discovery was limited generally to party depositions, inspections, and medical examinations. See Comment, *Depositions, Proceedings to Perpetuate Testimony, Interrogatories to Parties: The Federal Rules and California Law,* 44 Cal L Rev 909, 933 (1956); Note, *Procedure: Discovery: California and Federal Civil Procedure: Physical Examination of Parties: Admission of Facts and Genuineness of Documents,* 42 Cal L Rev 187, 193 (1954). The 1957 Act broadened the scope of these devices and added interrogatories and requests for admission.

The Federal Rules of Civil Procedure were revised in 1970. After a 2-year study that included consideration of the federal rules, California revised its own discovery statutes in 1986. See Hogan & Weber, California Civil Discovery §1.3 (2d ed 2005). The Civil Discovery Act of 1986 remained the definitive statutory discovery law in California until the 2005 Civil Discovery Act renumbered all provisions, eliminated certain redundancies, and improved grammar and clarity. The renumbered provisions closely track the language and sequencing of the 1986 Act, and retain the same base number as the section from which they were derived, *e.g.,* the section on oral depositions in California, former CCP §2025, became CCP §§2025.010-2025.570. See 33 Cal L Rev'n Comm'n Reports 789 (2003).

NOTE: Because of the substantive changes enacted in 1986, counsel should not rely on cases construing the 1957 Discovery Act unless certain that they retain their precedential value, as does, *e.g.*, *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 382, 15 CR 90, discussed in §1.29.

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II. RIGHT TO DISCOVERY UNDER CIVIL DISCOVERY ACT

§1.4 A. Matters to Which Civil Discovery Act Applies

Unless there is a statutory exception, the Civil Discovery Act (CCP §§2016.010-2036.050) applies to "every civil action and special proceeding of a civil nature." *Leake v Superior Court* (2001) 87 CA4th 675, 682, 104 CR2d 767, disapproved on other grounds in *People v Yartz* (2005) 37 C4th 529, 537 n4, 36 CR3d 328. See CCP §2016.020(a).

On "civil action," see §1.5; on "special proceeding of a civil nature," see §§1.6-1.12. For discussion of the difference between the two, see, *e.g.*, *People v Yartz* (2005) 37 C4th 529, 535, 36 CR3d 328.

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§1.5 1. Civil Actions

A civil action to which the Civil Discovery Act applies is defined as an ordinary proceeding in a court "by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." CCP §22.

Civil actions, as defined in CCP §§22-30, also include:

- Class actions (see, *e.g., Alpine Mut. Water Co. v Superior Court* (1968) 259 CA2d 45, 53, 66 CR 250);
- Declaratory relief and specific performance actions (see *Darbee v Superior Court* (1962) 208 CA2d 680, 25 CR 520); and
- Appeals, with trial de novo, from a labor commissioner's wage claim ruling to the superior court (see *Sales Dimensions v Superior Court* (1979) 90 CA3d 757, 153 CR 690).

NOTE: The Civil Discovery Act applies to enforcement of money judgments, but only to the extent provided in CCP §708.010. CCP §2016.070. See discussion in §1.26.

Limited civil cases. The Civil Discovery Act also applies to limited civil cases, *i.e.*, cases in which the amount in controversy does not exceed $25,000, and that otherwise meet the criteria of CCP §§85-86. In such cases, discovery is limited to any combination of 35 interrogatories, demands to produce documents, and requests for admission, as well as one oral or written deposition of each adverse party. CCP §94. Parties may also obtain physical and mental examinations and the identity of expert witnesses under CCP §§2032.010-2032.020. On discovery in limited civil cases, see chap 14.

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§1.6 2. Special Proceedings of Civil Nature

Civil discovery procedures are also available in special proceedings of a civil nature. CCP §2016.020(a). A special proceeding is defined by statute as any remedy that is not an action. CCP §23. For examples, see §§1.7-1.12.

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§1.7 a. Eminent Domain

Eminent domain is an example of a special proceeding listed under Part 3 of the Code of Civil Procedure (CCP §§1063-1822.60). See CCP §§1258.010-1258.030 on discovery in eminent domain proceedings. See also *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 710, 32 CR 288 (hearing to tax costs and for attorney fees after abandonment of eminent domain proceeding).

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§1.8 b. State Bar Disciplinary Proceedings

Courts have interpreted "special proceeding" to include State Bar disciplinary proceedings. *Brotsky v State Bar* (1962) 57 C2d 287, 301, 19 CR 153.

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§1.9 c. Probate Proceedings

The legislature has expressly made the discovery laws applicable to probate matters. Prob C §1000. See *Mota v Superior Court* (2007) 156 CA4th 351, 355, 67 CR3d 303, quoting *Forthmann v Boyer* (2002) 97 CA4th 977, 987, 118 CR2d 715 ("[T]here is no question but that the discovery procedures found in the [CCP] are available for use in probate proceedings").

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§1.10 d. Commitment Proceedings Under Sexually Violent Predator Act

A commitment proceeding under the Sexually Violent Predator Act (SVPA) (Welf & I C §§6600-6609.3) is a special proceeding of a civil nature, and the Civil Discovery Act (CCP §§2016.010-2036.050) applies to the proceeding. *People v Superior Court (Cheek)* (2001) 94 CA4th 980, 988, 114 CR2d 760, cited with approval in *People v Yartz* (2005) 37 C4th 529, 537 n4, 36 CR3d 328. See *Bagration v Superior Court* (2003) 110 CA4th 1677, 1686, 3 CR3d 292. See also *Lee v Superior Court* (2009) 177 CA4th 1108, 1123, 99 CR3d 712 (noting absence of legal authority limiting availability of civil discovery methods in SVPA proceedings and concluding that subpoenas duces tecum are available in such proceedings).

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§1.11 e. Child Dependency Proceedings

Juvenile court proceedings relating to dependent children in need of care (see Welf & I C §300) are special proceedings of a civil nature (see Welf & I C §203) and the Civil Discovery Act arguably applies in those proceedings. See *Leake v Superior Court* (2001) 87 CA4th 675, 682, 104 CR2d 767 (proceedings under Sexually Violent Predator Act (SVPA) (Welf & I C §§6600-6609.3), disapproved on other grounds in *People v Yartz* (2005) 37 C4th 529, 537 n4, 36 CR3d 328. There are, however, many special rules, including discovery provisions, that govern these proceedings (see *In re Chantal S.* (1996) 13 C4th 196, 200, 51 CR2d 866) and whether the Civil Discovery Act applies is not clear. For detailed discussion, see California Juvenile Dependency Practice §§3.28-3.48 (Cal CEB 2002).

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§1.12 f. Other

California Government Claims Act. A petition under Govt C §946.6 authorizing a claimant under the California Government Claims Act to apply to the court for an order relieving the claimant of claims presentation requirements is a special proceeding. *Jefferson v County of Kern* (2002) 98 CA4th 606, 612 n16, 120 CR2d 1.

NOTE: Because contract as well as tort claims can be subject to the claim requirements of Govt C §§810-996.6, the California Supreme Court refers to those sections as the Government Claims Act, rather than as the Tort Claims Act. *City of Stockton v Superior Court* (2007) 42 C4th 730, 741, 68 CR3d 295.

Adoption, mandamus. A proceeding for adoption (*Adoption of Thevenin* (1961) 189 CA2d 245, 251, 11 CR 219) and a mandamus proceeding (*Bagration v Superior Court* (2003) 110 CA4th 1677, 1687, 3 CR3d 292) are also special proceedings of a civil nature. For comprehensive list of special proceedings, see 110 CA4th at 1685 n7.

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B. Matters to Which Civil Discovery Act Does Not Apply

§1.13 1. Criminal Proceedings

The Civil Discovery Act does not apply to criminal proceedings. *Clark v Superior Court* (1961) 190 CA2d 739, 12 CR 191. Unlike civil discovery, which is based on statute, the right of the accused in a criminal case to obtain discovery is a judicially created doctrine and is available when the interests of justice so demand. *Clinton K. v Superior Court* (1995) 37 CA4th 1244, 44 CR2d 140.

Statutory provisions, however, control some aspects of discovery in criminal cases. See, *e.g.,* Pen C §§1054-1054.10 (discovery in criminal cases); Pen C §§1349-1362 (examination of out-of-state witnesses). Other aspects of pretrial discovery in criminal proceedings have mainly been a development of case law. See, *e.g., Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897; *Hill v Superior Court* (1974) 10 C3d 812, 112 CR 257.

For a complete analysis of discovery in criminal proceedings, see California Criminal Law Procedure and Practice, chap 11 (Cal CEB Annual).

NOTE: Some criminal cases are important to civil discovery because of their holdings relating to evidentiary privileges or the attorney work product doctrine. See, *e.g., PSC Geothermal Servs. Co. v Superior Court* (1994) 25 CA4th 1697, 1712, 31 CR2d 213 (prosecutor's seizure of documents, using search warrant, from office of expert hired by attorney, is lawful, but court must conduct hearing in chambers to prevent disclosure of any privileged information). See also *People v Superior Court* (*Bauman & Rose*) (1995) 37 CA4th 1757, 1766, 44 CR2d 734 ("The fact that the attorney is suspected of criminal activity does not lessen the client's interest in the confidentiality of his or her files or obviate the privilege with respect to those files").

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§1.14 2. Arbitration Agreements

Arbitration conducted under an agreement to arbitrate a dispute is not considered an "action" within the meaning of CCP §22. See *McRae v Superior Court* (1963) 221 CA2d 166, 170, 34 CR 346. The rules governing the conduct of contractual arbitration proceedings are set out in Title 9 of Part 3 of the Code of Civil Procedure (CCP §§1280-1294.2) and thus the provisions of the Civil Discovery Act (CCP §§2016.010-2036.050) do not apply. Instead, CCP §§1283.05 and 1283.1 articulate rules for taking depositions and for obtaining other discovery in certain types of arbitration proceedings. There is also provision for discovery of the other party's list of witnesses and the documents that party intends to produce at the arbitration hearing. CCP §1282.2(a)(2).

The parties to an arbitration may also agree to incorporate the CCP §1283.05 discovery provisions into their arbitration agreement. CCP §1283.1(b).

On discovery in contractual arbitration, see A Litigator's Guide to Effective Use of ADR in California §§9.69-9.70 (Cal CEB 2005).

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§1.15 a. Court's Authority When Case Submitted to Arbitration

After a case is submitted to arbitration under the parties' signed agreement, the court generally has no authority to control the case, including the resolution of discovery disputes. *Titan/Value Equities Group, Inc. v Superior Court* (1994) 29 CA4th 482, 35 CR2d 4 (improper for court to resume jurisdiction over case when arbitration proceeding stalled and became ineffective).

Court review of arbitrator discovery orders. An arbitrator's discovery decisions against a party to an arbitration are subject to only limited judicial review. *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 10, 10 CR2d 183. An arbitrator's discovery order against a *nonparty*, however, is subject to full judicial review. *Berglund v Arthroscopic & Laser Surgery Ctr., L.P.* (2008) 44 C4th 528, 537, 79 CR3d 370. When an arbitrator issues a discovery order against a nonparty, any dispute must first be submitted to the arbitrator. 44 C4th at 535. This follows from CCP §1283.05, which gives parties to an arbitration the right to discovery, including discovery from nonparties. However, nonparties, unlike parties, have a right to full judicial review of the arbitrator's discovery orders because, unlike parties to the arbitration, nonparties have not consented to arbitration or to the finality of arbitrator decisions. 44 C4th at 537.

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§1.16 b. Nature of Arbitration Discovery Under CCP §§1280-1294.2

Personal injury arbitrations. Regardless of the terms of the arbitration agreement, in all arbitration cases resulting from negligent acts that caused personal injury or death, the CCP §1283.05 provisions permitting depositions apply. CCP §1283.1(a).

Arbitrator authority. Under CCP §1282.6, arbitrators have the authority to issue subpoenas. Neutral organizations, associations, and governmental agencies or offices also possess this authority if the arbitration agreement so specifies.

Although CCP §§1283.05 and 1283.1 permit parties to exercise their rights to discovery as if the arbitration "were pending before a superior court of this state in a civil action," the arbitrator is not compelled to follow the remedies or sanctions outlined in the discovery statutes, even if a trial court would be mandated to do so. *Alexander v Blue Cross of Cal.* (2001) 88 CA4th 1082, 1088, 106 CR2d 431 (arbitrator not obligated to deem admissions admitted when defendant failed to respond).

Review of arbitrator discovery orders. An arbitrator's discovery decisions against a party are subject to only limited review. *Berglund v Arthroscopic & Laser Surgery Ctr., L.P.* (2008) 44 C4th 528, 536, 79 CR3d 370. In the case of arbitrator discovery orders against a *nonparty*, disputes must first be submitted to the arbitrator; however, the nonparty is then entitled to full judicial review of the arbitrator's decision. 44 C4th at 537.

NASD and NYSE arbitrations. Extensive discovery procedures are also available under the National Association of Securities Dealers, Inc. (NASD) or the New York Stock Exchange (NYSE) arbitration rules. *McManus v CIBC World Mkts. Corp.* (2003) 109 CA4th 76, 97, 134 CR2d 446. See *Brown v Wells Fargo Bank* (2008) 168 CA4th 938, 957, 85 CR3d 817 (deposition restrictions in NASD arbitrations—same restrictions applicable to nonpersonal injury arbitrations under CCP §§1283-1283.1 absent party agreement otherwise—do not make NASD arbitration substantively unconscionable). The CCP §1283.05 provisions apply to any other arbitration cases if the parties provide that those provisions are incorporated into their arbitration agreement. CCP §1283.1(b).

Agreement to use civil discovery provisions. The parties can also expand the availability of discovery in arbitration proceedings by agreeing that all discovery will be conducted in accordance with California state court procedures. *McManus v CIBC World Mkts. Corp.* (2003) 109 CA4th 76, 99, 134 CR2d 446.

Arbitration of FEHA claims. Section 1283.05 is automatically incorporated into an arbitration agreement arising out of a Fair Employment and Housing Act claim or a claim for wrongful termination in violation of a fundamental public policy. *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1081, 130 CR2d 892; *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 106, 99 CR2d 745. See also *Roman v Superior Court* (2009) 172 CA4th 1462, 1476 n3, 92 CR3d 153 (*Armendariz* "strongly suggested, but did not decide" that §1283.05 is incorporated in FEHA discrimination claim).

NOTE: If the arbitration agreement between parties lacks mutuality or severely limits the right to discovery, the court may refuse to enforce the arbitration agreement altogether and allow discovery under the Civil Discovery Act. *Ontiveros v DHL Express, Inc.* (2008) 164 CA4th 494, 515, 79 CR3d 471; *Fitz v NCR Corp.* (2004) 118 CA4th 702, 715, 13 CR3d 88; *O'Hare v Municipal Resource Consultants* (2003) 107 CA4th 267, 280, 132 CR2d 116.

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§1.17 c. Uninsured Motorist Arbitration

Special rules apply to discovery in arbitrations involving uninsured motorists. These rules provide that the discovery law, although subject to certain limitations, is generally applicable. Ins C §11580.2(f). See California Uninsured Motorist Practice (2d ed Cal CEB 2001). See also *Miranda v 21st Century Ins. Co.* (2004) 117 CA4th 913, 920, 12 CR3d 159 (Ins C §11580.2(f) adopts Civil Discovery statutes in their entirety and superior court has exclusive jurisdiction over uninsured motorist arbitration discovery disputes).

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§1.18 3. Judicial Arbitration

The legislative intent in establishing judicial arbitration (see CCP §§1141.10-1141.31) was to provide for mandatory arbitration of certain disputed, smaller claims with a simple, economical procedure for obtaining their prompt and equitable resolution. CCP §1141.10. Mandatory judicial arbitration applies to trial court cases in which the amount in controversy in the opinion of the court will not exceed $50,000 for each plaintiff. CCP §1141.11. To the extent that provisions for judicial arbitration and arbitration by agreement under CCP §§1280-1294.2 are in conflict, they are mutually exclusive and independent. CCP §1141.30. On mandatory judicial arbitration, see A Litigator's Guide to Effective Use of ADR in California, chap 11 (Cal CEB 2005).

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§1.19 a. Discovery in Judicial Arbitration

Discovery in judicial arbitration proceedings is governed by Cal Rules of Ct 3.822. Generally, all discovery rights under the Discovery Act are permissible in preparing for judicial arbitration. Cal Rules of Ct 3.822. Rule 3.822 permits discovery as a matter of right up to 15 days before the date set for arbitration. The Discovery Act expressly provides that the time limit for completing discovery in a judicial arbitration is subject to Judicial Council rule and is therefore not controlled by the discovery law time limits. CCP §2024.040(a).

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§1.20 b. Discovery After Judicial Arbitration

No discovery is permitted after a judicial arbitration award is made except by court approval on a showing of good cause, by stipulation, or to exchange expert witness lists. CCP §1141.24. Cases submitted to arbitration at the plaintiff's election are not affected by this rule. *McMillan v Superior Court* (1983) 146 CA3d 1014, 1018, 194 CR 670. Under *Regan v Lanet* (1987) 197 CA3d 353, 360 n7, 243 CR 20, six factors determine whether good cause for postarbitration discovery exists:

- The necessity and reasons for discovery;
- The diligence of the party requesting discovery;
- The result of delay;
- Whether the purposes of arbitration, *i.e.,* prompt, equitable, and efficient conflict resolution, will be thwarted;
- Whether the party seeking discovery is also the party requesting trial de novo; and
- The prejudice or hardship to both parties.

JUDGE'S PERSPECTIVE: Generally a court will be reluctant to permit the reopening of discovery after arbitration. Doing so has a tendency to undermine the arbitration process and the resulting sanctions, which are designed to discourage the parties from declining the arbitrators' determination and moving the litigation on to trial.

Under CCP §1141.19.5, a party may not require the production at arbitration of evidence of financial information relevant to punitive damages, as specified in CC §3295(a), unless a court enters an order permitting pretrial discovery under CC §3295.

When discovery reopens. When the trial court vacates arbitration proceedings, the discovery rule precluding discovery 15 days before the date originally set for arbitration (Cal Rules of Ct 3.822) no longer applies and discovery automatically reopens. At that point, the deadline for discovery is limited by any new dates set for either trial or arbitration and the rules applicable to discovery before those dates. *Roe v Superior Court* (1990) 224 CA3d 642, 273 CR 745.

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§1.21 4. Juvenile Court Delinquency Proceedings

Juvenile court delinquency proceedings involving the commission of crimes or violations of court orders (Welf & I C §602) and delinquent behavior short of criminal offenses (Welf & I C §601) are quasi-criminal in nature and the Civil Discovery Act does not apply. See *Joe Z. v Superior Court* (1970) 3 C3d 797, 801, 91 CR 594.

On discovery in child dependency proceedings, see §1.11.

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§1.22 5. Administrative Proceedings

For all administrative proceedings governed by the California Administrative Procedure Act (APA) (Govt C §§11340-11529), the provisions of Govt C §11507.6 "provide the exclusive right to and method of discovery" (Govt C §11507.5). The APA "applies to any state agency as determined by the statutes relating to that agency." Govt C §11501. For a thorough discussion of discovery in APA cases, see California Administrative Hearing Practice, chap 5 (2d ed Cal CEB 1997).

The APA, however, does not apply to all proceedings before administrative agencies in which a party might reasonably want to conduct procedures analogous to discovery. There are many quasi-legislative proceedings to which the APA does not apply. The question of whether the Civil Discovery Act applies to non-APA administrative proceedings has not been determined. Although a court of appeal held that the former discovery law did not apply to administrative proceedings (see *Romero v Hern* (1969) 276 CA2d 787, 790, 81 CR 281), the California Supreme Court expressly declined to reach that question (*Nightingale v State Personnel Bd.* (1972) 7 C3d 507, 518, 102 CR 758). For further information on discovery in non-APA administrative proceedings, see Admin Hearing §§5.4, 5.8-5.12, 5.20-5.23, 5.35.

CAUTION: Before confidential third party records can be disclosed in administrative proceedings, the subpoenaing party must take reasonable steps to notify the third party of the request for disclosure and to give the third party an opportunity to object to disclosure by seeking a protective order or by instituting proceedings to limit discovery. *Sehlmeyer v Department of Gen. Servs.* (1993) 17 CA4th 1072, 1080, 21 CR2d 840 (psychologist in disciplinary proceeding subpoenaed documents from former patient's physicians, psychotherapists, and attorneys without notice to the patient; appellate court upheld trial court's finding that subpoena violated patient's right of privacy and affirmed its award of $70,830 for patient's attorney fees). See Govt C §11450.20 requiring that all administrative subpoenas and subpoenas duces tecum comply with CCP §§1985-1985.4.

Administrative subpoena power. An administrative agency may serve a subpoena for a lawfully authorized purpose to obtain relevant documents to determine whether the entity under investigation has violated the agency's rules or regulations. *Millan v Restaurant Enters. Group, Inc.* (1993) 14 CA4th 477, 493, 18 CR2d 198 (employer required to provide documents to the Division of Labor Standards Enforcement for investigation of whether employer violated Lab C §227.3).

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§1.23 a. Specific Administrative Discovery Provisions

There are express statutory provisions for the conduct of discovery in particular administrative proceedings, such as workers' compensation proceedings (see Lab C §5710), state bar administrative proceedings (see Bus & P C §6052), and Public Utilities Commission proceedings (see Pub Util C §1794). The Civil Discovery Act does not apply to these proceedings. For example, discovery in a workers' compensation case closes on the date of the mandatory settlement conference. See Lab C §5502(e)(3); *County of Sacramento v WCAB (Estrada)* (1999) 68 CA4th 1429, 81 CR2d 266 (workers' compensation judge has no discretion to leave discovery open until after a mandatory settlement conference). On gathering evidence in workers' compensation proceedings, see California Workers' Compensation Practice, chap 14 (4th ed Cal CEB 2000).

Medical Board subpoena. An investigative subpoena issued by the Medical Board of California as part of its inquiry into the conduct of a physician with an apparent drug problem is not "discovery" within the meaning of Evid Code §1157, which provides that the records of a hospital peer review committee are not subject to discovery. *Arnett v Dal Cielo* (1996) 14 C4th 4, 24, 56 CR2d 706 ("discovery" in Evid C §1157 means only the formal exchange of evidentiary information between parties to a pending adversary proceeding).

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§1.24 b. Administrative Mandamus

As in arbitration (see §§1.14-1.20), discovery in administrative mandamus proceedings is governed by a special statute. For cases in which the courts discuss the scope and standards for compelling discovery admissible under CCP §1094.5 in an action for administrative mandamus, see *City of Fairfield v Superior Court* (1975) 14 C3d 768, 122 CR 543; *Mobil Oil Corp. v Superior Court* (1976) 59 CA3d 293, 130 CR 814.

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§1.25 6. Small Claims Court Proceedings

Discovery procedures are not permitted in small claims actions, including small claims appeals, *i.e.,* the de novo proceeding in the superior court. *Bruno v Superior Court* (1990) 219 CA3d 1359, 269 CR 142. See CCP §116.310(b) (pretrial discovery procedures described in CCP §2019.010 are not permitted in small claims actions).

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§1.26 7. Postjudgment Execution Proceedings

Court order for testimony of debtor. The traditional method for questioning judgment debtors about their property is provided by CCP §708.110, which authorizes a court order requiring the judgment debtor to appear personally before the court and testify under oath.

Interrogatories. In addition, CCP §708.020 provides that a judgment debtor can be examined by written interrogatories served in the manner provided by CCP §§2030.010-2030.410. The constitutionality of this procedure under former CCP §714.5 was upheld against an equal protection challenge in *MacDonald v Superior Court* (1977) 75 CA3d 692, 141 CR 667. The provisions of CCP §708.020 can be enforced "to the extent practicable" in the same manner as interrogatories in a civil action. CCP §708.020(c). However, neither this language nor the provisions of CCP §§2030.010-2030.410 (former CCP §2034) authorize the trial court to enjoin the debtor's prosecution of an appeal from the money judgment as a sanction for the judgment debtor's failure to answer interrogatories. *MacDonald v Superior Court, supra*.

Inspection of documents. Under CCP §708.030, the judgment creditor is authorized to demand that any judgment debtor permit inspection of documents in the debtor's possession, custody, or control, if the demand requests information to aid in enforcement of the money judgment. Both the demand and response must be in the manner provided by CCP §§2031.010-2031.060. CCP §708.030(a). Demands to inspect served under CCP §708.030 can be enforced, to the extent practicable, in the same manner as inspection demands in a civil action. CCP §708.030(c).

When to serve. The judgment creditor may not serve interrogatories or inspection demands under CCP §708.020 or §708.030 within 120 days after the judgment debtor has responded to the interrogatories or demands previously served under these sections or within 120 days after the judgment debtor has been examined under CCP §§708.110-708.205. The judgment debtor is not required to respond to any discovery served in violation of those time limits. CCP §708.030(b).

Third party claim procedures. A party availing itself of the third party claim procedures of CCP §§720.110-720.170 does not have the right to conduct discovery. A third party availing itself of this form of claim resolution—as opposed to an action to quiet title, injunctive relief, declaratory relief, suit for damages, or suit to recover possession of property—needs to be aware that discovery procedures are unavailable when choosing whether to proceed in this fashion. Generally, discovery is unavailable in judgment enforcement proceedings. *Whitehouse v Six Corp.* (1995) 40 CA4th 527, 48 CR2d 600 (rejecting third party's argument that it was deprived of its constitutional rights of due process by trial court's refusal to allow it to conduct discovery).

When final judgment obtained. A party who successfully obtains a final judgment for injunctive relief cannot use procedures under the discovery statutes to assist in the enforcement of that judgment absent a pending contempt proceeding. *Department of Fair Employment & Hous. v Superior Court* (1990) 225 CA3d 728, 275 CR 156 (motion to compel further interrogatory responses and inspection demands regarding defendant's financial status denied due to lack of pending action). See also *People v Gonzalez* (1990) 51 C3d 1179, 1257, 275 CR 729, modified by statute as stated in *In re Steele* (2004) 32 C4th 682, 693, 10 CR3d 536 (trial court lacks jurisdictional authority to enter postjudgment discovery order without proceeding pending before court).

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C. Broad Right to Discovery Under Civil Discovery Act

§1.27 1. Purposes of Civil Discovery Act

Discovery is the formal exchange of evidentiary information and materials between parties to a pending action. *Arnett v Dal Cielo* (1996) 14 C4th 4, 20, 56 CR2d 706. A party is entitled to disclosure in discovery as "a matter of right unless statutory or public policy considerations clearly prohibit it." *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 378, 15 CR 90, interpreting the Discovery Act of 1957. The intention of the discovery statutes is to make discovery a "simple, convenient, and inexpensive" means of revealing the truth and exposing false claims. 56 C2d at 376. Another purpose of the discovery statutes is to "educate the parties concerning their claims and defenses so as to encourage settlements and to expedite and facilitate trial." *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 1107, 68 CR2d 883, citing *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 376, 15 CR 90. The statutes are also designed to eliminate surprise. *Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 253 n2, 92 CR2d 70.

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§1.28 2. Construed Liberally

California courts have reiterated that discovery provisions in the Civil Discovery Act of 1986 (CCP §§2016-2036) and the Civil Discovery Act (CCP §§2016.010-2036.050), which replaces it, are to be liberally construed in favor of disclosure. For example, in a breach of contract action against an insurer, the court stated that "California's pretrial discovery procedures are designed to minimize the opportunities for fabrication and forgetfulness, and to eliminate the need for guesswork about the other side's evidence, with all doubts about discoverability resolved in favor of disclosure." *Glenfed Dev. Corp. v Superior Court* (1997) 53 CA4th 1113, 1119, 62 CR2d 195. To accomplish the legislative purpose behind the discovery statutes, they "must be construed liberally in favor of disclosure." *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 1107, 68 CR2d 883, quoting *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 377, 15 CR 90.

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3. Subject to Exercise of Court's Discretion

§1.29 a. *Greyhound Corp. v Superior Court*

The right to discovery is subject to the management of the trial court exercising its sound discretion. See *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 382, 15 CR 90. In exercising its discretion, the trial court bases its decisions on the language of the Civil Discovery Act and the legislative purpose of avoiding surprise and preventing fabrication of evidence at trial. *Glenfed Dev. Corp. v Superior Court* (1997) 53 CA4th 1113, 1119, 62 CR2d 195.

The principles announced by the California Supreme Court in the seminal case of *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 383, 15 CR 90, remain applicable, *i.e.*:

- The legislative purpose of liberal discovery must not be subverted under the guise of exercise of discretion.
- This purpose is to be given effect rather than thwarted, so discovery is encouraged.
- Disputed facts should be liberally construed in favor of discovery, rather than in the most limited and restricted manner possible.
- Statutory limitations on discovery should not, in the exercise of discretion, be extended beyond the limits expressed by the legislature.
- Judicial discretion may not be exercised in situations not included in the discovery statutes, *e.g.,* denial of discovery based on a claim that the party seeking discovery is engaging in a "fishing expedition." Such matters may, however, be considered under the court's statutory power to prevent misuse and advance the ends of justice.
- When the facts are undisputed, or are reasonably susceptible to only one interpretation, the issue becomes one of law and is not subject to the exercise of discretion.
- Whenever possible, a court should impose partial limitations on discovery rather than denying it entirely;
- Before requiring a party to bear the burden or cost of production, a court should weigh the importance of the information sought against the hardship that its production may entail, as well as the relative ability of the parties to obtain the information.

California courts still frequently rely on *Greyhound Corp.* for its guidelines on exercising discretion. See, *e.g.*, *Calcor Space Facility, Inc. v Superior Court* (1997) 53 CA4th 216, 224, 61 CR2d 567.

For further discussion of *Greyhound Corp.* in the context of balancing factors when a motion for protective order is under consideration, see §15.67. On protective orders, see chap 15.

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§1.30 b. Other Principles Guiding Court's Exercise of Discretion

In addition to the guidelines of *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 383, 15 CR 90, several other principles are well established in California discovery law:

- A legal basis must exist for the trial court's discretion. *Carlson v Superior Court* (1961) 56 C2d 431, 15 CR 132.
- In the face of an "irrelevance" objection, an order granting discovery is proper unless there is no reasonable possibility that the responses will lead to the discovery of admissible evidence or be helpful in preparing for trial. *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 7, 123 CR 283.
- Doubts concerning relevance should usually be resolved in favor of permitting discovery. *Colonial Life & Acc. Ins. Co. v Superior Court* (1982) 31 C3d 785, 183 CR 810.
- The concern for undue burden in discovery applies with greater weight when discovery is sought from a nonparty. *Calcor Space Facility, Inc. v Superior Court* (1997) 53 CA4th 216, 61 CR2d 567.
- All doubts about discovery are resolved in favor of disclosure. *Glenfed Dev. Corp. v Superior Court* (1997) 53 CA4th 1113, 1119, 62 CR2d 195.
- The trial court must have legal justification for any order granting or denying discovery and an order lacking legal justification can be set aside on an appeal or request for a writ. See *Johnson v Superior Court* (2000) 80 CA4th 1050, 1061, 95 CR2d 864, citing *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 378, 15 CR 90. On appellate and writ review, see chap 16.

Some aspects of discovery are explicitly entrusted to the court's discretion. For example, CCP §2019.020(b) gives the court the power to establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice. On the general timing limitations on discovery, see §§1.66-1.79. See also §§2.20-2.28.

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§1.31 D. Persons Who May Request Discovery

With one important exception, persons who may request discovery must be parties to a civil action. The exception is set forth in CCP §§2035.010-2035.060, which permits, under limited circumstances, a person who expects to be a party to perpetuate evidence through taking oral or written depositions, and to conduct inspection of documents, things and places, and physical and mental examinations. CCP §2035.020. To conduct such pre-suit discovery, a person must file a verified petition in superior court identifying the reasons why an action cannot be brought, the subject matter of the expected action, the discovery methods which the petitioner desires to employ, the facts which the petitioner desires to establish through discovery, and the reasons for perpetuating or preserving those facts before an action is filed. CCP §2035.030.

For procedures to follow when seeking a deposition to perpetuate testimony under CCP §§2035.010-2035.060, see §§5.147-5.155.

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Source: Civil Litigation/California Civil Discovery Practice/1 The Right to Discovery and Its Scope/ E. Persons From Whom Discovery Is Obtainable/§1.32 1. Parties: Full Discovery Available

E. Persons From Whom Discovery Is Obtainable

§1.32 1. Parties: Full Discovery Available

All parties, whether or not adverse, may be required to respond to any of the discovery methods:

- Notices of deposition (CCP §2025.210);
- Interrogatories (CCP §§2030.010-2030.410);
- Demands for inspection of documents, things, and places (CCP §2031.010);
- Demands for physical and mental examinations (CCP §§2032.010-2032.650);
- Requests for admission (CCP §§2033.010-2033.740);
- Requests to exchange lists of expert trial witnesses (CCP 2034.010-2034.730); and
- Demands for a physical or mental examination if the action puts mental or physical condition in controversy (CCP §2032.020(a)).

NOTE: For at least some purposes under the Civil Discovery Act, a "party" includes a person appointed as a guardian ad litem. *Regency Health Servs., Inc. v Superior Court* (1998) 64 CA4th 1496, 76 CR2d 95 (guardian ad litem is proper party to verify interrogatory responses if plaintiff or defendant, as real party in interest, is unable to do so because of incompetency).

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§1.33 2. Nonparties: Deposition Subpoenas Only

Although all discovery devices are available against a party, only deposition subpoenas can be directed to a nonparty. CCP §2020.010(b). In addition to oral and written depositions, a party may require a nonparty witness to produce business records, other documents, and things only through service of a deposition subpoena. CCP §§2020.010, 2020.410-2020.510. No authority exists for subjecting nonparty witnesses to any other discovery method. On deposition subpoenas to nonparties, see §§5.85-5.131.

The distinction between parties and nonparties reflects the notion that, by engaging in litigation, the parties should be subject to the full panoply of discovery devices, while nonparty witnesses should be somewhat protected from the burdensome demands of litigation.

A nonparty deponent who does not comply with a subpoena may be punished under CCP §2023.010. *Sears, Roebuck & Co. v National Union Fire Ins. Co.* (2005) 131 CA4th 1342, 32 CR3d 717.

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III. SCOPE OF DISCOVERY

§1.34 A. Relevance to Subject Matter

In general, any party may obtain discovery about any unprivileged matter that is relevant to the subject matter of the action. This concept of liberal discovery is codified in the Civil Discovery Act (CCP §§2016.010-2036.050), which states (CCP §2017.010):

> *Unless otherwise limited by order of the court in accordance with this title,* any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. [Emphasis added.]

Any information that "might reasonably assist a party in *evaluating* the case, *preparing* for trial, or *facilitating* settlement" falls within the definition of permissible discovery. (Emphasis added.) *Lipton v Superior Court* (1996) 48 CA4th 1599, 1611, 56 CR2d 341. Admissibility is *not* the test. Discovery rules are applied liberally in favor of discovery, and "(contrary to popular belief), fishing expeditions *are* permissible in some cases." *Gonzalez v Superior Court* (1995) 33 CA4th 1539, 1546, 39 CR2d 896. See also *Volkswagen of Am., Inc. v Superior Court* (2006) 139 CA4th 1481, 1490, 43 CR3d 723 (although claims submitted to bankruptcy trusts would likely be inadmissible under Evid C §1152, they were nonetheless discoverable because they could lead to discovery of admissible evidence).

Thus, with the exception of physical and mental examinations (see CCP §§2032.010-2032.650), which are obtainable only regarding physical or mental conditions that are "in controversy in the action," (see CCP §2032.020(a); §10.2), every discovery procedure is governed by the requirement of CCP §2017.010 that the information sought must be "relevant" to the subject matter, and either in itself be admissible, or appear reasonably calculated to lead to the discovery of admissible evidence.

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§1.35 1. Relevance Versus Burden, Expense, or Intrusiveness of Discovery

Aside from specific statutory prohibitions such as privilege, the most important limitation on discovery is the requirement that a court narrow the scope of discovery "if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." CCP §2017.020(a). On motions for protective orders, see chap 15.

This requirement of weighing burden, expense, and intrusiveness against the likelihood that the information will lead to discovery of admissible evidence—first stated by the Supreme Court in *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 378, 15 CR 90—is "so important as a counterbalance to the broad standards of discovery relevance" that it was written into the statute and not left to implication. Reporter's Notes to CCP §2017 of the Proposed California Civil Discovery Act of 1986 (as drafted by the State Bar/Judicial Council Joint Commission on Discovery) in Hogan & Weber, California Civil Discovery, App D (2d ed 2005).

Determining the proper scope of discovery is a fact-intensive process requiring the application of "reason, logic, and common sense." *Lipton v Superior Court* (1996) 48 CA4th 1599, 1611, 56 CR2d 341. By making both the scope of discovery and the court's discretion to limit it very broad, the California Legislature has ensured that California trial courts will continue the common law tradition of flexibility in applying legal concepts to specific discovery disputes and reaching reasonable conclusions.

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2. Nature of Relevance

§1.36 a. Statutory Definition

Civil Discovery Act. The most definitive statement on relevance is found in CCP §2017.010, which provides that, unless discovery is restricted by a limiting order of the court or by a valid assertion of privilege, any party may obtain discovery on any matter that is "relevant to the subject matter involved in the pending action or to the determination of any motion" in a pending action. CCP §2017.010.

Examination is expressly permitted with respect to a claim or defense of any party, the identity and location of persons having knowledge of any discoverable matter, and the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property. CCP §2017.010.

The statutory language makes clear that the concept of "relevance" is broader than that of "admissibility into evidence," and that a party is entitled to discover information (if it is not otherwise subject to a valid objection) that may constitute, *e.g.,* hearsay (*Smith v Superior Court* (1961) 189 CA2d 6, 11 CR 165) or inadmissible opinions and conclusions (*Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 391, 15 CR 90). For the Reporter's notes to the Civil Discovery Act of 1986 and former CCP §2017 in particular, see Hogan & Weber, California Civil Discovery, App D (2d ed 2005).

PRACTICE TIP: California practitioners cannot validly object on the grounds that the information sought in discovery will not be admissible at trial, if the information to be discovered "appears reasonably calculated to lead to the discovery of admissible evidence." CCP §2017.010. It is common to hear some counsel object at a deposition that a question calls for "speculation" of the witness. Since speculation may lead to the discovery of relevant evidence, however, such an objection to the form of the question cannot be used to limit the scope of inquiry. On objections during deposition, see §§6.94-6.101.

For discussion of categories of relevant information, see §§1.38-1.54.

Other statutes. Other statutes may affect the relevance of particular information in a particular case. For example, several California statutes declare that for purposes of state employment, civil rights, and employee housing claims, a person's immigration status is irrelevant. *Hernandez v Paicius* (2003) 109 CA4th 452, 460, 134 CR2d 756. See CC §3339; Govt C §7285; Lab C §1171.5. Labor Code §1171.5(b) states that:

> For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant on the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.

See also *Farmer Bros. Coffee v WCAB* (2005) 133 CA4th 533, 35 CR3d 23 (workers' compensation case); *Rivera v Nibco, Inc.* (9th Cir 2004) 384 F3d 822 (preclusion of discovery about plaintiff employees' immigration status justified to avoid chilling effect on pursuit of their workplace rights). On protective orders, see chap 15.

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§1.37 b. Judicial Guidelines

The Civil Discovery Act provides no precise test for determining whether a particular area of examination is relevant to the subject matter of the action. Although disputes about relevance during discovery are commonplace, a practitioner is also without any dispositive, firmly established test for resolving relevance issues based on reported cases. In general, the question of relevance will be determined in each case "according to the teachings of reason and judicial experience." *Pacific Tel. & Tel. Co. v Superior Court* (1970) 2 C3d 161, 172, 84 CR 718, quoting *Moody v Peirano* (1906) 4 CA 411, 418, 88 P 380. Nonetheless, some guidelines for determining relevance have been enunciated by the California courts, including the following:

- To accomplish the legislative purposes of the Civil Discovery Act, which include elimination of the "game" element from trial preparation, the statutory provisions should be construed liberally in favor of permitting disclosure. *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 377, 15 CR 90.
- Doubts about relevance should ordinarily be resolved in favor of permitting discovery. *Shepherd v Superior Court* (1976) 17 C3d 107, 120 n9, 130 CR 257, overruled in part on other grounds in *People v Holloway* (2004) 33 C4th 96, 131, 14 CR3d 212; *Pacific Tel. & Tel. Co. v Superior Court, supra*; *Glenfed Dev. Corp. v Superior Court* (1997) 53 CA4th 1113, 1119, 62 CR2d 195.
- The phrase "subject matter involved in the pending action" (see CCP §2017.010) has been defined to include not only the acts that constitute the cause of action but also the circumstances and physical facts from which the action arises, including the property, contract, or other things in dispute. *Darbee v Superior Court* (1962) 208 CA2d 680, 25 CR 520. Thus, relevance to the subject matter of the action is a broader concept than relevance to the issues. *Pacific Tel. & Tel. Co. v Superior Court, supra*. Because issues are less well defined during discovery than at trial, it is appropriate for the range of permissible discovery to be broader than the range of questioning at trial. See *Beverly Hills Nat'l Bank & Trust Co. v Superior Court* (1961) 195 CA2d 861, 16 CR 236.
- The admissibility of a document bears on its discoverability in that, if the document is admissible, it necessarily is discoverable. *Volkswagen of Am., Inc. v Superior Court* (2006) 139 CA4th 1481, 1490, 43 CR3d 723. The inverse is not necessarily true, however; that evidence is not admissible does not mean it is not discoverable. *Volkswagen of Am., Inc. v Superior Court, supra* ("admissibility is not prerequisite to discovery"), quoting *Davies v Superior Court* (1984) 36 C3d 291, 301, 204 CR 154.

Information is relevant to the subject matter of the action if it helps a party prepare for trial (see *Morris Stulsaft Found. v Superior Court* (1966) 245 CA2d 409, 54 CR 12) or facilitates pretrial settlement (see *Pettie v Superior Court* (1960) 178 CA2d 680, 688, 3 CR 267). See also *Lipton v Superior Court* (1996) 48 CA4th 1599, 1611, 56 CR2d 341 (information is relevant if it helps a party evaluate the case).

JUDGE'S PERSPECTIVE: The courts are mindful of the need for the parties to have a full disclosure of the facts and evidence before a case may be resolved short of trial. Therefore, judges are usually inclined to enforce discovery requests, rather than limit them.

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B. Categories of Relevant Information

1. Pleadings

§1.38 a. Facts Relating to Claim or Defense

Information that relates to a claim or defense of any party is relevant to the subject matter of the action and is subject to discovery, even though the information may be inadmissible at trial. CCP §2017.010. For an example of an appellate court ruling allowing broad latitude in discovering facts to meet a defense, see *Morfin v State* (1993) 12 CA4th 812, 15 CR2d 861, in which plaintiffs were allowed to propound interrogatories regarding collisions into and vehicle contact with any portions of any DMV buildings within 10 years of the plaintiff's accident.

Because discovery serves the function of "testing the pleadings" (*Burke v Superior Court* (1969) 71 C2d 276, 281, 78 CR 481), the pleadings are especially important in making the initial determination whether particular information sought to be discovered is relevant to the subject matter of the action. However, a party may not, by admitting allegations, foreclose discovery on the subject matter of the admitted allegations. *Pacific Tel. & Tel. Co. v Superior Court* (1970) 2 C3d 161, 174, 84 CR 718.

Information relating to contentions made by other parties (*Burke v Superior Court* (1969) 71 C2d 276, 78 CR 481) and factual information supporting allegations in the pleadings, including affirmative defenses and general denials, are relevant without regard to who has the burden of proof on the issue for which information is sought (*Dompeling v Superior Court* (1981) 117 CA3d 798, 173 CR 38, disapproved in part on other grounds in *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 500 n7, 213 CR 256). See also *Singer v Superior Court* (1960) 54 C2d 318, 5 CR 697, in which the court stated that there was no merit at all in the assertion that interrogatories should not be answered merely because they pertain to the pleadings.

Potential issues. A party may discover information about potential as well as actual issues in the case. *McClatchy Newspapers v Superior Court* (1945) 26 C2d 386, 394, 159 P2d 944; *Union Mut. Life Ins. Co. v Superior Court* (1978) 80 CA3d 1, 145 CR 316. For example, discovery may be obtained with regard to damages, even before the determination on liability has been made. *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 419 n4, 15 CR 119; *Coffelt v Superior Court* (1967) 254 CA2d 884, 62 CR 636. See §1.40.

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§1.39 b. Information to Cure Defective Pleading

It is not required that a pleading be legally sufficient for information pertaining to its subject matter to be considered relevant. For example, discovery may be used to obtain information that is both relevant to the subject matter of a defective pleading and necessary to cure the defect. See *Keely v Price* (1972) 27 CA3d 209, 216, 103 CR 531, disapproved in part on other grounds in *Tenzer v Superscope, Inc.* (1985) 39 C3d 18, 216 CR 130; *Los Angeles Cemetery Ass'n v Superior Court* (1968) 268 CA2d 492, 74 CR 97. However, if a defective pleading cannot be cured by amendment (*Silver v Los Angeles* (1966) 245 CA2d 673, 54 CR 203), or if the pleadings create no triable issue of fact, discovery may be denied (*Knoff v City & County of San Francisco* (1969) 1 CA3d 184, 200, 81 CR 683).

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§1.40 c. Financial Information

Financial information bearing on damages is discoverable even before liability has been established. *Hauk v Superior Court* (1964) 61 C2d 295, 38 CR 345; *Coffelt v Superior Court* (1967) 254 CA2d 884, 62 CR 636. When the financial condition of a party is in issue, as it is in many business disputes, substantial discovery and analysis of the claimant's fiscal condition may be conducted, including financial statements, projections of revenue and expenses, and other budgetary materials. See, *e.g., Flora Crane Serv., Inc. v Superior Court* (1965) 234 CA2d 767, 778, 45 CR 79 (financial information relevant to alter ego issue in breach of contract case). See Note, §1.43.

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§1.41 d. Defendant's Assets When Punitive Damages Claimed

Unless the defendant's financial condition is itself an issue, even though information about a defendant's assets may be relevant to the ability to respond in damages, it is discoverable only when there is a claim for punitive damages, and then only when the conditions of CC §3295 are met. See *Coy v Superior Court* (1962) 58 C2d 210, 23 CR 393; *Doak v Superior Court* (1968) 257 CA2d 825, 65 CR 193. See also *People v Superior Court* (*Kardon*) (1973) 35 CA3d 710, 111 CR 14 (potential imposition of civil financial penalties held sufficiently similar to punitive damages to justify discovery of defendant's financial worth).

A party sued for punitive damages has no constitutional right to withhold financial information on the ground of privacy. *Richards v Superior Court* (1978) 86 CA3d 265, 150 CR 77. However, in a claim for punitive damages, discovery of a defendant's financial condition is limited by CC §3295(c). Section 3295(c) prohibits pretrial discovery of the defendant's financial condition or of the profits allegedly gained by wrongful acts, unless the court orders such discovery on the plaintiff's motion, supported by appropriate affidavits. After a hearing, if the court deems a hearing necessary, the court may at any time enter an order permitting the discovery otherwise prohibited if the court finds that the plaintiff has established that a substantial probability exists of prevailing on the claim for punitive damages. CC §3295(c).

PRACTICE TIP: An effective way of handling disclosure of financial information when a claim for punitive damages is alleged is to have the defendant bring the requested documents to trial under seal, making them available to plaintiff only if the jury should determine that defendant was guilty of malice, oppression, or fraud. See *Jabro v Superior Court* (2002) 95 CA4th 754, 115 CR2d 843.

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§1.42 e. Defendant's Assets When Good Faith of Settlement Challenged

In *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256, the California Supreme Court held for the first time that the financial condition of a settling defendant is one of many relevant considerations in determining whether a settlement has been made in good faith under CCP §877. Under *Tech-Bilt,* a defendant who does not settle should be able to discover the financial condition of a defendant who does settle, subject to an appropriate protective order, for the purpose of challenging the good faith of a settlement.

CAUTION: A settling defendant's financial condition becomes relevant to a good faith settlement determination only if the settlement is "disproportionately low." If a settlement is not disproportionately low, financial condition is irrelevant, and discovery is unnecessary on the subject. *L.R. Rudd & Son, Inc. v Superior Court* (1997) 52 CA4th 742, 60 CR2d 703.

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§1.43 f. Plaintiff's Compensation and Damages

Interrogatories seeking information about compensation received by plaintiffs for personal injuries or property damage were held relevant to the determination whether a plaintiff is a "professional" litigant. *Bakman v Superior Court* (1976) 63 CA3d 306, 133 CR 703, disapproved on other grounds in *Brit v Superior Court* (1978) 20 C3d 844, 862, 143 CR 695.

NOTE: In a personal injury action, a defendant or cross-defendant may at any time request a statement of the nature and amount of special and general damages being sought by the plaintiff or cross-complainant. CCP §425.11. Normal discovery procedures can be used to elicit more detailed information. For further discussion of CCP §425.11 requests, see California Civil Procedure Before Trial §§15.9-15.12 (4th ed Cal CEB 2004). See also §2.43.

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2. Insurance

§1.44 a. Insurance Agreements

When statute expressly permits discovery. California discovery law expressly provides for discovery of information about the existence and contents of any insurance agreement under which a carrier may be liable to satisfy all or part of a potential judgment or to indemnify or reimburse payments made to satisfy the judgment. CCP §2017.210. The statute also provides for discovery of whether coverage of the claim involved in the action is disputed. CCP §2017.210. Recognizing that the existence of liability insurance may not be relevant to the underlying subject matter of the action, the legislature included cautionary language in CCP §2017.210, stating that information about insurance is not admissible in evidence at trial by reason of disclosure.

Nonparty insurer reinsurance agreements. Section 2017.210 does not authorize the discovery of information related to the financial condition of a defendant's nonparty reinsurer, however, nor does it authorize the discovery of an insurer's reinsurance agreements; the discoverability of reinsurance information rests on the general relevancy standards of CCP §2017.210. *Catholic Mut. Relief Soc'y v Superior Court* (2007) 42 C4th 358, 363, 64 CR3d 434.

Settlement agreement. In a legal malpractice action, the trial court was directed to review a settlement agreement between the plaintiff and its insurance carrier to determine if the agreement might lead to admissible evidence and be discoverable. *Norton v Superior Court* (1994) 24 CA4th 1750, 1761, 30 CR2d 217. The trial court had ruled earlier that the collateral source rule precluded the agreement's discovery by the attorney defendant. Although the collateral source rule prevents the attorney from mitigating damages using proceeds from the insurance company, the settlement agreement would be discoverable if it could lead to the discovery of other admissible evidence.

Insurance application. Under CCP §§2017.010 and 2031.010, a party can obtain production of relevant insurance policies in a personal injury action. *Irvington-Moore, Inc. v Superior Court* (1993) 14 CA4th 733, 18 CR2d 49. Unless the insurance application is incorporated into the policy, however, the application is not discoverable. On inspection of documents, see chap 8.

Existence of policy not privileged. There is no privilege under CC §47(b) regarding the existence of an insurance policy. That is, a party may not knowingly conceal the existence of an insurance policy and claim that the existence of such a policy is privileged under CC §47(b). CC §47(b)(3). On privileges, see chap 3.

Pretrial discovery of policy limits. A party does not have the right to discover the insured's insurance policy limits before an action is filed, unless the requirements of CCP §§2035.010-2035.060, governing discovery before commencement of an action, are met. *Griffith v State Farm Mut. Auto. Ins. Co.* (1991) 230 CA3d 59, 69, 281 CR 165. The filing of a petition to perpetuate testimony or the filing of a lawsuit ensures that a serious claim is being asserted and that the privacy interests of insureds are protected from unwarranted intrusion by third parties. On filing petition to perpetuate testimony, see §§5.147-5.155.

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§1.45 b. Prior Settlements in Insurance Coverage Litigation

In insurance coverage litigation, nonsettling excess insurers are entitled to discovery of settlement with primary insurers to determine whether the excess insurers have a duty to defend. For that reason, it is reversible abuse of discretion for a court to postpone discovery of such information until after the liability of the excess insurer has been preliminarily determined. The fact that the remaining, nonsettling insurers may defeat coverage on other grounds does not justify postponing discovery until after a coverage determination has been made. *Home Ins. Co. v Superior Court* (1996) 46 CA4th 1286, 54 CR2d 292.

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§1.46 c. Insurance Reserves

In a legal malpractice action, insurance reserves, which are relevant to the potential for coverage as well as to the likelihood of an excess verdict, are discoverable. *Lipton v Superior Court* (1996) 48 CA4th 1599, 56 CR2d 341. See also *Bernstein v The Travelers Ins. Co.* (ND Cal 2006) 447 F Supp 2d 1100, 1106 (citing *Lipton,* and applying federal procedural and California substantive law, court held that insurance reserves, internal notes, and communications relating to such reserves, and criteria or considerations used to establish size of reserves, are discoverable when relevant in insurance bad faith litigation).

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§1.47 3. Medical Information

Although protected by the right to privacy, medical information about an individual's prior or current medical condition is usually discoverable if placed in controversy. On mental and physical exams, see chap 10. As with other types of information protected by the right of privacy, courts will evaluate whether the medical information sought is necessary to fairly adjudicate the case and the request is no broader than necessary to accomplish that purpose. For example, in *Doyle v Superior Cour*t (1996) 50 CA4th 1878, 1885, 58 CR2d 476, the defendant in a wrongful employment termination case was not permitted to obtain plaintiff's medical examination because no ongoing mental distress was alleged as an element of damages.

JUDGE'S PERSPECTIVE: Because the plaintiff determines the scope of the damages sought to be recovered, the defendant will normally be limited to discovery that falls within that scope. For example, a plaintiff who does not seek damages for personal injury will usually be successful when objecting to the discovery of his or her medical records.

On privacy, see §§3.156-3.164.

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§1.48 4. Legal and Factual Contention Interrogatories Proper

Information is relevant that seeks to establish a party's contentions (*Burke v Superior Court* (1969) 71 C2d 276, 78 CR 481) or to determine the facts that support a party's contentions (*Associated Brewers Distrib. Co. v Superior Court* (1967) 65 C2d 583, 55 CR 772). See also *Southern Pac. Co. v Superior Court* (1969) 3 CA3d 195, 83 CR 231, overruled on other grounds in *Kadelbach v Amaral* (1973) 31 CA3d 814, 823, 107 CR 720. Discovery of such information is a means of "testing the pleadings," which is one of the principal purposes of discovery. *Burke v Superior Court* (1969) 71 C2d 276, 281, 78 CR 481. On testing the pleadings, see §1.38.

Contention interrogatories are expressly allowed in CCP §2030.010(b). *Rifkind v Superior Court* (1994) 22 CA4th 1255, 27 CR2d 822. See §§7.39-7.43. An interrogatory may not only relate to whether a contention is being made but also ask for facts, witnesses, and writings on which a contention is based. CCP §2030.010(b). Such contention questions are improper in a deposition, however. As the *Rifkind* court said, the basic vice of asking contention questions at a deposition (22 CA4th at 1262)

> is that they are unfair. They call upon the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot. There is no legitimate reason to put the deponent to that exercise.

The court in *Rifkind* explicitly stated that it was refraining from ruling on whether questions about legal contentions are appropriate at the deposition of an unrepresented party, or the extent, if any, to which some contention questions might be proper to test statements in a verified pleading. 22 CA4th at 1263 n3.

Written requests that another party admit the genuineness of documents or the truth of specified matters of fact, opinions relating to fact, or the application of law to fact are also expressly allowed under CCP §2033.010. On requests for admission, see chap 9.

NOTE: Although discovery of another party's factual or legal contentions is permissible, the California Supreme Court has held that the legal reasoning or theories behind the contentions, as opposed to the factual or documentary bases for the contentions, is nondiscoverable work product. See *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 5, 123 CR 283. For further discussion of work product, see §§3.52-3.68.

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5. Information About Witnesses

§1.49 a. Experts

Discovery of the identity of and information about experts who are expected to be called as witnesses at trial is governed exclusively by CCP §§2034.010-2034.730. See chap 11. Work product protection is available for the identity of an expert consultant not yet designated to testify at trial and the facts that expert consultant observed. See §11.5. On work product protection generally, see §§3.52-3.68.

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§1.50 b. Percipient and Nonpercipient Witnesses

The identity and location of persons who are not experts but who may have knowledge of any discoverable matter is relevant to the subject matter of the litigation and is discoverable. CCP §2017.010; *Pioneer Electronics (USA), Inc. v Superior Court* (2007) 40 C4th 360, 374, 53 CR3d 513 ("Our discovery statute recognizes that 'the identity and location of persons having [discoverable] knowledge' are proper subjects of civil discovery"; contact information about identity of class members generally discoverable). Such persons may be actual witnesses to an event in dispute, or they may have knowledge that is based on hearsay. See *Smith v Superior Court* (1961) 189 CA2d 6, 12, 11 CR 165; *City & County of San Francisco v Superior Court* (1958) 161 CA2d 653, 656, 327 P2d 195.

In some cases, the identity of persons who have no information on the specific facts of a case may still be relevant to a claim regarding the opposing party's regular business practices.

EXAMPLE: In a bad faith insurance action, the plaintiff was permitted to discover the names, addresses, and files of all other insured persons with whom a claims adjuster had attempted to reach settlements. The court held that such discovery was likely to produce evidence relevant to whether the defendant knowingly committed or engaged in an unlawful practice often enough to indicate a general business practice and whether it had acted with a conscious disregard of the plaintiff's rights. *Colonial Life & Acc. Ins. Co. v Superior Court* (1982) 31 C3d 785, 183 CR 810. An opposite result was reached in *Pollock v Superior Court* (2001) 93 CA4th 817, 113 CR2d 453, when the information sought was names and addresses of persons receiving psychiatric disability benefits from the defendant insurance company, because such disclosure would reveal a claimant's psychiatric condition.

For discussion on whether the burden, expense, or intrusiveness of the discovery outweighs the likelihood that the information sought will lead to the discovery of admissible evidence, see §1.35.

JUDGE'S PERSPECTIVE: In many personal injury cases, the plaintiff's attorney calls a family member to testify about the plaintiff's condition before and after the incident. Counsel should use supplemental interrogatories to obtain the identities of these potential witnesses before trial. On supplemental interrogatories, see §7.12. The use of form interrogatories that refer to persons with knowledge of the "incident" may not reveal the names of persons the responding party intends to call as witnesses on damages or ancillary issues.

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§1.51 6. Affirmative Action Plans

In actions for gender-based discrimination, discovery of defendants' affirmative action plan and self-critical analysis prepared with respect to the plan are relevant to the subject matter of the action and therefore discoverable. *Cloud v Superior Court* (1996) 50 CA4th 1552, 58 CR2d 365.

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§1.52 7. Facts Arising After Suit Filed

There is no provision in the Civil Discovery Act preventing discovery of facts arising after suit is filed. In cases alleging a continuing tort or breach of contract, such discovery may be needed to amend the complaint or to show that conduct before suit was part of a continuing plan or scheme.

Under CCP §464, a supplemental complaint may be filed "alleging facts material to the case occurring after the former complaint." Although such complaints are not technically permitted to allege facts constituting an entirely new cause of action, the distinction between amendment and supplement is often overlooked, and a new cause of action may be permitted. See *Honig v Financial Corp. of Am.* (1992) 6 CA4th 960, 966, 7 CR2d 922, in which an employee suing for harassment was permitted to amend her complaint to allege a defamation claim arising after suit was filed.

There are numerous other situations in which facts arising after filing are relevant to the subject matter of the action. They may show, *e.g.*, that tortious conduct continues and should be enjoined before trial, or has ceased and no longer needs to be enjoined under the doctrine of mootness. When punitive damages are sought, posttrial conduct and statements may show whether a corporate defendant has ratified a prior wrongful act. When assets are being traced in connection with an alleged breach of trust, discovery of postsuit filing activities may be necessary to prove their current location. For example, a former wife in a marital dissolution proceeding was permitted to discover books and records of two clinics founded by her former husband to determine whether he was continuing in medical practice. *Lehman v Superior Court* (1986) 179 CA3d 558, 224 CR 572.

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§1.53 8. Similar Incidents and Complaints

Subject to reasonable limitation based on burden, expense, and inconvenience, evidence of other similar complaints or incidents like the one being litigated are generally discoverable. They may be admissible to show intent, scheme, design, causation, or knowledge of an existing condition. *Stewart v Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1013, 105 CR2d 115 (questions seeking information about executive's conduct with other employees relevant to establishing a general practice of unjustified discipline or unfair criticism of employees); *Morfin v State* (1993) 12 CA4th 812, 15 CR2d 861 (discovery of prior accidents involving automobiles that crashed into DMV offices throughout state; see case discussion in §1.68).

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§1.54 9. Jurisdictional Facts

A plaintiff is generally entitled to discovery on jurisdictional issues *before* the court rules on a motion to dismiss for lack of personal jurisdiction. See *Goehring v Superior Court* (1998) 62 CA4th 894, 73 CR2d 105 (after reversing trial court's order granting motion to dismiss, court of appeal instructed trial court to consider plaintiff's request for jurisdictional discovery).

Similarly, when a defendant appears solely to contest jurisdiction, discovery undertaken in connection with that challenge will not constitute a general appearance. See *Islamic Republic of Iran v Pahlavi* (1984) 160 CA3d 620, 628, 206 CR 752 (the taking of a deposition, propounding interrogatories, and examining certain of plaintiff's documents for purposes of supporting a motion to dismiss for lack of jurisdiction do not constitute a general appearance). In conducting discovery relating to whether the court has personal jurisdiction, it is customary for a defendant appearing specially to state on the notice of motion to dismiss and all discovery requests and responses the notation "special appearance." However, although this designation is helpful, it is not dispositive of the general versus special appearance question. A defendant seeking to specially appear will carefully limit discovery requests and other actions in the case to the jurisdictional question. Otherwise, a general appearance may occur by taking part in the action or proceeding. See *Creed v Schultz* (1983) 148 CA3d 733, 739, 196 CR 252 (holding that a party makes a general appearance by noticing a deposition and seeking production of documents). See §1.77.

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§1.55 C. Irrelevant or Marginally Relevant Matter

Even under the broad concept of relevance, the courts have found some matters irrelevant and therefore not discoverable. For examples, see §§1.56-1.60. See also *Snell v Superior Court* (1984) 158 CA3d 44, 204 CR 200 (interrogatories about whether hospital required certain physicians to carry malpractice insurance held irrelevant in negligence action against hospital). But see *Brown v Superior Court* (1985) 168 CA3d 489, 502, 214 CR 266, in which a patient sued a hospital for negligently screening and evaluating a physician; the court rejected the reasoning of *Snell* and held that discovery regarding whether a hospital required physicians to have current malpractice coverage was relevant because it addressed whether hospital breached its duty of care. See also *Pacific Architects Collaborative v State* (1979) 100 CA3d 110, 166 CR 184 (depositions denied because state of mind of employees was irrelevant to case).

If the information sought is so remote from the subject matter of the action that its disclosure would be of little or no practical benefit to the party seeking it, discovery may be denied. See *Ryan v Superior Court* (1960) 186 CA2d 813, 9 CR 147, quoted with approval in *Columbia Broadcasting Sys. v Superior Court* (1968) 263 CA2d 12, 69 CR 348. As a general rule, information about the financial condition of a defendant's nonparty insurer and the insurer's reinsurance agreements is too remote from the subject matter of an underlying tort action to be relevant. See *Catholic Mut. Relief Soc'y v Superior Court* (2007) 42 C4th 358, 368, 64 CR3d 434 (holding that CCP §2017.010 does not authorize discovery of information about nonparty insurance carrier's reinsurance contracts).

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§1.56 1. Legislators' Thought Processes

Because the validity of legislation does not depend on motive, the motive of an individual legislator in enacting particular legislation is irrelevant and not discoverable. See *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 572 n5, 21 CR3d 331; *County of Los Angeles v Superior Court (Burroughs)* (1975) 13 C3d 721, 726, 119 CR 631; *City of King City v Community Bank of Cent. Cal.* (2005) 131 CA4th 913, 942, 32 CR3d 384; *Smith v Santa Rosa Police Dept.* (2002) 97 CA4th 546, 563, 119 CR2d 72; *City of Los Angeles v Superior Court* (1985) 170 CA3d 744, 753, 216 CR 311. See also §3.108.

The same principle applies to quasi-judicial decisions rendered by administrative bodies (*Board of Admin., Pub. Employees' Retirement Sys. v Superior Court* (1975) 50 CA3d 314, 319, 123 CR 530), and to a city attorney's draft opinion on the validity of a proposed city ordinance (*City & County of San Francisco v Superior Court* (*Callanan*) (1982) 130 CA3d 481, 181 CR 775).

A party may not evade the prohibition against questioning legislators about their thought processes and motives by posing questions to others about facts which may have led to the legislators' votes. See *Board of Supervisors v Superior Court* (*Mun. Court Judges' Ass'n, Los Angeles County*) (1995) 32 CA4th 1616, 38 CR2d 876 (appellate court precluded questions posed to county sheriff about county supervisors' decision to consolidate court services; questions to determine *when* a supervisor decided on a particular issue also related to supervisor's thought processes and were impermissible.

Under the Ralph M. Brown Act (Govt C §§54950-54963), legislative bodies, such as a city council, may hold closed sessions to discuss certain matters, and confidentiality may be inferred for the proceedings at such sessions. *Kleitman v Superior Court* (1999) 74 CA4th 324, 332, 87 CR2d 813. See §3.112.

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§1.57 2. Right of Privacy

When a party seeks to discover information protected by the right of privacy, the information is discoverable only if it is directly relevant to the issues in litigation. "It is not enough [that] the information may lead to relevant evidence." *Binder v Superior Court* (1987) 196 CA3d 893, 901, 242 CR 231 (court refused to allow discovery of defendant-doctor's photographs of patients' skin lesions when the photographs were of strangers to the litigation and served no diagnostic purpose). When a claim is made that discovery invades the right to privacy, courts apply the balancing test of *Hill v National Collegiate Athletic Ass'n* (1994) 7 C4th 1, 15, 26 CR2d 834 to determine whether there is a reasonable expectation of privacy in the information that is sought and to fashion proper protections when necessary. *Pioneer Electronics (USA), Inc. v Superior Court* (2007) 40 C4th 360, 370, 53 CR3d 513. On privacy, see §§3.156-3.164.

JUDGE'S PERSPECTIVE: Courts will balance the competing interests. Stronger privacy rights may overcome a weak showing of relevancy.

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§1.58 3. Attorney's Hourly Rate

A contract attorney's hourly rate was held to be irrelevant to the issue of whether the rate charged to the client was unconscionable. *Shaffer v Superior Court* (1995) 33 CA4th 993, 39 CR2d 506 (under Cal Rules of Prof Cond 4-200, attorney profit margin is irrelevant to the unconscionability of fees). On the other hand, the issue may be relevant in the context of a motion to recover attorney fees.

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§1.59 4. Identity of Unknown Parties

There is no good cause to permit the commencement of depositions without a showing that a plaintiff's attempt to identify unknown defendants is not merely a "fishing expedition."

In *Pearlson v Does 1 to 646* (1999) 76 CA4th 1005, 1011, 90 CR2d 787, the trial court's dismissal of the case for failure to timely serve summons and complaint and for failure to prosecute, and the court's denial of plaintiffs' request to take depositions, were upheld on appeal.

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§1.60 5. Reasons for Special Litigation Committee's Actions in Derivative Suit Litigation

In a shareholder's derivative suit alleging waste and breach of fiduciary duties by corporate officers and directors, a decision of the special litigation committee appointed by the board of directors not to prosecute the claims raises issues concerning the independence of committee members and the adequacy of their investigation, not the merits of the underlying claims. Thus, discovery is limited to the independence and investigation issues. *Desaigoudar v Meyercord* (2003) 108 CA4th 173, 190, 133 CR2d 408 (trial court's denial of motion to require special litigation committee to conduct depositions of individuals within plaintiffs' control upheld on appeal).

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D. Limitations on Discovery of Relevant Matter

§1.61 1. Privilege and Other Protections

Even if a matter is found to be relevant to the subject matter of an action, it may not be discoverable if the information is privileged (CCP §2017.010) or is part of an attorney's work product (CCP §§2018.010-2018.080).

For discussion of privileges, work product, and other protections that may prevent discovery of otherwise relevant information, see chap 3.

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§1.62 a. Constitutional Rights of Association and Privacy

When disclosure may be prevented. The identity and location of persons having knowledge of relevant matters may be protected from disclosure when the constitutional privileges of freedom of association and privacy take precedence over the purposes of the discovery statutes. See *Britt v Superior Court* (1978) 20 C3d 844, 143 CR 695 (compelled disclosure of plaintiffs' memberships in organizations opposed to some activities of defendant airport would have "chilling effect" on members' rights to join popular as well as unpopular organizations). See also *Tien v Superior Court* (2006) 139 CA4th 528, 539, 43 CR3d 121 (names, addresses, and telephone numbers of class members who had contacted plaintiffs' counsel, although relevant, were protected from disclosure by constitutional right of privacy).

In *United Farm Workers of Am. v Superior Court* (1985) 170 CA3d 391, 216 CR 469, an action by a grower against a farm workers' union, the court cited *Britt v Superior Court, supra,* and considered the constitutional right of freedom of association in quashing a subpoena demanding the production of lists of union members, striking union members, picketing union members, and the names of all persons who attended a certain union convention. The court ordered the lists of names in the first three categories to be produced for the court to review in chambers if it became necessary to determine specific information about particular individuals, and denied access to the fourth category.

In a wrongful death action, the court relied on *Britt v Superior Court, supra,* in upholding the right to privacy in sexual matters when the defendant sought to establish extramarital sexual activities of the plaintiff's deceased husband to mitigate damages. *Morales v Superior Court* (1979) 99 CA3d 283, 290, 160 CR 194. Only limited discovery was permitted with respect to the plaintiff's husband's extramarital sexual relations; the names, addresses, and telephone numbers of the women involved were held not discoverable. *Morales v Superior Court, supra*. On the right of privacy as a limitation on discovery, see §§3.156-3.164.

When disclosure may be required. In *John B. v Superior Court* (2006) 38 C4th 1177, 1198, 45 CR3d 316, the California Supreme Court held that the constitutional right to privacy did not allow defendant to refuse to answer questions about his HIV status and sexual history when his HIV status was known and defendant accused plaintiff of infecting him. See also *Bodenheimer v Superior Court* (1980) 108 CA3d 885, 167 CR 26 (plaintiff in defamation action allowed to question one defendant about his membership in organization when complaint alleged he was agent of organization and working under its direction and supervision).

On the issue of whether a private attorney general is entitled to recover attorney fees under CCP §1021.5, a defendant has the right to disclosure of the association's donor list to learn who funded the litigation despite the plaintiff's objection based on the associational privacy interests of the donors. *Save Open Space Santa Monica Mountains v Superior Court* (2000) 84 CA4th 235, 250, 100 CR2d 725.

To prepare a statistical analysis to support claims of industrywide age discrimination, plaintiff writers had a right to disclosure of data on writers' guild members despite objections of some guild members on privacy grounds. *Alch v Superior Court* (2008) 165 CA4th 1412, 1422, 82 CR3d 470.

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§1.63 b. Work Product Protection for Identity of Nonexpert Trial Witnesses

The identity of nonexpert witnesses who are expected to be called to testify is generally not discoverable. See *City of Long Beach v Superior Court* (1976) 64 CA3d 65, 72, 134 CR 468. The compelled disclosure of nonexpert witnesses intended to be called at trial violates the work product protection doctrine and should not be ordered unless special circumstances show that denial of such discovery will unfairly prejudice the party seeking discovery or will result in an injustice. 64 CA3d at 79. On the work product doctrine, see §§3.52-3.68.

Because an attorney's list of intended witnesses is protected under the qualified work product doctrine, it is nondiscoverable. However, the juvenile court's inherent power to manage its cases and its duty to ensure expeditious proceedings in juvenile matters permit the court to compel disclosure of witness lists 7 to 10 days before trial. *In re Jeanette H.* (1990) 225 CA3d 25, 275 CR 9 (approving but distinguishing the reasoning and holding in *City of Long Beach v Superior Court, supra,* that lists of trial witnesses are entitled to qualified work product protection).

JUDGE'S PERSPECTIVE: Typically, the court will order witness lists to be produced at or shortly before the pretrial conference.

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§1.64 2. Burden, Expense, or Intrusiveness

Otherwise relevant information may not be discoverable if the court, in its discretion, finds that the burden, expense, or intrusiveness of the discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. CCP §2017.020(a). See §1.35. On protective orders, see chap 15.

JUDGE'S PERSPECTIVE: The court may direct the requesting party to pay the costs. See *Toshiba Am. Electronic Components, Inc. v Superior Court* (2004) 124 CA4th 762, 772, 21 CR3d 532. See also CCP §2031.280(c). For discussion of cost shifting, see §8.33.

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§1.65 3. Prohibition of "Hybrid" Discovery Devices

A long line of cases holds that the use of discovery devices ("hybrid devices") other than those provided for in the Civil Discovery Act is impermissible. See, *e.g., Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 176 CR 874 (request to have opposing party make its employees available for purpose of informal interviews); *Browne v Superior Cour*t (1979) 98 CA3d 610, 614, 159 CR 669 (physical examination by nonphysician); *Edmiston v Superior Court* (1978) 22 C3d 699, 702, 150 CR 276 (video recording of medical examination).

After a plaintiff-employee had stolen a large number of employer documents for use in future litigation, the court of appeal, in a separate action for return of the documents, affirmed the trial court's preliminary injunction, holding that (*Pillsbury, Madison & Sutro v Schectman (*1997) 55 CA4th 1279, 1288, 64 CR2d 698):

> [T]he Discovery Act as amended and interpreted has subsumed the entire field pertaining to the gathering of evidence in preparation for trial. The fact counsel still conduct much pretrial preparation and discovery without judicial assistance [cite omitted] does not mean parties to litigation can operate outside the applicable parameters of the Discovery Act or may violate other laws or common law strictures in their zeal to pursue litigation.

Consistent with the *Pillsbury* decision is *Hernandez v Superior Court* (2003) 112 CA4th 285, 297, 4 CR3d 883, which held that a trial court may not order plaintiffs to serve expert declarations contrary to the Civil Discovery Act. In *Hernandez,* the court stated, "Trial courts may not adopt procedures that conflict with any statute." Under CCP §§2034.010-2034.730, discovery of experts must be by a simultaneous and mutual exchange of information.

NOTE: Counsel may *agree*, however, to modify the procedures provided by any discovery method, by written stipulation, unless the court orders otherwise. CCP §2016.030.

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E. Time Limitations on Scope of Discovery

§1.66 1. How Far Back Can Discovery Go?

The Discovery Act imposes no temporal limitation on how far back a party can pursue discovery of documents and other information. When discovery requests seek information during periods of time far beyond the applicable statute of limitations, the weighing of burden, expense, and intrusiveness against the likelihood of finding admissible evidence becomes particularly important. CCP §§2017.010, 2019.030(a)-(b). On weighing, see §1.35. The weighing can be particularly important when the information sought is stored electronically. See chap 4; §§8.16-8.27.

JUDGE'S PERSPECTIVE: In every case, there is an historical time limit beyond which discovery should not be required. Although in most cases discovery should be permitted for the period of the applicable statute of limitations, the nature of the request may be so burdensome that even that period is inappropriate. As with many other discovery issues, the temporal scope of discovery in each case is addressed to the sound discretion of the court.

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§1.67 a. Federal Authorities

Although few California cases address the issue (see §1.68), there are a number of federal decisions—particularly in antitrust cases—in which periods of 1 to 10 years before filing suit have been found reasonable. In antitrust cases, it is not uncommon for evidence of conduct occurring many years before the claimed injury to be admitted into evidence at trial. *Quonset Real Estate Corp. v Paramount Film Distrib. Corp.* (SD NY 1970) 50 FRD 240.

In these decisions, plaintiff typically alleges that defendants' illegal conduct began many years earlier than the 4-year statute of limitations, and was fraudulently concealed. See *Baush Mach. Tool Co. v Aluminum Corp. of Am.* (2d Cir 1934) 72 F2d 236, 240 ("the history of the organization throws light upon its illegality"); *FTC v Lukens Steel Co.* (DC 1977) 444 F Supp 803, 805 (document discovery predating action by 12½ years and the limitations period by 7½ years permitted when disclosure "may lead to the discovery of admissible evidence of design, pattern, or intent").

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§1.68 b. California Case Examples

The following California decisions are informative on the issue of how far back in time discovery may be permitted:

- In *Morfin v State* (1993) 12 CA4th 812, 15 CR2d 861, a plaintiff who was injured when an automobile crashed into a Department of Motor Vehicles (DMV) building propounded a series of interrogatories requesting information from the state about vehicles crashing into DMV buildings in the 10 years preceding the accident. The state responded with information for well over 100 DMV offices throughout the state. After the Superior Court refused to order the State to respond further, the court of appeal reversed and required full response, despite a declaration from a DMV official that responding would require at a minimum hundreds of work hours.
- In *Mead Reins. Co. v Superior Court* (1986) 188 CA3d 313, 232 CR 752 (bad faith action by city against insurer and insurer's corporate claims adjuster), on the other hand, a trial court order granting the city's motion to compel discovery of claim files relating to every similar claim made during a period of approximately 6½ years was reversed on the ground of oppression, noting that a response would require the manual review of over 13,000 claim files and over 1000 work hours, and thousands of dollars in expense. The trial court was instructed to reconsider the motion under former CCP §2019(b)(1), now CCP §2019.030(a)-(b).
- In *Borse v Superior Court* (1970) 7 CA3d 286, 86 CR 559 (Federal Employers' Liability Act (FELA) action against Southern Pacific Company in which company raised defense that plaintiff had signed release), plaintiff sought to prove his signature on the release was induced by false representations of a claims adjuster. Plaintiff submitted interrogatories requesting the names and addresses of all defendant's Sacramento employees involved in personal injury settlement negotiations, the name and address of each claims adjuster involved in those negotiations, and the names and addresses of other persons present during negotiations for a 6-year period. The court of appeal reversed a trial court decision allowing the discovery, holding that "plaintiff's request for names and addresses covering all claims negotiations over a six-year period was excessive, burdensome, and oppressive." 7 CA3d at 289. This case was remanded to the trial court to specify the proper time span for discovery.

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2. When Discovery Closes

§1.69 a. Generally On or Before 30 Days Before Initial Trial Date

Unless the parties stipulate or the court on a party's motion extends the time in which to complete discovery, discovery must be completed on or before the 30th day before the initial trial date. CCP §2024.020(b). Discovery is considered completed the day a response is due or a deposition begins. CCP §2024.010. On the parties' stipulation to extend or reopen discovery, see CCP §2024.060. See §§1.75, 2.21.

NOTE: When the last day to perform or complete any act provided for in the discovery statute falls on a Saturday, Sunday, or holiday (see CCP §10), the time limit is extended until the next day that is not a holiday or weekend day. CCP §2016.060.

Motions concerning discovery must be heard on or before the 15th day before the initial trial date, unless the court orders earlier completion. CCP §2024.020(a). On discovery motions, see chap 15.

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§1.70 b. Expert Witness Discovery

A party is entitled to complete discovery proceedings pertaining to expert witnesses by the 15th day, and to have motions concerning that discovery heard by the 10th day, before the initial trial date. CCP §2024.030. See chap 11. The court may not order nonsimultaneous exchange of experts. *Hernandez v Superior Court* (2003) 112 CA4th 285, 299, 4 CR3d 883. In *Hernandez*, the court of appeal overturned a case-management order requiring plaintiffs alone to make an early disclosure of their experts and their opinions, holding that the order conflicted with the statutory requirement for the mutual and simultaneous exchange of expert witnesses under CCP §2034.

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Source: Civil Litigation/California Civil Discovery Practice/1 The Right to Discovery and Its Scope/§1.71 c. Unlawful Detainer Actions

§1.71 c. Unlawful Detainer Actions

In an unlawful detainer action, discovery and the hearing of discovery motions must be completed on or before the 5th day before the date set for trial, except by leave of court or agreement by the parties. CCP §2024.040(b).

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§1.72 d. Certain Other Actions

These time limitations do not apply to certain arbitration actions (CCP §2024.040(a)), summary proceedings to obtain possession of real property, or eminent domain proceedings (CCP §2024.040(b)). On time limits for completing discovery in judicial arbitration proceedings, see §1.19.

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§1.73 3. When Discovery Reopens

A continuance or postponement of the trial date does not reopen discovery, but if the court grants a new trial, declares a mistrial, or orders a reversal on appeal, discovery reopens as a matter of right and the setting of a new trial establishes new discovery cutoffs in accordance with CCP §2016.060. *Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 92 CR2d 70; *Hirano v Hirano* (2007) 158 CA4th 1, 6, 69 CR3d 646; *Beverly Hosp. v Superior Court* (1993) 19 CA4th 1289, 24 CR2d 238. See *Guzman v Superior Court* (1993) 19 CA4th 705, 23 CR2d 585 (plaintiff permitted to designate new experts after trial court granted order for new trial on issue of damages). But see *Hernandez v Superior Court* (2004) 115 CA4th 1242, 9 CR3d 821 (plaintiff showed good cause for reopening discovery when his attorney died of cancer days before initial trial date).

Each time an action is tried, an "initial trial date" is set. Thus, there is a new discovery deadline whenever a trial date is set following a mistrial, an order granting a new trial, or a reversal on appeal. *Beverly Hosp. v Superior Court* (1993) 19 CA4th 1289, 24 CR2d 238. Although CCP §616 provides that an "action may be again tried immediately" following a mistrial, this rarely happens. If it does happen, a party can move for relief under CCP §2024.050. See 19 CA4th at 1295.

Although the discovery deadline may be reset in the event of a new trial, the Civil Discovery Act's strict limitations continue to apply. For example, a natural person may be deposed only once during the run of the litigation (see CCP §2025.610), the parties are limited to 35 special interrogatories (see CCP §2030.030) and requests for admission (see CCP §2033.030), and the parties may seek protective orders from discovery that is unreasonably cumulative or burdensome in light of discovery completed in a prior trial. *Fairmont Ins. Co.*, 22 C4th at 254; *Hirano,* 158 CA4th at 8 n6.

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4. Court's Role in Timing

§1.74 a. Establishing Sequence and Timing of Discovery

The Civil Discovery Act makes explicit the court's power to establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice. CCP §2019.020(b).

NOTE: After the initial period following commencement of an action has elapsed, the California discovery law follows the federal rule, which establishes no fixed priority for either party in the sequence of discovery. See Fed R Civ P 26(d)(2). However, for good cause shown, the court may establish the timing and sequence of discovery for the convenience of the parties, or in the interests of justice. CCP §2019.020. On the "good cause" requirement when making a motion to establish the timing and sequence of discovery, see §§15.4, 15.9.

In exercising its discretion to establish the sequence and timing of discovery, the court must often balance the policy of preventing unfair surprise against the contention that disclosure will impede impeachment of a witness. Even under the Discovery Act of 1957 (see §1.3), which followed the priority-in-time rule (one who initiated discovery procedure was entitled to complete that process before the other party could demand completion of any discovery process), courts recognized the need for flexible application of the priority rule. The current discovery provisions underscore the court's discretionary power and expressly eliminate the priority-in-time rule. See CCP §2019.020.

JUDGE'S PERSPECTIVE: Because today's court is required to manage the pace of the litigation, it will usually expect all parties to conduct discovery at the same time. Discovery should be sequenced based on the particular requirements of the individual case, not on the order in which discovery was commenced. Orders sequencing discovery may be sought in the context of case management orders. Nonetheless, counsel should periodically consult the California Rules of Court and local rules in applicable counties for any rules on the sequence and timing of discovery.

Older case law may still be useful in showing how the courts have dealt with particular fact situations in exercising discretion to establish an order of discovery.

EXAMPLE: An order to inspect may defer a deposition noticed earlier until the deponent can obtain and inspect prior recorded statements by the deponent that are in the opposing party's possession. *Rosemont v Superior Court* (1964) 60 C2d 709, 36 CR 439; *Poeschl v Superior Court* (1964) 229 CA2d 383, 40 CR 697. In contrast, a party's delay in seeking production of such statements after learning of their existence may justify a court's refusal to defer the deposition until after the statements have been produced. *Rosemont v Superior Court* (1964) 60 C2d 709, 715, 36 CR 439.

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§1.75 b. Managing Case Under Trial Court Delay Reduction Act

Counsel should understand the time constraints on the court managing cases under the Trial Court Delay Reduction Act of 1990 (TCDRA) (Govt C §§68600-68620). See Cal Rules of Ct 1.6(4), 3.700-3.735, 10.900-10.901. On such time constraints, see §§2.25-2.27.

Even to comply with TCDRA, however, the court may not impose a discovery deadline earlier than 30 days before trial, because doing so conflicts with CCP §2024.020(a), which allows a party to conclude discovery "as a matter of right" on or before the 30th day before the day initially set for trial. *Wagner v Superior Court* (1993) 12 CA4th 1314, 16 CR2d 534 (trial court's refusal to extend discovery cutoff when no trial date has been set in the case held an abuse of discretion under CCP §2016.060). See Govt C §68616(f), which states that, except in arbitration proceedings, delay reduction rules may not require shorter time periods for discovery than those set forth in CCP §§2016.010-2036.050.

Nor may attempting to meet statewide case disposition goals be a sufficient reason to deny a party's request for continuance of trial. *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7 (party served with summons more than 14 months after filing of complaint and 4 months before trial date was entitled to continuance to allow party to conduct discovery and make summary judgment motion; trial delay reduction rules suggesting that cases be litigated within 2 years from filing of complaint must give way to party's statutory right to make summary judgment motion). Likewise, the court in *Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 1395, 16 CR3d 638, held that when "two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency" (defense counsel's unavailability due to trial conflicts in another case was sufficient reason to continue trial).

JUDGE'S PERSPECTIVE: In some jurisdictions, local rules may authorize the court to propose specific dates for, *e.g.*, the exchange of expert witnesses. The parties are always free to stipulate to discovery timing that differs from that in the Code of Civil Procedure, and the stipulations may be incorporated into a case management order under Cal Rules of Ct 3.728. Counsel should be aware, however, that absent an agreement, a case management order cannot conflict with procedures specified by statute. *Hernandez v Superior Court* (2003) 112 CA4th 285, 299, 4 CR3d 883 (not within court's power to order unilateral disclosure of identity of each party's medical expert witnesses).

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5. When Discovery May Begin

a. Plaintiff

§1.76 (1) After Service

A plaintiff requires court approval to serve a deposition notice before 20 days have elapsed after service of the summons or appearance of any defendant. CCP §2025.210(b). On obtaining this permission, see §5.18.

Similarly, plaintiff requires court approval to serve interrogatories; a demand for inspection of documents, things, or places; or requests for admission within 10 days after service of a summons or appearance of a party from whom discovery is sought. CCP §§2030.020(d), 2031.020(d), 2033.020(d).

NOTE: After a plaintiff obtains a court order approving early formal discovery, the defendant may file a motion for a protective order. *O'Grady v Superior Court* (2006) 139 CA4th 1423, 1454, 44 CR3d 72 (plaintiff sought and obtained orders authorizing it to conduct early discovery depositions under CCP §2025.210(b)). Such order is not premature when plaintiff has made defendant a target of discovery by securing an order authorizing early discovery.

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§1.77 (2) After Defendant Appears

The "appearance" by a defendant may be either general or special. Thus, a party who appears specially for the sole purpose of testing the court's jurisdiction may be properly served with interrogatories, although their scope will be limited to jurisdictional questions until the issue has been determined. *1880 Corp. v Superior Court* (1962) 57 C2d 840, 22 CR 209. An unserved party has been held to make a general appearance by voluntarily answering interrogatories. See *Chitwood v County of Los Angeles* (1971) 14 CA3d 522, 526, 92 CR 441.

Specially appearing defendants should announce their appearance as "special" in court and on all motion papers, discovery requests, and responses. More importantly, a specially appearing defendant must abstain from any form of participation in the case which is not directed exclusively toward contesting jurisdiction. See *Creed v Schultz* (1983) 148 CA3d 733, 740, 196 CR 252. A defendant makes a general appearance when it seeks, takes, or agrees to some step in the proceeding beneficial to itself or detrimental to the plaintiff, other than contesting jurisdiction. *Creed v Schultz, supra.*

JUDGE'S PERSPECTIVE: It can be difficult for a party to avoid making a general appearance if important motions are pending that appear to require immediate response, such as an application for a temporary restraining order or for a preliminary injunction. In this situation, the specially appearing defendant should seek, by stipulation or court order, to have those matters postponed until the jurisdictional issues are resolved or obtain an order that participation in such matters will not constitute a general appearance.

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§1.78 b. Defendant

No delay requirements are imposed on a defendant who has been served and who seeks to pursue discovery by use of a deposition, interrogatories, inspection demand, or request for admission. The defendant may proceed without leave of court at any time after commencement of the action. CCP §§2025.210, 2030.020(a), 2031.020(a), 2033.020(a). The reasoning behind the distinction between plaintiff and defendant obligations is that a noninitiating party served with a complaint should have an opportunity to retain counsel and gather pertinent information before framing a response and being required to submit to discovery. See *Waters v Superior Court* (1962) 58 C2d 885, 892, 27 CR 153.

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§1.79 c. Unlawful Detainer Actions

In unlawful detainer actions, an oral deposition must be scheduled for a date at least 5 days after service of the deposition notice but not later than 5 days before trial. CCP §2025.270(b). The plaintiff can propound interrogatories to the defendant without leave of court 5 days after the defendant's appearance or service of the summons, whichever occurs first. CCP §2030.020(c).

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F. Discovery in Particular Circumstances

§1.80 1. Summary Judgment Motions

Although discovery requests may be outstanding when it hears a summary judgment motion, the court is not required to permit discovery under those requests absent the submission of a declaration or affidavit showing that discovery that would lead to facts essential to opposing the motion. *Scott v CIBA Vision Corp.* (1995) 38 CA4th 307, 44 CR2d 902. See also *Bushling v Fremont Med. Ctr.* (2004) 117 CA4th 493, 511, 11 CR3d 653 (continuance will be denied unless requesting party makes good faith showing that facts in opposition to a summary judgment motion exist and the reason those facts cannot be presented at time of hearing). Because of the seriousness of a summary judgment motion, however, the court must ensure that CCP §437c(h) is complied with in a liberal fashion. *Bahl v Bank of America* (2001) 89 CA4th 389, 395, 107 CR2d 270. When a party files a motion for summary judgment "the interests at stake are too high to sanction the denial of a continuance without good reason." *Frazee v Seely* (2002) 95 CA4th 627, 633, 115 CR2d 780 (nonmoving party made good faith showing by affidavit that continuance was necessary to present facts to oppose motion). But see *Knapp v Doherty* (2004) 123 CA4th 76, 101, 20 CR3d 1 (lack of due diligence in obtaining discovery was factor in court's refusal to continue summary judgment hearing to permit additional discovery); *Cooksey v Alexakis* (2004) 123 CA4th 246, 255, 19 CR3d 810 (no continuance when counsel's declaration does not explain why discovery is necessary for opposition and why plaintiff did not complete discovery sooner).

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§1.81 2. Anti-SLAPP Motions

When a defendant files a motion to strike a complaint under CCP §425.16 (anti-SLAPP statute), all discovery in the action is stayed unless the plaintiff files a noticed motion requesting additional discovery or until notice of entry of the order ruling on the anti-SLAPP motion. *Britts v Superior Court* (2006) 145 CA4th 1112, 1126, 52 CR3d 185; *Fair Political Practices Comm'n v American Civ. Rights Coalition, Inc.* (2004) 121 CA4th 1171, 1175, 18 CR3d 157; *Robertson v Rodriguez* (1995) 36 CA4th 347, 357, 42 CR2d 464.

NOTE: The CCP §425.16(g) stay on all "discovery proceedings" includes discovery motions such as motions to compel; any discovery motion pending at the time the anti-SLAPP motion is filed is stayed. *Britts v Superior Court* (2006) 145 CA4th 1112, 1128, 52 CR3d 185.

Plaintiff's failure to file a noticed motion or demonstrate good cause for additional discovery will result in a denial of plaintiff's request by the trial court. *Tuchscher Dev. Enters., Inc. v San Diego Unified Port Dist.* (2003) 106 CA4th 1219, 1247, 132 CR2d 57.

On anti-SLAPP motions, see Making and Opposing Special Motions to Strike Under the California Anti-SLAPP Statute (Cal CEB Action Guide Spring 2004).

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IV. FEDERAL DISCOVERY LAW

§1.82 A. Effect of Federal Cases on California Discovery Disputes

If the federal rules and state law are identical and no state precedent exists, the California courts will look to federal precedent for guidance. See *Reuter v Superior Court* (1979) 93 CA3d 332, 337, 155 CR 525. See also *Kahn v Kahn* (1977) 68 CA3d 372, 386, 137 CR 332.

EXAMPLES: In *Danzig v Superior Court* (1978) 87 CA3d 604, 610, 151 CR 185, because controlling state precedent was lacking, federal authority was deemed to be "particularly persuasive" in determining whether interrogatories could be propounded to unnamed members of the plaintiff class in a class action suit. See also *Deyo v Kilbourne* (1978) 84 CA3d 771, 149 CR 499, in which both federal and state precedents were cited in determining the propriety of sanctions when a party failed to answer interrogatories fully.

Although federal authority is persuasive in interpreting analogous California statutes, it is not binding. *Singer v Superior Court* (1960) 54 C2d 318, 323, 5 CR 697.

CAUTION: When the California appellate courts have not interpreted a specific provision of the Civil Discovery Act, counsel may argue by analogy that the California court should follow the federal precedent. If state law is unsettled or there is a split of authority in the state appellate courts, federal law may also become support for an argument for clarifying or changing California law. However, counsel should be certain that the federal cases were decided under federal rules substantially similar to the state statutes being interpreted.

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§1.83 B. Federal Right to and Scope of Discovery

Despite the similarities between the state and federal discovery regimes, there are also significant differences that counsel should consider when a plaintiff has a choice of whether to proceed in federal or state court or a defendant has the right to remove to federal court a case that was filed in state court. See CCP §§2016.010-2036.050; Fed R Civ P 26-37.

One important difference is that the federal rules limit the scope of discovery to matters relevant to claims or defenses, not subject matter. See Fed R Civ P 26(b)(1) (discovery obtainable on "any nonprivileged matter that is relevant to any party's claim or defense"). See also *Surfvivor Media, Inc. v Survivor Prods.* (2005) 406 F3d 625, 635 (in trademark infringement action, within judge's discretion to limit discovery to information regarding products plaintiff had identified in response to interrogatories as the infringing products; discovery relating to other products irrelevant when plaintiff failed to plead a cause of action that might have included other products).

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2

Creating a Discovery Plan

Martin L. Fineman
Joshua S. Goodman
Farley J. Neuman

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§2.1 I. SCOPE OF CHAPTER

This chapter addresses how to make a plan for discovering, in the most cost- and effort-efficient manner, the evidence necessary to prove or defend counsel's case.

Discovery can be wide-ranging. Under California discovery law, a party is entitled to obtain information about any unprivileged matter that is relevant to the subject of the lawsuit, if the matter itself is "admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." CCP §2017.010. Precisely because discovery can be so extensive, it must be carefully planned. On the scope of discovery, privileges, and other protections, see chaps 1, 3.

Discovery can also be the most expensive and time-consuming phase of litigation. Unplanned discovery creates the risk of unnecessary lawsuit expense, duplication of effort, and insufficient evidence to prove the client's case. See §2.10. Careful planning helps avoid discovery disputes, which are perhaps the single most wasteful aspect of litigation. On discovery motions and sanctions, see chap 15.

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II. PREPARING TO CREATE DISCOVERY PLAN

§2.2 A. Determining Issues of Case

Because one of the primary purposes of a discovery plan is to obtain the evidence needed to prove the client's case, the starting point for any discovery plan is an analysis of the factual and legal issues the case presents. Counsel should identify the issues in the case, determine what evidence is needed to prove or disprove each element of each claim or defense, and decide how best to obtain that evidence. Counsel should ask these ultimate questions: "What do I have to prove at trial? How am I going to prove it?" The answers to these questions lead to the creation of a discovery plan. In addition, counsel should use discovery to determine what evidence the other side has against his or her client, what evidence they are likely to present at trial, and to determine how best to counter that evidence or blunt its impact.

PRACTICE TIP: A good discovery plan should evolve as the case progresses and counsel learns of new potential sources of evidence. Accordingly, counsel should develop an initial discovery plan which anticipates change and allows ample time before the discovery cutoff for at least one or more additional waves of new discovery to follow-up on leads from the prior round of discovery. One of the most common mistakes attorneys make is not beginning discovery early enough to allow time to conduct additional discovery as the case develops.

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§2.3 1. Legal Issues: Reviewing Pleadings and Anticipated Jury Instructions

Pleadings. The pleadings (complaint, cross-complaint, and answers to the complaint and any cross-complaints) define the scope of the case and reveal the causes of action and affirmative defenses in issue. They are the starting point for determining the legal issues. Counsel should make a list of each cause of action pled in the complaint and any cross-complaints and each affirmative defense pled in the answer (or answers).

Jury instructions. To determine which law governs the claims and defenses tendered in the pleadings, it is useful to consult the jury instructions that the trial judge is likely to apply to plaintiff's claims and defendant's defenses at trial. Jury instructions also determine in large part what facts need to be proved at trial. Consult the California Civil Jury Instructions (CACI) for each cause of action and defense that appears in the pleadings and conduct supplementary research if necessary. Although the CACI instructions are relatively complete, they do not cover every conceivable facet of every cause of action or defense. To view the CACI on the Web, see http://www.courtinfo.ca.gov/reference/documents/civiljuryinst.pdf.

NOTE: The Judicial Council-approved CACI instructions "are the official instructions for use in the state of California" and "it is recommended that the judge use the Judicial Council instruction" that applies to a subject on which the trial court judge determines the jury should be instructed. Cal Rules of Ct 2.1050(a), (e) (use of CACI instructions "is strongly encouraged").

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§2.4 2. Factual Issues

After making a list of the legal issues presented by the case, counsel should make a list of the facts that must be proven in order for counsel's client to prevail on those issues. Determining how to obtain the evidence to prove those facts is, in effect, the discovery plan.

NOTE: A plaintiff's attorney who fails to carefully consider the elements of a claim before filing the complaint or fails to thoroughly plan how to obtain the necessary evidence early in the case is likely to encounter a failure of proof either at trial or when opposing a motion for summary judgment or summary adjudication of the issues. The same is true of a defendant's attorney with regard to an affirmative defense or a cross-complaint. The practice of pleading lengthy lists of often frivolous affirmative defenses usually only serves to encourage useless discovery and unnecessary costs.

Punitive damages example. If a plaintiff employee is making a punitive damages claim against a corporate employer, the plaintiff must prove that "an officer, director, or managing agent of the corporation" either engaged in, authorized, or ratified the conduct that is found to constitute oppression, malice, or fraud, or that the employer had advance knowledge of the unfitness of the employee who engaged in the wrongful conduct, and employed that person with a conscious disregard of the rights and safety of others. CC §3294(b). See CACI 3943. The legal issues involved in proving punitive damages give rise to a host of factual issues that plaintiff's counsel might consider when creating the discovery plan. For example:

- What evidence is likely to prove that the employer had knowledge of a particular employee's unfitness or misconduct?
- Who or what is the likely source of this evidence?
- Who are the corporation's managing agents? How can counsel prove this status?
- Should counsel consider interrogatories and/or a demand for production of the allegedly unfit employee's personnel file?
- Should counsel consider deposing the unfit employee's supervisors or coworkers?
- What occurred after the incident in question that might show ratification? When did this occur?
- Should counsel depose other witnesses to obtain evidence about what happened after the incident to show ratification?
- What are other possible sources of information that might show ratification?

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§2.5 3. Possible Sources of Evidence to Prove Facts and Resolve Legal Issues

Once counsel has identified the legal issues in the case and the facts that must be proven to win the case or to defend it, he or she should consider what evidence is likely to exist, what form it may take, and who is likely to have custody of it. For example, evidence that a corporate employer ratified the wrongful acts of its employee might be contained in notes of meetings between corporate officers preserved, *e.g.,* in a meeting participant's e-mail, in a memo on a corporate officer's private home computer, in the voicemail box of a participant's colleague, or in a letter in a corporate officer's file cabinet. Although the sources of evidence will be revealed in the discovery process, when planning discovery it is useful to consider what evidence is likely to be available to prove the necessary facts and where this evidence may be found.

EXAMPLE: If the case requires the deposition of out-of-state witnesses, counsel must build extra time into the discovery plan for, *e.g.,* retaining local counsel or traveling to the deposition location. On out-of-state depositions, see chap 12.

The client is frequently the best and most efficient source of information. Before embarking on discovery, counsel should almost always thoroughly interview the client in person, and review the client's pertinent documents. If the client is an entity, interviews of several or many people may be appropriate. Surprisingly, attorneys often do not want to "bother" their clients with questions, interviews, and requests to examine documents, but an early and thorough investigation is a very wise investment. For example, a defense attorney sometimes discovers that the plaintiff's allegations are all true—or, worse yet, that the plaintiff does not yet fully understand the extent of the defendant's wrongdoing. Thus, early and thorough inquiries to the client not only aid development of a discovery plan, they may also aid in deciding whether to engage in early settlement negotiations with the goal of preventing a bad case from becoming worse.

On when the duty to preserve electronically stored information (ESI) arises, see §§4.6-4.8. On how information can be stored electronically and the possible sources of ESI, see chaps 4, 8.

On obtaining information from the client, see §2.13.

On informal discovery, see §§2.32-2.41.

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§2.6 4. Drafting Chronology

Making a detailed chronology of the facts affecting liability can help counsel understand the case and plan for discovery. A chronology can be one of the most important steps in the discovery process, often highlighting the significance of events, documents, or testimony that might go unnoticed if not viewed in context. This is particularly true in cases involving issues of notice, discovery of facts giving rise to a cause of action, and other claims or defenses that depend on proof of a party's state of mind at a particular time.

PRACTICE TIP: Counsel should be sure that any chronology provided to an expert is factually accurate. If the expert relies on the chronology, opposing counsel can use any errors to undermine the basis of the expert's opinions. For this reason, many attorneys do not provide the chronology to expert witnesses to avoid this potentially embarrassing problem. On expert discovery, see chap 11.

Like the discovery plan itself, the chronology should be created at the outset of the case and revised as litigation proceeds. Similarly, when one of the parties is entity, it is useful to create a organizational chart early in the litigation. On using a chronology when preparing for depositions, see §6.5.

NOTE: There is a variety of computer programs that can assist counsel in creating and maintaining timelines and with overall case management.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.7 B. Identifying Discovery Goals

§2.7 B. Identifying Discovery Goals

The next step in formulating a discovery plan is to identify and consider the goals for discovery in the case. The general goals of discovery are to obtain evidence in favor of a client's case and to determine what evidence the other side will likely present. Other important goals include:

- To identify uncontested facts and issues (see §2.8);
- To commit the opponent to a specific version of the facts (see §2.8);
- To prepare to make or oppose pretrial motions (see §2.9);
- To minimizes discovery disputes (see §2.10);
- To preserve evidence for trial (see §2.11); and
- To obtain information for settlement (see §2.12).

NOTE: Unfortunately, some attorneys believe there are other discovery goals, such as to increase the opposition's litigation expenses or to wear down the opposition psychologically. These tactics are not only unethical but also usually ineffective. When faced with such adversity, litigants rarely fold their cards; instead, they tend to become more entrenched and less rational, escalating the cost and anguish to all parties.

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§2.8 1. Identifying Uncontested Facts and Issues; Committing Opponent to Specific Version of Facts

Identifying uncontested facts and issues. Even relatively minor or uncontroversial facts (*e.g.,* dates, places, persons present, genuineness of documents) may have to be proved at trial. To ignore these facts is to run the risk that proof at trial may be unavailable or expensive to obtain, or that the opposing party will suddenly deny or dispute the facts or raise new issues after discovery has closed. To avoid surprise at trial, counsel should obtain testimony confirming these matters at a deposition, make them the subject of interrogatories or requests for admission early in the litigation, or obtain a written stipulation from opposing counsel.

EXAMPLE: Plaintiff's punitive damages claim is that the corporate employer knew that the person who engaged in the wrongful conduct was unfit, but employed that person anyway with conscious disregard for the rights and safety of others. The plaintiff should be prepared to prove that this person was an employee of the employer on the date of the wrongful conduct.

Committing opponent to specific version of the facts. It is often crucial to "lock in" the testimony of an opposing party or an unfriendly witness to the maximum extent possible, even if counsel already knows what that witness intends to say. Discovery of detailed facts allows counsel to develop the claims or defenses at issue in the case.

PRACTICE TIP: If counsel can confine the witness to a particular version of the facts during a deposition, it will be possible to impeach that witness at trial if the witness changes that version or varies from it significantly. See §5.32.

On deposition procedures, see chap 5; on conducting and defending depositions, see chap 6.

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§2.9 2. Preparing for Pretrial Motions

From a defense perspective, one important purpose of discovery is to uncover facts to support a dispositive motion, *e.g.,* summary judgment (all causes of action) or summary adjudication of issues (some causes of action). See CCP §437c. The task of plaintiff's counsel is to obtain the evidence necessary to oppose such motions on the grounds that a triable issue of material fact exists for each cause of action or defense. CCP §437c(c). For discussion of summary judgment and summary adjudication motions, see California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

NOTE: Counsel should be aware of the potential need for discovery immediately after the commencement of the litigation if a request has been made for a temporary restraining order or a preliminary injunction. These motions often involve issues in addition to those presented by the merits of the case, *e.g.*, the extent of the parties' injuries and the equities of granting provisional relief. On obtaining a temporary or preliminary injunction, see Civ Proc Before Trial, chap 32.

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§2.10 3. Minimizing Discovery Disputes

One of the underlying causes of unnecessary discovery disputes is the pursuit of discovery with no specific ultimate goal in mind. Conducting discovery with a well-defined purpose may help avoid time-consuming and wasteful disputes that often create friction with clients who see their legal fees mount without much substantive accomplishment. Even when discovery disputes cannot be avoided, a well-defined discovery plan will help counsel justify the challenged discovery to opposing counsel, the client, or a discovery commissioner or judge. On motions to compel and motions for protective orders in general, see chap 15. Some discovery may appear to the responding party to be irrelevant and thus suspect, but if it is part of a well thought out discovery plan, counsel is in a much better position to overcome this first impression.

EXAMPLE: Subpoenaing a plaintiff's employment records from 1983 will probably appear unnecessary to the point of harassment. On the other hand, if the propounding attorney can explain why those records will assist in the evaluation of the case, be of importance to a jury or settlement judge, or lead to relevant evidence, the attorney can probably avoid, or at least win, a discovery dispute.

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§2.11 4. Preserving Evidence for Trial

A primary objective of discovery is to gather and preserve evidence for trial. It is important to take depositions to preserve evidence if counsel anticipates that a witness may be unavailable at trial or may change his or her testimony over time. See CCP §2025.620(a), (c). On depositions to preserve testimony, see §§5.32-5.33.

Preserving evidence, especially electronic evidence. If there is a danger that evidence may be lost through spoliation or otherwise, particularly electronically stored information (ESI), counsel should consider seeking an injunction to preserve the records. *Dodge, Warren & Peters Ins. Servs., Inc. v Riley* (2003) 105 CA4th 1414, 130 CR2d 385 (affirming trial court order granting plaintiff preliminary injunction requiring preservation of ESI by prohibiting defendants from destroying such evidence). See also *Northpoint Homeowners Ass'n v Superior Court* (1979) 95 CA3d 241, 244, 157 CR 42. On preservation orders, see §§8.16-8.17. On spoliation of ESI, see §8.108. On the duty to preserve ESI, see §§4.6-4.8.

Counsel should attempt to obtain documents promptly, particularly from nonparty witnesses, before they are misplaced, destroyed, lost, or altered. Counsel may demand documents from parties under CCP §2031.010, but must rely on deposition subpoenas to obtain documents from nonparty witnesses. CCP §2020.010(b). See §5.7.

Laying a foundation. Laying a foundation for the admissibility evidence is also a task for the discovery stage of the case. Counsel should gather facts to authenticate documents at trial or establish a foundation for the admissibility of physical evidence or business records, *e.g.,* through a custodian of records or other qualified witness. Because many foundational facts are uncontroversial, it may be possible to enter into a written stipulation with opposing counsel establishing those foundational facts. If a stipulation cannot be obtained, requests for admission are well suited to establishing such facts. On requests for admissions, see chap 9.

PRACTICE TIP: By focusing on the objectives of discovery early in the case, an attorney is less likely to miss important facts or fail to obtain admissible evidence of these facts. An attorney's worst nightmare is being surprised at trial by damaging evidence that should have been obtained during discovery and that could have been addressed or diffused had the attorney learned about it in time. A close second is being unable to prove some critical fact at trial because the attorney did not obtain the information in an admissible form.

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§2.12 5. Obtaining Information for Settlement

Because over 90 percent of cases settle without trial, positioning the case for a favorable settlement may be an important goal of the discovery plan. Counsel may encourage a favorable settlement by discovering weaknesses in the opposing party's case and strategically revealing to the other party strengths in the client's case. For example, a party might depose a friendly witness primarily to reveal the testimony to opposing counsel to persuade him or her for settlement purposes. Counsel should always be seeking facts to help evaluate the case so the client can make an informed decision regarding settlement.

Class action settlements. The extent of discovery completed is one of the factors a trial court considers, balances, and weighs when determining whether a class settlement is fair, adequate, and reasonable. See *Wershba v Apple Computer* (2001) 91 CA4th 224, 245, 110 CR2d 145; *Dunk v Ford Motor Co.* (1996) 48 CA4th 1794, 1801, 56 CR2d 483. The amount of discovery conducted in a class-action lawsuit, however, will not dictate whether a settlement was fair, adequate, and reasonable to individual class members. *7-Eleven Owners for Fair Franchising v Southland Corp.* (2000) 85 CA4th 1135, 1150, 102 CR2d 777 (class-action settlement may be upheld as fair even if only minimal or informal discovery has been conducted).

On use of interrogatories in class actions, see §§7.23, 7.70.

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C. Obtaining Client's Participation in Discovery Decisions

§2.13 1. Interviewing Client About Key Events

The client is an essential and relatively inexpensive source of information. Interviewing the client thoroughly can help both to identify issues in the case and to produce leads for admissible evidence for trial. A plaintiff is more often than not a percipient witness to many of the key events at issue in the lawsuit. By finding out who was present and what was said during these events, counsel can often highlight issues that should be covered in a discovery plan and at the same time begin evaluation of the strengths and weaknesses of the case.

If the defendant is a corporation, the client interview frequently requires interviews of several employees. In addition, the documentary trail with a corporate client is often far more extensive. The attorney should try to review all of the key documents from the client at the planning stage, which might require the attorney to obtain documents from various departments and employees.

EXAMPLE: In a case in which the time of an incident is of crucial significance, it is important to talk to the corporate representatives to ascertain what documents might establish or at least imply the time of the incident. It may be that the time stamped on a cash register receipt in the plaintiff's possession provides evidence of the time the incident occurred. If so, defense counsel would then know specifically to request the cash register receipt from the plaintiff.

Counsel may need to interview the client several times. It is helpful to have the client bring his or her documents to the meeting. The client may need to be re-interviewed after receiving interrogatory responses or documents from the adverse party, in order to obtain follow-up information relating to issues presented by the information obtained from the opposing side.

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§2.14 2. Informing Client of Duty to Preserve Evidence

Preservation of evidence is a legal responsibility that is triggered by different events. See §§4.6-4.8. Especially with regard to electronically stored information (ESI) records, which may be routinely destroyed as a matter of usual business practice, counsel must make sure that the client understands the duty to preserve evidence and takes appropriate measures to do so. See *Arthur Andersen LLP v U.S.* (2005) 544 US 696, 161 L Ed 2d 1008, 1013, 125 S Ct 2129. See also *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 11, 74 CR2d 248 (declining to create tort for spoliation of evidence and discussing non-tort remedies for destruction of evidence). On communicating the duty to preserve ESI, see §§4.9-4.12.

To provide meaningful advice to a client regarding the preservation of relevant documents, counsel needs to gain a thorough understanding of the documents in their client's possession. For example, the client may have videotape for security purposes. If counsel does not discover this at the outset through a thorough interview of the client, the company might destroy the videotape under to its standard procedures. A similar potential problem exists regarding e-mails, which the client might routinely purge unless counsel advises otherwise.

JUDGE'S PERSPECTIVE: Counsel should discuss the duty to preserve evidence at the first meeting with the client. There are substantial sanctions available for failure to preserve evidence, including default judgment and dismissal of claims. See chap 15.

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§2.15 3. Setting Priorities Within Litigation Budget

To avoid engaging in marginally helpful or repetitive discovery, counsel should list the priorities for obtaining information essential to prosecuting or defending the case. Counsel should communicate the costs and potential benefits of each major discovery effort and be sure to confirm in writing with the client the agreed on discovery plan as it evolves through the life of the case. Depending on the sophistication of the client, the client's expectations, whether the case is being handled on pure contingency, and counsel's history with the client, counsel may want or need to provide the client with a written litigation budget for each projected phase of litigation. Counsel should obtain advance approval from the client for particularly expensive discovery, such as the retention of experts or taking out-of-state depositions. See §2.16.

CAUTION: Counsel should be very careful about adopting an abbreviated discovery plan that assumes the case will settle. Although the client has the right to adopt such a strategy, counsel should inform the client in writing that it may result in major problems if the client later decides to, or needs to, bring the case to trial. Generally, the best strategy to obtain a good settlement is to be prepared for trial; if opposing counsel senses that a party is not prepared, a good settlement becomes much more difficult to obtain.

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§2.16 4. Analyzing Risks and Benefits

Like any other big investment, discovery should not be undertaken without a risk-benefit analysis. Because discovery is expensive, a client rarely wants counsel to take every deposition that may prove marginally useful or to obtain and review every conceivable document. A risk-benefit analysis can help counsel select discovery tools that are not only effective in obtaining evidence but also cost-effective.

Each client has his or her own acceptable levels of risk and cost, and each case warrants a different level of risk. For enough money, a litigant could virtually eliminate the risks of failing to obtain all the favorable and unfavorable information available before trial. However, the cost of such thorough discovery may be unacceptable to that litigant or unwarranted in light of the amount in controversy or the issues at stake. Unfortunately, many attorneys develop their own standard of risk tolerance without sufficient client input and without giving adequate consideration to the value of the case. Counsel should also revisit the risk-benefit analysis of various discovery options as the case proceeds and new facts come to light.

EXAMPLE: At the outset of a class action litigation, plaintiff's counsel estimates a multimillion dollar recovery and instigates nationwide discovery for relevant documents. As discovery on class issues develops, it becomes apparent that individual issues may well predominate over class issues, and that class certification may be denied. Counsel should consider postponing the expensive nationwide merits discovery in favor of a possible early certification hearing.

PRACTICE TIP: Issues of risk-benefit analysis commonly arise when considering the number of depositions to take in a particular case. A case may have more potential witnesses than counsel can justify deposing when considering the potential damages at stake. A well thought out discovery plan will play a critical role when counsel discusses these issues with the client and makes decisions. Counsel should inform the client of the issues and make any decisions with the client's agreement.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.17 D. Determining Type of Case

§2.17 D. Determining Type of Case

At the outset, counsel must also determine whether the case is designated (or can be designated) as a complex case or a limited civil case. This designation may affect available discovery procedures or the time allowed to complete discovery. Even though the Civil Discovery Act is available in all civil actions and special proceedings of a civil nature (see CCP §2016.020(a)), specific additional rules or procedures may apply to limited civil cases or complex cases. On which cases are and are not subject to the Civil Discovery Act, see §§1.4-1.26.

NOTE: Counsel should be aware that if judicial arbitration is ordered (see §§2.21, 2.28), discovery will generally be terminated by the time of the arbitration, possibly decreasing the overall use of discovery.

Counsel may have some flexibility to select a particular treatment for a case or to ask the court to designate it in a particular way. For examples, see §§2.18-2.19.

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§2.18 1. Complex Case

A complex case is one that, because of factors such as a large number of witnesses or separately represented parties, requires "exceptional judicial management" to avoid placing an unnecessary burden on the court or the litigants. Cal Rules of Ct 3.400(a)-(b). In a complex case, the court may order, or the parties may stipulate to, the use of technology in conducting discovery. See CCP §2017.730. Discovery in complex cases may be governed by case management order. The designation as a complex case may also impact the number of months the court will allow the parties to complete discovery. In addition, some courts assign complex cases to a single judge for all purposes. Counsel should review the court's local rules to determine the impact of the designation as a complex case.

JUDGE'S PERSPECTIVE: Cases not designated as "complex" may sometimes be assigned to a single judge for all purposes who will issue a case management order governing discovery. Counsel should consult local rules on how cases are assigned to a single judge and should consider seeking appointment of a single judge if the case would benefit from continuous, hands-on supervision of a judge.

On complex litigation, see §§2.73-2.74. On case management procedures relating to discovery of electronically stored information (ESI), see Cal Rules of Ct 3.724(8), §2.25. On discovery of ESI, see chaps 4, 8. On how electronic evidence can be stored, see §§8.19-8.27.

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§2.19 2. Limited Civil Case

In general, a limited civil case is one in which the amount at stake is $25,000 or less, not including interest. CCP §86. See chap 14. Special streamlined discovery procedures apply in limited civil cases, which are subject to the rules of economic litigation (CCP §§90-100) and include a mechanism for disclosure of witnesses and evidence before trial. CCP §96. On limited civil cases in general, see chap 14; on when it may be useful to classify a case as limited, see §14.2.

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§2.20 E. Taking Timing Into Account

All of counsel's discovery must be completed by the discovery cutoff. See CCP §2024.020; §2.21. In addition, counsel may have strategic reasons to complete all or certain portions of discovery prior to a mediation or an early settlement conference. Counsel's discovery plan must also include sufficient time for any necessary motions to compel to be heard before the applicable deadline. See §2.23. For example, see §7.14.

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§2.21 1. When Discovery Closes

Unless the parties stipulate or the court on a party's motion extends the time in which to complete discovery, discovery must be completed on or before the 30th day before the initial trial date. CCP §§2024.020(a), 2024.050, 2024.060. The cut-off for expert discovery is 15 days before the initial trial date. CCP §2024.030.

If the deadline to complete discovery falls on a Saturday, Sunday, or holiday, the parties have until the next court day to complete the discovery or to have discovery motions heard. CCP §2016.060. For more on when discovery closes, see §§1.69-1.72. On local rules affecting timing, see §2.24.

The deadline is different for cases referred to judicial arbitration. In any case ordered to judicial arbitration, no discovery other than expert witness discovery is permitted after the arbitration award, except by stipulation of the parties or by leave of court on a showing of good cause. CCP §1141.24.

CAUTION: A continuance or postponement of the trial does not reopen discovery. CCP §2024.020(b). Absent agreement between all counsel, an order to reopen discovery is required. See CCP §§2024.050-2024.060. A mistrial or reversal on appeal reopens discovery and activates new deadlines. See *Province v Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 1684, 25 CR2d 667.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.22 2. Extensions of Time to Respond to Discovery

§2.22 2. Extensions of Time to Respond to Discovery

Discovery requests are usually served by mailing them to counsel for the responding party and to counsel for all other parties who have appeared in the action. The party on whom a discovery request is served has a limited period to respond. See, *e.g.,* CCP §§2030.260(a) (interrogatories), 2031.260 (inspection demands). The time for a response may be extended, however, depending on the method of service. CCP §§1013, 2016.050.

Mail service. When service is by mail, the response period is increased by (CCP §1013(a)):

- 5 calendar days if the place of mailing and the address of the person served are within California;
- 10 calendar days if either place of mailing or the address is outside California but within the United States; and
- 20 calendar days if either the place of mailing or the address is outside the United States.

CAUTION: Counsel should be vigilant in distinguishing court from calendar days when determining various deadlines.

Express mail, fax, or overnight delivery. When service is by express mail, fax, or some other method of overnight delivery, the response period is increased by only 2 court days. CCP §1013(c), (e). Service by fax is only permitted when the parties agree and a written confirmation of that agreement is made in writing. CCP §1013(e).

Extensions by stipulation. As a matter of professional courtesy, attorneys generally grant at least one extension of time for any discovery request, if requested by opposing counsel. For more complex discovery requests, additional extensions may be warranted.

PRACTICE TIP: When planning discovery, counsel should keep in mind that opposing counsel will probably request at least one extension or will request a continued date for a deposition. In addition, counsel will occasionally need to request extensions of time for his or her own client's discovery responses or depositions. In the absence of extraordinary circumstances, counsel should routinely grant a request for an extension. Life as a litigator can become unnecessarily difficult if counsel refuse to extend professional courtesies.

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§2.23 3. Motion Timing

Deadline to hear motion. Motions about discovery must be heard at least 15 days before the first date set for trial. CCP §2024.020(a). Motions on expert discovery must be heard on or before the 10th day before the initial trial date. CCP §2034.030.

Notice of motion. A written notice of motion must be given at least 16 court days before the hearing. CCP §1005.

The provisions of CCP §1013, extending the time within which a right may be exercised or an act may be done, do not apply to a notice of motion, opposition papers, or reply papers. CCP §1005(b).

Mail and other service methods. When the notice of motion is served by mail, the 16-court-day notice period is increased by (CCP §1005(b)):

- 5 calendar days if the place of mailing and the address of the person served are within California;
- 10 calendar days if either place of mailing or the address is outside California but within the United States; and
- 20 calendar days if either the place of mailing or the address is outside the United States.

When service is by express mail, fax, or some other method of overnight delivery, the response period is increased by only 2 calendar days.

Opposition and reply. Counsel must file and serve papers opposing a motion at least 9 court days before the hearing and must file and serve any reply papers at least 5 court days before the hearing. CCP §1005(b).

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§2.24 4. Local Rules

Counsel should check local rules early in the case. Local rules may set (or authorize the court to set) specific dates for discovery. The court may also invite counsel at the case management conference to stipulate to dispense with certain requirements, such as the expert witness demand requirements of CCP §§2034.010-2034.730. The parties are free to stipulate to discovery timing that differs from that in the Code of Civil Procedure and the stipulations may be incorporated into a case management order under Cal Rules of Ct 3.728. Counsel should be aware, however, that absent an agreement, a local rule or case management order cannot conflict with procedures specified by statute. See *Hernandez v Superior Court* (2003) 112 CA4th 285, 299, 4 CR3d 883 (not within court's power to order unilateral disclosure of identity of each party's medical expert witnesses). See also §§1.74-1.75.

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§2.25 5. Case Disposition Time Goals (TCDRA)

Usually 1 year from complaint to disposition. The fast track timetables are extremely important to the discovery plan. Under the Trial Court Delay Reduction Act of 1990 (TCDRA) (Govt C §§68600-68620) and the differential case management rules (see Cal Rules of Ct 1.6(4), 3.710-3.715), trial courts establish local court rules and procedures for evaluating each case to determine how long it will take from the date the complaint is filed to disposition. See Cal Rules of Ct 3.711, 3.714-3.715. Most cases are assigned a disposition time goal of 1 year from the date of filing to disposition. Cal Rules of Ct 3.714(b). See §§1.74-1.75.

NOTE: Certain proceedings are excepted from differential case management rules, *i.e.,* probate, guardianship, conservatorship, family, juvenile, small claims, unlawful detainer actions, and "other civil petitions" (*e.g.,* for a writ of mandate, appointment of receiver, or temporary restraining order). Cal Rules of Ct 1.6(4). Uninsured motorist, coordinated, and certain collections cases are also excepted. Cal Rules of Ct 3.712(b)-(d).

Faced with the time constraints of the trial court's disposition time goals, counsel are usually unable to defer for very long the taking of depositions and other discovery. These time pressures make the early development of a viable discovery plan even more important for determining the essential evidence needed for each disputed issue and the most efficient method for obtaining that evidence.

Case management conference 180 days after complaint filing. In every general civil case assigned for disposition under the TCDRA time goals of Cal Rules of Ct 3.714(b), the trial court must schedule a case management conference to review the case no later than 180 days (or about 6 months) after the filing of the initial complaint. Cal Rules of Ct 3.721. At the conference, the parties must address such matters as whether the case should be referred to an alternative dispute resolution process, or whether discovery has been completed and, if not, the date by which it will be completed. Cal Rules of Ct 3.722, 3.727.

No later than 30 days before the case management conference (*i.e.,* 150 days or about 5 months after the complaint was filed), counsel must meet and confer to consider, among other issues, resolving any discovery disputes and setting a discovery schedule. See Cal Rules of Ct 3.724. Counsel must consider issues relating to the discovery of electronically stored information (ESI), including (Cal Rules of Ct 3.724(8)):

- The preservation of discoverable ESI;
- The form(s) in which ESI will be produced;
- The time within which ESI will be produced;
- The scope of discoverable ESI;
- How claims of privilege or attorney work product for ESI will be asserted, including whether such claims may be asserted after production;
- How the confidentiality, privacy, trade secrets, or proprietary status of information relating to a nonparty will be asserted or preserved;
- How the costs of production of ESI will be allocated among the parties; and
- Other issues concerning ESI, including developing a proposed discovery plan.

The trial court may include appropriate orders relating to the discovery of ESI in the case management order. See Cal Rules of Ct 3.728(13). See also Fed R Civ P 16(b)(3)(B)(iii), 26(f)(3)(C), discussed in §8.104.

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§2.26 a. Exempting Case From Disposition Time Goals

If the case justifies it, as soon as the complaint is filed or served counsel should check local rules on the procedures, criteria, and timing for exempting a general civil case from the Trial Court Delay Reduction Act of 1990 case disposition time goals that apply to the great majority of cases. See Cal Rules of Ct 3.714(c)(1) (in "the interest of justice," the court may exempt a general civil case if exceptional circumstances will prevent meeting the goals and deadlines imposed by the Cal Rules of Ct 3.720-3.730 case management review and conference program).

General civil cases that may be exempted from the time goals of Cal Rules of Ct 3.714(b) include complex or otherwise "exceptional" cases, for which the court must establish a case progression plan; the court must monitor each case with the goal of disposing of it within 3 years. Cal Rules of Ct 3.714(a)(2), (c). On complex cases, see §2.73-2.74.

If permitted by local rules, counsel may make a motion to exempt a case that had already been assigned to the case management review and conference program under Rule 3.720-3.730, if unforeseen and exceptional circumstances later develop.

NOTE: No time limit appears in the statewide rule specifying or limiting *when* the court may find that a case involves exceptional circumstances justifying a disposition goal of, *e.g.,* within 3 years. See Cal Rules of Ct 3.714(c).

In counties with a master calendar, counsel should also consider asking to have the case assigned to a single judge for all purposes. Counsel should check local rules for the proper procedure.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.27 b. Expedited Disposition

§2.27 b. Expedited Disposition

Under Cal Rules of Ct 3.714(a)(3), a general civil case may be assigned to a local case management plan for expedited disposition within 6 to 9 months after filing. Local procedures for identifying appropriate cases must be in place, and any case assigned to an expedited plan must be uncomplicated and amenable to early resolution without the need for a case management conference or other substantial judicial intervention. Cal Rules of Ct 3.714(d).

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§2.28 6. Judicial Arbitration Deadlines

Many cases are referred by the court to judicial arbitration. See CCP §§1141.10-1141.31. In any case ordered to judicial arbitration, no discovery other than expert witness discovery is permitted after the arbitration award, except by stipulation of the parties or by leave of court on a showing of good cause. CCP §1141.24. Thus, judicial arbitration imposes additional, earlier deadlines for discovery that must be taken into account in formulating the discovery plan. Counsel should plan to complete discovery (other than expert discovery) before the judicial arbitration. If some discovery cannot be completed by that time (due to unavailability of witnesses or for other reasons), counsel should ask the court to include in the order referring the case to judicial arbitration a provision that discovery shall be left open. Alternatively, he or she should seek a stipulation from opposing counsel to leave discovery open generally or for specific depositions, or make a motion supported by good cause to take the needed discovery.

On judicial arbitration, see A Litigator's Guide to Effective Use of ADR in California, chap 11 (Cal CEB 2005).

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§2.29 F. Determining Which Discovery Methods to Use

There are many informal methods of obtaining information about a case, *e.g.,* Internet searches, witness interviews, public records, and stipulations with other counsel. See §§2.32-2.41. In addition, experienced litigators often use statutory procedures outside the Civil Discovery Act, *e.g.,* the Public Records Act (Govt C §§6250-6277), to obtain information. See §§2.42-2.50.

When creating the discovery plan, counsel must take into account the facts already known to counsel and client as well as other, and perhaps less costly, ways for obtaining information than formal discovery methods. Counsel can then determine the formal discovery methods needed to prosecute or defend the case, based on what type of discovery is best in a given situation, and can avoid unnecessary quests when an alternative means of acquiring the same information is readily available.

On the six formal methods of discovery (see CCP §2019.010), see chaps 5-6 (depositions), 7 (interrogatories), 8 (demands for inspection), 9 (requests for admission), 10 (physical and mental examinations), and 11 (exchange of expert information).

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III. CREATING DISCOVERY PLAN

§2.30 A. Deciding When to Develop Plan

An attorney should begin to assemble a discovery plan as soon as possible. For a plaintiff's attorney, this is before the complaint is filed. Plaintiff's counsel has the ability to identify issues and make decisions about how a case is to be handled before commencing the suit. Counsel should not squander this advantage by waiting until after discovery has begun to consider what discovery should be undertaken and in what manner.

For the defense attorney, the discipline of planning discovery will enable that attorney to avoid acting solely in a responsive mode. Defending a case does not merely involve responding to the plaintiff's attempts to obtain information. By planning discovery early in the case, defense counsel can ensure that evidence necessary to rebut the plaintiff's contentions, support affirmative defenses, or support motions is obtained in a timely fashion.

PRACTICE TIP: Especially when exposure to potential damages is high, it may be appropriate to retain a consulting expert early to assist in the evaluation of the claim. This expert can also help create the discovery plan by advising counsel about what evidence is needed to prosecute or defend a claim and where that information can be obtained. On retaining a consulting expert and how to maintain the confidentiality of the consulting expert's advice or reports, see §11.5.

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§2.31 B. Conferring With Other Counsel

One of the key points in developing a realistic discovery plan is to communicate with other counsel. Informal discovery and discovery stipulations, such as expedited depositions, can be effective and efficient ways to conduct discovery. See CCP §2016.030. The degree to which opposing counsel is willing to cooperate and stipulate to the methods of exchanging information will bear on the form of the discovery plan that is eventually adopted. All parties benefit to the extent that discovery is conducted in a cooperative and orderly manner, with a minimum of discovery disputes.

JUDGE'S PERSPECTIVE: This point cannot be emphasized enough. The key to cost-effective discovery is cooperation among counsel. Experience on the bench makes it all too clear that discovery disputes are frequently the result of poor relationships among counsel. A court ruling can leave all parties dissatisfied and is often a poor substitute for the negotiated resolution that counsel, had they communicated, could have reached.

The key to obtaining modifications in discovery procedures by stipulation is making them of reciprocal benefit to all parties involved.

NOTE: Early in the litigation, counsel allied in a case, *e.g.*, lawyers representing different defendants, should evaluate the benefits of the so-called "joint defense doctrine" and arrange their communications so as not to eviscerate the protections for attorney work product and attorney-client communications. See §§3.19-3.21.

Identity of health care providers. Most plaintiffs' counsel in personal injury cases will agree to stipulations enabling the defense attorney to evaluate the case sooner rather than later. Although defense counsel can serve Judicial Council form interrogatories on the plaintiff's attorney and obtain the identity of health care providers, defense counsel can also pick up the telephone and ask the plaintiff's attorney to send a list of those providers the next day. This arrangement saves at least a full month compared to the formal interrogatory procedure.

PRACTICE TIP: Even if plaintiff's attorney provides the names voluntarily, counsel should follow up to formally verify the information by serving interrogatories.

Notice to consumer for subpoena of medical records. Similarly, most plaintiffs' counsel will agree to waive the 20-day period for notice to consumer for subpoenaing of records from medical providers (see CCP §1985.3). It is extraordinarily rare for plaintiff's counsel to move to quash a subpoena seeking consumer records relating to the plaintiff during that 20-day period. By obtaining medical records almost 2 months sooner, the plaintiff's deposition can be taken and the entire case resolved sooner, to the benefit of both parties.

Document production. In business litigation, documents are often numerous and cumbersome and, under CCP §2031.280(a), a responding party may produce documents in the manner in which they are kept in the ordinary course of business. However, a different arrangement for the efficient exchange of specific documents geared toward the claims and defenses raised in a given case might be much more efficient. Counsel are always free to enter into agreements for discovery that usually (although not always) benefit all the parties. See CCP §2016.030. On reaching agreement on the production of electronically stored information (ESI), see, *e.g.*, §§4.18, 4.22, 4.30, 4.33.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.32 C. Planning Informal Discovery

§2.32 C. Planning Informal Discovery

Informal discovery refers to nonstatutory techniques for gathering information available without using the procedures described in the Civil Discovery Act (CCP §§2016.010-2036.050), such as, *e.g.*:

- Interviewing witnesses;
- Gathering public information, such as searching the Internet or reading newspaper articles, technical publications, and textbooks;
- Conducting other investigations or inspections, of property or from persons, through the Internet or by other means, designed to obtain information useful to the litigation; or
- Exchanging information with other parties through agreement of counsel.

In addition to such informal discovery, using statutory procedures outside the Civil Discovery Act may play a role in the discovery plan in appropriate cases. For example, information contained in public records may be obtained from the federal government through the Freedom of Information Act (5 USC §§552-553) (see §2.49) and from the California government through the Public Records Act (Govt C §§6250-6277) (see §2.48) or from the Public Safety Officers Procedural Bill of Rights Act (Govt C §§3300-3313). See §2.50.

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§2.33 1. Witness Interviews

In informal discovery, the greatest dilemmas involve interviews of witnesses. In general, interviews are advantageous because they are less expensive than depositions, they are conducted outside the presence of the opposition without the necessity of having to release the witness's statement to all other counsel in the case, and they can be conducted even before suit is filed. An interview helps avoid the formality and adversarial nature of a deposition. For example, business clients are frequently reluctant to have depositions taken of their best customers but may be willing to accept the risks of a mere interview.

Interviewing a witness may also help an attorney decide whether to conduct a deposition of that witness. When taking a deposition of the witness, the interview provides a road map for the attorney, who already has a good sense of what the witness will say. If the witness changes his or her testimony during the deposition, it may be possible to impeach the witness with the information given during the interview or to refresh the witness's memory with it. For this reason, interviews are often conducted by someone other than counsel, *e.g.*, an investigator who can testify at trial. See §2.36.

PRACTICE TIP: It can be difficult to impeach a witness in a deposition with information given during an interview. Impeachment makes a witness dig in, and if the witness denies the information, counsel does not have sworn testimony with which to impeach the witness. A better approach is to keep the deposition exchange friendly and attempt to refresh the witness's recollection.

There are two disadvantages of interviews:

- The testimony is not preserved for trial if the witness dies or otherwise becomes unavailable.
- Interviews do not usually result in sworn testimony, so it may be difficult to impeach witnesses if they change their story at trial. A declaration or sworn statement is not likely to be admissible at trial. The best way to preserve a witness's testimony is to take a deposition.

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§2.34 a. Party Represented by Counsel

Although an attorney is not permitted to communicate with an opposing party represented by counsel (Cal Rules of Prof Cond 2-100), an attorney generally is permitted to communicate with a witness who is not a party to the case. However, special rules and limitations apply to present and former employees, directors, and officers of a corporate party to the litigation. See Cal Rules of Prof Cond 2-100. See also *D.I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 36 CR 468 (issue of fact whether Rule 2-100 was violated); *Snider v Superior Court* (2003) 113 CA4th 1187, 1208, 7 CR3d 119 (not Rule 2-100 violation for plaintiff's counsel to talk with company's sales manager and director of production); *Jorgensen v Taco Bell Corp.* (1996) 50 CA4th 1398, 58 CR2d 178 (not Rule 2-100 violation for plaintiff's investigator to interview certain of defendant's employees before legal claims had been brought). See also *Continental Ins. Co. v Superior Court* (1995) 32 CA4th 94, 111, 37 CR2d 843; *Nalian Truck Lines, Inc. v Nakano Warehouse & Transp. Corp*. (1992) 6 CA4th 1256, 1261, 8 CR2d 467; *Triple A Mach. Shop, Inc. v State* (1989) 213 CA3d 131, 261 CR 493.

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§2.35 b. Written or Recorded Statements

Even in the absence of a deposition, it may be possible to impeach a witness by a prior written or recorded statement. Although the witness's statement can be memorialized with an audio recorder or by asking the witness to sign a written statement, using a court reporter may be preferable. Although the resulting transcript would not qualify as that of an oral "deposition" under CCP §2025.010, it is may be easier to use at trial for impeachment purposes because it can be authenticated by the court reporter. This may help avoid, for example, difficulties which would result if the witness denies signing the statement. Some witnesses are intimidated by a request for a written or recorded interview, and may be even more hesitant to speak with a court reporter present. Counsel must weigh the benefit of obtaining a recorded interview against the risk of turning a cooperative, friendly witness into a recalcitrant, hesitant, or antagonistic one.

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§2.36 c. Unrecorded Interviews

A less intimidating way to "lock in" a witness is to have perhaps another person present (a corroborator) during the interview. The attorney may conduct the interview in the presence of the corroborator, perhaps an investigator or a paralegal at the firm, who could testify about the witness's statements, if necessary. Many attorneys prefer to have an investigator interview their witnesses, because the investigator can also testify at trial. Because any corroborator or investigator is subject to cross-examination based on bias, neither of these methods is nearly as effective as locking the witness into the statements made at the interview by a signed writing or recording.

PRACTICE TIP: If the testimony is important, counsel should take a deposition.

Counsel should not have the client conduct interviews. See Caution in §6.6.

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2. Investigations and Informal Procedures

§2.37 a. Internet Searches

Much information is available free on the Internet, or for a fee through private databases. For example, attorneys litigating against a publicly held corporation should not overlook that corporation's SEC 10K and 10Q filings, which contain the company's financial statements, detailed descriptions of its lines of business, future prospects, competition, stock holdings, options, compensation for officers and directors, and other significant information. These filings may even contain information about the specific case involved. There may be a plethora of articles available on the Internet about better-known companies. Counsel should thoroughly review the party's own website and search the party's name, as well as any witnesses' names, on Google or other search engines. There are many extremely useful Internet websites for informal evidence gathering, *e.g.,* Google and Yahoo! (search engines), findlaw.com, www.law.cornell.edu, and hg.org (legal materials), Yahoo! Finance (business and financial information), and firstgov.gov (US government information). In addition, counsel may request information under the federal Freedom of Information Act (5 USC §§552-553) and the California Public Records Act (Govt C §§6250-6277). See §§2.48-2.49.

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§2.38 b. Inspection of Property Open to Public

Property that is open to the public may be inspected without resorting to CCP §2031.010. In *Pullin v Superior Court* (2000) 81 CA4th 1161, 1165, 97 CR2d 447, the plaintiff's expert visited the store where a slip-and-fall injury had occurred and conducted a quick test on the floor in order to testify at trial about the floor's condition. The court held that, as long as a party does not violate any laws in conducting informal discovery, the party is entitled to gather information relevant to a lawsuit without being required to use formal discovery procedures.

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§2.39 c. Parties' Exchange of Information

Informal discovery can be advantageous when two parties want to exchange information without revealing it to a third party. The classic example is the situation in which a plaintiff sues two defendants who have indemnity claims between them. As a general rule, if each of the defendants aggressively pursues its indemnity claim through formal discovery, the plaintiff will obtain an enormous benefit. In fact, the plaintiff may be able to sit back and simply allow the two defendants to prove the plaintiff's claim against each other. Defense counsel frequently agree in such circumstances to exchange information with each other informally. This allows each defense counsel to obtain the information necessary to evaluate and try the case, without providing a windfall to plaintiff's counsel. On the "joint defense" doctrine, see §§2.31, 3.19-3.21.

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§2.40 d. Early Exchange of Expert Witness Opinions

Many cases, particularly business litigation and personal injury cases, turn on expert testimony. It may be difficult to evaluate a case until the experts have been deposed, which is generally not until a few weeks before trial and after an enormous amount of money has already been spent on the case. Most clients are interested in an early evaluation of the case so that an assessment can be made about whether it should be settled, and on what terms. An agreement to allow informal interviews of experts, an exchange of expert reports or opinions, or even early depositions can be beneficial to all parties in the action. Most counsel, however, want their experts to have flexibility to react to new evidence and revise and refine their opinions as the case develops. This particular problem can often be resolved through an appropriate stipulation that prevents the use of information obtained during an informal exchange for impeachment or other purposes in the case or through a stipulation that the expert's opinions are not confined to those provided at the early depositions.

CAUTION: If counsel agrees to early expert depositions, there is a risk that the expert may provide opinions based on incomplete discovery and that the opinions may thus be inconsistent with the facts developed by further discovery. For this reason, early expert discovery is rare. A more likely use of early expert disclosure would be for the parties to stipulate to disclose experts 30-60 days early to allow sufficient time for expert depositions in a complex case involving a large number of expert witnesses.

On expert witnesses, see chap 11.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.41 e. Public Records Search

§2.41 e. Public Records Search

Apart from formal discovery methods, counsel may seek information from public records during litigation or before suit is filed. Such government information includes court filings, filings with the SEC (http://www.sec.gov), corporate filings with the California Secretary of State (http://www.ss.ca.gov) or Department of Corporations (http://www.corp.ca.gov), and county records of title to real property.

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§2.42 D. Other Statutory Procedures for Discovery

Attorneys frequently use statutory procedures outside the Discovery Act for purposes of discovery, some of which are discussed in §§2.43-2.50. Although each procedure may serve a specific function for discovering information in particular cases, counsel should note the limitations that apply to each, *e.g.,* a request for statement of damages is permitted only in superior court in actions alleging personal injury or wrongful death. See CCP §425.11.

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§2.43 1. Request for Statement of Damages

Complaints for personal injury or wrongful death in superior court must not state the amount of damages sought. CCP §425.10(b). The purpose is to protect defendants, particularly in medical malpractice cases, from adverse publicity resulting from inflated demands. *Schwab v Rondel Homes, Inc.* (1991) 53 C3d 428, 431, 280 CR 83.

Timing. A defendant may serve a request for statement of damages at any time on the plaintiff. The plaintiff must then serve a responsive statement within 15 days setting forth the nature and amount of damages being sought (*e.g.,* the amount of medical, hospital, and nursing expenses, wage loss, any other special damages, and general damages). See CCP §425.11(b).

PRACTICE TIP: Unfortunately, when a request for statement of damages is served early in a case, the information given in return is generally incomplete or unreliable. The amount being claimed for medical expenses and lost wages is usually set forth in greater detail if the plaintiff is required to provide adequate responses to Judicial Council form interrogatories. See §7.44. In many cases, then, a request for statement of damages is superfluous.

If punitive damages are sought. If the plaintiff is also seeking punitive damages, the notice to defendants required by CCP §425.115 may be combined with the plaintiff's statement in response to a defendant's request under CCP §425.11. CCP §§425.11(e), 425.115(e). For discussion and form of request for statement of damages, see California Civil Procedure Before Trial §15.9 (4th ed Cal CEB 2004).

Establishing amount in controversy. One important use for a request for statement of damages is to establish the amount in controversy for purposes of removal to federal court. See 28 USC §§1441-1444. The 30-day time limit to remove a case to federal court does not begin to run until the defendant has sufficient information to be put on notice that the case is removable. 28 USC §1446(b). In a diversity case, this requires notice that the amount in controversy exceeds $75,000, not including costs or interests. See 28 USC §1332(a). It is not uncommon for a defense attorney to receive a case more than 30 days after the client's receipt of the suit. This would prevent removal if, at the time the defendant received the case, it had sufficient information to be put on notice that the amount in controversy exceeded $75,000. If no such notice was initially provided, defense counsel can serve on plaintiff a request for statement of damages. When the response to that request sets forth that the amount of claimed damages exceeds $75,000, defense counsel can then seek to remove the case to federal court, assuming diversity exists.

PRACTICE TIP: When the plaintiff is served with a request for statement of damages in a case in which diversity may exist, plaintiff's counsel should be cautious about overstating damages and thereby creating grounds for removal of the case to federal court. See Civ Proc Before Trial §§15.9, 15.12.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.44 2. Demand for Bill of Particulars

§2.44 2. Demand for Bill of Particulars

A defendant or cross-defendant may demand a bill of particulars to force a plaintiff or cross-complainant suing on an account to provide an itemization of the amount alleged to be owed, even before responsive pleadings are filed. See CCP §454. On procedures for demanding a bill of particulars, see California Civil Procedure Before Trial, chap 30 (4th ed Cal CEB 2004).

NOTE: This device may be used in contract or quasi-contract actions, but not in negligence or other actions pleading general damages. See Civ Proc Before Trial §§30.5-30.6. It is not proper in an action on an account stated. *Ahlbin v Crescent Commercial Corp.* (1950) 100 CA2d 646, 224 P2d 131. See *Jones v Wilton* (1938) 10 C2d 493, 75 P2d 593; *Hallford v Baird* (1938) 27 CA2d 384, 80 P2d 1040.

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§2.45 3. Gathering Information to Introduce by Judicial Notice

Judicial notice is often overlooked as a means of introducing evidence at trial without the need for a witness. The matters that must and may be judicially noticed are set forth in Evid C §§451 and 452, respectively. These matters include facts and propositions that are not reasonably subject to dispute and are capable of immediate determination by resort to sources of reasonably indisputable accuracy. Evid C §452(h).

Almost all official acts of the federal and state governments, including the results of hearings by administrative boards, may be judicially noticed. See Evid C §452(c). A certified copy of the government record is admissible in court, establishes the relevant fact without the need for any testimony, and entitles the noticing party to a jury instruction that a matter so noticed be accepted as a fact. See Evid C §457. On procedures for judicial notice, see California Trial Practice: Civil Procedure During Trial, chap 14 (3d ed Cal CEB 1995).

EXAMPLES: Judicial notice can be a powerful tool to prove marital status, a criminal record, suspension of corporate standing for nonpayment of income taxes, plaintiff's earlier knowledge of facts constituting the claim as shown in administrative filings, a statute of limitations defense, or other inconsistent allegations made by the opposing party in another lawsuit or administrative proceeding.

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§2.46 4. Using Injunction to Prevent Destruction of Evidence

The injunction procedure in CCP §§525-534 is used to require another party to refrain from taking a specified action when necessary to protect a legal right being pursued by the enjoining party. A party may apply to the court for an injunction against acts that threaten irreparable injury, such as destruction of evidence. See §§8.16-8.17. On procedures for obtaining an injunction, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004).

EXAMPLE: In a construction dispute, a party may apply to the court for an injunction to allow experts to view a defective pipeline before it is altered.

When seeking an injunction, a party is required by statute to provide an undertaking, or bond, to ensure that the enjoined party can be indemnified for any damage suffered in the event the injunction was improperly granted. See CCP §529.

PRACTICE TIP: In light of the bond requirement and the procedures for applying for injunctive relief, it is usually advantageous to seek a protective order rather than an injunction. If the action has already been filed, a protective order may ensure the desired result without requiring an undertaking. On how to seek a protective order, see §§15.59-15.84.

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§2.47 5. Using Subpoenaed Records at Trial Without Witness

There is a procedure that allows for the admissibility of copies of business records without the need for authentication by a witness or at deposition. See Evid C §§1560-1562. On deposition subpoenas for business records, see §§5.85-5.107. The Evidence Code procedure can be particularly useful when introducing medical or bank records, but when using it, counsel must be careful to comply with Evid C §1562, which states that the requirements of Evid C §1271 must also be met.

CAUTION: This is a difficult procedure to use successfully because it requires, among other things, compliance with the business records exception to the hearsay rule, a specific affidavit by the custodian of records, and possibly an affidavit by the attorney to whom the records were delivered. Counsel should not rely on this method for introducing records of crucial importance to the case, but should have a backup method for introducing the records, *e.g.*, by subpoenaing to trial the custodian of records to authenticate the documents and lay the foundation for the business records exception.

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§2.48 6. Request Under California Public Records Act

Under the California Public Records Act (Govt C §§6250-6277), the public has a right to disclosure from the California government of public records that are not subject to one of the specific exemptions stated in Govt C §6254. No reason need be given for the request. All that is required is that the requesting person pay the cost of copying the documents. Govt C §6253(b). The agency must respond to the request within 10 days of its receipt, although that period can be extended in "unusual circumstances" for another 14 days. Govt C §6253(c). Although the timeframe for a response is relatively tight, actual production of the requested documents may take considerably longer, so it is important to begin the process early. There is no relevancy requirement. The right to disclosure under the Act is broader than the relevancy-to-subject-matter standard of civil discovery (see CCP §2017.010) and may be enforced by writ of mandate. *Wilder v Superior Court* (1998) 66 CA4th 77, 83, 77 CR2d 629. See Govt C §6258 (injunctive or declarative relief or writ of mandate may be used to enforce right to inspect or receive copies of public records). See also Govt C §6259, which includes a provision for costs and reasonable attorney fees if the person requesting the records prevails.

In the appropriate case, requests for information from state agencies may be invaluable. For example, in *County of Los Angeles v Superior Court* (2000) 82 CA4th 819, 98 CR2d 564, an action for false imprisonment by three former county jail inmates against Los Angeles County, plaintiffs' counsel, who was unsuccessful in obtaining county documents in discovery, filed a request under Govt C §§6250-6277. The court held that the California Public Records Act may be used to gain access to public records that are not exempt from discovery, regardless of the purpose for which the record is requested, and that the plaintiffs were entitled to use those records in the litigation.

For further discussion of the Public Records Act, see §3.110. On when a governmental agency may assert the official information privilege under Evid C §1040, see §3.109.

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§2.49 7. Request Under Freedom of Information Act

Information is also available from the federal government through the Freedom of Information Act (FOIA) (5 USC §§552-553). FOIA applies only to federal agencies and does not create a right of access to records held by Congress, the courts, or by state or local government agencies. Each federal agency is responsible for meeting its FOIA responsibilities for its own records. A list of principal FOIA contacts at federal agencies is available on the Internet at http://www.justice.gov/oip/foiacontacts.htm. As with requests on the California Public Records Act, counsel must leave ample time for obtaining responsive documents. Although documents are sometimes produced in only a few weeks, they are sometimes not produced—if at all—for many months, or even more than a year. See §3.111.

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§2.50 8. Request Under Public Safety Officers Procedural Bill of Rights Act

The Public Safety Officers Procedural Bill of Rights Act (Govt C §§3300-3313) guarantees public safety officers the right to view any adverse comment placed in their personnel file. Within 30 days, they may file a written response, which must be attached to the adverse comment. Govt C §§3305-3306. See *Seligsohn v Day* (2004) 121 CA4th 518, 523, 16 CR3d 909. The disclosure obligation under Govt C §3306.5(c) does not include the right to review underlying investigatory materials that are not kept in personnel files or authorized to be used in personnel decisions on mere speculation that they might contain adverse comments. See *McMahon v City of Los Angeles* (2009) 172 CA4th 1324, 1335, 92 CR3d 68.

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§2.50A 9. Right to Information Under Other Provisions

Independent of a party's rights under the Discovery Act, a person or entity may have, for example, a contractual or statutory right to obtain or view certain information. For example, if the members of an out-of-state limited liability company residing in California represent 25 percent or more of the voting interests or members of that company, those members are entitled to all information and inspection rights provided in Corp C §17106 (*e.g.,* financial statements, tax returns, and books and records relating to the company's internal affairs, among other things). Thus, in an action for declaratory relief and accounting as to plaintiff's rights in a Delaware limited liability company, because 100 percent of the members resided in California, plaintiff (a 1 percent owner) was entitled to discover the company's financial records. *Burkle v Burkle* (2006) 141 CA4th 1029, 1038, 46 CR3d 562.

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§2.51 E. Coordinating Formal Discovery Methods

Often, more than one discovery method can be used to seek the same facts or evidence. For example, the same information can be discovered from a party through both interrogatories and depositions. When creating a discovery plan, counsel should give careful consideration to which method is appropriate for a given type of evidence. Often the best strategy is to use multiple methods aimed at the same evidence, but in a specific, predetermined sequence. On determining the sequence of discovery, see §§2.56-2.64.

A discovery plan can help counsel coordinate the various formal discovery methods, as in the examples in §§2.52-2.55.

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§2.52 1. Interrogatories and Demands for Inspection

Counsel can use interrogatories (CCP §§2030.010-2030.410) and demands for inspection of documents (CCP §2031.010) in conjunction with one another to obtain all evidence relating to a given point. For example, counsel may serve a set of interrogatories, which asks about contentions and facts, in conjunction with a set of demands for inspection of documents, which seeks the production of documents related to those contentions or facts. On interrogatories, see chap 7. On demands for inspection, see chap 8.

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§2.53 2. Interrogatories With Requests for Admission

Similarly, counsel can coordinate interrogatories with requests for admission (CCP §§2033.010-2033.740). For example, counsel should serve Judicial Council Form DISC-001, Interrogatory 17.1 in conjunction with requests for admission to obtain the identity of witnesses, facts, and documents supporting the denial of any particular request for admission. On interrogatories, see chap 7. On requests for admission, see chap 9.

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§2.54 3. Documents Before or At Depositions

If documents will be helpful in deposing a witness, counsel should obtain and review them to prepare for the deposition. Although documents can be requested in a notice of oral deposition (CCP §2025.220(a)(4)), it is better to demand inspection of the documents from a party under CCP §2031.010(a) well in advance of the deposition, especially if the documents to be produced are so voluminous that they cannot adequately be reviewed at the time of the deposition. On inspection demands, see chap 8. This also allows any discovery disputes to be resolved before the deposition goes forward. A deposition subpoena may be used to obtain documents from a nonparty, with or without a personal appearance at the deposition. See chap 5.

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§2.55 4. Documents Before Medical Examination

Defense counsel should obtain medical records for the examiner's review before a medical examination (CCP §§2032.010-2032.650). Not only may experts be listed as trial witnesses (CCP §2034.260), they may also be used as consultants to advise counsel in asking deposition questions or in drafting salient interrogatories. On maintaining the confidentiality of consulting experts, see §11.5.

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F. Determining Sequence of Discovery

§2.56 1. Sequence of Discovery Methods in General

If relevant evidence on a given point may be obtained from documents as well as live witnesses, counsel should decide whether it is better to depose the witnesses before or after obtaining the documents. Although it is usually better to obtain the documents first so they can be used in examining the witnesses, there are instances in which it is better to proceed with a deposition first. For example, the deposition of a preliminary witness may be necessary to gain a better understanding of the issues and determine whether the documents exist, their location, and their custodian. A deposition may also help counsel craft a more focused request for documents and eliminate the need to copy and review voluminous documents. Counsel should be cautious, however, when proceeding with a deposition before obtaining relevant documents because, absent a court order on a showing of good cause, a witness may only be deposed once. CCP §2025.610(a). See §5.15.

NOTE: Absent Judicial Council rule, local rule, agreement of counsel, or court order, the discovery methods may be used in any sequence. CCP §2019.020.

Commercial cases. In commercial cases, which depend heavily on documents, it is usually best to obtain all relevant documents before taking depositions. Doing so helps the attorney prepare for the deposition, make better use of consulting experts, and avoid the problem of finding out during expert discovery that an important set of documents was never obtained. Counsel should carefully consider, however, whether the deposition of a preliminary witness to help narrow the issues and gain a better understanding of the available documents will help discovery proceed more efficiently. On questions that counsel might ask a custodian of electronically stored information (ESI), see §§4.5, 4.40.

Background interrogatories, deposition, and contention interrogatories. It is often advantageous to send interrogatories to a party to obtain basic background information that will be useful in demanding records and in deposing the plaintiff. At the deposition, defense counsel can question the plaintiff about the circumstances surrounding the incident at issue and any related facts known to the plaintiff. Following that deposition, which locks the plaintiff into specific testimony, defense counsel can serve contention interrogatories on the plaintiff. Unlike deposition questions, contention interrogatories must be answered based on information available to both the plaintiff and plaintiff's counsel. The advantage of this particular sequence is that the plaintiff may be less prepared at the deposition to respond to questions about liability issues than if plaintiff's counsel had already been forced to answer detailed questions about those issues. On contention interrogatories, see §§7.3, 7.39-7.43.

For detailed discussion on when and how to use depositions, see §§5.31-5.35, 6.2, 6.91, 6.136-6.139.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.57 2. Sequence of Depositions

§2.57 2. Sequence of Depositions

An important issue in planning discovery is the order of depositions. There may be very important reasons to depose one witness or set of witnesses before another, as the examples in §§2.58-2.59 illustrate.

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§2.58 a. Locking Plaintiff Into His or Her Story

The defense may want to depose the plaintiff early, to lock the plaintiff into his or her story and prevent the plaintiff from shaping it to better fit the testimony of other witnesses. In a different case, it may be important to depose most or all of the other witnesses before deposing the plaintiff, so counsel knows as much as possible about the events at issue before the plaintiff's deposition. On depositions, see chaps 5-6.

By taking the deposition of the opposing side's major witness (*e.g.*, the plaintiff in a personal injury case, or the manager who fired plaintiff in a discrimination case), counsel can lock in the general story and then seek to undercut the testimony through subsequent depositions of peripheral witnesses (*e.g.,* eyewitnesses and doctors in a personal injury case and the human resources advisor and other employees in a discrimination case). Alternatively, beginning with the peripheral witnesses would allow the major witness to become educated and perhaps shape his or her story to be consistent with the other testimony. Of course, sequencing involves a large degree of judgment because there are generally pros and cons to almost any sequence.

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§2.59 b. When Plaintiff's Injuries Are Unresolved

When a plaintiff's medical condition is unresolved, *e.g.,* he or she is to undergo surgery for the injury at issue in the case, it may be too early to depose the plaintiff or the treating physicians, or to conduct a medical examination. Because surgery may alter the situation significantly, however, defense counsel should attempt to obtain the agreement of plaintiff's attorney to limited depositions, with the right to conclude them after the surgery. It may be possible to depose the plaintiff on one date about the facts giving rise to the incident, and later, after the plaintiff's condition has stabilized, about the injuries. Such arrangements are made by agreement among counsel or by motion and are not uncommon. Similarly, if a plaintiff is deposed early in a case, the trial does not take place for some time, and there is any suggestion that the plaintiff's condition has changed since the first deposition, defense counsel should try by agreement or court order to redepose the plaintiff on continuing damages issues.

On the one-deposition rule, see §5.15.

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§2.60 c. When One Party Is Corporation

Sequencing issues arise when both superiors and subordinates of a corporate party will be deposed. If one deposition goal is to identify inconsistent testimony among a corporate defendant's employees, it may be preferable to depose the employees before the supervisors; if the supervisors are deposed first, the employees may feel pressured to conform their testimony to that of the supervisors. A related consideration is how much time to allow between depositions. A plaintiff's attorney seeking to depose three employees of a corporate defendant may choose to schedule all the depositions for the same day and complete the depositions in that day, thus minimizing the witnesses' opportunity to compare notes about the earlier questions and testimony.

Counsel should also evaluate the need for and sequence of depositions of natural persons at the corporation and of the person "most qualified to testify on its behalf" on specific topics under CCP §2025.230. See §§5.40-5.41.

On deposition scheduling procedures, see generally chap 5.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.61 d. Defendants' Identity and Liability

§2.61 d. Defendants' Identity and Liability

Some discovery must be conducted as early as possible. For example, it is essential for plaintiff's attorney to obtain all information that might indicate other potentially liable parties. Because liability for noneconomic damages is no longer necessarily joint and several (CC §§1431.1-1431.5), the plaintiff's failure to name a potentially liable party may reduce the damages recoverable by the plaintiff. Even in a case with purely economic damages, for which joint and several liability may remain the law, the omission of a potential party from the suit allows another defendant to point to the "empty chair" in an effort to convince the jury that the entire blame is attributable to the missing party. Among other discovery efforts aimed at determining the range of potentially liable parties, plaintiff's counsel should obtain defendants' contentions and supporting evidence related to its lack of liability as early in the case as possible. The initial effort for determining contentions is through contention interrogatories. See §§7.39-7.43.

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§2.62 e. Identity of Percipient Witnesses

Both plaintiff's and defense counsel will want to obtain information in the other's possession about witnesses who have knowledge relevant to the case. In general, counsel should obtain this information as early in the case as possible through interrogatories or documents, and then make decisions about whom to depose. On interrogatories, see chap 7. On demands for inspection, see chap 8.

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§2.63 f. Medical Records

Defense counsel should request medical records early in the case, not only for use when deposing the plaintiff, but also in connection with an independent medical examination. On medical examinations, see chap 10. Medical records often contain information that prompts further discovery. For example, medical records may disclose prior treatment for conditions similar to those at issue in the case or contain information suggesting an earlier workers' compensation claim for similar injuries. The earlier in the case these medical records are obtained, the greater the opportunity to conduct follow-up discovery.

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§2.64 g. Medical Examinations

Before conducting a medical examination under CCP §§2032.010-2032.650, defense counsel should consider deposing treating physicians. If they testify in a manner favorable to the defense, it is generally less expensive and more effective to use their deposition testimony than to conduct a medical examination.

CAUTION: Defense counsel should be aware that unfavorable treating physician testimony can damage defendant's case. The trier of fact will generally view a treating physician as more credible and less biased than a retained independent medical exam physician, and, because defense counsel is not allowed to speak with a treating physician (on physician-patient privilege, see §§3.84-3.106), it is difficult for counsel to know in advance what the physician will say at the deposition. Unless defense counsel has a large measure of confidence that the treating physician's testimony will be favorable, the better course is an independent medical examination.

In cases in which the injuries cover several medical specialties, it is often essential to depose the treating physicians to determine what type of doctor to use for the medical examination. Under CCP §2032.220(a), the defendant has the right to only one examination of the plaintiff without a court order. See §10.2. Because defense counsel will be allowed only one medical exam, defense counsel should choose the medical examiner's specialty carefully.

On moving for additional medical examination, see §§10.43-10.49.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.65 G. Revising Discovery Plan

§2.65 G. Revising Discovery Plan

As the litigation progresses, counsel should update the original discovery plan to reflect how the case has changed and make any necessary adjustments. Most cases change, sometimes remarkably, over their life span: Claims and defenses are modified, or even discarded entirely in favor of new ones, based on the evidence developed during discovery. Reviewing the initial discovery plan helps the attorney identify those new issues and incorporate them into the evolving discovery plan.

EXAMPLE: In a typical personal injury lawsuit, a defense attorney is likely to identify plaintiff's wage loss as one of the issues in the case and may determine that the best way to obtain the information is to subpoena plaintiff's employment records. If there are no meaningful employment records because the majority of plaintiff's income came through self-employment, the attorney must revise the discovery plan. Essentially, the wage loss issue has changed, and the discovery originally planned to address that issue would be relatively ineffective. By having a plan at the outset of the case, the attorney can return to that plan not only to see if it has been followed but also to determine whether it is still the best plan for the case, in light of the way in which the case has developed. In this example, defense counsel probably will want to add several new initiatives to the discovery plan, including interrogatories and requests for production of documents specifically geared toward self-employment lost income claims, subpoenas for accounting and bookkeeping records, and perhaps depositions of accountants and bookkeepers.

One of the benefits of a discovery plan is that it compels the attorney to focus on the issues presented by a case and to make at least preliminary decisions about what discovery is needed and how it should be conducted. A discovery plan is more than a set of steps; it is a discipline that forces the attorney to continually reevaluate the case.

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IV. STRATEGIC CONSIDERATIONS

§2.66 A. Larger Consequences of Decisions

In preparing a discovery plan, it is important to consider the ultimate consequences on the case of discovery decisions and strategies. The best decision in the short run may not be the best decision in the longer term for the case.

JUDGE'S PERSPECTIVE: One of the primary benefits of formulating a discovery plan is that it forces the attorney to think through the issues early in the case and avoid taking a position harmful to the client's long-term interests. Many attorneys make the mistake of failing to consider how their discovery decisions may come back to haunt them at trial. For example, if the attorney-client privilege is asserted for an employer's investigation of a sexual harassment claim, defense counsel may have great difficulty during trial convincing the judge that it is now necessary affirmatively to use the "privileged" information (which the plaintiff was prevented from discovering) to prove that a timely and thorough investigation of the employee's complaint took place.

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§2.67 B. Hiring and Consulting Experts Early

It is usually advisable to consult with experts early in the case, rather than waiting until discovery is underway, particularly if the case involves new areas of expertise for the attorney. The expert can provide valuable education about the case that may be much more costly to learn through formal discovery methods. In addition, the expert may be quite useful in helping counsel formulate discovery requests and evaluate and review the responses. An accountant, for example, may aid in crafting specific document requests to get the financial records the plaintiff needs to bolster a damages claim.

On the difference between consulting and testifying experts and how to maintain confidentiality, see §11.5.

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C. Using Discovery Referee

§2.68 1. When Discovery Referee May Be Helpful

Most cases do not require the use of a discovery referee, but in some cases a discovery referee can be essential. For example, if a particular attorney or witness is being difficult to the point of being obstructive, the presence of a discovery referee can avoid unnecessary motions to compel and allow for a prompt and efficient resolution of discovery disputes. It is not feasible to stop a deposition every time an attorney or a witness becomes obstructive, run to court to have a judge or discovery commissioner resolve the issue, and then resume the deposition. Generally, a discovery referee's presence at a deposition will put a stop to such conduct.

JUDGE'S PERSPECTIVE: The court frequently appoints a discovery referee to assist the parties in developing a voluntary exchange of discovery to avoid or limit the need for formal motions. The referee may ensure that deadlines are met and simultaneous exchanges are made, if needed. When stipulating to a referee, counsel should consider that the referee will be required to use his or her judgment and discretion about, *e.g.,* what is "reasonably calculated to lead to the discovery of admissible evidence," or what is "burdensome." A busy trial judge will usually give the recommendations of a referee great weight.

Discovery referees can also be useful when the number of complicated discovery issues is large. Although it may be costly, appointing a discovery referee to resolve these issues is usually less expensive than filing successive motions in court. After the referee becomes familiar with the issues, any new issues can be resolved by a conference call instead of the lengthy process of a noticed motion.

PRACTICE TIP: When using a discovery referee for depositions, it is possible to have that referee either attend or be available by telephone throughout the deposition. If the problem is with an obstructive witness or attorney, the referee should probably be present. The referee's very presence may inhibit such conduct. If counsel want the referee to rule on issues that may arise from time to time during the deposition, it is probably sufficient to have the referee available if needed by telephone.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.69 2. Obtaining Discovery Referee

§2.69 2. Obtaining Discovery Referee

The parties may stipulate to the appointment of a discovery referee or may file a noticed motion, accompanied by a declaration from counsel explaining why a referee is needed. On procedures for consenting to the appointment of a discovery referee, see CCP §638. On motion for the court's appointment of a referee, see CCP §639.

PRACTICE TIP: If the parties agree that a referee may be useful, they should try to agree on a specific person whose judgment they respect and are likely to accept. Doing so will make disputes easier to resolve because the process of "appealing" the referee's order to the court is time consuming and expensive. The parties should evaluate whether a practicing attorney, who may be busy with his or her own cases, is the better choice, or whether it may be better to select a retired judge who might have more time and credibility. It is always wise to pay the referee's bills for services promptly.

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§2.70 3. Payment of Referee's Fees

The referee's fees are to be paid as agreed by the parties (see CCP §645.1(a)) or as ordered by the court (see CCP §645.1(b)). In determining whether the discovery referee's fees would be a hardship to a party, the trial court should accept the party's sworn declaration unless there is some reason to disbelieve it. *Hood v Superior Court* (1999) 72 CA4th 446, 449, 85 CR2d 114; *McDonald v Superior Court* (1994) 22 CA4th 364, 370, 27 CR2d 310.

If the plaintiff is indigent and cannot contribute to paying the discovery referee's fees, the court may not (a) order plaintiffs' counsel to pay the fees or (b) order the defendant to pay the entire fee. Under CCP §§645.1 and 1023, "the parties," not their counsel, are required to pay referee fees. If only one side is required to pay the fee, there may be an appearance of unfairness if the rulings favor the party paying, a situation that is not "fair and reasonable" under CCP §645.1(b). If one side is unable to contribute to the cost of a discovery referee, and the court cannot make a cost-free option available, then the court may not order a reference. *Taggares v Superior Court* (1998) 62 CA4th 94, 72 CR2d 387 (trial court abused its discretion by appointing discovery referee on condition defendants pay entire fee).

PRACTICE TIP: Counsel should consider obtaining their clients' consent to split fees for a discovery referee. A stipulation may avoid expensive motions over fees and the appointment of a referee may save the parties money by eliminating discovery disputes and costly discovery motions.

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§2.71 4. Scope of Referee's Authority

The trial court may not appoint a discovery referee to resolve disputes that could be quickly resolved by the judge. *Hood v Superior Court* (1999) 72 CA4th 446, 449, 85 CR2d 114. A special referral to a discovery referee under CCP §639(e) does not allow the referee to consider nondiscovery matters without the parties' consent. *Jovine v FHP, Inc.* (1998) 64 CA4th 1506, 76 CR2d 322 (discovery referee does not have jurisdiction to decide motions for summary adjudication).

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§2.72 5. Peremptory Challenge of Referee

The appointment of a discovery referee is not the functional equivalent of the appointment of a trial judge, who is assigned to the case for all purposes. See *Grant v Superior Court* (2001) 90 CA4th 518, 526, 108 CR2d 825. Thus, a peremptory challenge of a discovery referee follows the "ten-day/five-day rule" of CCP §170.6(a)(2), *i.e.,* when a referee assigned to hear a matter is known at least 10 days before the date set for trial or hearing, the motion to disqualify must be made at least 5 days before that date. *Pedus Servs. v Superior Court* (1999) 72 CA4th 140, 146, 84 CR2d 771 (holding that peremptory challenge made over 2 months after appointment of discovery referee, and after discovery referee issued a report on discovery dispute but before any hearing, was timely).

According to the court in *Grant v Superior Court* (2001) 90 CA4th 518, 526, 108 CR2d 825, a peremptory challenge cannot be properly filed until there is a pending trial, a pending hearing involving a contested factual or legal issue, or an all-purpose assignment. Thus, under *Grant,* a party can challenge a discovery referee when a hearing involving a contested issue of law or fact is pending on the referee's calendar, but not when the referee is first appointed.

PRACTICE TIP: Counsel should let the court and opposing counsel know as soon as possible that he or she is going to challenge a referee, even if the challenge cannot be formally heard until a motion is set.

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D. Handling Complex Litigation

§2.73 1. Complex Litigation Defined

California Rules of Court 3.400-3.403 and 3.751 govern the designation of "complex cases," which may require careful judicial management to avoid unnecessary burdens on the court or litigants, to expedite the case, to keep costs low, and to promote efficient decision making by the court, the parties, and counsel. Cal Rules of Ct 3.400(a). Complex cases are likely to include numerous pretrial motions, many witnesses, a substantial amount of documentary evidence, or a large number of parties. Cal Rules of Ct 3.400(b).

Certain actions are provisionally designated as complex. See Cal Rules of Ct 3.400(c). These include cases involving antitrust or trade regulation claims, construction claims involving many structures or parties, securities or environmental claims involving many parties, mass torts, class actions, or insurance coverage claims arising out of any of the claims. Cal Rules of Ct 3.400(c). Local rules may also address designation of a case as complex.

The court, on its own motion or on a party's noticed motion, may decide that the an action is a complex case or that a previously declared complex case is not a complex case. Cal Rules of Ct 3.403(b).

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§2.74 2. Designating Case as Complex

A plaintiff designates an action as a complex case by marking the civil case cover sheet (Judicial Council Form CM-010). Cal Rules of Ct 3.401. As in any action, the case cover sheet must be filed with the court with the first paper in the action, but in a complex case it must also be served with the complaint. Cal Rules of Ct 3.220, 3.401.

If the plaintiff has designated an action as a complex case, the defendant may join the plaintiff in the designation or, no later than the defendant's first appearance, file and serve either a "noncomplex counterdesignation" or, if the plaintiff did not designate the case as complex, a "complex counterdesignation." See Cal Rules of Ct 3.220, 3.401-3.402.

The court may order, or the parties may stipulate to, the use of technology in conducting discovery in complex litigation, coordinated cases, and exceptional cases that are exempt from the disposition time goals of the Trial Court Delay Reduction Act (Govt C §§68600-68620) or by stipulation of the parties. CCP §2017.730.

NOTE: Even if a case is not designated as "complex," assignment to a single judge for all purposes may provide many of the same hands-on case management benefits as a "complex" designation. Counsel should consult local rules on the possibility of requesting assignment to a single judge for all purposes.

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§2.75 E. Stipulated Discovery Plan When Multiple Parties

Even if an action is not formally designated as a complex case (see §§2.73-2.74), any case involving multiple parties raises the risk of duplicative discovery. On multiple expert witnesses, see §§11.10, 11.64. If each party serves discovery on all the other parties, the result is both cumbersome and inefficient. It is far preferable to stipulate to a discovery plan among counsel. A stipulated discovery plan can set the scope and order of discovery directed toward each party.

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§2.76 1. Sample Provisions of Stipulated Plan

A stipulated discovery plan can contain provisions such as the following:

Interrogatories. Rather than have all six defense counsel serve form interrogatories on plaintiff's counsel, all parties can agree that one defense counsel will serve them.

Depositions. To avoid dueling deposition notices, counsel may agree to set aside a number of consecutive days for taking several depositions, without delays or interruptions in the discovery process. For example, the parties may agree to alternate by week between plaintiffs and defendants. Counsel may also agree to a series of simultaneous depositions.

Document production. In business litigation cases involving numerous documents, a simple way of keeping those documents organized is for the parties to agree that documents being produced by a given party will be page numbered by letters identifying that party before each page number (*e.g.,* IBM 0001). This process is referred to as "Bates stamping," based on the Bates brand name for the stamping device. This numbering system will enable counsel to determine with certainty what documents were produced and also to identify the source of documents received through a production request. On document production and management, see chap 8. On "numbering" electronic documents produced in their native format, see §4.35.

Exhibits. To track multiple exhibits to be used in a series of depositions, it is helpful to create a master list with one set of exhibit numbers. This avoids having 14 different "Exhibit 1"s to 14 different depositions. Particularly in a complex case, the parties should avoid the custom of using letters for defense exhibits and numbers for plaintiff's exhibits. Exhibit BBBB is simply not as easy to use as Exhibit 80. If the matter proceeds to trial, all parties will be working with the same set of numbered deposition exhibits, the exhibits will already be pre-numbered (as required by many judges), and the trial exhibit numbers will be the same as the deposition exhibit numbers (which avoids confusion when the jury is read testimony that refers to an exhibit number). On conducting and defending depositions, see chap 6.

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§2.77 2. Using Database in Large Document Cases

In large document cases or cases involving electronically stored information (ESI), creating a database is often a useful organizational tool. See §4.26. A database is a file composed of records, each of which contains fields of information and a set of operations for searching, sorting, recombining, and performing other functions. A database not only helps organize the documents but also helps in their retrieval. The database may also be used to assist in preparing trial exhibits or for use by experts. Databases can be set up so that documents can be cross-referenced in a variety of different ways.

EXAMPLE: In construction litigation cases, there may be volumes of letters by homeowners or tenants making specific complaints about their units. Entering this information into a database allows the attorney to search for complaints by unit, owner or tenant, type of complaint, or time frame. Such database entries will enable the attorney to determine what complaints are being made relative to the work of a given subcontractor, and may also assist in making or resisting a statute of limitations defense.

When organizing documents in a database, counsel should be extremely careful at the outset to make sure that the organization of the database fits the needs of the case. Databases are expensive, and it would be quite frustrating to learn after expending a great deal of money to create one that it does not allow retrieval of information in the manner desired.

PRACTICE TIP: If counsel is inexperienced in the use of document management database software, there are many third party vendors who provide database management services. Counsel should interview several vendors to determine which will best meet the counsel's needs for a particular case.

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§2.78 F. Using Technology

Under CCP §2017.730(a), on noticed motion, the court may order the use of technology for conducting discovery in cases designated as complex (see Cal Rules of Ct 3.400-3.403, 3.751; §§2.73-2.74), coordinated cases under CCP §§404-404.9 (see Cal Rules of Ct 3.510-3.545), and exceptional cases that are exempt from the disposition time goals of the Trial Court Delay Reduction Act (Govt C §§68600-68620; see §§2.25-2.27). The court order may be made only on the express findings of the court after a noticed motion or on the parties' stipulation that the procedures to be used meet certain criteria, *e.g.,* that they do not create an undue economic burden or hardship on any person. See CCP §2017.730(a), (c). The parties may stipulate to the use of technology without court approval, provided that the procedures do not affect the court (*e.g.*, the parties cannot file motions electronically absent the court's consent).

The purpose of using technology is to improve communication and make the discovery process more cost effective and efficient. "Technology" includes telephone, e-mail, CD-ROM, Internet websites, electronic documents and depositories, Internet depositions and storage, and videoconferencing. CCP §2017.710. The court may order the use of electronic technology to serve discovery requests and their responses, serve and present motions, store and access information in electronic form, and conduct discovery in electronic media. CCP §2017.730(d). Although it rarely does so, the court may appoint a service provider to administer the technological procedures used in conducting discovery. CCP §2017.740.

On conducting discovery of electronically stored information (ESI), see chap 4.

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Source: Civil Litigation/California Civil Discovery Practice/2 Creating a Discovery Plan/§2.79 G. Preserving Electronic Evidence

§2.79 G. Preserving Electronic Evidence

Electronically stored information (ESI) is information "stored in an electronic medium." CCP §2016.020(e). ESI generally refers to information stored in a computer or on a data storage device. This could be the internal memoranda of a corporate party, e-mail messages, or photographs stored on a CD-ROM. On the duty to preserve such evidence, see §§2.14, 4.6-4.8. On the problems this type of evidence may present when requesting or producing documents, see, *e.g.,* §§8.16-8.17, 8.19-8.27, 8.31. On conducting discovery of ESI, see chap 4.

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§2.80 V. PLANNING DISCOVERY IN FEDERAL COURT

In general, the same concepts involved in planning discovery in California courts apply equally to a federal court action. The precise procedural rules and deadlines differ, however. A complete discussion of these differences is beyond the scope of this chapter, but a few of the most significant differences from a planning standpoint are discussed below.

NOTE: Amendments to the Federal Rules of Civil Procedure relating to discovery of electronically stored information (ESI) took effect December 1, 2006. For a brief summary, see §8.104.

Initial disclosure. Each party must make an initial disclosure of key information, including witnesses, certain documents and electronically stored information, a computation of damages, and insurance. Fed R Civ P 26(a)(1). This requires an early investigation of the case—which is always preferable—to enable counsel to comply with this requirement.

JUDGE'S PERSPECTIVE: Courts look to the parties to engage in real give-and-take discussions at the initial discovery conference and when any dispute arises. The parties should address the scope and nature of discovery, consider agreeing to limits on the number of requests, and be prepared to discuss these issues and any expected problems at the initial case management conference. They should also share information on the location of documents and identify the person most knowledgeable about how ESI is created, stored, and routinely destroyed or overwritten, and the format used.

Meet and confer. Under Fed R Civ P 26, the parties must meet and confer "as soon as practicable" or at least 21 days before a scheduling conference or before a scheduling order is due under Rule 16(b). Fed R Civ P 26(f)(1). Except for exempted categories of cases under Rule 26(a)(1)(B) or when ordered by the court, no discovery may be initiated before the parties have conferred as required by Rule 26(f). Fed R Civ P 26(d)(1). The purpose of the meet-and-confer requirement is to encourage the parties, at an early stage in the litigation, to explore settlement options and to develop an overall discovery plan that includes proposals about the disclosure and discovery of electronically stored information. Fed R Civ P 26(f).

This meet-and-confer requirement differs substantially from California practice, in which in general a defendant may begin discovery at any time and a plaintiff may begin at any time that is 10 days after service of summons on or appearance by the party to be served. See, *e.g.*, CCP §2030.020 (interrogatories). Under Cal Rules of Ct 3.724, however, the parties are required to meet and confer at least 30 days before the initial case management conference to consider, among other matters, discovery issues, including issues relating to the discovery of ESI. See §2.25.

Expert disclosure. Expert disclosure must include a written expert report, containing "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed R Civ P 26(a)(2)(B)(i). This requires early retention of an expert and a major investment of time and money long before the expert deposition.

Deposition limit. A stipulation or court order is required to take any more than 10 depositions per side. Fed R Civ P 30(a)(2)(A)(i). Thus, if counsel anticipates the need to depose more than 10 witnesses, he or she should promptly seek a stipulation from opposing counsel or make a motion to the court. If the court limits the number of depositions, counsel will want to know this as soon as possible in order to prioritize which depositions to take. On the other hand, counsel may need to take several depositions before making the motion in order to obtain the factual basis to justify the need for the additional depositions.

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Evaluating Privileges, Work Product, and Other Protections

Mitchell E. Abbott
Ginetta L. Giovinco

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§3.1 I. SCOPE OF CHAPTER

Pretrial discovery is limited by the rule that privileged communications and other protected matters are not discoverable. CCP §2017.010. Nonetheless, privileges may be forever waived if they are not properly asserted during discovery.

This chapter discusses privileges that arise frequently in the course of discovery proceedings. Waiver of privilege is discussed both in the context of specific privileges and in general (see §§3.165-3.190).

Discussion of privileges as interpreted by the Supreme Court, the Ninth Circuit Court of Appeals, and California District Courts is included as an adjunct to California law. For a comprehensive treatment of the law of privileges as interpreted by the federal courts, see Epstein, The Attorney-Client Privilege and the Work Product Doctrine (ABA 4th ed 2001). For a table of statutory privileges, see §3.199.

Privileges are an exception to the common law concept that "the public… has a right to every man's evidence." *DMV v Superior Court* (2002) 100 CA4th 363, 370, 122 CR2d 504, quoting *Trammel v U.S.* (1980) 445 US 40, 50, 63 L Ed 2d 186, 195, 100 S Ct 906. Under California law, all privileges are codified. In the absence of a privilege, there is no right to refuse to testify or to produce documents in a legal proceeding. Evid C §§910-911.

For further discussion of evidentiary privileges, see Jefferson's California Evidence Benchbook (4th ed CJA-CEB 2009).

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II. SOURCES OF PRIVILEGE

§3.2 A. Legislatively Created Privileges and Limitations on Disclosure

Generally, pretrial discovery in California is limited to "any matter, not privileged, that is relevant to the subject matter involved in the pending action." CCP §2017.010. The principal testimonial privileges that apply to pretrial discovery proceedings are set forth in Evid C §§900-1063. The attorney work product doctrine is codified in CCP §§2018.010-2018.080.

In federal court, privileges derive from two sources, depending on the type of case. In federal question cases, the attorney-client privilege is governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed R Evid 501. In diversity cases, state privilege law is applicable. Fed R Evid 501. See *Frontier Ref. Inc. v Gorman-Rupp Co.* (10th Cir 1998) 136 F3d 695, 703 n10.

In addition to the traditional statutory privileges, there is a wide array of special statutory privileges applying to communications and information in various occupations and factual settings, ranging from newspaper reporters (Evid C §1070) to MediCal recipients (Welf & I C §14100.2) and persons taking tests to detect the presence of HIV (Health & S C §120975). An extensive listing of statutory privileges is set forth in §3.199. However, if no statutory privilege appears to be applicable, a motion for protective order, grounded in common sense considerations of privacy, may nevertheless provide the desired relief. See §§3.156-3.154.

JUDGE'S PERSPECTIVE: Counsel should always be prepared to request a protective order when asserting a privilege in response to a discovery request. If the court finds that the information sought to be discovered is not privileged or that the privilege has been waived, then counsel should request a protective order to keep the information private and free from public dissemination.

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§3.3 B. Judicially Created Privileges and Protective Orders

California cases have sometimes stated that statutory privileges, *e.g.,* Evid C §§900-1070, and work product doctrine exceptions to discovery are exclusive, and that the courts are not free to create new privileges or exceptions to privileges as a matter of judicial policy. *Jurcoane v Superior Court* (2001) 93 CA4th 886, 895, 113 CR2d 483. This is not quite true. For example, in *Valley Bank v Superior Court* (1975) 15 C3d 652, 656, 125 CR 553, the supreme court no sooner stated the familiar rule that privileges are exclusively statutory than it announced a new rule limiting the right to discover certain private bank records. Although the *Valley Bank* ruling was codified a few years later by the adoption of CCP §1985.3, the fact remains that this limitation originated with the courts, not the legislature.

Similarly, the familiar rule that federal and state income tax returns are not discoverable under California law is not found in any statute, but originated with the supreme court in *Webb v Standard Oil Co.* (1957) 49 C2d 509, 513, 319 P2d 621, and a rather tortured interpretation of former Rev & T C §19282 (now Rev & T C §§7056 and 19542), prohibiting state employees from revealing the contents of tax returns. Notwithstanding these examples, California courts—unlike federal courts applying common law—are not free to create new privileges. *OXY Resources Cal. LLC v Superior Court* (2004) 115 CA4th 874, 889, 9 CR3d 621 (joint defense or common interest privilege can only be applied to documents or communications otherwise protected by attorney-client privilege or attorney work product doctrine).

The important message in these cases is that, for purposes of discovery proceedings, the trial courts generally determine which privileges will be applied, and under what circumstances. These interlocutory pretrial discovery rulings are not appealable orders, and are rarely reviewed on petitions for extraordinary writs in the courts of appeal; indeed, writ review of discovery rulings is discouraged. *Pacific Tel. & Tel. Co. v Superior Court* (1970) 2 C3d 161, 169, 84 CR 718; *Oceanside Union Sch. Dist. v Superior Court* (1962) 58 C2d 180, 185 n4, 23 CR 375 (prerogative writs should be used in discovery matters only "to review questions of first impression that are of general importance to the trial courts"). Thus, a ruling in law and motion court on a pretrial discovery dispute is frequently the first and last word on the applicability of privileges or the work product doctrine. In many cases, even when no traditional privilege applies, a trial court may nevertheless be persuaded, in the interests of justice, to issue a protective order that has precisely the same effect. Counsel should be alert to opportunities for expanding or narrowing the scope of traditionally privileged information by applying to the trial court for appropriate orders under the Civil Discovery Act. On writ review on discovery orders, see chap 16.

JUDICIAL PERSPECTIVE: If the statutory privilege relied on does not clearly cover the situation, counsel should ask in the alternative for a protective order. In the absence of a clear statutory prohibition against disclosure, judicial officers must assume that disclosure is required. See §1.28. Thus, unless counsel requests a protective order, the court will not be able to craft an order protecting the client from invasions of privacy not anticipated by the legislature. On protective orders, see §§15.59-15.84.

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III. ATTORNEY-CLIENT PRIVILEGE

§3.4 A. Statement of Rule

The attorney-client privilege in California is specifically codified in Evid C §§950-962. The applicable definitions are in Evid C §§950-953, and the basic statement of the attorney-client privilege is in Evid C §954. In substance, the Code authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between the attorney and the client unless the client waives the privilege. See *De Los Santos v Superior Court* (1980) 27 C3d 677, 166 CR 172; *People v Lines* (1975) 13 C3d 500, 509, 119 CR 225. Except as otherwise set forth in the Evidence Code, the privilege is absolute, and production may not be ordered based on relevance or particular facts of the case. *2,022 Ranch, LLC v Superior Court* (2003) 113 CA4th 1377, 1388, 7 CR3d 197; *Solin v O'Melveny & Myers, LLP* (2001) 89 CA4th 451, 466, 107 CR2d 456.

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§3.5 B. Policy Underlying Privilege

Two basic policy justifications have been articulated in support of the recognition of the attorney-client privilege.

First, the privilege promotes freedom of consultation between a lawyer and his client and encourages full disclosure and discussion of the facts, without fear that subsequent disclosure can be compelled without the client's consent. *Fisher v U.S.* (1976) 425 US 391, 403, 48 L Ed 2d 39, 51, 96 S Ct 1569; *People v Meredith* (1981) 29 C3d 682, 690, 175 CR 612. Both California and federal courts have recognized that without full discussion with the client, the attorney cannot give effective legal advice. *Upjohn Co. v U.S.* (1981) 449 US 383, 389, 66 L Ed 2d 584, 591, 101 S Ct 677; *People v Meredith, supra*.

Second, some courts have noted that the attorney-client privilege fosters and encourages voluntary compliance with regulatory laws by protecting a client's freedom of consultation with a legal counselor. See, *e.g., Natta v Hogan* (10th Cir 1968) 392 F2d 686, 691.

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§3.6 C. Strict or Liberal Construction

Because application of the attorney-client privilege prevents disclosure of what otherwise might be relevant evidence, federal courts and some California courts have indicated that the privilege should be "strictly construed." See, *e.g., D.I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 739, 36 CR 468; *Gonzales v Municipal Court* (1977) 67 CA3d 111, 119, 136 CR 475; *Fisher v U.S.* (1976) 425 US 391, 403, 48 L Ed 2d 39, 51, 96 S Ct 1569 ("since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose"). However, most California courts have stated that the important public policy interests underlying the attorney-client privilege warrant a liberal construction of the privilege. *Kroll & Tract v Paris & Paris* (1999) 72 CA4th 1537, 1545, 86 CR2d 78; *Benge v Superior Court* (1982) 131 CA3d 336, 344, 182 CR 275.

California courts have urged a broad interpretation of the attorney-client privilege in strong terms. In *People v Flores* (1977) 71 CA3d 559, 565, 139 CR 546, the court stated:

> The privilege of confidential communication between client and attorney should not only be liberally construed, but must be regarded as sacred. Courts should not whittle away at the privilege upon slight or equivocal circumstances.

The courts have recognized the tension between the protection of the attorney-client privilege and the search for truth through the adversary process. See*, e.g., In re Ampicillin Antitrust Litig.* (D DC 1978) 81 FRD 377, 384. An attorney arguably has the obligation to structure communications with a client, whenever possible, to preserve the attorney-client privilege.

JUDGE'S PERSPECTIVE: Generally, the court is likely to be very protective of the attorney-client privilege. As a practical matter, however, there may be variations in how strictly courts approach the *elements* of the privilege. For example, a court may be liberal in finding that an attorney-client relationship exists or that a communication relates to the representation, but strict in determining whether a communication was confidential or intended to be confidential. Counsel should keep in mind, however, that the privilege is closely guarded and the natural presumptions are against disclosure. In making a motion to compel disclosure, counsel should present to the court in as much detail as possible why the communication in question was *not* privileged.

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Source: Civil Litigation/California Civil Discovery Practice/3 Evaluating Privileges, Work Product, and Other Protections/ §3.7 D. Elements of Confidential Communication

§3.7 D. Elements of Confidential Communication

Only confidential communications are protected by the attorney-client privilege. Evid C §954. Evidence Code §952 defines a "confidential communication" between a client and a lawyer to which the attorney-client privilege applies as a communication:

- Made in confidence;
- Made between an attorney (or an agent of the attorney) and his or her client;
- Not disclosed to any third persons other than those reasonably necessary to transmit the information or to accomplish the purpose for which the lawyer was consulted; and
- Made for the purpose of seeking or obtaining legal assistance, in the course of the attorney-client relationship, and including legal opinions formed and advice given in the course of that relationship.

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§3.8 1. Was There Communication?

A privileged communication may be oral or written, or may even be wordless, as when a client simply nods "yes" or "no" in response to a lawyer's question. See *Mitchell v Superior Court* (1984) 37 C3d 591, 600, 208 CR 886; *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 235, 231 P2d 26. A privileged communication may also be in the form of a photograph taken by an attorney's investigator that conveys confidential information from client to attorney. *People v Gillard* (1997) 57 CA4th 136, 162, 66 CR2d 790. The privilege applies not only to statements made by the client to the attorney, but also to statements made by the attorney to the client. Evid C §952. It also applies whether or not litigation is actually threatened or pending. *Roberts v City of Palmdale* (1993) 5 C4th 363, 371, 20 CR2d 330.

JUDGE'S PERSPECTIVE: In a motion for a protective order or in response to a motion to compel, counsel should spell out the circumstances in some detail in order to show there was a communication. If relying on purely physical gestures, counsel should indicate to the court that, *e.g.,* the client responded with affirmative nods to counsel's questions when the case was discussed in counsel's law office. Of course, counsel cannot be specific about the content of the attorney-client communication.

The privilege, however, protects only the content of the communication; it does not immunize the underlying facts from disclosure. In other words, a client may be required to testify about the facts at issue, even though the attorney-client privilege would protect the client's discussions with his or her lawyer about such facts. See *San Francisco Unified Sch. Dist. v Superior Court* (1961) 55 C2d 451, 456, 11 CR 373; *State Farm Fire & Cas. Co. v Superior Court* (1997) 54 CA4th 625, 639, 62 CR2d 834. For the same reasons, a client cannot shield a document or object under the privilege merely by providing the document or object to his or her attorney. See *People v Meredith* (1981) 29 C3d 682, 692, 175 CR 612; *San Francisco Unified Sch. Dist. v Superior Court, supra*. Nonetheless, if an attorney learns about evidence through a confidential conversation and then goes out and observes that evidence, the observation is privileged, as long as he or she does not remove or tamper with the evidence. *People v Meredith, supra*. The privilege covers the transmission of publicly available documents, not merely transmission of information known only by the client or attorney. It is the fact of transmission, not the document itself, that is privileged. Discovery of the transmission could reveal the client's communication or strategy. *Solin v O'Melveny & Myers, LLP* (2001) 89 CA4th 451, 457, 107 CR2d 456.

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§3.9 2. Unprotected Communications

Notwithstanding the general rule, certain communications are considered unprotected. The following items of information are outside the scope of the privilege and thus discoverable:

- **The existence of the attorney-client relationship.** *In re Grand Jury Subpoena (Roe v U.S.)* (2d Cir 1986) 781 F2d 238, 247; *Humphreys, Hutcheson & Moseley v Donovan* (6th Cir 1985) 755 F2d 1211, 1219; *In re Michaelson* (9th Cir 1975) 511 F2d 882, 888.
- **The identity of the client and the nature of that client's fee arrangement.** *Hays v Wood* (1979) 25 C3d 772, 785, 160 CR 102 (attorney-client privilege "does not ordinarily protect" client's identity); *Tien v Superior Court* (2006) 139 CA4th 528, 536, 43 CR3d 121; *Willis v Superior Court* (1980) 112 CA3d 277, 291, 169 CR 301; *In re Michaelson* (9th Cir 1975) 511 F2d 882, 888. However, such information may be privileged when the person invoking the privilege can show a strong probability that disclosure of the information would implicate the client in the very criminal activity for which the legal service was sought. See *Hays v Wood, supra; DeBlase v Superior Court* (1996) 41 CA4th 1279, 1285, 49 CR2d 229; *Baird v Koerner* (9th Cir 1960) 279 F2d 623, 632. But see *Reiserer v U.S.* (9th Cir 2007) 479 F3d 1160, 1166 (distinguishing *Baird;* when IRS initiated investigation against attorney, not clients, disclosure of clients' identities would not in itself incriminate them, and thus attorney-client privilege did not apply). Another exception exists when the disclosure of the client's identity would reveal the nature of the legal problem or personal confidential information about the client. *Rosso, Johnson, Rosso & Ebersold v Superior Court* (1987) 191 CA3d 1514, 1519, 237 CR 242 (disclosure not permitted when identity of women who responded to attorneys' advertisement for anyone suffering from use of Dalkon Shield IUD would reveal private medical information about clients). On exceptions to the general rule that a client's identity is not within the privilege, see §3.34.
- **The purpose for which the attorney was retained and a general description of the type of service provided.** *U.S. v Legal Servs. for New York City* (DC Cir 2001) 249 F3d 1077, 1081 ("the general subject matters of clients' representations are not privileged"); *Diversified Indus., Inc. v Meredith* (8th Cir 1977) 572 F2d 596, 603; *Westhemeco Ltd. v New Hampshire Ins. Co.* (SD NY 1979) 82 FRD 702, 707.
- **Factual circumstances surrounding the attorney-client communication.** *Mitchell v Superior Court* (1984) 37 C3d 591, 601 n3, 208 CR 886 (date on which person first consulted with attorney is not privileged); *State Farm Fire & Cas. Co. v Superior Court* (1997) 54 CA4th 625, 640, 62 CR2d 834 (privilege does not protect fact that communication took place, or time, date, or participants in communication). See *Blumenthal v Drudge* (D DC 1999) 186 FRD 236, 241. An attorney's impression of a client's mental state is not protected by the attorney-client privilege. See *People v Perry* (2006) 38 C4th 302, 316, 42 CR3d 30 (counsel's comments at bench conference about risk that defendant would become violent were based on counsel's past experience with defendant; they "did not reveal any confidential communications with his client, and thus did not violate" attorney-client privilege).

JUDGE'S PERSPECTIVE: Counsel often object to disclosing that a conversation or other communication occurred. This is not a proper objection or basis for a protective order.

- **Police reports prepared in the course of performing duties that were later communicated to attorney.** *Green & Shinee v Superior Court* (2001) 88 CA4th 532, 105 CR2d 886.
- **Fee arrangements and contract.** *Hays v Wood* (1979) 25 C3d 772, 785, 160 CR 102; *Clarke v American Commerce Nat'l Bank* (9th Cir 1992) 974 F2d 127, 129.
- **Billing statements and time sheets.** See *Real v Continental Group, Inc.* (ND Cal 1986) 116 FRD 211, 213. However, if the contents of a bill might reveal client confidences or the attorney's theories or strategy, the bills may be redacted to protect the privileged information. *In re Grand Jury Witness, Salas v U.S.* (9th Cir 1982) 695 F2d 359, 362; *Leach v Quality Health Servs.* (ED Pa 1995) 162 FRD 499, 501 (production of redacted billing records required).

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3. Confidentiality

§3.10 a. Communication Must Be Made to Attorney

Except for certain persons whose presence is necessary to further the client's interest or to further the purpose for which the attorney is consulted (see §§3.14-3.18), the communication must be made to a person authorized to practice law in any state or nation or to a person whom the client reasonably believes is so authorized. Evid C §§950, 952. Of course, if there is no reasonable belief that the person is an attorney, there is no privilege. See *People v Wattie* (1967) 253 CA2d 403, 410, 61 CR 147 (no privilege when defendant spoke with fellow jail inmate called "lawyer" by other prisoners, but known not to be admitted to practice law). One expansion of this rule appears in Welf & I C §10950, in which the legislature expanded the definition of representation to include representation by laypersons as well as counsel in connection with welfare due process hearings. *Welfare Rights Org. v Crisan* (1983) 33 C3d 766, 770, 190 CR 919 (term "authorized representative" in §10950 "signifies an expansion of the right of representation that previously had been accorded welfare claimants").

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§3.11 b. Communication Must Be Made in the Course of Attorney-Client Relationship

The communication must also have been made in the course of the attorney-client relationship. Evid C §952. The attorney must have been acting within his or her professional legal capacity when the communication was made. *People v Gionis* (1995) 9 C4th 1196, 1210, 40 CR2d 456. This does not mean, however, that the attorney must actually have been employed or retained. Rather, the privilege applies as long as the person consulted a lawyer "for the purpose of retaining the lawyer or securing legal services or advice from him in his professional capacity." Evid C §951. The privilege applies even if the lawyer is not retained, renders no service, or even refuses employment. See *People v Canfield* (1974) 12 C3d 699, 704, 117 CR 81 (financial statement filled out by criminal defendant to determine his eligibility for service of public defender was subject to privilege); *People v Gardner* (1980) 106 CA3d 882, 887, 165 CR 415 (undelivered letter, addressed to "P.D." and intended for local public defender, was privileged); *People v Dorrance* (1944) 65 CA2d 125, 128, 150 P2d 10 (privilege applied even though attorney declined representation because of conflict of interest); *Estate of Dupont* (1943) 60 CA2d 276, 288, 140 P2d 866 (privilege applied even though attorney refused employment after interview).

NOTE: If an attorney expressly refuses to represent a person, a reasonable inference arises that, in continuing to speak to the attorney, the person is not consulting the attorney for legal advice. *People v Gionis, supra*.

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§3.12 c. Client Must Intend to Maintain Confidentiality

A communication is protected only if the client intends that it be treated in confidence. *D.I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 732, 36 CR 468. If the facts demonstrate that the communication was not intended to be kept in confidence, the communication is not privileged. Thus, if the client communicates with his or her attorney with the intention that the communication will be conveyed to a third party not covered under the privilege, the communication is not privileged. See *In re Grand Jury Proceedings* (4th Cir 1984) 727 F2d 1352, 1356 (no privilege if information given to attorney with intention that it be incorporated into prospectus). Similarly, there is no privilege if the communication is made by the client in the open presence of such third parties. *Gonzales v Municipal Court* (1977) 67 CA3d 111, 118, 136 CR 475.

Nevertheless, under California law, a communication made during the course of an attorney-client relationship is presumed to have been made in confidence, and the opponent of a claim of privilege has the burden of proof to establish that the communication was not confidential. Evid C §917(a). But see *United States v Ruehle* (9th Cir 2009) 583 F3d 600, 608 n8 (no prima facie presumption of privilege under federal common law). If the communication from a client to an attorney serves a dual purpose, one for transmittal to an attorney in the course of professional employment and one not related to that purpose, the trial court must determine which purpose predominates. This is known as the "dominant purpose test." *Travelers Ins. Cos. v Superior Court* (1983) 143 CA3d 436, 449, 191 CR 871. For further discussion of the "dominant purpose" test, see §3.36.

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§3.13 d. Privilege Waived in Presence of Unnecessary Third Parties

The privilege is waived if the communication is made in the presence of unnecessary third persons who have no legitimate reason for hearing such communications. *People v Poulin* (1972) 27 CA3d 54, 64, 103 CR 623 (statements made to attorney in front of bailiff were not privileged). There is no waiver if the communication is made in the presence of the lawyer's secretary or paralegal—these third parties are considered "reasonably necessary" for the accomplishment of the purpose for which the lawyer was consulted. See §§3.14-3.18. The privilege is not lost if the communication is overheard by eavesdroppers or if confidential documents are stolen or misappropriated. Comment to Evid C §954; *Cooke v Superior Court* (1978) 83 CA3d 582, 588, 147 CR 915 (fact that servant surreptitiously duplicated confidential documents did not destroy privilege). See *McCafferty's, Inc. v Bank of Glen Burnie* (D Md 1998) 179 FRD 163, 170 (privilege not waived when private detective trespassed on bank property and retrieved privileged memo from dumpster). See §3.188.

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§3.14 e. Privilege Not Lost in Presence of Third Persons When Presence Necessary to Further Client's Interest

Evidence Code §952 provides that certain third parties may be privy to the communication without destroying the privilege. These include:

- Persons "present to further the interest of the client in the consultation";
- Persons "to whom disclosure is reasonably necessary… for the accomplishment of the purpose for which the lawyer is consulted"; and
- Persons "to whom disclosure is reasonably necessary for the transmission of the information."

JUDGE'S PERSPECTIVE: This is an area in which the courts are likely to be fairly strict. Counsel should make a detailed showing of the necessity of the communication to support extension of the privilege to cover communications to third parties.

Courts have stated that, depending on the circumstances, these persons can include clerks, secretaries, interpreters, physicians, spouses, parents, business associates, or joint clients. See *Insurance Co. of N. Am. v Superior Court* (1980) 108 CA3d 758, 771, 166 CR 880.

Assuming an attorney-client relationship existed, the court will generally presume confidentiality, and the burden will effectively be on the party seeking disclosure to show it was not. See §3.12.

PRACTICE TIP: At the inception of the representation, counsel should, especially with relatively unsophisticated clients, spell out the purpose and nature of the privilege. Counsel should also instruct clients how to protect the privilege.

It is not uncommon for clients, especially individuals new to the litigation process, to talk to family and friends concerning the litigation and, in doing so, to relate what counsel has told them about the case. For the privilege to be waived, however, the client must have disclosed a significant part of the communication (see §§3.167-3.173). If the disclosure is to a spouse, the communication may nevertheless be protected by the spousal privilege.

PRACTICE TIP: It can be a fruitful exercise by opposing counsel to inquire of a party at deposition whether he or she has spoken to family or friends about the litigation.

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§3.15 (1) Examples of Third Persons Necessary to Further Client's Interest

Courts have held that the presence of third parties in the following circumstances does *not* destroy the privilege:

- Agents of lawyers. These include:
- Secretaries, law clerks, paralegals, and clerical personnel. *Insurance Co. of N. Am. v Superior Court* (1980) 108 CA3d 758, 771, 166 CR 880; *U.S. v Kovel* (2d Cir 1961) 296 F2d 918, 921; 8 Wigmore, Evidence §2301 (McNaughton rev ed 1961).
- Investigators in criminal cases. *People v Meredith* (1981) 29 C3d 682, 690 n3, 175 CR 612. But see *Wilson v Superior Court* (1964) 226 CA2d 715, 38 CR 255 (litigant may not rely on attorney-client privilege to prevent disclosure of statement to *adverse* party's investigator).
- Patent agents working under direction or supervision of attorney. *Hercules, Inc. v Exxon Corp.* (D Del 1977) 434 F Supp 136, 146; *Golden Trade S.r.L. v Lee Apparel Co.* (SD NY 1992) 143 FRD 514, 518. But see *Status Time Corp. v Sharp Elec. Corp.* (SD NY 1982) 95 FRD 27, 31 (privilege not applied when patent agent is nonlawyer or lawyer in foreign country).
- Interpreters. *People v Alvarez* (1996) 14 C4th 155, 235, 58 CR2d 385.
- Statements made to union members about their rights, even though not all members end up retaining union counsel. *Benge v Superior Court* (1982) 131 CA3d 336, 348, 182 CR 275. But see *American Airlines, Inc. v Superior Court* (2003) 114 CA4th 881, 888, 8 CR3d 146 (no testimonial privilege for communications between worker and union representative).
- Communications from minor to guardian ad litem for transmittal to minor's attorney. *De Los Santos v Superior Court* (1980) 27 C3d 677, 683, 166 CR 172.
- In a suit by a minority shareholder of a closely held corporation to dissolve the corporation, communications made in front of spouses of officers and directors who attended meetings. *Hoiles v Superior Court* (1984) 157 CA3d 1192, 1200, 204 CR 111.
- Communications with lawyers for other parties may be privileged under the common interest or joint defense privilege, where the disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer is consulted. *STI Outdoor LLC v Superior Court* (2001) 91 CA4th 334, 341, 109 CR2d 865. See §§3.19-3.21.

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§3.16 (2) Nontestifying Expert Consultants

An expert retained by a lawyer to consult, rather than to testify as an expert witness, is generally considered an agent of the attorney, and communications between the expert and the client are protected by the attorney-client privilege. *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 234, 231 P2d 26 (doctor retained by attorney for plaintiff in personal injury case); *In re Ochse* (1951) 38 C2d 230, 232, 238 P2d 561 (psychiatrist retained by lawyer for private examination of client). But see *Mowry v Superior Court* (1962) 202 CA2d 229, 241, 20 CR 698, disapproved on other grounds in *San Diego Prof. Ass'n v Superior Court* (1962) 58 C2d 194, 204, 23 CR 384 (privilege did not preclude questioning of expert concerning opinions and conclusions when party offered expert's testimony by affidavit in condemnation proceedings). See *U.S. v Kovel* (2d Cir 1961) 296 F2d 918, 921 (privilege applied to communications by client to former IRS agent employed by lawyer).

Counsel should be aware that an expert who is interviewed by an attorney for a party in a case, but is not retained, may not thereafter be retained by the opposing party. The attorney-client privilege protects communications made to a potential expert, even though the expert is not retained by that party. Indeed, if a law firm consults an expert who was previously interviewed by the opposing party, the law firm may be disqualified. *Shadow Traffic Network v Superior Court* (1994) 24 CA4th 1067, 1088, 29 CR2d 693. But see *Western Digital Corp. v Superior Court* (1998) 60 CA4th 1471, 1489 n3, 71 CR2d 179 (no disqualification of expert when plaintiff disclosed information to coworkers of expert later retained by defendant and "ethical wall" was created between expert and coworkers).

JUDGE'S PERSPECTIVE: To disqualify an expert, there must be some discussion between the expert and opposing counsel beyond merely the nature of the case. Some experienced expert witnesses are careful not to obtain too much information about the case when they are initially consulted in the event the other side wishes to retain them later.

When the expert is retained by the client, rather than the lawyer, communications between the expert and the client may not be protected by the attorney-client privilege or the work product doctrine. *Bank of the Orient v Superior Court* (1977) 67 CA3d 588, 598, 136 CR 741 (accounting firm hired by bank to investigate embezzlement before lawyer was retained); *Jasper Constr., Inc. v Foothill Jr. College Dist.* (1979) 91 CA3d 1, 17, 153 CR 767 (expert retained by client before lawyer was retained).

Of course, an attorney may not shield otherwise unprivileged communications or information merely by retaining a person as an expert or consultant. *San Francisco Unified Sch. Dist. v Superior Court* (1961) 55 C2d 451, 455, 11 CR 373 (doctor who treated client before being retained as expert could not shield reports by later sending them to attorney); *Wilson v Superior Court* (1957) 148 CA2d 433, 444, 307 P2d 37 (privilege inapplicable to communications and information conveyed to engineer before retention by attorney). See *Gould, Inc. v Mitsui Mining & Smelting Co, Ltd.* (2d Cir 1987) 825 F2d 676, 679 (documents that would not be privileged if they remained in client's hands would not acquire protection merely because they were transferred to lawyer).

For further discussion of the difference between expert consultants and designated expert witnesses, see §§3.17, 11.5.

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§3.17 (3) Designated Expert Witnesses

Once a person is designated as an expert witness expected to testify at trial, he or she may be compelled to testify about any communications with either the attorney or the client. Neither the attorney-client privilege nor the work product doctrine can be invoked to protect communications with a witness who has been designated as an expert to testify at trial. *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 484, 210 CR 535; *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 857, 139 CR 888; *Sanders v Superior Court* (1973) 34 CA3d 270, 279, 109 CR 770. See *Bio-Rad Labs., Inc. v Pharmacia, Inc.* (ND Cal 1990) 130 FRD 116, 123 (lawyer designated as expert witness could be deposed regarding his opinions and conversations with trial counsel).

PRACTICE TIP: Counsel should use discretion in conferring with a designated expert witness because every word of such a conference, as well as shared documents, may later be discovered by the opposing party.

On expert witnesses in general, see chap 11.

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§3.18 (4) Insurance Adjusters and Investigators

There is no statutory privilege for communications between an insured and the insurer. *Lectrolarm Custom Sys., Inc. v Pelco Sales, Inc.* (ED Cal 2002) 212 FRD 567, 571. See Anno, Insured-Insurer Communications as Privileged, 55 ALR4th 336 (1997). Courts have held, however, that once an insurance carrier has agreed to provide a defense in a particular lawsuit and has retained a lawyer for the insured, then communications among the insured, the insurer, and the attorney may be protected from compelled disclosure under the attorney-client privilege. *American Mut. Liab. Ins. Co. v Superior Court* (1974) 38 CA3d 579, 593, 113 CR 561. In this circumstance, insurer and insured are treated as joint clients of the attorney. *State Farm Fire & Cas. Co. v Superior Court* (1989) 216 CA3d 1222, 1227, 265 CR 372 (insured's statements given to insurance adjuster for purpose of defending against lawsuit are protected by attorney-client privilege); *Reavis v Metropolitan Prop. & Liab. Ins. Co.* (SD Cal 1987) 117 FRD 160, 165. At least one court has held that even before an insurer has agreed to provide a defense, communications between the insured and insurer may be privileged if the dominant purpose of the communication is for litigation purposes. *Soltani-Rastegar v Superior Court* (1989) 208 CA3d 424, 428, 256 CR 255 (holding communications are privileged even though litigation is only "a threat on the horizon" and no attorney has been retained yet to defend insured).

If a hospital is preparing accident reports for the purpose of transmitting the reports to an in-house risk manager to determine legal exposure under a self-insurance program, the communication may be privileged. *Scripps Health v Superior Court* (2003) 109 CA4th 529, 534, 135 CR2d 126. This may be true even if the reports are prepared on a routine basis and there is no pending litigation contemplated at the time the report is prepared. 109 CA4th at 534.

If, however, the insured and insurer later become adversaries, any privileged communications lose their protected status. Evid C §962; *Glacier Gen. Assur. Co. v Superior Court* (1979) 95 CA3d 836, 840, 157 CR 435; *McGrath v Everest Nat'l Ins. Co.* (ND Ind., May 13, 2009, No. 2:07 cv 34) 2009 US Dist Lexis 40513, *5 (citing *Glacier*; attorney-client privilege cannot be asserted against insured or insured's assignee in action against insurer for materials prepared as part of insured's defense in underlying action).

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Source: Civil Litigation/California Civil Discovery Practice/3 Evaluating Privileges, Work Product, and Other Protections/ §3.19 f. Joint Defense or Common Interest Doctrine

§3.19 f. Joint Defense or Common Interest Doctrine

Although, as noted in §3.13, the disclosure of client confidences to unnecessary third parties generally constitutes a waiver of the attorney-client privilege, the federal courts have recognized an exception to this rule known as the "joint defense" or "common interest" doctrine. Under the terms of this doctrine, the disclosure of privileged information does *not* constitute a waiver of the attorney-client privilege if the disclosure is made to the counsel for actual or potential codefendants in "an on-going joint effort to set up a common defense strategy." *U.S. v Bay State Ambulance & Hosp. Rental Serv., Inc.* (1st Cir 1989) 874 F2d 20, 28.

Ninth Circuit. The Ninth Circuit Court of Appeals has likewise held that the attorney-client privilege is not waived when confidential statements are exchanged between attorneys "to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings." *Hunydee v U.S.* (9th Cir 1965) 355 F2d 183, 185. See also *Waller v Financial Corp. of Am.* (9th Cir 1987) 828 F2d 579, 583 n7 ("[t]he joint defense privilege, which is an extension of the attorney client privilege, has been long recognized by this circuit"). A joint defense agreement may create an implied attorney-client relationship with each codefendant involved, which can result in disqualification if the parties later become adverse. *U.S. v Henke* (9th Cir 2000) 222 F3d 633, 637.

***Raytheon* approach**. One California court has asserted that "[t]here is no joint defense privilege as such in California." *Raytheon Co. v Superior Court* (1989) 208 CA3d 683, 689, 256 CR 425. But see *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 981, 98 CR3d 422 (California recognizes common interest doctrine). However, the *Raytheon* court noted that other courts have reached precisely the same result under Evid C §912(d) by holding that disclosure of privileged information to third parties does not constitute a waiver if the disclosure was "reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted." See, *e.g., Insurance Co. of N. Am. v Superior Court* (1980) 108 CA3d 758, 771, 166 CR 880. The doctrine is not limited to litigation scenarios—the common interest privilege has also been upheld when parties shared privileged documents during a business negotiation. *STI Outdoor LLC v Superior Court* (2001) 91 CA4th 334, 340, 109 CR2d 865. Similarly, the disclosure of attorney work product does not waive the work product doctrine unless the disclosure is wholly inconsistent with the purpose of the doctrine, which is to safeguard the attorney's work product and trial preparation, or by disclosure to one with no interest in maintaining its confidentiality. See *Fellows v Superior Court* (1980) 108 CA3d 55, 65, 166 CR 274; *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1261, 245 CR 682. See also Jefferson's California Evidence Benchbook §43.18 (4th ed CJA-CEB 2009). The federal courts also recognize that when parties are conducting a joint defense, they may share work product without waiving the protection of the work product doctrine. *U.S. v American Tel. & Tel. Co.* (DC Cir 1980) 642 F2d 1285, 1299; *Castle v Sangamo Weston, Inc.* (11th Cir 1984) 744 F2d 1464, 1466.

The *Raytheon* approach is a roundabout means of reaching the same conclusion and tends to obscure the real rationale for the doctrine by casting the question in terms of whether the disclosure was reasonably necessary, a question that is always asked after the fact. This approach is "more appropriately characterized under California law as a nonwaiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the attorney-work product doctrine." *OXY Resources Cal. LLC v Superior Court* (2004) 115 CA4th 874, 889, 9 CR3d 621. The first step in such an analysis is to determine whether the communications disseminated to third parties would otherwise be protected by a claim of privilege. The second is to determine whether disclosure of the information to a person outside the attorney-client relationship amounted to a waiver. For either attorney-client communications or attorney work product to remain protected, the person disseminating the protected information must have a reasonable expectation that it will remain confidential. 115 CA4th at 890. While evidencing an expectation of confidentiality, a joint defense agreement is neither a requirement nor a guarantee that disclosure of shared information will not result in waiver if these underlying factors are not present. 115 CA4th at 892.

The federal approach is more sensible (and more certain) because it presumes that exchanging information in the pursuit of a joint defense is "reasonably necessary."

JUDGE'S PERSPECTIVE: Under either principle, there must be a shared interest between the parties. The mere fact

that two parties are on the same side of a litigation does not necessarily mean they have a joint interest or that communication of privileged information is necessary. Thus, it is wise to be very careful when disclosing privileged information to other parties in the action.

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§3.20 (1) Waiver of Joint Defense Protection

The courts have recognized that the privilege under the joint defense doctrine cannot be waived without the consent of all parties. This protects shared information even if there is a subsequent falling out among the parties. *John Morrell & Co. v Local Union 304A* (8th Cir 1990) 913 F2d 544, 556; *In re Grand Jury Subpoena* (SD NY 1975) 406 F Supp 381, 394; *Ohio-Sealy Mattress Mfg. Co. v Kaplan* (ND Ill 1980) 90 FRD 21, 29.

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§3.21 (2) Advisability of Written Agreement

Although no case has specifically required it, parties intending to mount a joint defense and take advantage of the joint defense doctrine may find it advisable to prepare a written agreement memorializing their mutual intent to preserve the confidentiality of attorney-client communications and attorney work product exchanged in the course of the joint defense.

The agreement should also acknowledge that protection under the joint defense doctrine cannot be waived except with the consent of all parties. It should also specify whether the sharing of information will prevent the parties or their counsel from asserting claims against each other. Such an agreement may prove useful in the event of a discovery dispute in which joint defense documents are sought by an adverse party or in the event a former participant in a joint defense needs to be restrained from disclosing confidential information. A sample form of agreement is set forth in §3.178.

Both the California and federal courts have recognized and upheld the joint defense privilege even in the absence of a written agreement. *OXY Resources Cal. LLC v Superior Court* (2004) 115 CA4th 874, 892, 9 CR3d 621; *U.S. v Stepney* (ND Cal 2003) 246 F Supp 2d 1069, 1080 n5.

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§3.22 E. Definition of Client

Evidence Code §951 defines the client as a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or seeking advice in the lawyer's professional capacity. The client can be an individual, a trustee (*Moeller v Superior Court* (1997) 16 C4th 1124, 1129, 69 CR2d 317), a corporation (*D.I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 36 CR 468), an unincorporated association (*Benge v Superior Court* (1982) 131 CA3d 336, 345, 182 CR 275), or a public entity (*Vela v Superior Court* (1989) 208 CA3d 141, 150, 255 CR 921).

The client can also be a person with a disability, as defined in Prob C §3603, if he or she consults the attorney or if a guardian or conservator consults the attorney on behalf of the person with a disability. Evid C §951.

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1. Corporations

§3.23 a. *Chadbourne* Test

The leading California case on the scope of the corporate attorney-client privilege is *D.I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 36 CR 468. The California Supreme Court enunciated the basic principles governing the applicability of the attorney-client privilege when the client is a corporation:

- When an employee of a corporation who is potentially liable gives a confidential statement to a representative of the employer for communication of the statement to corporate counsel, the statement is privileged. 60 C2d at 736.
- When an employee who gives a statement is not a person who may be charged with liability, the communication is not privileged *unless,* under all the circumstances of the case, the employee is the natural person to speak for the corporation; *i.e.,* "the communication constitutes information that emanates from the corporation (as distinct from the nonlitigant employee)," and the employee would ordinarily be the person used for relaying such information to the corporation's attorney. 60 C2d at 736.
- When an employee is merely a witness and has no other connection to the matter observed, the fact that the employer requires the employee to make a statement for transmittal to the corporation's lawyer does not alter the employee's status or make the employee's statement subject to the attorney-client privilege. 60 C2d at 737.
- When "the employee's connection with the matter grows out of his or her employment to the extent that the report or statement is required in the ordinary course of the corporation's business," his or her statement or report is that of the employer. 60 C2d at 737. Thus, when the employer requires by standing rule or otherwise that its employees make a report regarding a potential claim, whether the report is privileged depends on the employer's dominant purpose in requiring it. If the employer's dominant purpose in directing an employee to make a report or statement is for confidential transmittal to the employer's attorney, the communication may be privileged. 60 C2d at 737.
- If otherwise privileged, a communication does not lose its privilege merely because it was obtained, with the knowledge and consent of the employer, by an agent of the employer, including agents of the employer's insurance carrier. 60 C2d at 737. However, a communication may lose its confidential status if it travels through too many hands, as determined from the particular facts of the case. 60 C2d at 737.
- Statements of a company employee who was not directed by the employer to make a report may or may not be privileged depending on the intent of the person from whom the information originally emanated. Thus, if an employee does not know that the statement is sought on a confidential basis, or does not intend that it be confidential, the statement is not privileged regardless of the intent of the party receiving and transmitting the statement. 60 C2d at 737.
- When the corporate employer at the request of its insurance carrier directs the employee to make a statement, "the intent of the employer controls; and unless the insurance carrier or its agent has advised the employer that the employee's statement is to be obtained and used [by a lawyer], it cannot be said that the corporation intended the statement to be made as a confidential communication from client to attorney." 60 C2d at 738.
- Finally, the court in *Chadbourne* emphasized that a corporation should not be afforded privileges greater than those enjoyed by a natural person merely because an artificial entity must use individual agents and employees to speak. 60 C2d at 738.

JUDGE'S PERSPECTIVE: Motions to compel disclosure of reports made by corporate representatives are very difficult for the court, because these motions usually lack essential information to enable the court to make a correct decision. Whether making or opposing such a motion, counsel should provide the court with as much detail as possible on the *Chadbourne* factors.

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§3.24 b. *Chadbourne* Progeny

Since the *Chadbourne* decision, most California cases that have elaborated on the corporate attorney-client privilege have upheld the privilege:

Corporation holds privilege. It is the corporation itself, not the shareholders, that holds the attorney-client privilege. *McDermott, Will & Emery v Superior Court* (2000) 83 CA4th 378, 383, 99 CR2d 622 (shareholders who file shareholder derivative action do not hold attorney-client privilege on behalf of corporation and cannot waive privilege by filing lawsuit). A director of the corporation who has sued the corporation likewise has no right to inspect attorney-client privileged documents of the corporation. *Tritek Telecom v Superior Court* (2010) 169 CA4th 1385, 1391, 87 CR3d 455 ("a corporate director does not have the right to access documents that are covered by the attorney-client privilege and were generated in defense of a suit for damages that the director filed against the corporation"). Similarly, a successor corporation is the holder of the attorney-client privilege of the predecessor corporation. *Venture Law Group v Superior Court* (2004) 118 CA4th 96, 103, 12 CR3d 656 (minority shareholders of predecessor corporation could not compel testimony from predecessor corporation's attorney over the objection of successor corporation).

Accident reports. A store manager's report of a slip-and-fall accident made at the request of the employer's insurance carrier has been considered privileged. *Payless Drug Stores, Inc. v Superior Court* (1976) 54 CA3d 988, 127 CR 4; *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 412, 72 CR 74 (absent waiver, employee's investigation and accident report to employer regarding explosion would be protected); *Sierra Vista Hosp. v Superior Court* (1967) 248 CA2d 359, 56 CR 387 (hospital administrator's report about incident made to insurance carrier on carrier's form was held privileged). The privilege has been extended to cover accident reports that are prepared by a hospital's onsite risk manager. *Scripps Health v Superior Court* (2003) 109 CA4th 529, 534, 135 CR2d 126 (risk manager considered agent of legal department because he reported to corporate in-house counsel and hospital was self-insured; accident reports were used to determine potential liability and possible reserves for hospital's self-insurance program).

Reports of corporate employees. Reports made by corporate employees after the beginning of litigation for the purpose of preparing a defense that are transmitted to employer's counsel are privileged. *Rodriguez v North Am. Rockwell Corp.* (1972) 28 CA3d 441, 448, 104 CR 678. But see *Martin v WCAB* (1997) 59 CA4th 333, 343, 69 CR2d 138 (statements made by corporate employee to investigator hired by corporation's attorney are not necessarily protected by attorney-client privilege, even when taken in preparation for litigation, if employee is deemed to be independent witness, or one who does not speak for corporation).

Discussions between in-house and outside attorneys. Discussions between in-house counsel and the corporation's outside lawyers about the facts and theory of a case are privileged. *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 733, 101 CR3d 758 (attorney-client privilege (Evid C §954) protects opinion letter sent by outside counsel to corporate client); *Alpha Beta Co. v Superior Court* (1984) 157 CA3d 818, 826, 203 CR 752 (discussions between in-house and outside counsel privileged even though in-house counsel verified discovery responses).

Public employees. The reasoning in *Chadbourne* has also been applied to employees of public entities. See *Vela v Superior Court* (1989) 208 CA3d 141, 149, 255 CR 921 (statements made by police officer to Special Investigation Team following shooting incident were privileged when report was made primarily for purposes of defending city in subsequent litigation).

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§3.25 c. Ex Parte Communication With Corporate Employees

An issue related to the scope of corporate attorney-client privilege is the extent to which counsel can privately interview present or former employees of an adversary party. See §§3.26-3.27.

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§3.26 (1) Present Employees

California courts have determined that counsel may meet with any *present* employee of an opposing party as long as the employee is not an officer, director, or managing agent of the corporation and as long as the communication does not involve the employee's act or failure to act that may bind the corporation, be imputed to it, or constitute an admission of the corporation. *Continental Ins. Co. v Superior Court* (1995) 32 CA4th 94, 118, 37 CR2d 843.

The California rule is based on Cal Rules of Prof Cond 2-100(A), which states that an attorney, while representing a client, is prohibited from communicating with a party the attorney knows to be represented by another lawyer in the matter without the consent of that lawyer. It is not necessary that the matter be in litigation. *Jorgensen v Taco Bell Corp.* (1996) 50 CA4th 1398, 1401, 58 CR2d 178.

A "party" includes an officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or an association member or an employee of an association, corporation, or partnership, if the subject of communication concerns an act or omission by the employee that may be binding on or imputed to the company or that may constitute an admission. Cal Rules of Prof Cond 2-100(B).

The term "know" has been narrowly defined to require actual knowledge that the employee is represented by counsel in this matter. The fact that the attorney "should have known" that the employees were represented or knew that the employees were represented in another matter (but not in this one) is irrelevant. *Jorgensen v Taco Bell Corp.*, *supra*. This narrow interpretation of the term "know" may lead to mischief, including deliberate ignorance on the part of counsel, and rogue interviews of key witnesses prior to the filing of a lawsuit. The *Jorgensen* court proposed solutions to this problem (*e.g.,* instruct employees not to speak with investigators or send warning letters to potential opposing parties). 50 CA4th at 1403.

JUDGE'S PERSPECTIVE: Counsel's communications with the opposing party's current employees is an area full of land mines. There may be current employees of an opposing party to whom counsel could legally speak under California law, but the courts are much more comfortable with evidence acquired through regular discovery channels. Counsel may not make a good impression on the court trying to defend telephone calls to the opponent's employees.

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§3.27 (2) Former Employees

Counsel can communicate with former employees of an opposing party, even if such employees were managerial employees, as long as (1) they are unrepresented by counsel, and (2) the attorney does not inquire about privileged communications. *State Farm Fire & Cas. Co. v Superior Court* (1997) 54 CA4th 625, 652, 62 CR2d 834.

The corporation can seek a protective order preventing the disclosure of any privileged information by former employees. 54 CA4th at 652. See also *Nalian Truck Lines, Inc. v Nakano Warehouse & Transp. Corp.* (1992) 6 CA4th 1256, 1264, 8 CR2d 467.

For further discussion of depositions of non-party employees, see Wrongful Employment Termination Practice §11.8 (2d ed Cal CEB 1997).

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§3.28 d. Shareholder Actions

Federal law. Federal courts have recognized a limitation on a corporation's ability to assert the attorney-client privilege against its shareholders in shareholder derivative suits. See *Garner v Wolfinbarger* (5th Cir 1970) 430 F2d 1093, 1103. The Ninth Circuit has restricted the *Garner* doctrine to derivative actions. *Weil v Investment/Indicators, Research & Mgmt., Inc.* (9th Cir 1981) 647 F2d 18, 23. Other federal courts have held that *Garner* should apply whenever the corporation is sued for breach of a fiduciary duty. *Fausek v White* (6th Cir 1992) 965 F2d 126, 132 ("[t]here is a mutuality of interests between a corporation and its shareholders that precludes use of the privilege by management to deprive shareholders of information relating to their investments in the corporation").

California law. California courts, however, have refused to acknowledge any such limitation. See *Hoiles v Superior Court* (1984) 157 CA3d 1192, 1198, 204 CR 111 (stating that *Garner* has been "squarely rejected in this state"); *Dickerson v Superior Court* (1982) 135 CA3d 93, 99, 185 CR 97. Although shareholder status enables a shareholder to obtain access to some corporate information, it does not entitle the shareholder to unlimited access to all corporate records, including attorney-client privileged communications. *National Football League Props., Inc. v Superior Court* (1998) 65 CA4th 100, 107, 75 CR2d 893. See *Tritek Telecom v Superior Court* (2009) 169 CA4th 1385, 1391, 87 CR3d 455 (court may preclude director's examination of corporate attorney-client privileged documents in lawsuit director filed against corporation). Because California does not recognize a shareholder exception to the attorney-client privilege, corporations can assert the attorney-client privilege to preclude disclosure of communications between the corporation and its counsel. One exception to this rule is when the shareholder can establish an independent attorney-client relationship with corporate counsel or can establish that the crime-fraud exception under Evid C §956 applies to permit disclosure. 65 CA4th at 108. On crime-fraud exception, see §§3.48-3.51.

A successor corporation is the holder of the attorney-client privilege of the predecessor corporation. Thus, minority shareholders of a predecessor corporation could not compel testimony from the corporate attorney for predecessor corporation over the objection of the successor corporation. These communications remain protected by the attorney-client privilege. *Venture Law Group v Superior Court* (2004) 118 CA4th 96, 103, 12 CR3d 656.

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§3.29 2. Partnerships

Partners owe a fiduciary duty to each other, and general partners have a fiduciary relationship with limited partners. As a result, all partners, whether limited or general, are entitled to access to a wide range of information related to the partnership. *Wortham & Van Liew v Superior Court* (1987) 188 CA3d 927, 932, 233 CR 725. All general and limited partners are entitled to access to any information relayed to or from the attorney for the partnership; *i.e.,* the attorney-client privilege cannot be invoked between partners concerning affairs of the partnership. *Wortham & Van Liew v Superior Court, supra.*

However, matters involving the purely private or personal interests of one of the partners are privileged as against the other partners. *Wortham & Van Liew v Superior Court, supra.*

To determine whether a partnership attorney has established an attorney-client relationship with individual partners, the courts tend to evaluate five factors (noting that these factors are not exhaustive) (*Johnson v Superior Court* (1995) 38 CA4th 463, 476, 45 CR2d 312):

- Size of the partnership;
- Nature and scope of the attorney's engagement;
- Type and extent of interaction between the attorney and the individual partners;
- The attorney's access to financial information relating to the individual partner's interests; and
- Whether the totality of the circumstances indicates that the attorney has agreed not to take actions, including accepting other representation, adverse to the individual partner's personal interests.

JUDGE'S PERSPECTIVE: This issue usually arises in actions to disqualify an attorney from representing one partner in a partnership dissolution action. If the attorney has previously represented the partnership, even in a limited capacity, the attorney may be removed from the case because the prior representation created a presumption that the attorney came into possession of privileged information or material.

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§3.30 3. Unincorporated Associations

The definition of "client" set forth in Evid C §951 includes partnerships, corporations, and other associations. Evid C §175. The Comment to Evid C §951 states that unincorporated associations such as labor unions, social clubs, and fraternal societies are entitled to assert the attorney-client privilege when the organization, rather than any individual member, is the client. See *Benge v Superior Court* (1982) 131 CA3d 336, 345, 182 CR 275. See also Evid C §175. A condominium association that retains an attorney and files a lawsuit against developers for construction defects may do so without disclosing privileged information to the individual homeowners. *Smith v Laguna Sur Villas Community Ass'n* (2000) 79 CA4th 639, 641, 94 CR2d 321.

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§3.31 4. Public Entities

It is well established that public entities have a right to assert the attorney-client privilege with respect to communications made in the course of the attorney-client relationship. *Roberts v City of Palmdale* (1993) 5 C4th 363, 370, 20 CR2d 330. The public entity is the holder of the attorney-client privilege regarding confidential legal opinions prepared by the entity's attorney. Under Evid C §§175, 950, and 953, public entities can assert the attorney-client privilege to protect confidential communications, even if there is no "pending litigation" to justify the assertion of the privilege. *Roberts v City of Palmdale* (1993) 5 C4th 363, 370, 20 CR2d 330. For purposes of the attorney-client privilege, city council members are considered clients of the city attorney with regard to city business. *Hamilton v Town of Los Gatos* (1989) 213 CA3d 1050, 1059 n7, 261 CR 888.

Neither the Ralph M. Brown Act (which requires that "all meetings" be "open and public") nor the Public Records Act requires the disclosure of documents or information protected by the attorney-client privilege. *Roberts v City of Palmdale* (1993) 5 C4th 363, 370, 20 CR2d 330; *Sutter Sensible Planning, Inc. v Board of Supervisors* (1981) 122 CA3d 813, 824, 176 CR 342; *Sacramento Newspaper Guild v Sacramento County Bd. of Supervisors* (1968) 263 CA2d 41, 69 CR 480. See also *City of Hemet v Superior Court* (1995) 37 CA4th 1411, 1422, 44 CR2d 532. On Ralph M. Brown Act, see §3.112; on Public Records Act, see §3.110.

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§3.32 5. Joint Clients

If two or more clients consult a lawyer about a matter of common interest, and civil litigation later arises between the clients or some of them or their respective successors in interest, the attorney-client privilege does not apply to any communications made during the course of the attorney-joint-client relationship. Evid C §962. See *Glacier Gen. Assur. Co. v Superior Court* (1979) 95 CA3d 836, 840, 157 CR 435. The rule is not limited merely to those communications made by the joint clients in the presence of each other, but also pertains to conversations that one client may have had with the attorney outside the other client's presence. 95 CA3d at 841. Courts have extended this concept to encompass relations between an attorney and partners in a partnership. *Wortham & Van Liew v Superior Court* (1987) 188 CA3d 927, 933, 233 CR 725. See §3.29.

However, the joint client exception does not apply if an attorney-client relationship was never established between the attorney and one of the clients, or if two clients of the same attorney did not consult the attorney on the same matter or in a common transaction. *Houston Gen. Ins. Co. v Superior Court* (1980) 108 CA3d 958, 962, 166 CR 904 (in action by insured's assignee against insurer for bad faith refusal to defend, communications between insurer and attorney concerning insurer's obligation to defend were privileged because there was no showing that attorney was ever employed by insurer to defend its insured); *Glade v Superior Court* (1978) 76 CA3d 738, 747, 143 CR 119; *Hoiles v Superior Court* (1984) 157 CA3d 1192, 1199 n4, 204 CR 111.

See §§3.19-3.21 on the joint defense privilege.

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§3.33 6. Fiduciary or Beneficiary

A potentially complex issue arises when a person serving as a fiduciary seeks legal advice regarding his or her fiduciary duties. The California courts have determined that, in such a scenario, the fiduciary can claim the attorney-client privilege concerning communications between the fiduciary and the trust's attorney. *Shannon v Superior Court* (1990) 217 CA3d 986, 993, 266 CR 242 (holding that privilege specifically applies when fiduciary is executor of estate or receiver).

A trustee's ability to assert the attorney-client privilege is determined by the powers specified in the trust instrument, conferred by statute, and necessary to comply with the "reasonable person and prudent investor standards of care in managing the trust estate." *Moeller v Superior Court* (1997) 16 C4th 1124, 1129, 69 CR2d 317. Because the holder of the attorney-client privilege is the successor trustee, the predecessor trustee cannot withhold confidential communications with the trust attorney on matters of trust administration. A successor trustee who assumes the office of trustee also assumes the power to assert the privilege with respect to the confidential communications between the predecessor trustee and the attorney. See *Schwartz v Labow* (2008) 164 CA4th 417, 432, 78 CR3d 838 (attorney-client privilege does not alleviate predecessor trustee from obligation to turn trust documents over to successor trustee).

PRACTICE TIP: A predecessor trustee who wants to assert the attorney-client privilege for confidential communications with an attorney about the trustee's personal liability for breach of fiduciary duty should hire a separate attorney and pay for the advice out of personal funds. *Moeller v Superior Court* (1997) 16 C4th 1124, 69 CR2d 317. Otherwise, it is presumed that any legal advice sought by a predecessor trustee for which the trust pays was incurred in the management and preservation of the trust estate in the trustee's fiduciary capacity, not in the trustee's personal capacity. 16 C4th at 1135.

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§3.34 7. When Identity of Client Is Within Privilege

Client's identity not usually protected. The identity of a client is not usually protected by the attorney-client privilege. See *Tien v Superior Court* (2006) 139 CA4th 528, 536, 43 CR3d 121; *In re Grand Jury Subpoena (Roe v U.S.)* (2d Cir 1986) 781 F2d 238, 247. See also §3.9. There are two recognized exceptions:

Exceptions. One exception is if the disclosure would tend to implicate the client in unlawful activities or provide the last link in a prosecutorial chain. See *Baird v Koerner* (9th Cir 1960) 279 F2d 623, 633. An example is the attorney's refusal to disclose the identity of a client who provides evidence relevant in a criminal case. *People v Sullivan* (1969) 271 CA2d 531, 545, 77 CR 25. But see *Reiserer v U.S.* (9th Cir 2007) 479 F3d 1160, 1166 (disclosure of clients' identity permitted when in its investigation of attorney, IRS subpoenaed documents related to law firm's trust accounts); *In re Osterhoudt* (9th Cir 1983) 722 F2d 591, 593 (information regarding fee arrangement ordinarily not part of subject matter of professional consultation and thus not privileged communication even though it may evidence wrongdoing by client).

The other exception is if the disclosure of the client's identity would also have the effect of disclosing information which has been confidentially communicated by the client. *In re Grand Jury Proceedings, Cherney* (7th Cir 1990) 898 F2d 565; *In the Matter of Witnesses Before the Special March 1980 Grand Jury* (7th Cir 1984) 729 F2d 489, 493; *Rosso, Johnson, Rosso & Ebersold v Superior Court* (1987) 191 CA3d 1514, 1518, 237 CR 242 (noting that some jurisdictions take view that in unusual situations client's identity is treated as privileged information, especially if so much is known of attorney-client relationship that to disclose client's name will betray confidential communication).

NOTE: Even when the attorney-client privilege is inapplicable, the identity of a client may be shielded by the right of privacy. *Hooser v Superior Court* (2000) 84 CA4th 997, 101 CR2d 341 (attorney subject to debtor's examination was not required to disclose identities of clients); *Tien v Superior Court* (2006) 139 CA4th 528, 43 CR3d 121 (discussing privacy rights of putative class members).

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§3.34A 8. Limited Liability Companies

The attorney-client privilege may be invoked by or on behalf of a limited liability company. *HLC Props., Ltd. v Superior Court* (2005) 35 C4th 54, 61, 24 CR3d 199. See Evid C §§951 (defines "client," for purposes of the attorney-client privilege, as "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice"), 175 (defines "person" as including "a natural person, firm, association, partnership, business trust, corporation, *limited liability company*, or public entity" (emphasis added)).

One federal district court, applying the federal common law of privileges and "guided by referencing [Nevada and California] state law," has held that for purposes of the attorney-client privilege, a limited liability company should be treated like a corporation rather than like a partnership. *Montgomery v ETreppid Technols., LLC* (D Nev 2008) 548 F Supp 2d 1175, 1179 n3, 1183. Under this approach, the company is the sole client and holds the privilege. Thus, only current management may assert or waive the privilege; a member of a limited liability company who is no longer part of its management may not access the company's attorney-client privileged communications.

On representing limited liability companies, including issues of attorney-client privilege, see Forming and Operating California Limited Liability Companies, chaps 2, 16 (2d ed Cal CEB 2007).

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§3.35 F. Attorney

It is self-evident that, to invoke the attorney-client privilege, the communication must be made to, or in the presence of, the client's lawyer. If one is a lawyer, but not the client's lawyer, no privilege attaches to the communication. Similarly, if the lawyer is acting in some capacity other than one of giving legal advice, no privilege attaches to the communications exchanged in pursuit of such a nonlegal endeavor.

It is not necessary, however, that the attorney actually be retained. The privilege applies when a person seeks the assistance of an attorney, intending to employ the attorney professionally. However, after the attorney explicitly refuses to undertake representation, a person can have no reasonable expectation of being represented by the attorney. Thus, statements made to the attorney after that point are not privileged, even if they touch on legal matters. *People v Gionis* (1995) 9 C4th 1196, 1210, 40 CR2d 456. The court in *Gionis* also noted that a nonprivileged communication between a person and an attorney does not become privileged merely because the person is represented by the attorney at a later date. 9 C4th at 1212. See also §3.11.

JUDGE'S PERSPECTIVE: This problem can often arise when the client seeks free legal advice without intending to retain the lawyer. For example, if a person meets a lawyer at a party and relates aspects of a controversy without intending to retain, or evaluate retaining, the lawyer, the communication is not privileged even though the "client" intended the communication to be confidential.

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§3.36 1. "Dominant Purpose" of Communication

Some courts have held that a communication is privileged only when the "dominant purpose" of the communication is transmission of information to or from an attorney acting in his or her capacity as an attorney. Thus, communications between an attorney and his or her liability insurers may be privileged, depending on the dominant purpose of the particular communication. *Travelers Ins. Cos. v Superior Court* (1983) 143 CA3d 436, 449, 191 CR 871. If the trial court determines as a question of fact that the dominant purpose of the communication was to transmit information to an attorney in the course of professional employment, the matter is privileged. For example, if the dominant purpose of routinely reporting potential accidents to in-house counsel is to determine internal risk exposure under a self-insured program, the communication will be deemed attorney-client privileged communications. *Scripps Health v Superior Court* (2003) 109 CA4th 529, 534, 135 CR2d 126. If the dominant purpose of the communication was for some unrelated purpose, there is no privilege. *2,022 Ranch, LLC v Superior Court* (2003) 113 CA4th 1377, 1390, 7 CR3d 197. A client may be required to disclose evidentiary facts known to him and communicated to a lawyer, without waiving the attorney-client privilege concerning all other confidential communications. *Aerojet-General Corp. v Transport Indem. Ins.* (1993) 18 CA4th 996, 1004, 22 CR2d 862.

Likewise, it is well settled that a document does not become privileged simply because a lawyer has received a copy. *San Francisco Unified Sch. Dist. v Superior Court* (1961) 55 C2d 451, 456, 11 CR 373; *People v Meredith* (1981) 29 C3d 682, 692, 175 CR 612. "A corporation cannot be permitted to insulate its files from discovery simply by sending a 'cc' to in-house counsel." *U.S. Postal Serv. v Phelps Dodge Ref. Corp.* (ED NY 1994) 852 F Supp 156, 163.

PRACTICE TIP: The "dominant purpose" test is slippery and potentially hazardous because it is invariably applied after the fact. Lawyers and clients who wish to preserve the privilege should make sure that confidential, attorney-client communications are segregated from those exchanged for business-related or other non-law-related purposes.

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§3.37 2. Corporate Counsel

Questions about whether a lawyer is acting as a lawyer or in some other capacity arise most frequently in the context of lawyers employed by corporations. It is well settled that the attorney-client privilege applies to confidential communications to or by in-house counsel. *State Farm Fire & Cas. Co. v Superior Court* (1997) 54 CA4th 625, 642, 62 CR2d 834; *Chicago Title Ins. Co. v Superior Court* (1985) 174 CA3d 1142, 1151, 220 CR 507; *In re Grand Jury Subpoena Dated Dec. 19, 1978* (2d Cir 1979) 599 F2d 504, 510; *Valente v Pepsico, Inc.* (D Del 1975) 68 FRD 361, 367. Nevertheless, this is a troublesome area because in-house lawyers frequently act in a multitude of capacities on behalf of their corporate employers. Special care must be taken to establish that a communication claimed to be privileged is made to or by the attorney acting in his capacity as legal counsel, and not as business adviser or policymaker. See, *e.g., In re Sealed Case* (DC Cir 1984) 737 F2d 94, 99 (corporation could shelter advice of in-house counsel and vice president "only upon a clear showing that attorney gave it in a professional legal capacity"); *Diversified Indus., Inc. v Meredith* (8th Cir 1977) 572 F2d 596, 602; *North Am. Mortgage Investors v First Wis. Nat'l Bank* (ED Wis 1975) 69 FRD 9, 11 ("[f]or the privilege to exist, the lawyer must not only be functioning as an advisor, but the advice given must be predominantly legal, as opposed to business, in nature").

Similarly, an attorney acting as a claims adjuster—investigating, analyzing, and determining whether a claim should be paid for an insurance company—is ordinarily engaged in work performed by an individual not licensed to practice law. See *2,022 Ranch, LLC v Superior Court* (2003) 113 CA4th 1377, 1397, 7 CR3d 197 ("evidence reflecting the factual investigation of 2,022 Ranch's claim is subject to discovery. Only those communications reflecting the requesting of, or rendering of, legal advice are protected by the attorney-client privilege…").

An in-house attorney who gives legal advice and is also involved with the business operations of the corporation presents special problems in the attorney-client privilege context. The courts seek to separate the two functions, even though they may be inextricably intertwined. Both federal and state courts have held that when the attorney is acting as a business advisor rather than a legal counselor, the attorney-client privilege is inapplicable. *Liew v Breen* (9th Cir 1981) 640 F2d 1046, 1050 (applying California law); *Montebello Rose Co. v ALRB* (1981) 119 CA3d 1, 32, 173 CR 856 (communications with attorney acting as labor negotiator held not privileged when main purpose of communications was not to secure or render legal advice); *Watt Indus., Inc. v Superior Court* (1981) 115 CA3d 802, 805, 171 CR 503 (work product protection inapplicable when attorney was acting as business agent for client). See also *In re Feldberg* (7th Cir 1988) 862 F2d 622, 626 (corporation that gets marketing advice from lawyer does not acquire privilege in bargain); *J.P. Foley & Co. v Vanderbilt* (SD NY 1974) 65 FRD 523 (no privilege when attorney is acting as negotiator or business agent for client).

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§3.38 3. Attorney as Tax Preparer

Generally speaking, the courts have not recognized an "accountant-client" privilege. See *U.S. v Arthur Young & Co.* (1984) 465 US 805, 817, 79 L Ed 2d 826, 836, 104 S Ct 1495; *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 383, 11 CR2d 51. Accordingly, communications with a lawyer who acts as a tax preparer are not protected from disclosure by the attorney-client privilege. *U.S. v Davis* (5th Cir 1981) 636 F2d 1028, 1043; *Olender v U.S.* (9th Cir 1954) 210 F2d 795, 806 (lawyer had performed only in accounting capacity, not legal one). However, other courts have declared the attorney-client privilege to be applicable, particularly when the legal and tax-preparing aspects of the services are intertwined. See *U.S. v El Paso Co.* (5th Cir 1982) 682 F2d 530, 539 (court "would be reluctant to hold that a lawyer's analysis of the soft spots in a tax return and his judgments on the outcome of litigation on it are not legal advice"); *Colton v U.S.* (2d Cir 1962) 306 F2d 633, 638 (business advice given by lawyer gives rise to no privilege; however, giving tax advice and preparing tax returns are encompassed within attorney-client privilege). Communications between in-house counsel and an outside accounting firm on the tax aspects of a proposed transaction are not generally privileged unless the accountant was interpreting the client's otherwise privileged information or data to enable counsel to understand that information or data. *U.S. v Chevron Texaco Corp.* (ND Cal 2002) 241 F Supp 2d 1065, 1072 (privilege does not apply when accountant hired merely to give additional legal advice about complying with tax code even if doing so would assist attorney in advising client).

Although the attorney-client privilege may not be available to protect communications between a client and an attorney acting as a tax preparer, the tax returns themselves are generally privileged from production under California law. *Deary v Superior Court* (2001) 87 CA4th 1072, 1077, 105 CR2d 132. See §3.116. Furthermore, Bus & P C §17530.5 provides statutory confidentiality for client information furnished to tax preparers. Note that the rule is different in federal court: Generally, no privilege for tax returns is recognized under federal law. *Premium Serv. Corp. v Sperry & Hutchinson Co.* (9th Cir 1975) 511 F2d 225, 229. See §3.118.

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§3.39 4. Attorney as Lobbyist

Communications with a lobbyist are not privileged solely because the lobbyist is an attorney. *U.S. Postal Serv. v Phelps Dodge Ref. Corp.* (ED NY 1994) 852 F Supp 156, 164 (communications between house counsel and law firm retained to do lobbying were not privileged); *North Carolina Elec. Membership Corp. v Carolina Power & Light Co.* (MD NC 1986) 110 FRD 511, 517 (communications by lawyer regarding results of lobbying efforts on behalf of power project not privileged).

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§3.40 5. Attorney as Witness

When an attorney merely performs ministerial or clerical duties or is merely a percipient witness to an event, the attorney is not performing a legal function and the attorney-client privilege does not apply. *McKnew v Superior Court* (1943) 23 C2d 58, 64, 142 P2d 1 (attorney asked by client to witness business transaction, namely, deposit of funds in bank, could not assert privilege concerning name and location of bank); *Mitchell v Towne* (1939) 31 CA2d 259, 265, 87 P2d 908 (attorney as witness to conversation); *U.S. v Bartone* (6th Cir 1968) 400 F2d 459, 461 ("[m]inisterial or clerical services… are not within the privilege").

Taking the deposition of an adverse party's lawyer is uniformly discouraged by both the state and federal courts, and is generally allowed only on a showing of "extremely good cause." See *Carehouse Convalescent Hosp. v Superior Court* (2006) 143 CA4th 1558, 1562, 50 CR3d 129 (depositions of opposing counsel "are presumptively improper, severely restricted, and require 'extremely' good cause—a high standard"); *Fireman's Fund Ins. Co. v Superior Court* (1977) 72 CA3d 786, 790, 140 CR 677 (practice of taking deposition of opposing counsel "should be severely restricted, and permitted only upon showing of extremely good cause"); *Trade Ctr. Props. v Superior Court* (1960) 185 CA2d 409, 411, 8 CR 345 (deposition of opposing counsel should be allowed only on showing of "extremely good cause"); *Shelton v American Motors Corp.* (8th Cir 1986) 805 F2d 1323, 1327 (opposing counsel's deposition should be taken only in limited circumstances); *American Cas. Co. of Reading, Pennsylvania v Krieger* (SD Cal 1995) 160 FRD 582, 588 (party seeking to depose opposing counsel has burden of establishing "propriety and need" for deposition).

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§3.41 6. Attorney as Patent Agent or Advisor

Legal services provided by patent agents, retained to assist in filing for and obtaining a patent, present special problems that have been addressed at length by the federal courts. *Advanced Cardiovascular Sys., Inc. v C.R. Bard, Inc.* (ND Cal 1992) 144 FRD 372, 378 ("communications from inventor to patent lawyer, even those that are entirely technical, remain presumptively protected by the attorney-client privilege"); *In re Spalding Sports Worldwide, Inc.* (Fed Cir 2000) 203 F3d 800, 805 (invention record is privileged communication if provided to attorney for primary purpose of obtaining legal opinion). The privilege generally applies to communications seeking or conveying a legal opinion on the patentability of an invention but does not protect communications made with the intention that the attorney transmit the information to the U.S. Patent and Trademark Office. *In re Application of Minebea Co.* (SD NY 1992) 143 FRD 494, 502.

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§3.42 7. Attorney as Friend or Relative

Communications to a friend or relative who happens to be an attorney are not privileged if such communications were made to the individual in his or her capacity as a friend or relative rather than in his or her professional capacity. *U.S. v Tedder* (4th Cir 1986) 801 F2d 1437, 1442 (statement by lawyer to fellow associate in law firm); *Modern Woodmen of Am. v Watkins* (5th Cir 1942) 132 F2d 352, 354; *In re Kinoy* (SD NY 1970) 326 F Supp 400, 403 (lawyer could not claim privilege when daughter consulted him as parent, regardless of status as lawyer).

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§3.43 8. Attorney as Investigator

When an attorney supervises or conducts a factual investigation to render legal advice to the client, the communications requested or received during the investigation generally will be protected by both the attorney-client privilege and the work product doctrine. *Upjohn Co. v U.S.* (1981) 449 US 383, 66 L Ed 2d 584, 101 S Ct 677 (communications by Upjohn employees to counsel for Upjohn, at direction of corporate superiors to secure legal advice from counsel, protected from compelled disclosure); *Wellpoint Health Networks, Inc. v Superior Court* (1997) 59 CA4th 110, 68 CR2d 844 (plaintiff failed to present evidence to show that lawyer hired to investigate discrimination charges was not acting in legal capacity).

However, when the attorney has been retained for some purpose other than the rendering of legal advice, such as the monitoring of compliance with a consent decree or helping develop business strategy, communications with the attorney may not be protected by the privilege. See *Diversified Indus., Inc. v Meredith* (8th Cir 1977) 572 F2d 596, 603 (when counsel was retained to conduct special investigation into corporate bribes and to advise company on legal consequences, communications held not privileged); *Osterneck v E.T. Barwick Indus., Inc.* (ND Ga 1979) 82 FRD 81, 85 (claim of privilege rejected when attorney was employed by company as special counsel to special review committee set up under SEC consent decree).

PRACTICE TIP: In light of these divergent lines of cases, counsel undertaking an investigation should include a recital in the engagement letter that the client has specifically requested the investigation for purposes of rendering legal advice, in order to improve the likelihood that communications with a client or company's employees are privileged.

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§3.44 G. Who May Claim Privilege

Under Evid C §954, the lawyer-client privilege may be claimed by:

- The holder of the privilege;
- A person authorized by the holder to claim the privilege; or
- The lawyer at the time the communication was made, if a holder of the privilege still exists, unless the lawyer is otherwise instructed by a person authorized to permit disclosure.

The holder of the privilege is the client, the client's guardian or conservator, or the client's personal representative if the client is deceased, including a personal representative appointed for purposes of subsequent estate administration under Prob C §12252. Evid C §953(a)-(c). If the client is deceased, the privilege ceases to exist when the client's estate is finally distributed and his or her personal representative is discharged. Evid C §953(c); Comment to Evid C §954; *HLC Props., Ltd. v Superior Court* (2005) 35 C4th 54, 65, 24 CR3d 199 (staff assembled by decedent to handle his business affairs did not succeed as holder of attorney-client privilege after his death).

JUDGE'S PERSPECTIVE: The guardian or other personal representative cannot protect communications unrelated to the interests of the person he or she represents. When the guardianship, conservatorship, or other representative relationship terminates, the privilege reverts to the person on whose behalf the representative was acting.

The holder may also be a successor, trustee, or similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence. Evid C §953(d). On the definition of a client and the scope of client protection, see §§3.22-3.34.

A person who furnishes an attorney with information with the intent to employ him or her professionally may claim the attorney-client privilege, whether or not actual employment results. *People v Canfield* (1974) 12 C3d 699, 705, 117 CR 81.

On problems that may arise when an attorney is retained or consulted by joint clients, see §§3.19-3.21.

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§3.45 1. Attorney Required to Claim Privilege

Although the holder may voluntarily waive the privilege by not claiming it, the attorney must claim the privilege whenever disclosure is sought in his or her presence. Evid C §955. If the attorney fails to do so, the court may on its own motion preclude disclosure of the privileged communications. *Stearns v Los Angeles City Sch. Dist.* (1966) 244 CA2d 696, 723, 53 CR 482.

Privileged materials in an attorney's possession that are seized under a search warrant remain privileged, and the attorney may request an in camera hearing to determine which documents must be disclosed. The attorney's ability to protect the privileged nature of the records does not depend on whether the attorney is suspected of a crime. *People v Superior Court (Laff)* (2001) 25 C4th 703, 716, 107 CR2d 323.

NOTE: Penal Code §1524(c) prohibits issuance of a search warrant for documentary evidence in the possession of an attorney (if the attorney is not reasonably suspected of engaging or having engaged in criminal activity related to the documentary evidence for which the search warrant is requested) unless multiple requirements are satisfied, including (1) the appointment of a special master to accompany the officer serving the warrant, (2) the sealing of all documents seized, and (3) a hearing procedure for the resolution of claims of privilege. Despite the plain language of Pen C §1524(c), the California Supreme Court has suggested that this procedure may apply even if the attorney is suspected of criminal activity. See *People v Superior Court (Laff), supra*.

An attorney-plaintiff claiming malpractice against an attorney whom the attorney-plaintiff hired to assist him or her with a client's legal issues may not reveal the client's confidential communications, or require the defendant attorney to reveal the client's confidential communications, in order to try the malpractice action. *Solin v O'Melveny & Myers, LLP* (2001) 89 CA4th 451, 466, 107 CR2d 456 (court must dismiss malpractice action if defendant could not defend itself without revealing privileged information plaintiff shared with defendant).

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§3.46 2. Burden of Proof

A party asserting the attorney-client privilege must present evidence establishing that the communication comes within the privilege. In other words, the party must present foundational facts showing that a communication has been made in confidence in the course of the lawyer-client relationship. *People v Gionis* (1995) 9 C4th 1196, 1208, 40 CR2d 456; *Ralls v U.S.* (9th Cir 1995) 52 F3d 223, 225 ("[t]he party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication").

The communication is then presumed to have been made in confidence, and the opponent of the claim of privilege has the burden of establishing that the communication was not confidential or that an exception exists. Evid C §917(a); *State Farm Fire & Cas. Co. v Superior Court* (1997) 54 CA4th 625, 639, 62 CR2d 834; *Federal Deposit Ins. Corp. v Ogden Corp.* (1st Cir 2000) 202 F3d 454, 460.

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H. Exceptions to Attorney-Client Privilege

§3.47 1. Exceptions in General

Exceptions to the attorney-client privilege are set out in Evid C §§956-962. The attorney-client privilege does not apply:

- If the attorney's services are sought or obtained to assist someone in committing or planning to commit a crime or fraud (Evid C §956; see §3.48);
- To a communication, the disclosure of which the attorney reasonably believes is necessary to prevent a criminal act that the attorney also reasonably believes is likely to result in death or substantial bodily harm (Evid C §956.5);
- To a communication relevant to an issue between parties claiming through a deceased client (Evid C §957);
- To a communication relevant to an issue of breach, by the attorney or the client, of a duty arising out of the attorney-client relationship (Evid C §958). This exception applies only when either the attorney or the client charges the other with a breach of duty arising from their professional relationship. See *Dietz v Meisenheimer & Herron* (2009) 177 CA4th 771, 786, 99 CR3d 464 (noting that law was not fully settled, court "assume[d] for purposes of this decision that there is no exception to the duty to preserve client confidences in a case brought against an attorney by a third party").

  NOTE: This exception, however, does not apply to an attorney-plaintiff's malpractice action against another law firm. The action will be dismissed if the court finds that the defendant law firm cannot defend itself without revealing the client's confidential communications. *Solin v O'Melveny & Myers, LLP* (2001) 89 CA4th 451, 466, 107 CR2d 456.

- To a communication relevant to an issue concerning the intention or competence of a client executing an attested document concerning which the attorney is an attesting witness, or concerning the execution or attestation of that type of document (Evid C §959);
- To a communication relevant to an issue concerning the intention of a deceased client regarding a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property (Evid C §960);
- To a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a now-deceased client, purporting to affect an interest in property (Evid C §961);
- If two or more clients retain or consult an attorney on a matter of common concern and there is subsequent litigation between any of the clients or their successors in interest (Evid C §962; see §3.31);
- To permit a predecessor trustee to withhold confidential communications relating to the administration of the trust from the successor trustee (*Moeller v Superior Court* (1997) 16 C4th 1124, 69 CR2d 317).

Unlike other jurisdictions, California courts are not free to create or imply exceptions to the attorney-client privilege "based on notions of policy or *ad hoc* justification." *Wells Fargo Bank, N.A. v Superior Court* (2000) 22 C4th 201, 209, 91 CR2d 716 (refusing to imply exception to attorney-client privilege for communications between trustee and its counsel based on Prob C §16060 requirement that trustee must keep trust beneficiaries reasonably informed about trust and its administration). Generally speaking, the statutory privileges, *e.g.,* Evid C §§900-1070, and work product doctrine exceptions to discovery are exclusive, and the courts are not free to create new privileges or exceptions to privileges as a matter of judicial policy. *Jurcoane v Superior Court* (2001) 93 CA4th 886, 895, 113 CR2d 483. On judicially created privileges and protective orders, see §3.3.

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§3.48 2. Crime-Fraud Exception

There is no attorney-client privilege "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." Evid C §956. Thus, although the privilege protects the client's disclosures regarding past criminal acts, it does not cover communications about the client's contemplated criminal or fraudulent acts. The exception can be invoked only when the client seeks the attorney's services to *assist* in the commission of a crime. "[N]o exception was intended to apply to a statement of intent to commit a crime alone." *People v Clark* (1990) 50 C3d 583, 621, 268 CR 399.

JUDGE'S PERSPECTIVE: Counsel should be very cautious any time a client talks about a potential future crime. The line relating to a general discussion and rendering legal assistance in planning a crime is not always clear.

As noted in §3.47, the attorney-client privilege does not apply if the attorney reasonably believes that disclosure of a confidential communication is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm to another person. Evid C §956.5; *People v Dang* (2001) 93 CA4th 1293, 1298, 113 CR2d 763 (client who made threats against potential witnesses and his attorney was not entitled to protect communications based on attorney-client privilege).

The Ninth Circuit has held that in a civil case in which outright disclosure of attorney-client communications is sought under the crime-fraud exception, "(1) both parties have a right to present evidence to the district court, and (2) the party seeking disclosure must prove by a preponderance of the evidence that the exception applies." *In re Napster, Inc. Copyright Litig.* (9th Cir 2007) 479 F3d 1078, 1098.

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§3.49 a. Party Must Make Prima Facie Showing to Invoke Crime-Fraud Exception

Courts have recognized that a mere allegation of crime or fraud is insufficient to trigger application of the crime-fraud exception. Before the exception will be recognized, a prima facie showing must be made that the client contemplated a crime or fraud. *State Farm Fire & Cas. Co. v Superior Court* (1997) 54 CA4th 625, 643, 62 CR2d 834; *Dickerson v Superior Court* (1982) 135 CA3d 93, 100, 185 CR 97; *Nowell v Superior Court* (1963) 223 CA2d 652, 657, 36 CR 21; *Clark v U.S.* (1933) 289 US 1, 15, 77 L Ed 993, 1000, 53 S Ct 465 ("[t]o drive the privilege away, there must be 'something to give colour to the charge;' there must be 'prima facie evidence that it has some foundation in fact'"); *U.S. v Chen* (9th Cir 1996) 99 F3d 1495, 1502 (prima facie showing before judge will order in camera review). See also *In re Napster, Inc. Copyright Litig.* (9th Cir 2007) 479 F3d 1078, 1098.

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§3.50 b. Requirements of Prima Facie Showing of Fraud

To make a prima facie showing of fraud, a party need not prove all the elements beyond a reasonable doubt. Instead, the proponent of the exception is required to make a prima facie showing that a reasonable person would have a reasonable basis to expect the perpetration or attempted perpetration of a crime or fraud. *In re Grand Jury Proceedings* (9th Cir 1996) 87 F3d 377, 381 (district court must find "'reasonable cause to believe' that the attorney's services were 'utilized… in furtherance of the ongoing unlawful scheme'"). A negligent misrepresentation does not suffice to invoke the exception. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1262, 245 CR 682.

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§3.51 c. Cases Divided on Whether Showing Must Be Made Without Reference to Documents Sought to Be Discovered

The courts appear divided on whether the prima facie showing must be made without reference to the documents or evidence sought to be discovered. In *U.S. v Zolin* (1989) 491 US 554, 572, 105 L Ed 2d 469, 490, 109 S Ct 2619, the Supreme Court approved in camera review of the materials in controversy, in order to determine whether the crime-fraud exception applied. The Court held that the crime-fraud exception need not be demonstrated by independent evidence.

In *State Farm Fire & Cas. Co. v Superior Court* (1997) 54 CA4th 625, 640, 62 CR2d 834, however, the California Court of Appeal expressly stated that it was not taking into account the actual privileged information in making its determination, citing *Shannon v Superior Court* (1990) 217 CA3d 986, 995, 266 CR 242.

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IV. WORK PRODUCT DOCTRINE

§3.52 A. Statement of Rule

Although the protection afforded an attorney's work product is often referred to as a "privilege," it is not one of the privileges enumerated in Evid C §§900-1063. Both the United States and California Supreme Courts have instead described the protection as the attorney work product *doctrine*. See *Kizer v Sulnick* (1988) 202 CA3d 431, 435 n3, 248 CR 712.

In California, the doctrine was originally court-created law but was codified in 1963 when the California Legislature added former CCP §2016 (now CCP §2018.030), which provides:

> (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.
>
> (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

The work product doctrine is as fundamental to our system of justice as the attorney-client privilege. *PSC Geothermal Servs. Co. v Superior Court* (1994) 25 CA4th 1697, 1710, 31 CR2d 213.

Under CCP §§2018.010-2018.080, attorney work product is given either *absolute* or *qualified* protection. The work product doctrine applies to both attorneys and nonattorneys representing themselves in propria persona. *Dowden v Superior Court* (1999) 73 CA4th 126, 133, 86 CR2d 180.

In the federal courts, the work product doctrine had its genesis in *Hickman v Taylor* (1947) 329 US 495, 91 L Ed 451, 67 S Ct 385, in which the Supreme Court held that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." 329 US at 510, 91 L Ed at 462. And in his concurring opinion, Justice Jackson wrote, "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." 329 US at 516, 91 L Ed at 465.

The principles established in *Hickman v Taylor* are codified in Fed R Civ P 26(b)(3)(B) and Fed R Crim P 16(b)(2).

The federal work product doctrine is significantly different from the California rule in some respects and is discussed in more detail below. See §3.62. For example, the federal work product doctrine applies only to documents prepared "in anticipation of litigation or for trial."

NOTE: The federal work product doctrine, unlike federal law regarding privileges, applies to *all* federal cases, including diversity jurisdiction cases. *Great Am. Surplus Lines Ins. Co. v Ace Oil Co.* (ED Cal 1988) 120 FRD 533, 539.

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§3.53 1. Absolute Protection

As noted in §3.52, work product protection may be either absolute or qualified. In civil cases, there is absolute protection against discovery of any writing that reflects an attorney's "impressions, conclusions, opinions, or legal research or theories." CCP §2018.030(a). This protection continues even if the writing is delivered to a client, as long as it is delivered in confidence. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1252, 245 CR 682. Because such documents are absolutely protected, courts do not engage in any sort of weighing or balancing of competing interests with regard to these documents. *Fellows v Superior Court* (1980) 108 CA3d 55, 68, 166 CR 274.

In the federal courts, Fed R Civ P 26(b)(3)(A) provides that work product protection attaches only to documents and tangible things "prepared in anticipation of litigation or for trial by or for another party." Rule 26(b)(3)(B) requires the court to protect from disclosure the "mental impressions, conclusions, opinions, or legal theories of a party's attorney."

The court may not require disclosure of documents claimed to be protected under the attorney work product doctrine to determine the claim of privilege, except as an in camera inspection under Evid C §915(b). Because documents reflecting an attorney's impressions and opinions are protected by the work product doctrine, a lawyer may not be deposed regarding such impressions and opinions. CCP §2018.030(a); *Trade Ctr. Props. v Superior Court* (1960) 185 CA2d 409, 411, 8 CR 345. Because of the unavoidable risks of intruding into areas protected by the work product doctrine and the attorney-client privilege, taking the deposition of an adverse party's lawyer is uniformly discouraged by both the state and federal courts, and is generally allowed only on a showing of "extremely good cause." See §3.40.

On the crime-fraud exception to the work product doctrine in law enforcement investigations, see §3.67.

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§3.54 2. Qualified Protection

Any work product of an attorney that is not absolutely protected is not discoverable except on a showing that withholding it would unfairly prejudice the party seeking discovery in preparing that party's claim or defense or if it would result in an injustice. CCP §2018.030(b). This is qualified work product protection. It protects material that is of a derivative or interpretative nature, such as diagrams; charts; audit reports of books, papers, or records; and findings, opinions, and reports of consulting experts employed by an attorney to analyze evidentiary material. *Fellows v Superior Court* (1980) 108 CA3d 55, 68, 166 CR 274.

One area of qualified work product protection that has seen considerable litigation is insurance bad faith litigation in which plaintiffs seek production of the entirety of an insurance company's claims review file relating to the insurance company's decision not to settle a claim. At least one court has held that the nature of a bad faith claim justifies production of the entire claims file, including the opinions of counsel that led the insurance company to make its decision. *Reavis v Metropolitan Prop. & Liab. Ins. Co.* (SD Cal 1987) 117 FRD 160, 164 ("[w]hen mental impressions and opinions are directly at issue in a case, [c]ourts have permitted an exception to the strict protection of [Fed R Civ P] Rule 26(b)(3) and allowed discovery"). See *Holmgren v State Farm Mut. Auto Ins. Co.* (9th Cir 1992) 976 F2d 573, 577 ("opinion work product may be discovered and admitted when mental impressions are *at issue* in a case and the need for the material is compelling").

In applying qualified work product protection, the court engages in a balancing test of competing interests. Specifically, the court balances the attorney's interest in protecting these documents against the unfair prejudice or injustice to the party seeking discovery if the documents are not disclosed. In so doing, the court analyzes whether an adequate substitute exists for the information sought. *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 491, 210 CR 535.

In making its analysis under the qualified component of the doctrine, a court also evaluates the purposes served by the work product doctrine. *Kizer v Sulnick* (1988) 202 CA3d 431, 440, 248 CR 712. The policy of the state, as articulated by the legislature is (1) to "[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases" and (2) to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." CCP §2018.020.

JUDGE'S PERSPECTIVE: The lawyer's likelihood of success in this area is tied to the amount of detail that he or she can provide to the court. When the court must engage in a balancing test, the attorney should ensure that the longest list of factors is on the client's side of the scale, which means counsel must *give the court information.* Counsel representing the moving party should tell the court what needs to be discovered, why, and what kind of injustice will occur if the information is not made available. Counsel should marshal any facts demonstrating that the material is not really work product or, if it is, why the client's need for it outweighs the protections of the doctrine. Counsel should remember that when the attorney-client privilege is in issue, the court will not usually review the materials in question to determine application of the privilege. When a qualified work product claim is in issue, however, the court generally conducts an in camera review of the materials in dispute. See §3.52.

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§3.55 B. Exceptions to Work Product Protection

Under California law there are three statutory exceptions to work product protection:

- Code of Civil Procedure §2018.070 allows the State Bar to discover attorney work product of an attorney against whom disciplinary charges are pending if such information is relevant to issues of breach of duty by the lawyer. Discovery of this information requires client approval and a protective order.
- Code of Civil Procedure §2018.080 provides that, in an action between an attorney and his or her former client, the doctrine does not apply if the work product is relevant to an issue in the case. See *Metro-Goldwyn-Mayer, Inc. v Superior Court* (1994) 25 CA4th 242, 248, 30 CR2d 371.
- Code of Civil Procedure §2018.050 provides for a crime-fraud exception to work product protection in official investigations and actions brought by a public prosecutor in the name of the People of the State of California. See §3.68.

As noted above, in the federal courts, the work product doctrine applies *only* to documents prepared "in anticipation of litigation." Fed R Civ P 26(b)(3)(A). On federal work product protection, see §3.62

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§3.56 C. Scope of Work Product Protection

California. Although by its terms the California work product statute applies only to discovery in civil cases, the doctrine has been extended to apply to testimony at trial in civil cases (*Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 648, 151 CR 399; but see *Mize v Atchison, Topeka & Santa Fe Ry.* (1975) 46 CA3d 436, 449, 120 CR 787 (doctrine does not apply at trial if witness uses documents that would otherwise be protected work product to refresh his recollection)), in criminal matters (*Izazaga v Superior Court* (1991) 54 C3d 356, 381, 285 CR 231), and in juvenile matters (*In re Jeanette H.* (1990) 225 CA3d 25, 33, 275 CR 9). Furthermore, the doctrine survives the termination of the litigation or matter for which it was developed, and therefore protects work product prepared for a completed case from discovery in subsequent litigation. *Fellows v Superior Court* (1980) 108 CA3d 55, 63, 166 CR 274.

The California work product doctrine has been held to apply even if the attorney is working in a nonadversarial context, *e.g.,* when the lawyer acts as a lawyer on behalf of the client in a business deal, rather than in litigation. *County of Los Angeles v Superior Court* (2000) 82 CA4th 819, 833, 98 CR2d 564; *Aetna Cas. & Sur. Co. v Superior Court* (1984) 153 CA3d 467, 478, 200 CR 471; *Rumac, Inc. v Bottomley* (1983) 143 CA3d 810, 812, 192 CR 104. However, the doctrine does not apply when a lawyer is not acting in his or her capacity as a lawyer but rather in a nonlegal capacity, *e.g.,* as a business agent for the client. *Watt Indus., Inc. v Superior Court* (1981) 115 CA3d 802, 805, 171 CR 503. See *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 735, 101 CR3d 758. It also appears that the doctrine does not apply to the work product of a public prosecutor when (1) that prosecutor has failed to obtain an indictment and has announced that he or she will take no further action, and (2) the fruits of the prosecutor's investigation become relevant to civil litigation to which the prosecutor is not a party. *Shepherd v Superior Court* (1976) 17 C3d 107, 121, 130 CR 257, overruled in part on other grounds in *People v Holloway* (2004) 33 C4th 96, 131, 14 CR3d 212.

At least one court has held that the work product doctrine may be invoked to preclude discovery of trial preparation materials by a non-lawyer litigant. *Dowden v Superior Court* (1999) 73 CA4th 126, 136, 86 CR2d 180 (in propria persona litigants may assert CCP §2018 work product privilege).

Federal. In federal court, the rule is quite different: The work product doctrine does not apply to documents prepared by a lawyer in connection with a business deal, if there is no threat of litigation. See *In re Fischel* (9th Cir 1977) 557 F2d 209, 212 (considering summaries of business transactions prepared by attorney, but not prepared in anticipation of litigation); *First Pac. Networks, Inc. v Atlantic Mut. Ins. Co.* (ND Cal 1995) 163 FRD 574, 582 (no work product protection for reports sent to insurance carrier when no litigation anticipated). *Interstate Credit Prod. Ass'n v Firemans' Fund Ins. Co*. (D Or 1989) 128 FRD 273, 279.

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§3.57 1. Materials Protected by Work Product Doctrine

Absolute protection. Courts have determined that there is absolute attorney work product doctrine protection for the following:

- Any notes or recorded statements that counsel takes in interviewing potential witnesses. *Nacht & Lewis Architects, Inc. v Superior Court* (1996) 47 CA4th 214, 217, 54 CR2d 575.
- Information on a percipient witness's anticipated testimony. *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 39, 91 CR2d 293; *City of Long Beach v Superior Court* (1976) 64 CA3d 65, 80, 134 CR 468.
- Attorney's response to audit inquiry letter about pending or threatened litigation against the defendant. *Laguna Beach County Water Dist. v Superior Court* (2004) 124 CA4th 1453, 1459, 22 CR3d 387.
- An attorney's assessment about pending litigation, transmitted to the client in confidence. *Newport Pac., Inc. v County of San Diego* (SD Cal 2001) 200 FRD 628, 634 (county counsel's analysis of issues for presentation to Board of Supervisors in closed session is protected).

Qualified protection. There is qualified attorney work product protection for the following:

- A list of potential witnesses interviewed by opposing counsel. *Nacht & Lewis Architects, Inc. v Superior Court* (1996) 47 CA4th 214, 217, 54 CR2d 575. But see *Fellows v Superior Court* (1980) 108 CA3d 55, 69, 166 CR 274.
- During the discovery stage of litigation, a list of percipient witnesses to be called to trial. *In re Jeanette H.* (1990) 225 CA3d 25, 36, 275 CR 9; *City of Long Beach v Superior Court* (1976) 64 CA3d 65, 72, 134 CR 468. However, the doctrine does not preclude an ordered exchange of witness lists shortly before trial. *In re Jeanette H., supra*.
- A report by an expert who has been designated in the present case that had been prepared for prior litigation and obtained by counsel in the present matter as background material in preparation for trial. *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 487, 210 CR 535.
- Selection and order of particular documents chosen by an attorney out of many thousands of documents, that may tend to reveal the attorney's understanding and theory of the case. *James Julian, Inc. v Raytheon Co.* (D Del 1982) 93 FRD 138, 144. However, an attorney may risk waiving work product protection of his selection of documents if they are used to refresh a witness's recollection. 93 FRD at 144; *Sporck v Peil* (3d Cir 1985) 759 F2d 312, 317.

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§3.58 2. Materials Not Protected by Work Product Doctrine

The work product doctrine does not protect:

- The results of an investigation of an attorney acting as a claims adjuster for an insurance company (*2,022 Ranch, LLC v Superior Court* (2003) 113 CA4th 1377, 1397, 7 CR3d 197);
- Knowledge possessed by a witness that is later communicated to an attorney (*County of Los Angeles v Superior Court (Martinez)* (1990) 224 CA3d 1446, 1458, 274 CR 712; *Kadelbach v Amaral* (1973) 31 CA3d 814, 822, 107 CR 720);
- Witness statements prepared by employees (or by the employer) that are then turned over to the attorney or a list of potential witnesses who turned over such statements (*Nacht & Lewis Architects, Inc. v Superior Court* (1996) 47 CA4th 214, 218 n2, 54 CR2d 575; see *Green & Shinee v Superior Court* (2001) 88 CA4th 532, 105 CR2d 886);
- A party's (or nonparty's) own statement concerning the action or its subject matter (Fed R Civ P 26(b)(3)(C); *Miles v M/V Mississippi Queen* (5th Cir 1985) 753 F2d 1349, 1351);
- Opinions or reports of an expert hired by the client and later communicated to the attorney (*Jasper Constr., Inc. v Foothill Jr. College Dist.* (1979) 91 CA3d 1, 16, 153 CR 767);
- Identity or location of evidentiary matter, such as material objects (*Fellows v Superior Court* (1980) 108 CA3d 55, 69, 166 CR 274);
- Material objects that constitute admissible evidence (*Fellows v Superior Court, supra*); and
- A report or memorandum that would normally be protected by the doctrine, except that a witness used it to refresh his or her recollection before testifying (*Mize v Atchison, Topeka & Santa Fe Ry.* (1975) 46 CA3d 436, 449, 120 CR 787; *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 410, 72 CR 74); see Fed R Evid 612(2); *U.S. v 22.80 Acres of Land* (ND Cal 1985) 107 FRD 20, 25 (under Fed R Evid 612(2), court ordered production of report used to refresh witness's recollection prior to deposition); but see *Sporck v Peil* (3d Cir 1985) 759 F2d 312, 317 (court declined to order production, exercising discretion under Fed R Evid 612). See §§3.165-3.190 for discussion of waiver of privileges.

For the applicability of the crime-fraud exception to the work product doctrine, see §3.68.

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§3.59 D. Expert Witnesses and Consultants

Reports prepared by an expert as a consultant retained by the attorney are generally protected from compelled disclosure by the attorney work product doctrine unless and until the expert is designated as a witness to testify at trial. See Fed R Civ P 26(b)(4)(B). But see *Delcastor, Inc. v Vail Assocs., Inc.* (D Colo 1985) 108 FRD 405, 408 (court ordered production of nontestifying expert's report when defendant's expert observed site of a mudslide 1 day after occurrence, and plaintiff's expert was unable to observe site until 5 days later, when conditions had changed significantly).

Once designated as an expert for trial, all the expert's present and previous opinions are proper subjects of discovery, as are any communications the expert may have had with counsel, clients, or other retained experts, any notes the expert took, or any documents ever provided to the expert. See *Shadow Traffic Network v Superior Court* (1994) 24 CA4th 1067, 1079, 29 CR2d 693; *County of Los Angeles v Superior Court (Martinez)* (1990) 224 CA3d 1446, 1458, 274 CR 712; *Williamson v Superior Court* (1978) 21 C3d 829, 835, 148 CR 39. But see *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 488, 210 CR 535 (even after consultant is designated as expert for trial, any work product created purely in advisory capacity is subject to protection of qualified work product doctrine). See *Energy Capital Corp. v U.S.* (Ct Claims 2000) 45 Fed Cl 481, 493 (court ordered production of attorney opinion work product provided to designated expert).

On expert witnesses in general, see chap 11.

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§3.60 1. Communications to Potential Expert

Communications made to a potential expert in a retention interview can be considered confidential and therefore subject to protection from subsequent disclosure, even if the expert is not thereafter retained, as long as there was a reasonable expectation of such confidentiality. *Shadow Traffic Network v Superior Court* (1994) 24 CA4th 1067, 1080, 29 CR2d 693.

The *Shadow Traffic* court recognized that there is a legitimate concern that a party may attempt to deplete the pool of available experts by interviewing as many experts as possible simply to stop the other side from being able to use any of them. However, the court said that if such a situation developed, a trial court would find a way to resolve the problem. 24 CA4th at 1080 n9. See *Western Digital Corp. v Superior Court* (1998) 60 CA4th 1471, 1489 n3, 71 CR2d 179 (no disqualification of expert when plaintiff disclosed information to coworkers of expert later retained by defendant and "ethical wall" was created between expert and coworkers).

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§3.61 2. When Expert Witness Is Withdrawn

In general, if a party withdraws a previously designated expert witness, not yet deposed, but keeps the expert as a consultant, the opposing party is precluded from deposing or communicating with the expert witness or retaining him or her as an expert witness. *County of Los Angeles v Superior Court* (*Hernandez)* (1990) 222 CA3d 647, 657, 271 CR 698. If an attorney violates this rule and communicates with the other side's previously designated expert witness (now consultant), the attorney may be disqualified from the case. *Collins v State* (2004) 121 CA4th 1112, 1126, 18 CR3d 112 (courts are obligated to disqualify attorney who knowingly hires opposing counsel's expert witness). However, in *Toyota Motor Sales, U.S.A., Inc. v Superior Court* (1996) 46 CA4th 778, 782, 54 CR2d 22, the court held that the hiring of a former opposition consultant or a former employee of opposing counsel is not by itself sufficient to warrant disqualification of an attorney or law firm. If the

> former consultant or employee is shown to have possessed confidential information material to the pending litigation, a *rebuttable* presumption arises that the consultant has disclosed such information to present counsel. If the presumption is rebutted, disqualification is not required. If the presumption is not rebutted, disqualification may be required.

See, *e.g., Collins,* 121 CA4th at 1131, in which plaintiff's counsel hired an expert who also worked for defense counsel, but counsel was not disqualified because no privileged information was disclosed and counsel dismissed the expert as soon as he learned of the dual retention.

JUDGE'S PERSPECTIVE: As a practical matter, even in courts that adopt the rebuttable presumption analysis, the presumption is difficult to rebut.

Note that the supreme court has held that withdrawal of an expert in exchange for payment of money by a coparty does not prevent discovery of the suppressed expert's report. *Williamson v Superior Court* (1978) 21 C3d 829, 835, 148 CR 39.

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§3.62 E. Comparison to Federal Work Product Doctrine

The attorney work product doctrine in the federal courts is governed by Fed R Civ P 26(b)(3). This rule provides that a party may discover documents and tangible items prepared in anticipation of litigation or for trial by another party (or party's representative) only on a showing of "substantial need" and a showing that the party cannot obtain the "substantial equivalent" of the information elsewhere without "undue hardship." Furthermore, the rule provides that federal courts are to protect against disclosing an attorney's mental impressions, conclusions, opinions, or legal theories. See Fed R Civ P 26(b)(3)(B). This rule is a codification and restatement of the Supreme Court decision in *Hickman v Taylor* (1947) 329 US 495, 91 L Ed 451, 67 S Ct 385. The 1970 Advisory Committee Notes to Rule 26 provide important guidance regarding its application.

In general, qualified protection. In the federal courts, an attorney's work product is generally granted qualified protection: Disclosure requires a balancing of interests, with the party seeking disclosure required to show substantial need, undue hardship, and "an extraordinary showing of unfairness." See *Intermedics, Inc. v Ventritex, Inc.* (ND Cal 1991) 139 FRD 384, 387. Some federal courts distinguish between fact work product and opinion work product. See, *e.g., Kintera, Inc. v Convio, Inc.* (SD Cal 2003) 219 FRD 503, 507 (court afforded opinion work product "nearly absolute protection"). In *Kintera,* the court concluded that signed witnesses' statements were protected as fact work product because they would only have been created for the likelihood of litigation. 219 FRD at 509. The court further concluded, however, that the work product protection was waived after the plaintiff specifically referenced the statements on its website. 219 FRD at 512.

The main differences between California and federal law on attorney work product are, first, in the scope of application, and second, in the area of disclosure of an attorney's mental impressions, conclusions, opinions, and legal theories ("opinion work product").

Scope. Under Fed R Civ P 26(b)(3)(A), the federal courts will accord the protection of the work product doctrine *only* to documents "prepared in anticipation of litigation." In California, the protection is not so limited. "It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity." *County of Los Angeles v Superior Court* (2000) 82 CA4th 819, 833, 98 CR2d 564. See *Laguna Beach County Water Dist. v Superior Court* (2004) 124 CA4th 1453, 1461, 22 CR3d 387 ("in some circuits, the federal work product doctrine is more limited than California's").

Opinion work product. As noted in §3.51, an attorney's mental impressions, conclusions, opinions, and legal theories are absolutely privileged in California. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1250, 245 CR 682. In the federal courts, Rule 26(b)(3)(B) provides that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney… concerning the litigation." This language leaves room for arguing that an attorney's mental impressions, etc., are not *absolutely* protected. Nonetheless, some federal courts have held that an attorney's mental impressions and opinions *are* entitled to absolute protection. See, *e.g., Diamond State Ins. Co. v Rebel Oil Co.* (D Nev 1994) 157 FRD 691, 699. Other courts assert that such impressions and opinions are discoverable only in rare and extraordinary circumstances. See, *e.g., Maloney v Sisters of Charity Hosp.* (WD NY 1995) 165 FRD 26, 30 n1. A third line of cases asserts that such impressions and opinions are discoverable if mental impressions are at issue in the case and the need for the material is compelling. See, *e.g., Holmgren v State Farm Mut. Auto Ins. Co.* (9th Cir 1992) 976 F2d 573, 577. So far, the Supreme Court has expressly refused to decide which approach is correct. *Upjohn Co. v U.S.* (1981) 449 US 383, 401, 66 L Ed 2d 584, 599, 101 S Ct 677 ("[w]hile we are not prepared at this juncture to say that such material is always protected by the work product rule, we think a far stronger showing of necessity and unavailability… would be necessary to compel disclosure").

Attorney notes of witness interviews. Under Fed R Civ P 26(b)(3)(A), the protection for attorney notes of witness interviews is entitled only to qualified protection; production may be ordered on a showing of "substantial need" and that the information is not otherwise available without undue hardship. See *Copperweld Steel Co. v Demag-Mannesmann-Bohler* (3d Cir 1978) 578 F2d 953, 963 n14 (production ordered of lawyer's memorandum regarding interview with crucial witness whom opposing counsel could not depose before witness's death); *McDougall v Dunn* (4th Cir 1972) 468 F2d 468, 474 (plaintiff who suffered amnesia as result of accident, and who did not engage counsel until more than

2 years later, was allowed to discover statements taken by defendant's insurer, in anticipation of litigation, shortly after accident).

For a discussion of the crime-fraud exception to the work product doctrine under both California and federal law, see §3.68.

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§3.63 F. Attorney Controls Work Product Doctrine

It is well settled that the attorney, not the client, controls the right to assert work product protection. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1257, 245 CR 682. See also *State Compensation Ins. Fund v Superior Court* (2001) 91 CA4th 1080, 1091, 111 CR2d 284; *Mylan Labs., Inc. v Soon-Shiong* (1999) 76 CA4th 71, 81 n2, 90 CR2d 111; *Hercules, Inc. v Exxon Corp.* (D Del 1977) 434 F Supp 136, 156 (work product doctrine "may be invoked only by an attorney"); *In re Grand Jury Proceedings* (8th Cir 1973) 473 F2d 840, 848 (reversing attorney's contempt conviction for refusing to produce work product documents to grand jury).

Even if the client does not object to disclosure, the attorney can still assert the doctrine and prevent disclosure. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1260, 245 CR 682. In the attorney's absence, the California courts hold that the client has standing to assert the doctrine on the attorney's behalf. 199 CA3d at 1257.

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Source: Civil Litigation/California Civil Discovery Practice/3 Evaluating Privileges, Work Product, and Other Protections/ §3.64 G. Asserting, Enforcing, and Testing Work Product Doctrine

§3.64 G. Asserting, Enforcing, and Testing Work Product Doctrine

The party asserting the work product doctrine has the burden to establish that the material in question is work product and therefore protected. *People v Superior Court (Bauman & Rose)* (1995) 37 CA4th 1757, 1771, 44 CR2d 734; *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1252, 245 CR 682.

When documents requested. When documents protected by the attorney work product doctrine are requested from the client and the attorney is aware of the request, it is proper for the attorney to assert such protection in the trial court. See generally *Wells Fargo Bank, N.A. v Superior Court* (2000) 22 C4th 201, 91 CR2d 716.

When a court is unable to rule on a claim of work product protection without requiring disclosure of the information claimed to be privileged, the court may conduct an in camera review of the documents in question. Evid C §915(b); see *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 736, 101 CR3d 758. However, an in camera review may prove overly time-consuming (when numerous documents are at issue), may be entirely unnecessary (when documents fall into a clearly protected class), and may bias the court (especially when the documents are particularly revealing and the court is the trier of fact). *Wellpoint Health Networks, Inc. v Superior Court* (1997) 59 CA4th 110, 121, 68 CR2d 844. See also *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 983, 98 CR3d 422 (court need not review all documents claimed as protected work product when court only needed to determine whether attorney sought to be disqualified was privy to *some* confidential work product reasonably shared among defense counsel in furtherance of common interests).

If the trial court orders the production of documents claimed to be protected by the work product doctrine, the party resisting disclosure may seek appellate review by means of a petition for writ of mandate or prohibition. *Raytheon Co. v Superior Court* (1989) 208 CA3d 683, 686, 256 CR 425. On appellate review, see chap 16.

JUDGE'S PERSPECTIVE: Courts often look with disfavor on efforts to compel production of information that is clearly protected by the attorney-client privilege or the work product doctrine. It may be unwise to seek such production if success appears unlikely. If the protection afforded by the privilege or doctrine is clear during the court's in camera inspection, the court may be unhappy with the party seeking production of what it has already concluded is nondiscoverable information.

Discovery referee. A discovery referee may be appointed to advise the trial court about the applicability of the doctrine. CCP §638. On using a discovery referee, see §§2.68-2.72. It is the trial court, however, that must consider the referee's findings and any objections submitted by the parties before accepting or rejecting the referee's determination. *Rockwell Int'l Corp. v Superior Court* (1994) 26 CA4th 1255, 1269, 32 CR2d 153.

JUDGE'S PERSPECTIVE: Counsel concerned about the effect of the information on the court should request review by a referee. Most trial judges appreciate counsel's voicing concerns about the impact of prejudicial information at the outset. The court will find this approach clearly preferable to undertaking a review of possibly inflammatory information and then having to recuse himself or herself, or deal with later challenges. If the referee's findings generate a great deal of controversy, however, the judge may ultimately have to review the materials in any event.

Deposition of adverse party's lawyer. Taking the deposition of an adverse party's lawyer is uniformly discouraged by both the state and federal courts, and is generally allowed only on a showing of extremely good cause. A lawyer whose deposition has been noticed should almost always consider filing a motion for protective order because of the risk, inevitable in the heat of a deposition, of inadvertent disclosure of protected attorney work product or attorney-client privileged communications. See *Carehouse Convalescent Hosp. v Superior Court* (2006) 143 CA4th 1558, 1566, 50 CR3d 129 (plaintiffs did not show "extremely good cause" for deposing opposing counsel because likelihood counsel would assert work product and attorney-client privilege claims was great and thus "the usefulness of the procedure is questionable"); *Spectra-Physics, Inc. v Superior Court* (1988) 198 CA3d 1487, 1493, 244 CR 258 ("extremely good cause" required to justify opposing counsel's deposition); *Fireman's Fund Ins. Co. v Superior Court* (1977) 72 CA3d 786, 790, 140 CR 677 (practice of taking deposition of opposing counsel "should be severely restricted and permitted only upon showing of extremely good cause"); *Trade Ctr. Props. v Superior Court* (1960) 185 CA2d 409, 411, 8 CR 345

(deposition of opposing counsel should be allowed only on showing of "extremely good cause"); *Shelton v American Motors Corp.* (8th Cir 1986) 805 F2d 1323, 1327; *American Cas. Co. of Reading, Pennsylvania v Krieger* (SD Cal 1995) 160 FRD 582, 588.

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§3.65 H. Waiver of Work Product Doctrine

In general, waiver of the doctrine occurs only when there is a disclosure that is wholly inconsistent with the doctrine's purpose of safeguarding the confidentiality of the attorney's work product and trial preparation. *Raytheon Co. v Superior Court* (1989) 208 CA3d 683, 689, 256 CR 425. Thus the absolute work product protection is waived by failure to object or otherwise raise the claim, by tendering certain issues, by disclosing the confidential information to a third party, or by engaging in any other sort of conduct that is inconsistent with the doctrine. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1261, 245 CR 682.

The doctrine is also waived when the work product is used as an offensive weapon, *e.g.,* for cross-examination or to refresh the recollection of a witness. *Kadelbach v Amaral* (1973) 31 CA3d 814, 821, 107 CR 720; *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 413, 72 CR 74; *Handgards, Inc. v Johnson & Johnson* (ND Cal 1976) 413 F Supp 926, 929. Waiver of the absolute protection can also occur when an attorney who formerly represented several clients in an action later represents one of those clients against the others. See *Metro-Goldwyn-Mayer, Inc. v Superior Court* (1994) 25 CA4th 242, 248, 30 CR2d 371.

The protection of the work product doctrine is not waived by the attorney delivering the writing to the client in confidence. *Wells Fargo Bank, N.A. v Superior Court* (2000) 22 C4th 201, 214, 91 CR2d 716, quoting *BP Alaska Exploration,* 199 CA3d at 1260. The protection of the work product doctrine is likewise not waived by an attorney's authorizing his or her client to waive it, if no actual disclosure takes place. *Fellows v Superior Court* (1980) 108 CA3d 55, 65, 166 CR 274. The doctrine is also not waived merely because the opposing side later files a malicious prosecution suit against the law firm and the law firm, in its own defense, claims that it had probable cause to bring the suit. *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 503, 165 CR 748. But see *Panter v Marshall Field & Co.* (ND Ill 1978) 80 FRD 718, 721 (reliance on "advice of counsel" defense waives protection for work product).

Similarly, the attorney work product doctrine is not waived when a defendant asserts the litigation privilege as a defense to a libel cause of action. The thoughts, conduct, or work product of the defendant's attorney were not at issue when the defendant had a good faith belief that he had a valid claim against the plaintiff and was contemplating litigation against the plaintiff. *Aronson v Kinsella* (1997) 58 CA4th 254, 269, 68 CR2d 305.

Nor is the work product doctrine waived if disclosure is made under the common interest doctrine. *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 981, 98 CR3d 422. In *Meza*, the court held that the common interest doctrine applied because (1) defense counsel disclosed work product to each other relating to the defendants' common interests, (2) counsel had a reasonable expectation that counsel for codefendants would preserve confidentiality because the trial court's case management order expressly authorized defense counsel to disclose to each other work product relating to defendants' common interests without fear of waiver, and (3) disclosure was reasonably necessary to accomplish the purpose for which defense counsel were retained, to better prepare for trial.

PRACTICE TIP: The waiver of the attorney-client privilege does not automatically waive any applicable work product protection. Waiver of the work product doctrine should always be analyzed distinctly from waiver of the privilege because they derive from different sources and serve different policies. For a more detailed discussion of waiver, see §§3.165-3.190.

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§3.66 I. Work Product on Termination of Attorney-Client Relationship

Under Cal Rules of Prof Cond 3-700(D), an attorney whose employment by a client has been terminated must promptly release to the client, on the client's request, all the client's papers and property, including correspondence, pleadings, expert's reports, and other items reasonably necessary to the client's representation.

However, the statutory work product privilege under CCP §2018.030(a) and the client's right to his or her file under Cal Rules of Prof Cond 3-700(D) "pose an apparent conflict, one that has not been definitively resolved by the courts." *Eddy v Fields* (2004) 121 CA4th 1543, 1549, 18 CR3d 487. Because the work product was presumably prepared for the client's benefit, not for the attorney's, and also presumably paid for by the client, the better view is that the client should be entitled to the attorney's work product, whether absolutely or qualifiedly protected. *John F. Matull & Assocs, Inc. v Cloutier* (1987) 194 CA3d 1049, 1056, 240 CR 211 ("[t]he law is clear that 'an attorney's work product belongs absolutely to the client'"); *Metro-Goldwyn-Mayer, Inc. v Superior Court* (1994) 25 CA4th 242, 249, 30 CR2d 371 (if lawyer's representation terminated as a result of corporate merger, work product shared with some former clients had to be disclosed to all former clients). But see *Lasky, Haas, Cohler & Munter v Superior Court* (1985) 172 CA3d 264, 278, 218 CR 205 ("the attorney is the sole holder of the privilege and may effectively assert it even as against a client"). See *Roberts v Heim* (ND Cal 1988) 123 FRD 614, 634 (California cases on this subject "appear to be in irreconcilable conflict with each other").

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§3.67 J. Work Product in Criminal Proceedings

In general, a search warrant cannot issue for the seizure of documentary evidence from an attorney who is not reasonably suspected of engaging in criminal activity without the appointment of a special master who accompanies the officer conducting the search and, at the request of the party who has been served, seals the documents, and takes them to court for a hearing. Pen C §1524(c). The superior court has the inherent power, as well as the power afforded by Pen C §1536, to determine whether the seized materials should be disclosed to authorities. See *People v Superior Court (Laff)* (2001) 25 C4th 703, 717, 107 CR2d 323 (protection of work product doctrine applies to criminal cases and may be invoked to prevent disclosure of work product seized pursuant to search warrant). See also Pen C §§1524(c), 1536.

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§3.68 K. Crime-Fraud Exception and Work Product Doctrine

It is unclear whether California recognizes a crime-fraud exception to the work product doctrine or not. Several courts have squarely held that the Evid C §956 crime-fraud exception does not apply to documents protected by the work product rule. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1249, 245 CR 682; *Wellpoint Health Networks, Inc. v Superior Court* (1997) 59 CA4th 110, 120, 68 CR2d 844. But see *State Farm Fire & Cas. Co. v Superior Court* (1997) 54 CA4th 625, 650, 62 CR2d 834 (after employing "crime-fraud analysis," court held that refusal to order disclosure of work product would result in injustice). Counsel should approach this area with caution.

By contrast, nearly all the federal circuits recognize a crime-fraud exception to the work product doctrine. *In re Grand Jury Proceedings* (9th Cir 1996) 87 F3d 377, 380 (applying crime-fraud exception to "fact" work product); *In re John Doe Corp.* (2d Cir 1982) 675 F2d 482, 492 (if work-product itself may be part of criminal scheme "all reason for protecting it from judicial examination evaporates").

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§3.69 V. MARITAL OR SPOUSAL PRIVILEGE

There are essentially two marital or spousal privileges. The first is a privilege not to testify against one's spouse. See Evid C §§970-973. The second is a privilege not to disclose confidential marital communications. Evid C §§980-987. The distinction is important because the privilege not to testify may be waived by the testifying spouse (see §§3.70-3.73), while the marital communication privilege protects a communication unless both spouses waive it (see §§3.74-3.83). While both of these privileges apply to civil actions, virtually every reported case applying them has been a criminal case. Nonetheless, the same principles should apply in a civil context.

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§3.70 A. Privilege Not to Testify Against One's Spouse

A married person has a privilege not to testify against his or her spouse in any proceeding, except as otherwise provided by statute. Evid C §970. In addition, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party unless the party calling the spouse does so in good faith without knowledge of the marital relationship. Evid C §971. The privilege under Evid C §§970-971 belongs to the married person whose testimony is being sought, not the spouse who is the party. *Jurcoane v Superior Court* (2001) 93 CA4th 886, 896, 113 CR2d 483.

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§3.71 1. Scope of Privilege

The privilege applies only as long as the couple is married. The privilege also applies without regard to the condition of the marriage. Thus, a wife who has not seen her husband for 17 years but who remains legally married to him may assert the privilege not to be called as a witness in a murder case. *Jurcoane v Superior Court* (2001) 93 CA4th 886, 113 CR2d 483. Once a final divorce decree is obtained, the privilege does not apply, even if the alleged events occurred during the marriage. *People v Dorsey* (1975) 46 CA3d 706, 716, 120 CR 508.

The privilege is also not applicable in proceedings brought by or on behalf of one spouse against the other spouse, proceedings to commit or place a spouse under another's control due to a mental or physical condition or to determine competence, various criminal and juvenile proceedings, and proceedings against a former spouse regarding spousal or child support. Evid C §972.

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§3.72 2. Waiver of Privilege

A married person who testifies against his or her spouse in any proceeding waives the privilege. Evid C §973(a). Thus, testimony of a spouse in an earlier portion of the trial constitutes a waiver of the privilege. *People v Rice* (1981) 126 CA3d 477, 178 CR 647 (spouse testifying for prosecution waives Evid C §§970-971 privilege); *People v Lucas* (1995) 12 C4th 415, 490, 48 CR2d 525.

A waiver can occur even if the claimant was never advised that the privilege existed. *People v Resendez* (1993) 12 CA4th 98, 108, 15 CR2d 575. However, a waiver cannot occur if the claimant was erroneously compelled to testify. Evid C §973(a). The claimant has the burden of proving that he or she was erroneously compelled to testify. 12 CA4th at 107.

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§3.73 3. Limitation on Privilege

There is no privilege in a civil proceeding brought or defended by a married person for the immediate benefit of his or her spouse, or for the immediate benefit of the married person and his or her spouse. Evid C §973(b). The courts are split on how the "immediate benefit" language is to be interpreted in connection with community property laws, when damages recovered by one spouse become the community property of both spouses. See *Duggan v Superior Court* (1981) 127 CA3d 267, 270, 179 CR 410 (holding that spouse's potential future interest in property due to community property laws was not "immediate benefit" under Evid C §973(b), because spouse had no present, immediate, or direct interest in property at issue). Compare *Duggan* with *Hand v Superior Court* (1982) 134 CA3d 436, 442, 184 CR 588 (holding that if marriage is intact, unliquidated claims for community property personal injury damages are for noninjured spouse's "immediate benefit").

PRACTICE TIP: The *Duggan* case presents the better argument on this issue, *i.e.,* that "immediate benefit" should not be construed as including a potential community property interest in the cause of action being litigated. If community property were a factor, the exception in Evid C §973(b) would destroy the marital-spousal privilege in virtually every civil case when damages are claimed because virtually every civil damage claim would arguably be for the immediate benefit of the spouse. This surely was not the legislature's intent in enacting §973(b).

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§3.74 B. Privilege for Confidential Marital Communications

A spouse, whether or not a party to an action, has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, a communication if (1) he or she claims the privilege, and (2) the communication was made in confidence between the spouses while they were married. Evid C §980. *Either* spouse may claim the privilege. Thus, one spouse cannot testify unless both spouses waive the privilege. *People v Dorsey* (1975) 46 CA3d 706, 717, 120 CR 508. Note that this is different from the Evid C §§970-971 privileges in which only the testifying spouse holds the privilege.

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§3.75 1. Privilege Applies Only to Valid Marriage

Like the Evid C §§970-971 privileges, the privilege for confidential marital communications applies only in the case of a valid marriage. *People v Delph* (1979) 94 CA3d 411, 415, 156 CR 422. The requirement that the parties be "married" is strictly interpreted. Thus, persons who have cohabited, but are not married, are not entitled to assert the privilege. *People v Badgett* (1995) 10 C4th 330, 363, 41 CR2d 635; *People v Hunt* (1982) 133 CA3d 543, 559, 184 CR 197. Indeed, in one case, a couple was not considered married for purposes of Evid C §980 because the husband's marriage to another person had not been legally dissolved; his subsequent marriage to his second "wife" was therefore illegal and void, and thus the defendant had no right to assert the marital privilege concerning communications with the present "wife." *People v Gallego* (1990) 52 C3d 115, 176, 276 CR 679. See also *People v Catlin* (2001) 26 C4th 81, 130, 109 CR2d 31. Similarly, a long estrangement between husband and wife does not create an implied exception to the privilege. *Jurcoane v Superior Court* (2001) 93 CA4th 886, 889, 113 CR2d 483 (husband's departure of 17 years to Mexico does not support finding that privilege no longer applies absent "viable marital relationship"). If the marriage was valid under the laws of the jurisdiction where it occurred, it is recognized as valid in California. *People v Badgett* (1995) 10 C4th 330, 363, 41 CR2d 635.

Although there are not yet any reported cases on the issue, the marital communications privilege likely applies to domestic partners who are registered in California. See Fam C §297.5(a): "Registered domestic partners shall have the same rights, protections, and benefits,… whether they derive from statutes,… common law, or any other provisions or sources of law, as are granted to and imposed upon spouses."

JUDGE'S PERSPECTIVE: There may be a distinction with respect to a marriage that is voidable due to such things as mental incapacity or problems of age. In such cases, a court might apply the privilege at least until the marriage is nullified.

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§3.76 2. Privilege Survives Termination of Marriage

The privilege for confidential marital communications under Evid C §980 survives the termination of the marriage and continues to exist even if there was termination by divorce or annulment for fraud. *People v Dorsey* (1975) 46 CA3d 706, 717, 120 CR 508. This differs from Evid C §§970-971, which apply only during marriage.

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§3.77 3. Privilege Applies Only to Communications

The Evid C §980 privilege also applies only to "communications" between the spouses. Such communications may be written, oral, or even videotaped communications. *Rubio v Superior Court* (1988) 202 CA3d 1343, 1347, 249 CR 419. However, the privilege does not extend to physical actions or facts that are observed. *People v Cleveland* (2004) 32 C4th 704, 742, 11 CR3d 236; *People v Delph* (1979) 94 CA3d 411, 416, 156 CR 422; *People v Dorsey* (1975) 46 CA3d 706, 717, 120 CR 508. Thus, if one spouse admits to the other spouse that he or she is stealing money, the privilege applies; however, if one spouse sees the other spouse steal the money, the privilege does not apply to that observation.

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§3.78 4. Communication Must Be Made in Confidence

To be privileged, the communication must be made "in confidence." Evid C §980. The speaker must have (1) intended nondisclosure and (2) have a reasonable expectation of privacy. *People v Cleveland* (2004) 32 C4th 704, 744, 11 CR3d 236; *People v Mickey* (1991) 54 C3d 612, 654, 286 CR 801. A written note that was found in a trash can and never communicated to a spouse is neither a communication nor a communication made under circumstances of confidentiality. *People v Bogle* (1995) 41 CA4th 770, 784, 48 CR2d 739. The "reasonable expectation of privacy" issue is a predominantly factual question. *People v Mickey, supra*.

If proved, however, the privilege can be asserted to prevent eavesdropping third parties from testifying about what they heard. Comments to Evid C §980. See also *People v Johnson* (1991) 233 CA3d 425, 438, 284 CR 579. But see *Rubio v Superior Court* (1988) 202 CA3d 1343, 1348, 249 CR 419 (ruling that testimony by eavesdropper about what she heard was not privileged).

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§3.79 5. Burden of Proving Privilege

The claimant of the marital communications privilege must present facts that support, by a preponderance of the evidence, a prima facie claim of privilege; the burden then switches to the opposing party to show that the privilege does not apply or was waived. *OXY Resources Cal. LLC v Superior Court* (2004) 115 CA4th 874, 894, 9 CR3d 621; *People v Badgett* (1995) 10 C4th 330, 364, 41 CR2d 635. However, whenever a claim of marital privilege for communications is made, the communication is presumed to have been made in confidence and the opponent of the claim has the burden of proof to establish that the communication was not confidential. Evid C §917(a); *People v Mickey* (1991) 54 C3d 612, 655, 286 CR 801.

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6. Exceptions to Marital Privilege

§3.80 a. Miscellaneous Statutory Exceptions

The marital communications privilege does not apply in:

- A proceeding to commit or place a spouse or the spouse's property under another's control due to a mental or physical condition (Evid C §982);
- A proceeding to determine a spouse's competence (Evid C §983);
- A proceeding brought by or on behalf of one spouse against the other (Evid C §984(a));
- A proceeding between a surviving spouse and a person who claims through a deceased spouse (Evid C §984(b));
- A proceeding in which one spouse is charged with: a crime against the other spouse or a child of either, a crime against the person or property of a third person in the course of committing a crime against the other spouse, bigamy, or a crime defined by Pen C §270 or §270a (Evid C §985);
- A proceeding under the Juvenile Court Law (Welf & I C §§200-987) (Evid C §986);
- A criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made (Evid C §987); or
- A law enforcement administrative investigation or hearing (*Riverside County Sheriff's Dept. v Zigman* (2008) 169 CA4th 763, 772, 87 CR3d 358).

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§3.81 b. Crime or Fraud Exception

There is no marital privilege if the communication was made in whole or in part to enable or aid someone to commit or plan to commit a crime or fraud. Evid C §981.

Courts have interpreted this exception narrowly, applying it only if the spousal communication is for the purpose of obtaining assistance in the commission of the crime or fraud. *People v Dorsey* (1975) 46 CA3d 706, 718, 120 CR 508. The exception does not apply to communications in which one spouse merely reveals to the other that he or she plans to commit a crime or fraud. 46 CA3d at 718.

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§3.82 c. Threats Against Third Persons When Spouse Is Abused

The courts have decreed that threats made against third persons by one spouse in the course of criminally victimizing the other spouse are not privileged. *People v Carter* (1973) 34 CA3d 748, 752, 110 CR 324; *People v Johnson* (1991) 233 CA3d 425, 438, 284 CR 579. As the court noted in *Johnson*, when a spouse is abused, the relationship on which the privilege is predicated is also abused. Similarly, the privilege does not apply where one spouse commits a crime against a third person in the course of committing a crime against the other spouse, even if he or she is not charged with harming the spouse. *People v Sinohui* (2002) 28 C4th 205, 212, 120 CR2d 783.

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§3.83 7. Waiver of Marital Privilege

A waiver of the marital privilege occurs if the holders of the privilege, without coercion, disclose a significant part of the communication or jointly consent to such disclosure. Evid C §912(a). See *People v Carter* (1973) 34 CA3d 748, 753, 110 CR 324 (determining that significant part of spousal communication had been disclosed to another).

Consent to disclosure includes joint failure to claim the privilege at any proceeding in which the holder has the legal standing and the opportunity to claim the privilege. Evid C §912(a). Once a communication has been disclosed at any point in the proceeding, the privilege is thereafter waived. *People v Johnson* (1991) 233 CA3d 425, 437, 284 CR 579 (wife's testimony at preliminary hearing bars assertion of privilege at trial). However, California courts have not yet addressed whether a party may waive a privilege for purposes of discovery but then successfully reassert the privilege in a motion for summary judgment or at trial. At least one federal court case applying California law has held that this is impermissible. See *Feldman v Allstate Ins. Co.* (9th Cir 2003) 322 F3d 660, 668.

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VI. PHYSICIAN-PATIENT AND PSYCHOTHERAPIST-PATIENT PRIVILEGES

§3.84 A. Statement of Rule

A patient, whether or not a party to an action, generally has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the patient and either a physician or a psychotherapist. Evid C §§994 (physician-patient privilege), 1014 (psychotherapist-patient privilege). The purposes of the privileges are to preclude humiliation of the patient and to encourage a patient's full disclosure to the physician or psychotherapist. *Binder v Superior Court* (1987) 196 CA3d 893, 898, 242 CR 231.

NOTE: Federal law does not recognize the physician-patient privilege. *Hutton v City of Martinez* (ND Cal 2003) 219 FRD 164, 166. Concluding that the defendant could not rely on the physician-patient privilege, medical records privilege, or a right of privacy under the California Constitution, the court in *Hutton* weighed the police officer's right of privacy against the plaintiff's need for the information. The court ordered disclosure of the officer's medical records in his workers' compensation file because the records were directly relevant to the officer's physical condition on the day he shot the plaintiff.

The physician-patient privilege and the psychotherapist-patient privilege are identical in many respects. See *Rittenhouse v Superior Court* (1991) 235 CA3d 1584, 1588 n1, 1 CR2d 595 (noting that statutory language, exceptions, and definitions of holder of two privileges are generally the same). Nonetheless, because psychoanalysis and psychotherapy depend on the fullest revelation of the personal details of a patient's life, the psychotherapist-patient privilege is generally perceived to provide broader protection than the physician-patient privilege. See *Grosslight v Superior Court* (1977) 72 CA3d 502, 507, 140 CR 278.

Some courts have followed the suggestion in *In re Lifschutz* (1970) 2 C3d 415, 430, 85 CR 829, that the privilege might be as broad as to even bar disclosure of the very existence of the psychotherapist-patient relationship. See *Smith v Superior Court* (1981) 118 CA3d 136, 140, 173 CR 145; *City of Alhambra v Superior Court* (1980) 110 CA3d 513, 519, 168 CR 49. However, there are exceptions to the rule protecting the existence of the psychotherapist-patient relationship, such as when one inmate of a county mental health facility allegedly raped another inmate. *County of Alameda v Superior Court* (1987) 194 CA3d 254, 261, 239 CR 400. In addition, when the therapy or treatment is court-ordered, the psychotherapist-patient privilege will not preclude the therapist from giving "circumscribed information to accomplish the information-gathering goal of therapy." Evid C §1012; *In re Mark L*. (2001) 94 CA4th 573, 584, 114 CR2d 499. The psychotherapist-patient privilege is recognized as a part of federal common law in *Jaffee v Redmond* (1996) 518 US 1, 12, 135 L Ed 2d 337, 116 S Ct 1923.

JUDGE'S PERSPECTIVE: Unless a party places his or her medical or psychological condition in issue (see §3.99), courts are reluctant to cast aside the protections of these medical privileges. Thus, a party seeking disclosure must make a greater showing of relevance than that the disclosure is reasonably calculated to lead to the discovery of admissible evidence. Similarly, a party seeking nondisclosure should stress the limited or even nonexistent value of the information sought to be disclosed.

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§3.85 1. Patient Defined

For purposes of the physician-patient privilege, a "patient" is any person who consults the physician for diagnosis or treatment of a physical, mental, or emotional condition. Evid C §991. For purposes of the psychotherapist privilege, a "patient" is any person who consults the psychotherapist for diagnosis, treatment, or scientific research regarding a mental ailment. Evid C §1011.

If a person is not consulting the physician or psychotherapist for such purposes, the privilege does not exist. *In re Tabatha G.* (1996) 45 CA4th 1159, 1168, 53 CR2d 93 (person submitting herself to "bonding" study to determine whether termination of parental rights should be ordered is not a "patient"); *People v Cabral* (1993) 12 CA4th 820, 828, 15 CR2d 866 (because appellant's "dominant purpose" was not to obtain treatment, but to achieve probation, privilege did not apply). But see *Menendez v Superior Court* (1992) 3 C4th 435, 454, 11 CR2d 92 (as long as therapy occurs, motives of either patient or therapist in engaging in such therapy are irrelevant); *Story v Superior Court* (2003) 109 CA4th 1007, 1015, 135 CR2d 532 (therapy to obtain probation is still therapeutic in nature, and records are protected by privilege).

A person who consults a clinic or physician for purposes of donating sperm is not a "patient" as defined in Evid C §991 because he is not seeking a physician for diagnosis or treatment of a specific physical, mental, or emotional ailment. *Johnson v Superior Court* (2000) 80 CA4th 1050, 1063, 95 CR2d 864. In this situation, there is no physician-patient privilege under Evid C §994 that may be invoked to protect confidential communications.

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§3.86 2. Physician and Psychotherapist Defined

The term "physician" is defined as a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation. Evid C §990.

The term "psychotherapist" is broadly defined. It includes a person authorized or reasonably believed by the patient to be authorized to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry. The definition also includes psychologists and psychotherapists; certain specified associates, assistants, trainees, registered nurses, and interns; certain clinical social workers; school psychologists; licensed marriage, family, and child therapists; and educational psychologists. Evid C §§1010, 1010.5. The psychotherapist-patient relationship also includes the relationship between the psychological, marriage and family therapy corporation, or licensed clinical social workers' corporation, and the patient to whom it renders services. Evid C §1014.

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§3.87 3. Privilege in Civil Cases

The physician-patient and psychotherapist-patient privileges are almost always applicable in civil cases; the relevancy or importance of the information to the other party is irrelevant to a determination of whether the privilege applies. *San Diego Trolley, Inc. v Superior Court* (2001) 87 CA4th 1083, 1091, 105 CR2d 476; *Koshman v Superior Court* (1980) 111 CA3d 294, 297, 168 CR 558; *In re Daniel C.H.* (1990) 220 CA3d 814, 832, 269 CR 624. One notable exception is that the psychotherapist-patient privilege does not apply to commitment proceedings under the Sexually Violent Predator Act (Welf & I C §§6600-6609.3), which are civil in nature. *People v Angulo* (2005) 129 CA4th 1349, 1366, 30 CR3d 189.

In criminal cases, there is no physician-patient privilege (Evid C §998), but the psychotherapist-patient privilege is available. *Menendez v Superior Court* (1992) 3 C4th 435, 456 n18, 11 CR2d 92. An exception to the psychotherapist-patient privilege exists when the patient is a danger to himself or to the general public. Evid C §1024; *People v One Ruger.22-Caliber Pistol* (2000) 84 CA4th 310, 314, 100 CR2d 780; *San Diego Trolley, Inc. v Superior Court, supra*. See §3.100; Jefferson's California Evidence Benchbook §§37.26, 40.28, 40.35 (4th ed CJA-CEB 2009).

One federal court applying California law has recognized an exception when disclosure of psychotherapist-patient communications may prevent imprisonment of an innocent person. *U.S. v Alperin* (ND Cal 2001) 128 F Supp 2d 1251, 1255. When disclosure of psychotherapist-patient communications is material to the defendant's claim of self-defense, the trial court should conduct an in camera review of the records to determine the relevancy.

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§3.88 4. Burden of Proof

The party asserting the privilege has the burden of proof regarding the existence of the privilege. *Kizer v Sulnick* (1988) 202 CA3d 431, 439, 248 CR 712. See also *Story v Superior Court* (2003) 109 CA4th 1007, 1014, 135 CR2d 532. When determining whether the requisite relationship between patient and physician or psychotherapist exists, the court must strictly construe the privilege. *People v Cabral* (1993) 12 CA4th 820, 827, 15 CR2d 866.

Once the relationship has been established, the privilege is to be liberally construed in favor of the patient. *Story v Superior Court, supra*; *People v Wharton* (1991) 53 C3d 522, 554, 280 CR 631. An exception to the privilege is narrowly construed and is applied only when the patient's case falls squarely within the ambit of the exception. 53 C3d at 554

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§3.89 B. Confidential Communication

"Confidential communication" means any information, including information obtained by an examination of the patient, that is transmitted between a patient and the physician or psychotherapist in the course of the relationship and in confidence. It includes a diagnosis made and the advice given by the physician or psychotherapist. Evid C §§992, 1012. In fact, any information that a physician obtains as a result of examining patients, regardless of whether there is any other communication between patient and physician, is privileged. *Hurvitz v Hoefflin* (2000) 84 CA4th 1232, 1239, 101 CR2d 558. The phrase "in confidence" means that, as far as the patient is aware, the information is being disclosed to no third person other than those to whom disclosure is necessary for the transmission of the information or the accomplishment of the purpose for which the physician or psychotherapist is consulted. Evid C §§992, 1012. Thus even the testimony of an eavesdropper can be barred. *San Diego Trolley, Inc. v Superior Court* (2001) 87 CA4th 1083, 1090, 105 CR2d 476; *Menendez v Superior Court* (1992) 3 C4th 435, 448, 11 CR2d 92.

PRACTICE TIP: It is important to be aware of all persons who were present at the time of the communication. It is not uncommon for family or friends to be present, especially in emergency situations. The presence of such persons may waive the privilege. See §§3.88, 3.102.

Confidential communications need not be verbal. *Hale v Superior Court* (1994) 28 CA4th 1421, 1424, 34 CR2d 279 (fact that patient never actually speaks to physician or psychotherapist does not thwart privilege). Confidential communication can even include photographs taken by the physician or psychotherapist. *Binder v Superior Court* (1987) 196 CA3d 893, 897, 242 CR 231.

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§3.90 1. Presumption of Confidentiality

Communications between physicians or psychotherapists and their patients are presumptively confidential and the burden of proof is on the opponent of the privilege to show that the communication was not confidential. Evid C §917.

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§3.91 2. Communication by Family Members

The privilege can also apply when the communication is first made to a parent, if such communication is to further the child's interest in communication with, or is necessary for transmission of information to, the physician or psychotherapist. *In re Terry W.* (1976) 59 CA3d 745, 748, 130 CR 913. In fact, one court has gone so far as to hold that the privilege includes all relevant communications to psychotherapists by any of the patient's intimate family members. *Ewing v Goldstein* (2004) 120 CA4th 807, 818, 15 CR3d 864 (communication between patient's family members and psychotherapist related to diagnosis is protected by psychotherapist-patient privilege). This is a broad construction of the privilege.

NOTE: When the privilege is asserted, the communication to or by the family member must be in the patient's medical interest, not in the interests of the family member to whom the communication was made.

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§3.92 3. Nature of Condition or Ailment Is Generally Privileged

Cases have generally held that disclosure of the condition for which the patient sought treatment is privileged, especially regarding psychiatric treatment. *City of Alhambra v Superior Court* (1980) 110 CA3d 513, 518, 168 CR 49. Even disclosure of the patient's name may violate the privilege. *Smith v Superior Court* (1981) 118 CA3d 136, 140, 173 CR 145.

The courts have held, however, that certain information about the patient can be disclosed when the patient was aware that such information would not be confidential. See *Brillantes v Superior Court* (1996) 51 CA4th 323, 342, 58 CR2d 770 (allowing disclosure of certain information about Medi-Cal patients after determining that such patients should have been aware that, as part of participation in such program, certain information about them would not be kept confidential). But see *Blue Cross v Superior Court* (1976) 61 CA3d 798, 801, 132 CR 635 (holding that names and ailments of patients that had been disclosed to Blue Cross for purpose of paying doctor's fees did not abrogate confidentiality because disclosure was reasonably necessary to accomplish purpose for which physician was consulted). At least one court has held that disclosure of otherwise privileged information may be made in extraordinary cases. *County of Alameda v Superior Court* (1987) 194 CA3d 254, 261, 239 CR 400 (allowing patient who had been raped in county facility by another patient to discover name of other patient).

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§3.93 C. Holder of Privilege

The holder of the privilege is the patient, the patient's guardian or conservator (if there is one), or the patient's personal representative if the patient is deceased. Evid C §§993, 1013. An attorney or court-appointed special advocate may be the holder of the privilege for a defendant minor child, including in a juvenile dependency proceeding where legal counsel is the juvenile's guardian ad litem. *San Diego County Health & Human Serv. Agency v Kristine W*. (2001) 94 CA4th 521, 525, 114 CR2d 369; *In re Mark L*. (2001) 94 CA4th 573, 582, 114 CR2d 499. The holder of the privilege is determined at the time the disclosure of confidential information is sought to be introduced in evidence. *In re Cole C.* (2009) 174 CA4th 900, 911, 95 CR3d 62.

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§3.94 1. Claim by Physician or Psychotherapist

The physician or psychotherapist does not hold the privilege and has no power to waive it. *Roberts v Superior Court* (1973) 9 C3d 330, 341, 107 CR 309. See, however, *Shaddox v Bertani* (2003) 110 CA4th 1406, 2 CR3d 808 (dentist permitted to report police officer's suspected prescription drug abuse to his superiors despite Confidentiality of Medical Information Act (CC §§56-56.37)). Similarly, the physician or psychotherapist has no personal protected privacy rights to the information. *In re Lifschutz* (1970) 2 C3d 415, 423, 85 CR 829.

The physician or psychotherapist, however, has an affirmative duty to assert the privilege whenever he or she is present and a privileged communication is sought to be disclosed. Evid C §§995, 1015.

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§3.95 2. Claim by Attorney or Necessary Third Parties

The assertion of the privilege on behalf of the patient can also be claimed by an attorney for the patient (*In re Daniel C.H.* (1990) 220 CA3d 814, 829, 269 CR 624) and by third parties to whom the physician or psychotherapist disclosed the communication to accomplish the purpose of the consultation (*Rudnick v Superior Court* (1974) 11 C3d 924, 932, 114 CR 603).

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§3.96 3. Claim by Parent on Behalf of Minor

A parent can assert the privilege on behalf of a minor patient. *Palay v Superior Court* (1993) 18 CA4th 919, 927, 22 CR2d 839. However, the child is generally the one who holds the privilege. Thus the parent cannot assert the privilege if he or she is in conflict with the child or if the child has already waived the privilege. 18 CA4th at 927.

If disclosure would harm the therapist-patient relationship or damage a minor's well-being, a parent is denied access to the communications between a child and his or her therapist, "except in very special circumstances." *In re Daniel C.H.* (1990) 220 CA3d 814, 828, 269 CR 624.

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§3.97 4. Claim by Court

The court may become obligated to assert the privilege on behalf of the patient. *People v Pack* (1988) 201 CA3d 679, 684, 248 CR 240, disapproved in part on other grounds in *People v Hammon* (1997) 15 C4th 1117, 1123, 65 CR2d 1. Under Evid C §916, the court on its own motion or on that of a party must exclude information that is subject to a claim of privilege if the person from whom the information is sought is not authorized to claim the privilege and no party to the proceeding is authorized to claim the privilege unless a person authorized to claim the privilege instructs otherwise or the proponent of the evidence establishes that there is no one authorized to claim the privilege.

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§3.98 5. Privilege Survives Patient's Death

The privilege survives the patient's death, and only the personal representative of the patient can waive it. Evid C §§993(c), 1013(c); *California Consumer Health Care Council, Inc. v Department of Managed Health Care* (2008) 161 CA4th 684, 694, 74 CR3d 215 (privilege applies even against claim by family member who is not decedent's personal representative).

The "personal representative of the patient" generally refers to the executor or administrator of the patient's estate. *Boling v Superior Court* (1980) 105 CA3d 430, 440, 164 CR 432.

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D. Exceptions to Physician-Patient or Psychotherapist-Patient Privilege

§3.99 1. Tender of Physical or Emotional Condition as Issue

No privilege attaches to a communication if the patient or any party claiming through the patient, including the patient's parent filing a personal injury or wrongful death claim under CCP §376, tenders the issue of his or her physical or emotional condition. Evid C §§996, 1016. A party generally tenders his or her physical or emotional condition as an issue by seeking damages for physical or emotional injuries. A parent does not tender his or her physical or emotional condition to an extent sufficient to waive the privilege simply by seeking child custody or visitation rights. See *Simek v Superior Court* (1981) 117 CA3d 169, 176, 172 CR 564; *Koshman v Superior Court* (1980) 111 CA3d 294, 298, 168 CR 558. Also, a patient does not tender his or her medical condition simply by denying the plaintiff's allegations regarding the same. *Manela v Superior Court* (2009) 177 CA4th 1139, 1149, 99 CR3d 736. On when physical or emotional health is in controversy for purposes of a mental or physical examination, see §§10.5-10.11.

Evidence Code §§996 and 1016 allow for disclosure only of the communications related to the issue tendered. They do not allow the opposing party to view any and all medical records or communications. *Britt v Superior Court* (1978) 20 C3d 844, 864, 143 CR 695; *Heller v Norcal Mut. Ins. Co.* (1994) 8 C4th 30, 44 n5, 32 CR2d 200. But see *Patterson v Superior Court* (1983) 147 CA3d 927, 931, 193 CR 99 (allowing psychiatric facility, accused of allowing patient to commit suicide, to view all of patient's prior psychiatric records). However, the scope of the waiver is not determined by the patient's subjective intent but by the nature of the issue tendered. *Jones v Superior Court* (1981) 119 CA3d 534, 547, 174 CR 148.

JUDGE'S PERSPECTIVE: To the extent that causation becomes an issue, the court may broaden the scope of discovery of medical conditions to those that might reasonably have contributed to the patient's condition.

Mere speculation that past psychiatric or hospital treatment might be a component of the party's present condition is insufficient to bring a matter within the exception. *Roberts v Superior Court* (1973) 9 C3d 330, 339, 107 CR 309. Furthermore, the issue of a person's mental or physical state is not tendered merely by the bringing of a suit involving custody or visitation rights (*Simek v Superior Court* (1981) 117 CA3d 169, 175, 172 CR 564), probate of a holographic will (*Rittenhouse v Superior Court* (1991) 235 CA3d 1584, 1591, 1 CR2d 595), or a child's allegations of abuse by a parent (*In re Daniel C.H.* (1990) 220 CA3d 814, 829, 269 CR 624).

Because only the patient, and not the party seeking disclosure, knows the content of any confidential communications, the burden initially rests on the patient to show that a given communication is not directly related to the issue the patient has tendered to the court. *In re Lifschutz* (1970) 2 C3d 415, 436, 85 CR 829.

JUDGE'S PERSPECTIVE: Probably the greatest examples of overreaching in discovery occur in the effort to acquire the psychiatric records of a plaintiff who has included in the complaint a cause of action for infliction of emotional distress. The argument is made that the plaintiff, in tendering the issue of emotional condition, waives the privilege as to his or her entire history of psychiatric treatment, because the opponent is entitled to compare the plaintiff's condition before and after the stressful event. The tremendous personal invasions of privacy that could occur were such a broad waiver upheld are obvious. Attorneys should work to develop a compromise agreement to allow disclosure of what is relevant and protect what is not.

At trial in a criminal case, the psychotherapist-patient privilege may yield to a defendant's need for protected information to conduct a proper cross-examination of the therapist. See *People v Hammon* (1997) 15 C4th 1117, 65 CR2d 1.

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§3.100 2. Crime or Tort Exception to Physician-Patient or Psychotherapist-Patient Privilege

An exception to the privilege arises if the services of the physician or psychotherapist were sought or obtained to aid in the planning or commission of a crime or tort, or to escape detection or apprehension after the commission of a crime or tort. Evid C §§997, 1018. Related to this exception, Pen C §11166 requires a child-care custodian or health practitioner who observes a child in his or her professional capacity and reasonably suspects child abuse to report such abuse to a child protective agency.

Neither the physician-patient nor psychotherapist-patient privilege applies to information so reported. *In re Troy D.* (1989) 215 CA3d 889, 901, 263 CR 869.

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§3.101 3. Miscellaneous Statutory Exceptions Applicable to Both Physician-Patient and Psychotherapist-Patient Privileges

Neither the physician-patient nor the psychotherapist-patient privilege applies to communications relevant to:

- An issue between parties all of whom claim through a deceased patient (Evid C §§1000, 1019);
- An issue of breach arising from the physician-patient or psychotherapist-patient relationship (Evid C §§1001, 1020);
- An issue concerning the intentions of a deceased patient about any writing purporting to affect an interest in property (Evid C §§1002, 1021);
- An issue regarding the validity of any writings purporting to affect an interest in property (Evid C §§1003, 1022);
- Proceedings regarding the patient's competence (Evid C §§1004-1005, 1023, 1025); or
- Information that the physician or psychotherapist is required to report to a public employee (Evid C §§1006, 1026).

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4. Exceptions Applicable to Physician-Patient Privilege Only

§3.102 a. Good Cause for Disclosure

There is no physician-patient privilege for a communication about the condition of the patient in a proceeding to recover damages based on the patient's conduct if good cause for disclosure is shown. Evid C §999; *Slagle v Superior Court* (1989) 211 CA3d 1309, 1313, 260 CR 122 (defendant alleged contributory negligence and cross-complained for equitable contribution and indemnity arising from car accident). Courts have refused to apply this rule to the psychotherapist-patient privilege. *City of Alhambra v Superior Court* (1980) 110 CA3d 513, 519, 168 CR 49. A sperm donor's identity may be disclosed despite a contract between the clinic and the donor that promises otherwise. *Johnson v Superior Court* (2000) 80 CA4th 1050, 1067, 95 CR2d 864. A contract between the donor, the recipient of the sperm, and the clinic agreeing not to disclose the identity of the sperm donor may be void as against public policy if there is good cause for disclosing the identity of the donor, such as when the donor passes on a genetic disease through his sperm. *Johnson v Superior Court, supra.* See CC §§1667-1668 (unlawful contracts).

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§3.103 b. Proceeding on Right, License, or Authority

There is no physician-patient privilege in proceedings brought by a public entity to determine whether a right, license, authority, or privilege, including the right to be employed by a public entity or to hold public office, should be revoked, suspended, terminated, limited, or conditioned. Evid C §1007.

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5. Exceptions Applicable to Psychotherapist-Patient Privilege Only

§3.104 a. Patient Is Dangerous to Self or Others

There is no privilege if the psychotherapist has reasonable cause to believe that the patient is dangerous to himself, another person, or another person's property and that disclosure of the communication is necessary to prevent the threatened danger. Evid C §1024; *People v One Ruger.22-Caliber Pistol* (2000) 84 CA4th 310, 314, 100 CR2d 780. This exception also applies when the patient is dangerous only to the therapist. *Menendez v Superior Court* (1992) 3 C4th 435, 451, 11 CR2d 92. If the danger under Evid C §1024 exists, the therapist has an affirmative duty to warn intended victims. 3 C4th at 452. This exception does not apply when the patient discloses a danger to himself from third parties. *Swan v U.S.* (2001) 159 F Supp 2d 1174, 1185 (therapist who was informed by her patient that he feared attack from fellow inmates was not obligated to disclose confidential communication to authorities).

Once the therapist determines that such a danger exists, the privilege no longer applies to the communication and the communication can be disclosed at trial or any other proceeding. *People v Wharton* (1991) 53 C3d 522, 554, 280 CR 631 (stating that it would be "absurd" to have exception evaporate as soon as threat of harm ceases to exist). In fact, the privilege does not apply even if the therapist never communicated the danger to the potential victim or anyone else, as long as the therapist reasonably believed that such a danger existed. *Menendez,* 3 C4th at 451.

In determining whether Evid C §1024 applies, the trial court must examine the applicable records in camera. *Mavroudis v Superior Court* (1980) 102 CA3d 594, 605, 162 CR 724. The holder of the privilege and anyone the holder wishes to have present must be allowed to be present at the in camera hearing. *Menendez,* 3 C4th at 456 n18. If necessary, the court can appoint its own expert to determine the standard of care for the profession in determining whether §1024 should be applied. *Mavroudis v Superior Court, supra*. If disclosure is considered justified, the court's decision is reviewable under an abuse of discretion standard. *In re Kevin F.* (1989) 213 CA3d 178, 183, 261 CR 413.

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§3.105 b. Other Exceptions to Psychotherapist-Patient Privilege

In the psychotherapist-patient arena, there is no privilege to refuse to disclose a communication if the patient is under 16 and the psychotherapist has reasonable cause to believe that (1) the patient has been the victim of a crime, and (2) disclosure of the communication is in the best interest of the child. Evid C §1027.

Other exceptions to the privilege have been articulated by the courts. See, *e.g., In re Christopher M.* (2005) 127 CA4th 684, 695, 26 CR3d 61 (condition of probation requiring that records of juvenile's psychological treatment be made available to court and probation officer does not violate psychotherapist-patient privilege); *In re Pedro M.* (2000) 81 CA4th 550, 555, 96 CR2d 839 (when juvenile is required to participate in court-ordered therapy, juvenile cannot prevent therapist from reporting on juvenile's progress by asserting psychotherapist-patient privilege); *Scull v Superior Court* (1988) 206 CA3d 784, 790, 254 CR 24 (allowing for balancing of interests in certain narrow instances to determine whether psychotherapist-patient privilege applies). But see *In re Kristine W.* (2001) 94 CA4th 521, 528, 114 CR2d 369 (therapist was precluded from disclosing confidential communications or details of therapy when juvenile was required to participate in court-ordered therapy; therapist can provide only limited disclosure that assists court in evaluating whether further orders are necessary for juvenile's benefit).

On whether psychological condition is automatically tendered in custody and visitation cases, thus waiving the privilege, see §3.98.

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§3.106 E. Waiver of Physician-Patient or Psychotherapist-Patient Privilege

The physician-patient or psychotherapist-patient privilege is waived if the patient, without coercion, discloses a significant part of the communication or allows someone else to do so. Evid C §912(a); *Manela v Superior Court* (2009) 177 CA4th 1139, 1146, 99 CR3d 736 (privilege waived when husband consented to wife's presence during medical examination). Additionally, consent may be manifested by the privilege holder's failure to claim the privilege in any proceeding in which he or she has legal standing and an opportunity to claim the privilege. See *Inabnit v Berkson* (1988) 199 CA3d 1230, 1238, 245 CR 525 (privilege waived when patients did nothing after receiving notice that their therapist's records regarding their treatment were being subpoenaed); *Colleen M. v Fertility & Surgical Assocs. of Thousand Oaks* (2005) 132 CA4th 1466, 1479, 34 CR3d 439.

However, the mere disclosure of the existence of the relationship, or even the purpose of the treatment, does not constitute a waiver under Evid C §912. *Roberts v Superior Court* (1973) 9 C3d 330, 340, 107 CR 309; *San Diego Trolley, Inc. v Superior Court* (2001) 87 CA4th 1083, 1092, 105 CR2d 476. A waiver also does not occur by the mere exchange of information or records between a physician or psychotherapist and other physicians treating the patient. Furthermore, if the physician or psychotherapist discloses the communication without the consent of the patient, there is no waiver of the privilege. *Roberts,* 9 C3d at 341. Nor does the disclosure of current communications with a physician "relate back" to a patient's communications with a physician many years earlier. *Manela*, 177 CA4th at 1148. A consent form allowing for waiver of the privilege is strictly construed against the party supplying the form and is generally frowned on by courts. 9 C3d at 343. A waiver does occur, however, when the patient tenders the issue of his physical health by filing an action for personal injuries, but only concerning information that relates to the claimed injuries. See *Slagle v Superior Court* (1989) 211 CA3d 1309, 1313, 260 CR 122. See also §3.98.

JUDGE'S PERSPECTIVE: It is a delicate issue whether information relates to the claimed injuries; often, the defense of a matter is to show that a plaintiff's injuries are not new and that earlier conditions are the cause of current complaints, but the presumptions of privilege and a person's right to privacy weigh heavily and are difficult to overcome.

The submission of a claim for psychiatric disability coverage is a condition precedent to receiving insurance and does not constitute a waiver of the psychotherapist-patient privilege. *Pollock v Superior Court* (2001) 93 CA4th 817, 821, 113 CR2d 453. Nor does the waiver of the psychotherapist-patient privilege in one proceeding necessarily imply waiver in a later unrelated proceeding. *San Diego Trolley,* 87 CA4th at 1093 (holding that individual did not waive privilege through disclosures made in a workers' compensation proceeding). Furthermore, even if a waiver occurs, the patient still has general privacy rights under the California and federal constitutions. 87 CA4th at 1092.

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VII. GOVERNMENTAL, LEGISLATIVE, AND JUDICIAL PRIVILEGES

§3.107 A. Mental Processes of Judicial, Quasi-Judicial, and Administrative Officers

California law. A judicial or administrative officer, including a local official acting in a quasi-judicial or administrative capacity, generally cannot be questioned regarding the mental processes used to reach a decision. *City of Fairfield v Superior Court* (1975) 14 C3d 768, 779, 122 CR 543; *State v Superior Court (Veta Co.)* (1974) 12 C3d 237, 258, 115 CR 497; *San Joaquin Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 170, 76 CR3d 93; *Governing Bd. v Superior Court* (1985) 167 CA3d 1158, 1161, 213 CR 771. Originating in federal law, the rule is necessary to preserve the integrity of the judicial process. See *U.S. v Morgan* (1941) 313 US 409, 422, 85 L Ed 1429, 1435, 61 S Ct 999.

The privilege also reflects the rule that in proceedings to review a quasi-judicial determination, review is generally limited to the administrative record of the proceeding before the local agency. CCP §1094.5; *City of Fairfield v Superior Court, supra*.

Federal law. The federal courts have likewise recognized and enforced the deliberative process privilege. Under the privilege, "a government can withhold documents or prevent testimony that 'reflect[s] advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.'" *FTC v Warner Communications* (9th Cir 1984) 742 F2d 1156, 1161.

The purpose of the privilege is "'to promote frank and independent discussion among those responsible for making governmental decisions and also to protect against premature disclosure of proposed … policies or decisions.'" *North Pacifica, LLC v City of Pacifica* (ND Cal 2003) 274 F Supp 2d 1118, 1120, aff'd (9th Cir 2008) 526 F3d 478.

A litigant invoking the deliberative process privilege need not demonstrate prejudice from the proposed discovery or disclosure. *California Native Plant Soc. v U.S. Environmental Protection Agency* (ND Cal 2008) 251 FRD 408, 411 ("Agencies do not need to establish harm from the release of each specific document").

Application of the deliberative process privilege is not automatic or indiscriminate. *Pacific Fisheries, Inc. v U.S.* (9th Cir 2008) 539 F3d 1143, 1148 ("Factual portions of documents covered by the deliberative process privilege must be segregated and disclosed unless they are 'so interwoven with the deliberative material that [they are] not [segregable].'"); *California Native Plant Soc.,* 251 FRD at 411 (agency's privilege log did not provide sufficient information to enable court to determine whether deliberative process privilege applied).

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§3.108 B. Mental Processes of Legislators

Courts will not allow inquiry into the mental processes and subjective motives of those who vote on legislation. *City & County of San Francisco v Cooper* (1975) 13 C3d 898, 913, 120 CR 707; *County of Los Angeles v Superior Court (Burroughs)* (1975) 13 C3d 721, 727 n5, 119 CR 631. See §1.56. This rule is based on the doctrine of "separation of powers" (see Cal Const art III, §3), as well as the practical difficulty of determining whether an improper motive actually affected a legislator's vote.

The rule has been vigilantly enforced. See *San Joaquin County Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 172, 76 CR3d 93 (depositions of commission chair and members not allowed because they would go to "decision making process of the commissioners"); *Connecticut Indem. Co. v Superior Court* (2000) 23 C4th 807, 814, 98 CR2d 221 (court may not second-guess purposes of legislative investigation if reasons set forth in resolution are facially legitimate); *Nadler v Schwarzenegger* (2006) 137 CA4th 1327, 1336, 41 CR3d 92 (evidence of individual legislators' mental processes is 'irrelevant' to judicial task and is not proper subject of discovery requests); *Schroeder v Irvine City Council* (2002) 97 CA4th 174, 192, 118 CR2d 330 (plaintiff could not use discovery to determine legislators' motives, as any motives were irrelevant to City Council's action); *City of Santa Cruz v Superior Court* (1995) 40 CA4th 1146, 48 CR2d 216 (plaintiffs not permitted to depose city's planning director and commissioners on whether they were predisposed to vote for zoning plan); *Board of Supervisors v Superior Court (Mun. Court Judges' Ass'n, Los Angeles County)* (1995) 32 CA4th 1616, 1626, 38 CR2d 876 (party may not evade prohibition against questioning legislators about thought processes and motives by posing questions to others about matters that relate to legislator's thought processes and motives). But see *City of King City v Community Bank of Cent. Cal.* (2005) 131 CA4th 913, 931 n12, 32 CR3d 384 (legislators are not immune from discovery into their knowledge of facts).

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§3.109 C. Official Information

Under Evid C §1040, public entities have a privilege not to disclose "official information." This is defined as information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public before the claim of privilege is made. Evid C §1040(a). Official information that is shared between governmental agencies will remain privileged if there is no disclosure to persons with no "official interests" in the information. *Michael P. v Superior Court* (2001) 92 CA4th 1036, 1048, 113 CR2d 11 (no waiver of official information privilege when police department shared official information with social services agency). The privilege found in Govt C §6254(f) precludes disclosure of information even if the underlying investigation is closed. *Rackauckas v Superior Court* (2002) 104 CA4th 169, 174, 128 CR2d 234 (newspaper's request for report into alleged misconduct of police officers denied even after district attorney closed its file for lack of sufficient evidence).

Government entity bears burden of showing privilege. The governmental entity has the burden of showing that the requested documents are privileged and must further explain why the official privilege applies, or declare that it cannot so state in open court without disclosing the privileged information. *Torres v Superior Court* (2000) 80 CA4th 867, 872, 95 CR2d 686. Official information is protected by the privilege if disclosure is forbidden by state or federal law or if disclosure is against the public interest because the necessity for confidentiality outweighs the necessity for disclosure in the interest of justice. The interest of the public entity as a party in the outcome of the proceeding may not be considered. Evid C §1040(b)(2). In a juvenile dependency hearing, to determine the confidentiality of information requested, the court must conduct an in camera review for each item a public agency seeks to protect under the official information privilege. *Michael P. v Superior Court* (2001) 92 CA4th 1036, 1043, 113 CR2d 11 (juvenile court must examine in camera each item requested by parents and weigh parents' need for disclosure against law enforcement's need for confidentiality).

For a discussion of the official information privilege of public entities under Evid C §1040, see *Shepherd v Superior Court* (1976) 17 C3d 107, 123, 130 CR 257, overruled in part on other grounds in *People v Holloway* (2004) 33 C4th 96, 131, 14 CR3d 212; *Parnes v Superior Court* (1978) 81 CA3d 831, 835, 146 CR 818 (when faced with claim of official information privilege, trial court must weigh competing interests and, if discovery is denied, must find that disclosure would be "against the public interest" within meaning of Evid C §1040(b)(2)); *People v Superior Court (Lyons Buick-Opel-GMC, Inc.)* (1977) 70 CA3d 341, 344, 138 CR 791 (disclosure of official investigative material held against public interest under Evid C §1040(b)(2) absent substantial and credible showing of invidious discrimination); *Los Angeles Police Dep't v Superior Court* (1977) 65 CA3d 661, 135 CR 575 (records of intelligence information held exempt from disclosure in action under California Public Records Act (Govt C §§6250-6276.48)). Of necessity, the weighing of competing interests involves a consideration of consequences to both the litigant and to the public of disclosure or nondisclosure, including the public's interest in ensuring that justice is done in a particular case. *Dominguez v Superior Court* (1980) 101 CA3d 6, 11, 161 CR 407.

Peace officer personnel records. The "official information" privilege in Evid C §1040 should not be confused with the privilege for peace officer personnel records under Evid C §§1043-1047. These sections provide the exclusive method to obtain discovery from a peace officer's personnel records and require counsel to proceed by motion. See California Criminal Law Procedure and Practice §§11.19-11.24 (Cal CEB Annual). See also *Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897 (discovery of excessive force complaints against officers). However, the "official information" privilege is waived if the documents or information is disclosed during a personnel commission hearing open to the public. *Berkeley Police Ass'n v City of Berkeley* (2008) 167 CA4th 385, 401 n16, 84 CR3d 130.

On the Public Records Act, see §§2.48, 3.110.

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§3.110 1. Public Records Act

The California Public Records Act (Govt C §§6250-6276.48) provides that, on request, any person may examine and obtain a photocopy of any public record in the file of any state or local governmental entity unless the requested records are exempt from disclosure. Govt C §6253; *Teamsters Local 856 v Priceless, LLC* (2003) 112 CA4th 1500, 1510, 5 CR3d 847; *Johnson v Winter* (1982) 127 CA3d 435, 437, 179 CR 585.

Under Govt C §6253.1, the public agency is required to assist the public in requesting public records by helping to identify the records and information that are responsive to the request, describing the location or information technology in which the records and information exist, and providing suggestions for overcoming any practical basis for denying access to the records or information sought. Govt C §6253.1(a). In the alternative, the public agency may make the requested records available or provide an index of its records. The above is not required if the requested records are not discoverable based on an exemption under Govt C §6254. Govt C §6253.1(d)(2). For discussion of using the Public Records Act to supplement discovery, see §2.48.

A recent case has held a governmental agency, such as a city, to be a "person" entitled to obtain records under the Public Records Act. *Los Angeles Unified School Dist. v Superior Court* (2007) 151 CA4th 759, 771, 60 CR3d 445.

Government entity bears burden of showing record exempt from disclosure. An agency that withholds a record must justify its decision by demonstrating that the record is exempt under one of the Public Records Act's express exemption provisions or that the public interest served by not disclosing the record clearly outweighs the public interest served by its disclosure. *The Copley Press, Inc. v Superior Court* (2006) 39 C4th 1272, 1282, 48 CR3d 183 (peace officer disciplinary appeal records exempt from disclosure under Govt C §6254(k), which incorporates Pen C §§832.7-832.8). See also *International Fed'n of Prof. & Tech. Eng'rs v Superior Court* (2007) 42 C4th 319, 329, 64 CR3d 693 (disclosure of salaries of public employees earning more than $100,000 a year not unwarranted invasion of privacy).

Effect on discovery. Exemptions found in the Public Records Act do not outright preclude discovery of records sought in pending litigation that are relevant to the issues in the litigation. *Marylander v Superior Court* (2000) 81 CA4th 1119, 1125, 97 CR2d 439 (when litigant sought production of memorandum between California governmental agency and governor, court was required to balance need for preserving confidentiality against litigant's interest in disclosure). Nor does the Public Records Act prevent litigants from discovering relevant documents. Govt C §6260. See *County of Los Angeles v Superior Court* (2000) 82 CA4th 819, 830, 98 CR2d 564 (document is not protected by "pending litigation" exception under Govt C §6254(b) unless "specifically prepared for use in litigation"). In *Marylander*, the court observed that Evid C §1040 is the "*exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy*" (81 CA4th at 1125) (emphasis in original), noting that a governmental agency cannot rely on a common law privilege, "sometimes referred to as the deliberative process privilege or executive privilege." 81 CA4th at 1126. This is not an absolute privilege, but a conditional one, and requires the court to balance the competing interests. 81 CA4th at 1126.

NOTE: There is a split of authority regarding whether the Public Records Act is the exclusive means for litigating an allegedly wrongful withholding of public records. Compare *County of Santa Clara v Superior Court* (2009) 171 CA4th 119, 89 CR3d 520 (allowing taxpayers' action to challenge county policy of requiring identity information from persons making Public Records Act requests), with *Filarsky v Superior Court* (2002) 28 C4th 419, 433, 121 CR2d 844 (public entity not allowed to pursue ordinary declaratory relief action to circumvent procedures and other provisions specified in Public Records Act).

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§3.111 2. Federal Freedom of Information Act

An analogous right to inspect the records of federal agencies is created by the Freedom of Information Act (FOIA) (5 USC §552). The California courts have approved looking to federal cases construing the FOIA as an aid to interpreting the Public Records Act. *State Bd. of Equalization v Superior Court* (1992) 10 CA4th 1177, 1186 n10, 13 CR2d 342.

In *Williams v Superior Court* (1993) 5 C4th 337, 348, 19 CR2d 882, however, the supreme court rejected the argument that Govt C §6254(f) incorporates limiting criteria in the FOIA, which has a comparable exemption.

For a case interpreting the trade secrets and law enforcement exception to the FOIA, see *Lion Raisins, Inc. v U.S. Dep't of Agric.* (9th Cir 2004) 354 F3d 1072.

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§3.112 3. Ralph M. Brown Act

The Ralph M. Brown Act (Govt C §§54950-54963) is California's public meeting law. It provides, in general, that the public's business must be conducted in duly noticed meetings that are open to the public. Govt C §54950. The Ralph M. Brown Act is primarily applicable to local legislative bodies. Govt C §54952. It makes it a misdemeanor for a quorum of any local legislative body to meet privately to discuss or take action on any matter of public business. Govt C §54959.

The requirement that public business be transacted in public is subject to several exceptions, including personnel matters involving the public entity's employees, the attorney-client privilege, and the work product doctrine. Under the Brown Act, legislative bodies, such as a city council, may hold closed sessions to discuss certain matters, and confidentiality may be inferred for the proceedings at such sessions. *Kleitman v Superior Court* (1999) 74 CA4th 324, 331, 87 CR2d 813. The courts have recognized that cities, no less than private clients, require the right of confidential communications with their attorneys, and a city council is accordingly permitted to meet in "closed session" with its attorneys to discuss pending litigation. Govt C §54956.9. See *Roberts v City of Palmdale* (1993) 5 C4th 363, 378, 20 CR2d 330; *Sutter Sensible Planning, Inc. v Board of Supervisors* (1981) 122 CA3d 813, 824, 176 CR 342 ("Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps").

Attorney-client communications and the Brown Act. Certain rules apply to attorney-client communications that are subject to the Brown Act. For example, an attorney's right to meet with a client is ordinarily unlimited, and communications with the client are ordinarily privileged even after the client's death, under Evid C §953. However, an attorney may meet privately with a local legislative body only if there is pending or threatened litigation, or if another exception to the Brown Act permits it, and then only if the statutory requirements for public notice of the closed session are met. Govt C §54956.9. The attorney-client privilege may be invoked for confidential written materials distributed to local legislators at a public meeting. Govt C §54957.5. It is clear that a local legislative body may not meet in closed session merely to receive confidential communications from its lawyer. The confidential communications must themselves fall within one of the categories that warrant a closed session. *Roberts v City of Palmdale* (1993) 5 C4th 363, 375, 20 CR2d 330. For discussion of attorney-client privilege generally, see §§3.4-3.51.

On the relationship between the Brown Act and the California Public Records Act (Govt C §§6250-6276.48), see *Roberts v City of Palmdale, supra* (Brown Act does not require disclosure of confidential memorandum prepared by city attorney that is privileged under Public Records Act and Evid C §953).

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§3.113 D. Compulsory Vehicle Accident Reports

Under Veh C §20012, official accident reports are confidential except for "any person who may have a proper interest therein," including but not limited to:

- The driver or drivers involved, their representatives, guardians or conservators, or, if a minor or minors, their parents;
- Injured persons named in the report;
- Owners of the damaged vehicles or property;
- Persons who may incur civil liability; and
- Any attorney who declares under penalty of perjury that he or she represents any of the above persons.

In *State ex rel Dep't of Transp. v Superior Court* (*Hall)* (1985) 37 C3d 847, 855, 210 CR 219, the court held that a person charged with a crime arising from an automobile accident can establish a "proper interest" under Veh C §20012 to obtain the reports of other accidents at the same location. To establish a proper interest, the accused must:

- Demonstrate that the requested information will facilitate the ascertainment of the facts and a fair trial;
- Describe the requested information with enough specificity to preclude the possibility of a "fishing expedition"; and
- Make a showing that the information cannot be readily obtained elsewhere.

Although *Hall* applies only to criminal defendants, its rationale might prove useful to civil litigants seeking similar information.

Despite the limitation on discoverability in Veh C §20012, evidence of any prior accidents is discoverable to show alleged negligence in the state's design, construction, and maintenance of the accident site. *Davies v Superior Court* (1984) 36 C3d 291, 300, 204 CR 154 (allowing discovery of statistical data derived from official accident reports). It is the details contained in the reports, such as the identities of the persons involved, the witnesses, and the investigating officers, that are confidential. The fact of prior occurrences is not. 36 C3d at 301; *Nelson v Superior Court* (1986) 184 CA3d 444, 229 CR 94 (in absence of sufficient showing of good cause, denying discovery of California Highway Patrol accident reports to plaintiff who had already received data on prior accidents). See also California Government Tort Liability Practice §§12.147-12.149 (4th ed Cal CEB 1999).

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§3.114 E. Department of Motor Vehicle Records

Under Veh C §1808.5, all records of the department about the physical or mental condition of anyone are confidential and not open to public inspection. Precluding public inspection, however, does not create an evidentiary privilege.

Such information is official information under Evid C §1040 (see §3.109) and its discoverability requires a balancing between preserving confidentiality and allowing disclosure in the interest of justice. *DMV v Superior Court* (2002) 100 CA4th 363, 122 CR2d 504 (ordering production of DMV records on physical and mental condition of driver charged with vehicular homicide). Similarly, other sections of the Vehicle Code protect confidential information. See, *e.g.,* Veh C §§1808.2, 1808.4, 1808.6, and 1808.21 on the confidentiality of residential address information of public officials and public employees, their spouses and children, and any other person.

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§3.115 F. Information Practices Act of 1977

To implement California's constitutional right of privacy, the legislature enacted the Information Practices Act of 1977 (CC §§1798-1798.78). The Act was designed to prevent the misuse of information collected by the government about its citizens, the discovery of which could be embarrassing or prejudicial (*Bates v Franchise Tax Bd.* (2004) 124 CA4th 367, 376, 21 CR3d 285), and strictly limits dissemination of personal information obtained by government agencies. Among other things, the Act requires that an agency maintain only such personal information as is necessary to accomplish its goal; that to the greatest extent possible, the information be gathered from the individual who is the subject of the information; and that the agency retain the sources of the information.

In the context of an agency investigation, such as one by the California Commission on Teacher Credentialing and the Committee on Credentials of alleged misconduct by a teacher, the Act supports an agency regulation redacting all identifying information in agency documents about complainants and witnesses, other than their names. *California Teachers Ass'n v California Comm'n on Teacher Credentialing* (2003) 111 CA4th 1001, 4 CR3d 369 (trial court's denial of petition for writ of mandate by teacher under investigation to obtain addresses and other identifying information about complainants and witnesses upheld on appeal).

Certain aspects of some provisions of the Act are limited by the federal government's 2003 amendments to the Fair Credit Reporting Act (FCRA) (15 USC §§1681-1681x). See *American Bankers Ass'n v Gould* (9th Cir 2005) 412 F3d 1081 (FCRA preempts at least some of state law's affiliate-sharing provisions). See also 15 USC §1681t(b)-(c).

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VIII. MISCELLANEOUS PRIVILEGES

A. Tax Returns and Related Information

§3.116 1. General Rule

Under California law, tax returns are not generally discoverable in civil actions (*Webb v Standard Oil Co.* (1957) 49 C2d 509, 513, 319 P2d 621) or in administrative proceedings (*King v Mobile Home Rent Review Bd.* (1989) 216 CA3d 1532, 1536, 265 CR 624). When a husband and wife file a tax return jointly, each must waive the privilege before a court can require disclosure. *Coate v Superior Court* (1978) 81 CA3d 113, 115, 144 CR 350. Note that under federal law, there is no privilege for tax returns. *Heathman v U.S. Dist. Court* (9th Cir 1974) 503 F2d 1032, 1035. See §3.118.

Income tax returns. In *Webb v Standard Oil Co.,* 49 C2d at 513, the supreme court based its analysis on former Rev & T C §19282, which made it a misdemeanor for any employee of the Franchise Tax Board to disclose any information contained in a tax return. As the supreme court stated (49 C2d at 513), the purpose of this statute

> is to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes. If the information can be secured by forcing the taxpayer to produce a copy of his return, the primary legislative purpose of the secrecy provisions will be defeated. The effect of the statutory prohibition is to render the returns privileged, and the privilege should not be nullified by permitting third parties to obtain the information by adopting the indirect procedure of demanding copies of the tax returns.

Current Rev & T C §7056 (governing disclosure of information in tax returns) is equivalent to former Rev & T C §19282 and should be interpreted consistently. *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 6, 123 CR 283. Because of the overlap in information contained in federal and state tax returns, both are privileged under California law. *Webb v Standard Oil Co.,* 49 C2d at 513.

Other tax returns. The privilege protecting income tax returns also protects employment tax returns (*Crest Catering Co. v Superior Court* (1965) 62 C2d 274, 276, 42 CR 110), sales tax returns (*Sav-On Drugs v Superior Court,* 15 C3d at 6), tax returns of a new spouse in litigation between former spouses regarding child support payments (*In re Marriage of Brown* (1979) 99 CA3d 702, 707, 160 CR 524), W-2 forms (*Brown v Superior Court* (1977) 71 CA3d 141, 143, 139 CR 327), and income tax returns of a law corporation of which the husband was a member (*Rifkind v Superior Court* (1981) 123 CA3d 1045, 1048, 177 CR 82, disapproved on other grounds in *Schnabel v Superior Court* (1993) 5 C4th 704, 722, 21 CR2d 200).

Foreign tax returns. It has been held that although California case law creates a privilege for certain tax returns, the privilege does not apply to foreign tax returns. *Firestone v Hoffman* (2006) 140 CA4th 1408, 45 CR3d 534 (in suit on promissory note, plaintiff's foreign tax returns were relevant and not privileged).

Marital dissolution. The privilege also protects a third party's tax records in a marital dissolution proceeding. *Schnabel v Superior Court* (1993) 5 C4th 704, 720, 21 CR2d 200. In *Schnabel,* the supreme court interpreted and applied *Webb* and *Sav-On*. The court held that, in a marital dissolution proceeding, the wife was entitled to inspect financial records of a corporation in which her husband was a shareholder, including the corporate tax returns. However, the court held that the wife was not entitled to discover quarterly payroll tax returns or other records containing information relating to third persons. This decision was based on a shareholder's right of inspection of corporate documents (5 C4th at 722):

> Here, the marital community and the corporation are closely related; the corporation has but two shareholders, one of whom is Terry, and the marital community owns 30 percent of the stock. This is not a public corporation whose shares have a readily ascertainable market value. These facts, combined with the legislatively declared public policy in favor of full disclosure in a marital dissolution proceeding, warrant an exception to the privilege in this case limited to those tax returns that are reasonably related to the purpose for which they are sought.

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§3.117 2. Exceptions to Tax Return Privilege

The privilege against discovery of tax returns is not absolute. *Schnabel v Superior Court* (1993) 5 C4th 704, 721, 21 CR2d 200. The courts have recognized exceptions to the privilege, and have ordered that tax returns are discoverable in a variety of settings:

- **Intentional waiver.** When the privilege has been intentionally waived (*Crest Catering Co. v Superior Court* (1965) 62 C2d 274, 277, 42 CR 110);
- **Implied waiver.** When the gravamen of the lawsuit is so inconsistent with continued assertion of the privilege as to compel conclusion that the privilege has in fact been waived (*Wilson v Superior Court* (1976) 63 CA3d 825, 830, 134 CR 130 (plaintiff could not assert privilege concerning tax returns she placed into issue in malpractice lawsuit against accountants));
- **Public policy.** When a public policy greater than that of confidentiality of tax returns is involved (*Miller v Superior Court* (1977) 71 CA3d 145, 149, 139 CR 521 (policy favoring confidentiality of tax returns must give way to greater public policy of enforcing child support obligations));
- **Punitive damages.** *Weingarten v Superior Court* (2002) 102 CA4th 268, 276, 125 CR2d 371 (affirming trial court order (prior to punitive damages trial) compelling production of defendant's joint tax returns for 2 years on public policy grounds, subject to providing her husband with notice and redacting, to extent possible, any references to his sole and separate property).

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§3.118 3. Tax Returns Not Privileged Under Federal Law

Federal law recognizes no privilege for tax returns. *Stokwitz v U.S.* (9th Cir 1987) 831 F2d 893, 896; *Premium Serv. Corp. v Sperry & Hutchinson Co.* (9th Cir 1975) 511 F2d 225, 229; *Heathman v U.S. Dist. Court* (9th Cir 1974) 503 F2d 1032, 1035. Thus, although tax returns may not be discovered in a state court proceeding, their production may be compelled in a federal court proceeding. The federal courts possess broad powers, however, to impose orders to protect the legitimate privacy interests that litigants may have in their tax returns, or to limit or forbid discovery of such information if it has only marginal relevance to the subject matter of the litigation. The 9th Circuit has recognized that the "public policy against unnecessary public disclosure [of tax returns] arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns." *Premium Serv. Corp.,* 511 F2d at 229. See *Aliotti v Vessel Senora* (ND Cal 2003) 217 FRD 496, 497 (production of tax returns may be ordered only if relevant and requesting party demonstrates compelling need because information is unavailable through less intrusive means, *e.g.,* focused interrogatory questions).

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§3.119 4. Tax Advice

Generally courts do not recognize a privilege for communications between an accountant and his or her client regarding tax advice. *U.S. v Arthur Young & Co.* (1984) 465 US 805, 817, 79 L Ed 2d 826, 104 S Ct 1495; *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 383, 11 CR2d 51 (citing *U.S. v Arthur Young & Co.*). Following this line of reasoning, courts have held that communications with a lawyer who has been hired to prepare a tax return are not privileged because an accountant could have performed the same function. *U.S. v Davis* (5th Cir 1981) 636 F2d 1028, 1043 (preparation of tax returns is accounting and not legal function). *Deary v Superior Court* (2001) 87 CA4th 1072, 1082, 105 CR2d 132 (some or all records in a tax preparation file may be discoverable, short of the returns themselves). However, communications in connection with the rendering of legal advice on tax issues may be protected by the attorney-client privilege. See *In re Grand Jury Subpoena (Rich v U.S.)* (2d Cir 1984) 731 F2d 1032, 1037. See also §3.36.

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B. Trade Secrets

§3.120 1. Statement of Rule

The owner of a "trade secret" can refuse to disclose the secret and prevent another from disclosing it. However, the privilege does not apply if it will tend "to conceal fraud or otherwise work injustice." Evid C §1060; *State Farm Fire & Cas. Co. v Superior Court* (1997) 54 CA4th 625, 651, 62 CR2d 834. In determining whether the trade secret privilege applies, the court balances the interests of the claimant of the privilege (*i.e.,* the need for secrecy) with the interests of the party seeking disclosure (*i.e.,* the need to have the information for trial). In so balancing, the court must consider whether a protective order, or other less intrusive alternative, will protect the parties' interests. *Bridgestone/Firestone, Inc. v Superior Court* (1992) 7 CA4th 1384, 1393, 9 CR2d 709. If the information sought to be protected affects public health, the trial court is required to balance the interests of the parties and the public in reaching a decision on disclosure. *Stadish v Superior Court* (1999) 71 CA4th 1130, 1145, 84 CR2d 350.

In addition, trade secrets are protected by the Uniform Trade Secrets Act (CC §§3426-3426.11). Under the Act, a court must use "reasonable means" to preserve the secrecy of an alleged trade secret, including granting a protective order, holding "in-camera hearings," sealing court records, or ordering litigants not to disclose trade secrets without prior court approval. CC §3426.5; *ReadyLink Healthcare v Cotton* (2005) 126 CA4th 1006, 1017, 24 CR3d 720.

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§3.121 2. Trade Secret Defined

The term "trade secret," as it applies in the civil context, is defined as information, including a formula, pattern, compilation, program, device, method, technique, or process, that (1) derives actual or potential independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts under the circumstances to maintain its secrecy. CC §3426.1(d); Evid C §1061(a)(1). See *Masonite Corp. v County of Mendocino Air Quality Mgmt. Dist.* (1996) 42 CA4th 436, 445, 49 CR2d 639.

JUDGE'S PERSPECTIVE: One of the most common errors attorneys make in trying to protect alleged trade secret information is failing to make a sufficient showing concerning the second prong of the test, *i.e.,* that the client maintained the information on a confidential basis. The party contesting a motion to compel or seeking a protective order must show the efforts that the client employed to maintain the secrecy of the information. In this age of electronic information storage, it is necessary to convince the court of the electronic security methods employed. Attorneys can fall back on Evid C §917(b), however, which provides that a communication does not lose its privileged character solely because it is "communicated by electronic means" or because persons involved in its electronic delivery, facilitation, or storage may have access to its content.

Generally speaking, when a governmental agency requires the submission of trade secret information as part of a regulatory program, the agency is responsible for preserving the confidentiality of the information and may not disclose it in response to a Public Records Act request. However, governmental agencies are also generally free to disclose trade secret information to other governmental agencies when necessary to address an emergency that threatens the public health or safety. Various code provisions specifically provide that certain information submitted to the government is or is not to be considered a trade secret disclosable under the Public Records Act. See, *e.g.,* Govt C §§6254.2 (information regarding pesticide safety and efficacy), 6254.7 (information regarding air pollution); Health & S C §44346 (facility diagrams for toxic air emissions); 42 CA4th at 445 (discussing relationship between Govt C §6254.7 and Health & S C §44346).

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§3.122 3. Procedure for Asserting and Testing Trade Secret Privilege

The party claiming the trade secret privilege has the initial burden of showing that it meets the statutory criteria. *Citizens of Humanity, LLC v Costco Wholesale Corp*. (2009) 171 CA4th 1, 13, 89 CR3d 455. Once this is done, the burden shifts, and the party seeking discovery must make a prima facie and particularized showing that the information sought is (1) both relevant and necessary to the proof of, or defense against, a material element of one or more causes of action in the case and (2) essential to a fair resolution of the lawsuit. *Raymond Handling Concepts Corp. v Superior Court* (1995) 39 CA4th 584, 590, 45 CR2d 885. If this showing is made, the burden shifts back to the trade secret holder to demonstrate that there is some alternative to full disclosure that will not unduly hamper the adverse party in the preparation of the case. *Bridgestone/Firestone, Inc. v Superior Court* (1992) 7 CA4th 1384, 1393, 9 CR2d 709.

Either party may propose or oppose less intrusive alternatives to disclosure of the trade secret. *Bridgestone/Firestone, Inc.,* 7 CA4th at 1393 (disallowing discovery of trade secret information relating to the composition of tires because plaintiffs failed to prove that such information was necessary to their ability to prove their case); *Raymond Handling Concepts Corp.,* 39 CA4th at 590 (applying *Bridgestone/Firestone* test and determining that protective order would sufficiently protect defendants' interests).

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C. Privilege Against Self-Incrimination in Civil Proceedings

§3.123 1. Statement of Rule

Under the Fifth Amendment to the United States Constitution, a defendant in a criminal proceeding has the right to refuse to testify when doing so might tend to incriminate him or her. This privilege against self-incrimination has been extended to civil trials and administrative hearings as well. Evid C §940; *Dwyer v Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1432, 240 CR 297. See §5.9. But see Govt C §83119, providing special rules for application of privilege in context of investigations by Fair Political Practices Commission.

Acts that have already occurred. In most instances, the privilege against self-incrimination applies only to acts that have already occurred. A prospective application is generally limited to "disclosure requirements imposed upon a 'highly selective group' of persons 'inherently suspect' of criminal activity." *Smith v Superior Court* (1980) 110 CA3d 422, 426, 168 CR 24 (quoting *Albertson v SACB* (1965) 382 US 70, 79, 15 L Ed 2d 165, 172, 86 S Ct 194).

PRACTICE TIP: A defendant's right to assert the Fifth Amendment privilege depends on the possibility of prosecution, not just the likelihood.

Consider stay of civil case. The privilege protects only against the possibility of criminal sanctions. The possibility of being assessed exemplary damages or civil penalties is not sufficient to trigger the privilege. *People v Superior Court (Kaufman)* (1974) 12 C3d 421, 433, 115 CR 812; *Blackburn v Superior Court* (1993) 21 CA4th 414, 426, 27 CR2d 204.

JUDGE'S PERSPECTIVE: If criminal proceedings are pending against a defendant in a civil case arising from the same conduct (*e.g.,* a wrongful death action and a pending or potential vehicular manslaughter charge), plaintiff's discovery will be severely hampered by the defendant's exercise of this privilege. It may be well to file a lawsuit to protect the statute of limitations and then seek a stay from the trial court pending resolution of the criminal case.

Although staying the civil case is often desirable when criminal proceedings are pending against a defendant based on the same conduct, plaintiffs are not required to seek a stay and, in fact, can proceed with their case, including the filing of a summary judgment motion against a defendant who has invoked his or her Fifth Amendment privilege against self-incrimination. See *Fisher v Gibson* (2001) 90 CA4th 275, 278, 109 CR2d 145. In *Fisher,* the defendant opposed the summary judgment motion by asserting his privilege, but failed to provide evidence demonstrating that he was the target of a criminal investigation or showing by affidavit that facts necessary to oppose the motion might exist but could not be presented because of the criminal investigation. Without such evidence, the court cannot determine whether invoking the Fifth Amendment is a proper assertion of the privilege. 90 CA4th at 285. For this reason, plaintiffs should not rely on the mere invocation of the privilege to halt all trial proceedings.

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§3.124 2. Self-Incrimination Privilege Applies Only to Defendants

Does not apply to civil plaintiffs. The privilege against self-incrimination properly applies only to civil defendants and third party witnesses, not to civil plaintiffs. The plaintiff should not be able to make allegations against a defendant and then hide behind the shield of the privilege against self-incrimination. As the court stated in *Fremont Indem. Co. v Superior Court* (1982) 137 CA3d 554, 560, 187 CR 137, the plaintiff "cannot have his cake and eat it too." Plaintiffs who do invoke the privilege against self-incrimination may be exposed to any civil penalties at the court's disposal, including the ultimate sanctions of dismissal of the action or the striking of the pleadings. 137 CA3d at 560; *Dwyer v Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1432, 240 CR 297. Courts have wide discretion to impose such sanctions, which will be overturned on appeal only if an abuse of discretion is found. *Hartbrodt v Burke* (1996) 42 CA4th 168, 175, 49 CR2d 562.

PRACTICE TIP: Counsel representing a plaintiff invoking the privilege should try to show that the requested information is not central to the case and that a lesser sanction, *e.g.,* evidentiary sanctions or issue preclusion, will sufficiently protect the defendant.

Possible sanctions. Civil defendants who invoke the privilege can also be sanctioned. For example, in *A & M Records, Inc. v Heilman* (1977) 75 CA3d 554, 566, 142 CR 390, the defendant asserted the privilege in a deposition. To ensure that the defendant could not use the privilege to thwart plaintiff's discovery during deposition but then waive the privilege at trial and testify about those topics, the trial court issued an order precluding the defendant from testifying at trial about any matters about which he had already asserted the privilege. The court of appeal upheld the trial court's order, stating that the defendant should not be permitted to "blow hot and cold in this manner." 73 CA3d at 566. However, it has been held that the striking of the defendant's answer and resultant default are too harsh a penalty to impose against civil defendants exercising such an important constitutional right. *Alvarez v Sanchez* (1984) 158 CA3d 709, 712, 204 CR 864.

Privilege not absolute. A defendant may not be penalized in a civil case for exercising his or her Fifth Amendment right against self-incrimination. Evid C §940. However, a civil defendant's right to invoke the privilege is not absolute, and any of the accommodations developed by trial courts to protect this constitutional right in a civil proceeding, such as a temporary stay, or permitting assertion of the privilege but precluding the defendant from later testifying at trial, will be upheld absent a showing of abuse of discretion. *Fuller v Superior Court* (2001) 87 CA4th 299, 307, 104 CR2d 525.

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§3.125 3. Self-Incrimination Privilege Applies Only to Individuals

The privilege against self-incrimination applies only to individuals. *Craib v Bulmash* (1989) 49 C3d 475, 486 n13, 261 CR 686. It does not protect corporations (*Triple A Mach. Shop, Inc. v State* (1989) 213 CA3d 131, 137 n3, 261 CR 493) or persons acting on behalf of a corporation in a representative capacity (*Craib v Bulmash, supra*).

In a nuisance abatement action against a corporation, a business representative of the corporation cannot invoke the privilege to refuse to produce documents in response to a subpoena, even if the documents sought to be withheld might incriminate the representative. *People ex rel Clancy v Superior Court* (1985) 39 C3d 740, 745, 218 CR 24.

However, corporate employees are not required to verify discovery responses if doing so would violate their Fifth Amendment rights. A reasonable alternative is for the corporation to appoint an agent who can furnish information requested of the corporation without impairing such rights. *Avant! Corp. v Superior Court* (2000) 79 CA4th 876, 886, 94 CR2d 505 (writ of mandate that challenged trial court's order requiring indicted corporation to answer requests for admission and interrogatories was denied).

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§3.126 4. Self-Incrimination Privilege Applies Only to Communications or Testimony

Does not apply to physical evidence. The privilege applies only to "communications or testimony." The privilege cannot be used to prevent the use of physical evidence obtained from a person. *People v Ellis* (1966) 65 C2d 529, 533, 55 CR 385; *People v Tai* (1995) 37 CA4th 990, 996, 44 CR2d 253. Thus the privilege offers no protection against a compulsion to submit to fingerprinting, photographs, or measurements; to write or speak for identification; to appear in court; or to assume a stance, walk, or make a particular gesture. *People v Hess* (1970) 10 CA3d 1071, 1076, 90 CR 268. Similarly, there is no protection from being compelled to submit to voice identification or breathalyzer tests (*People v Ellis, supra*) or to provide a handwriting sample (*People v Tai, supra*).

Consistent with this concept, a person's refusal to submit to such tests is not privileged and can be commented on at trial. *People v Ellis, supra*. Furthermore, opinion testimony that a person has attempted to cheat on the tests can also be admitted. Thus, in *People v Tai, supra,* the court allowed opinion evidence that the defendant had attempted to disguise his handwriting when he was required to provide a handwriting sample.

Communication must be compelled. The Fifth Amendment creates a privilege to refuse to testify if the testimony might tend to incriminate the witness. The privilege may be invoked only if the judicial process is seeking to "compel" testimony. It cannot be used, for example, to prevent the compelled disclosure of documents that were voluntarily prepared. See *Craib v Bulmash* (1989) 49 C3d 475, 486 n14, 261 CR 686 (contents of subpoenaed business records that have been voluntarily prepared are not privileged because they were not made under compulsion). Even records kept as part of a mandatory statutory scheme are not privileged. 49 C3d at 490.

JUDGE'S PERSPECTIVE: It may be a defense to production, however, that the mere existence or possession of the documents would incriminate the party. The act of producing documents in response to a subpoena "may implicitly communicate 'statements of fact,'" and be within the ambit of the Fifth Amendment. *U.S. v Hubbell* (2000) 530 US 27, 35, 147 L Ed 2d 24, 35, 120 S Ct 2037 (even if government intended to make no use of act of producing documents, it made prohibited "derivative use" by basing indictment on such production.

It may also be a defense to production that the government cannot independently verify that the compelled documents "are in fact what they purport to be." *In re Grand Jury Subpoena (Doe v U.S.)* (9th Cir 2004) 383 F3d 905, 912 quoting *U.S. v Stone* (4th Cir 1992) 976 F2d 909, 911 (district court erred in requiring subpoenaed party to produce documents before grand jury, because government could not authenticate documents independent of subpoenaed party's testimony, and district court should have reviewed documents in camera before production).

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§3.127 5. Procedure for Claiming Self-Incrimination Privilege

A person claiming the privilege cannot just make a blanket refusal to testify. He or she must assert the privilege with specific reference to particular questions asked or evidence sought. *Blackburn v Superior Court* (1993) 21 CA4th 414, 428, 27 CR2d 204. Once that has been done, the court must evaluate each assertion of the privilege. 21 CA4th at 428; *Warford v Medeiros* (1984) 160 CA3d 1035, 1045, 207 CR 94 (listing possible factors the court could evaluate in making its inquiry); *Fuller v Superior Court* (2001) 87 CA4th 299, 308, 104 CR2d 525 (upholding trial court's refusal to enter blanket protective order against deposition on ground of self-incrimination). Hearings need not be conducted in camera, but the court must clearly state for the record the basis for its conclusion that the claim of privilege is or is not valid. *Warford v Medeiros,* 160 CA3d at 1048. In *Fuller v Superior Court,* 87 CA4th at 308*,* there was no abuse of discretion found in the trial court's refusal to issue a blanket order precluding the depositions of defendants or staying the civil action. On remand, the trial court could consider granting immunity from prosecution for deposition answers that are incriminating, requiring the defendants to immediately notify the court and parties if they later decide to waive the privilege, and setting a deadline for doing so with sufficient time before trial to allow for their depositions. The court could also invite the parties to stipulate on the scope of deposition questions within the Fifth Amendment privilege. On depositions, see chaps 5-6.

The person asserting the privilege against self-incrimination has the burden of showing that the proffered evidence might tend to incriminate him. Evid C §404. Once he has done so, "the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege." Evid C §404.

The language in Evid C §404 is broadly interpreted as encompassing not only answers that would themselves support criminal prosecution but also answers that would furnish a link in a chain of evidence necessary to prosecute the person invoking the privilege. *Gonzales v Superior Court* (1980) 117 CA3d 57, 63, 178 CR 358. It does not matter that the real reason for the person's silence has nothing to do with his or her fear of prosecution. *In re Sales* (1933) 134 CA 54, 24 P2d 916. In *Sales,* several people were alleged to have killed a woman by burying her alive, apparently in response to her spousal infidelity. The district attorney contended that many witnesses refused to testify not from fear of prosecution, but rather to shield the defendants. The court of appeal, though agreeing that there were grounds to believe the district attorney's assessment, nonetheless determined that it made no difference what the true reason was for the witnesses' silence. 134 CA at 60.

Evidence Code §404 is also broadly interpreted as applying in any instance in which a witness can show that the possibility of prosecution is more than fanciful. *Warford v Medeiros* (1984) 160 CA3d 1035, 1044, 207 CR 94. However, if the witness can no longer be punished (*e.g.,* if the statute of limitations has run), the privilege cannot be invoked. *Blackburn v Superior Court* (1993) 21 CA4th 414, 428, 27 CR2d 204.

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§3.128 6. Methods of Compelling Testimony Despite Self-Incrimination

Courts are encouraged to devise means by which a person can be required to disclose the otherwise privileged information in a civil case without violating their right to protection from self-incrimination.

Stay. One approach is to stay the civil proceedings until the criminal statute of limitations has run or until the criminal proceedings have ended and the time for appeal has run. *Pacers, Inc. v Superior Court* (1984) 162 CA3d 686, 689, 208 CR 743. However, courts will generally refuse to stay proceedings for long periods of time, especially if such delay would exceed the 5-year limit for prosecution of civil actions under CCP §583.310. See *Dwyer v Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1433, 240 CR 297; *Fuller v Superior Court* (2001) 87 CA4th 299, 308, 104 CR2d 525. On stay, see also §3.123.

There is no constitutional right to a stay of civil proceedings in the face of a related criminal prosecution. *People v Coleman* (1975) 13 C3d 867, 884, 120 CR 384, 533 P2d 1024. In determining whether to stay a civil proceeding, the trial court should consider the following criteria (*Avant! Corp. v Superior Court* (2000) 79 CA4th 876, 885, 94 CR2d 505, citing *Keating v Office of Thrift Supervision* (9th Cir 1995) 45 F3d 322, 324):

- The interest of the plaintiffs in proceeding expeditiously with the litigation or any particular aspect of it, and the potential prejudice to the plaintiffs of delay;
- The burden that any particular aspect of the proceedings may impose on the defendant;
- The convenience of the court in the management of its cases and the efficient use of judicial resources;
- The interests of persons not parties to the civil litigation; and
- The interest of the public in the pending civil and criminal litigation.

See also *Bains v Moores* (2009) 172 CA4th 445, 486, 91 CR3d 309 (applying *Avant!* criteria).

JUDGE'S PERSPECTIVE: Obviously, the court will be more receptive to a stay when it is a party who invokes the privilege, rather than a witness.

Use immunity. Courts sometimes grant "use immunity" for the testifying defendant or witness. Under use immunity, the court grants the defendant or witness immunity from criminal prosecution based on the use of the information disclosed or the fruits of that information. *People v Superior Court (Kaufman)* (1974) 12 C3d 421, 428, 115 CR 812. However, private parties in civil suits cannot create their own immunity orders and have those orders granted by a court. For obvious reasons, such a rule could substantially interfere with criminal prosecutions. Instead, in order for an immunity order to be granted in civil cases, the party proposing the order must provide the relevant prosecuting agencies (both state and federal) with notice of the proposed immunity order, including what testimony would or would not be immunized from criminal prosecution. The immunity order can then be granted only if the relevant agencies either fail to object to the proposed order or declare that the use immunity order will not unduly hamper criminal prosecution. *Daly v Superior Court* (1977) 19 C3d 132, 137 CR 14.

When the party proposing the immunity order is a public employer, a different rule applies. Absent a statute to the contrary, a public employer may compel answers from its own employee about the employee's job conduct without consulting prosecuting authorities about granting formal immunity. The strong interest in the public employer's ability to act promptly and freely to investigate and remedy misconduct by employees on the public payroll outweighs the incidental effect on enforcement of criminal laws that may arise because the compelled statements may not be used in a later criminal prosecution against the employee. *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 729, 88 CR3d 590. Similarly, in *Kaufman*, the supreme court held that a court, using its powers under the civil discovery statutes, could grant immunity to allow the state to compel deposition answers in a civil enforcement action. 12 C3d at 428.

Federal courts. For an example of how federal courts deal with this issue, see *FTC v J.K. Publications, Inc.* (CD Cal 2000) 99 F Supp 2d 1176, 1197 (decision to stay civil proceedings when parallel criminal proceeding exists is within discretion of trial court after considering competing interests).

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§3.129 7. Waiver of Self-Incrimination Privilege

The failure to timely assert the privilege against self-incrimination constitutes a waiver of it. *Brown v Superior Court* (1986) 180 CA3d 701, 712, 226 CR 10. However, a witness does not waive the privilege by furnishing testimony before trial. Rather, the witness is generally free to assert the privilege at trial even though he or she gave testimony in earlier proceedings. *Alvarez v Sanchez* (1984) 158 CA3d 709, 715, 204 CR 864; *In re Sales* (1933) 134 CA 54, 61, 24 P2d 916.

As noted in §3.124, the filing of a civil lawsuit will under most circumstances be deemed an implied waiver of the plaintiff's right to assert the privilege against self-incrimination. *Fremont Indem. Co. v Superior Court* (1982) 137 CA3d 554, 560, 187 CR 137 (plaintiff could not sue insurance company for fire loss and then assert Fifth Amendment privilege in response to questions about arson).

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D. Newsperson's "Shield Law"

§3.130 1. General Statement of Rule

Both California and federal law recognize a conditional privilege for a reporter to decline to reveal a source of information obtained by the reporter in the course of his or her employment. There are significant differences between the state and federal rule, and there are significant differences between the applicability of privilege in civil and criminal cases. This discussion will focus on the privilege in civil litigation.

California rule. Using virtually identical language, both the California Constitution and the Evidence Code provide that any person connected with or employed by a newspaper, magazine, or other periodical; by a press association or wire service; or by a radio or television station cannot be held in contempt for refusing to disclose a source of information or any unpublished information obtained or prepared as part of the reporter's employment. Cal Const art I, §2; Evid C §1070.

In *O'Grady v Superior Court* (2006) 139 CA4th 1423, 44 CR3d 72, Apple Computer sought to compel disclosure of the source of information about a future Apple product that the web magazines had posted on their websites. The court quashed the subpoenas and directed the trial court to grant a protective order, finding that the publishers were entitled to the protections of Cal Const art I, §2(b) and Evid C §1070(a). See also §§3.131, 3.164.

Unpublished information. "Unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, including, but not limited to, all notes, outtakes, photographs, tapes, recordings, or other data not disseminated to the public. It is irrelevant whether published information based on or related to such material has already been disseminated. Evid C §1070(c). See *Playboy Enters. v Superior Court* (1984) 154 CA3d 14, 201 CR 207.

Not a privilege against testifying. "The shield law is both expansive and narrow." *Rancho Publications v Superior Court* (1999) 68 CA4th 1538, 1543, 81 CR2d 274 (although newspaper advertisements are not automatically protected under shield law, court protected newspaper on grounds of free speech and privacy from subpoena that sought information about anonymous authors of ads). Although the shield law provides absolute immunity on its face, which cannot be overcome by a showing of need for a journalist's unpublished information, the law also provides immunity only against contempt and is not a privilege against testifying, which is available in other states. News organizations are still subject to sanctions if they are litigants in actions such as defamation suits; the protection yields to conflicting rights in appropriate circumstances, including the due process rights of criminal defendants. 68 CA4th at 1543. That is, the shield law cannot be used as both a sword and shield by a news agency. In *Dalitz v Penthouse Int'l, Ltd.* (1985) 168 CA3d 468, 214 CR 254, the trial court's dismissal of a cross-complaint for defamation by the magazine because of its reporters' refusal to disclose confidential sources was upheld on appeal.

Federal rule. In *Branzburg v Hayes* (1972) 408 US 665, 689, 33 L Ed 2d 626, 682, 92 S Ct 2646, the Supreme Court held that the First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and further that a reporter enjoys no constitutional testimonial privilege for an agreement to conceal facts relevant to a grand jury's investigation, including the identify of his source or facts concerning the source's criminal conduct. That case remains the law today. See, *e.g., In re Grand Jury Subpoena (Miller)* (DC Cir 2005) 397 F3d 964, 968.

Nevertheless, the federal circuit courts, including the Ninth Circuit, have interpreted *Branzburg,* at least in civil cases, as "establishing a qualified privilege for journalists against compelled disclosure of information gathered in the course of their work." *Shoen v Shoen* (9th Cir 1995) 48 F3d 412, 414. The Ninth Circuit has recognized "that routine court-compelled disclosure of research materials poses a serious threat to the vitality of the newsgathering process." 48 F3d at 415. The Ninth Circuit has therefore adopted a three-prong test: a litigant can overcome the valid assertion of the journalist's privilege by a nonparty "only upon a showing that the requested material is (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." 48 F3d at 416. The test makes disclosure the exception rather than the rule. See 48 F3d at 415.

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§3.131 2. *New York Times Co. v Superior Court*

The main case analyzing the California shield law as it applies in the civil context is *New York Times Co. v Superior Court* (1990) 51 C3d 453, 273 CR 98. In *New York Times Co.,* the plaintiffs, who had been involved in an automobile accident, filed a products liability action against the manufacturer of their automobile and the state of California. The automobile manufacturer served a subpoena on a local newspaper owned by the New York Times Company, whose reporter, acting in the scope of his employment, had taken several photographs of the accident scene, two of which were later published in his newspaper. The subpoena sought production of all photographs, negatives, notes, and letters in the newspaper's possession that related to the accident. When the newspaper refused to turn over its unpublished photographs of the accident, the automobile manufacturer filed a motion to compel.

In affirming the court of appeal's order to the trial court to deny the automobile manufacturer's motion to compel, the California Supreme Court made the following rulings:

- The shield law, by its very terms, provides to the witness (whether a party or a nonparty) immunity only from being adjudged in contempt. It does not protect against any other sanctions that a court may choose to impose. 51 C3d at 458.
- The shield law applies to all unpublished information gathered by a newsperson, even if the information was not obtained in confidence. 51 C3d at 461.
- If the newsperson has fulfilled all of the requirements articulated in Evid C §1070 (see above), the newsperson is absolutely immune from contempt and there is no need for a balancing test. 51 C3d at 461.

NOTE: The court noted that this differs from the criminal context, in which "a criminal defendant's federal constitutional right to a fair trial may in some cases overcome a claim of immunity under the state shield law." 51 C3d at 461. For a detailed analysis of the balancing test to be used in criminal actions, see *Delaney v Superior Court* (1990) 50 C3d 785, 797 n6, 268 CR 753. But see *Miller v Superior Court* (1999) 21 C4th 883, 89 CR2d 834 (holding that *state* constitutional right to due process of law in criminal proceeding did not affect shield law and did not require production of unpublished parts of journalist's video interview with defendant charged with murder).

In *New York Times,* the court left open the possibility, however, that a civil litigant seeking discovery from a nonparty newsperson might have a state or federal constitutional right that would have to be weighed against the immunity afforded by the shield law. *New York Times Co. v Superior Court* (1990) 51 C3d 453, 462 n11, 273 CR 98. See also *Mitchell v Superior Court* (1984) 37 C3d 268, 279, 208 CR 152 (employing balancing test in defamation case).

Note that a judgment of contempt is a prerequisite to a petition for extraordinary writ in the court of appeal seeking relief based on the shield law. *People v Sanchez* (1995) 12 C4th 1, 54, 47 CR2d 843, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209.

The journalist's qualified privilege does not extend to illegally gathering information or using information for a nonjournalistic purpose, such as disclosure to a foreign government or to any other person not associated with the journalist. *Anti-Defamation League of B'nai B'rith v Superior Court* (1998) 67 CA4th 1072, 1094, 79 CR2d 597. When the information is sought in a nondefamation action, such as for invasion of privacy, the establishment of a prima facie case should not be required before discovery is allowed. 67 CA4th at 1097.

The court in *O'Grady v Superior Court* (2006) 139 CA4th 1423, 44 CR3d 72 (see §3.130), applied the balancing test of *Mitchell v Superior Court* (1984) 37 C3d 268, 279, 208 CR 152, to hold that the online publishers enjoyed a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information. On the protection under the Stored Communications Act (18 USC §§2701-2712) for the subpoena to the e-mail service provider in *O'Grady,* see §3.164.

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§3.132 3. When Court Seeks Disclosure

Although the standard in *New York Times Co. v Superior Court* (1990) 51 C3d 453, 273 CR 98, applies to civil cases in which a party seeks disclosure of information, a different standard has been applied when the court, rather than a party, requested disclosure from a newsperson in order to control the judicial process or maintain an unbiased jury pool. In *In re Willon* (1996) 47 CA4th 1080, 55 CR2d 245, to allow for the selection of an unbiased jury, the trial court had issued a protective ("gag") order prohibiting certain court personnel from releasing certain information to the public. The trial court then held in contempt two newspersons who had broadcast a report that revealed information protected by the gag order but refused to reveal the source of their information.

The court of appeal held that, when a violation of a gag order has already occurred, the court should determine the necessity of disclosure of the newsperson's source of information by analyzing whether there is a substantial probability of future leaks and whether there are reasonable alternatives to disclosure that will protect the interests asserted by both the newsperson and the defendant. 47 CA4th at 1099. After analyzing these factors, the court of appeal in *Willon* annulled the judgment of contempt.

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§3.133 4. Editorial Process Privilege

The First Amendment may also provide a measure of protection against compelled disclosure of the "editorial process" by editors and news organizations. In *Herbert v Lando* (1979) 441 US 153, 60 L Ed 2d 115, 99 S Ct 1635, the United States Supreme Court considered a defamation action brought by a retired Army officer against the producer and editor of the *60 Minutes* television news program. Although the Supreme Court held that the producer in that case could be required to answer questions concerning his "mental process" during the preparation and editing of the program, the majority suggested this would not necessarily be true in all civil cases (441 US at 174, 60 L Ed 2d at 132):

> This is not to say that the editorial discussions or exchanges have no constitutional protection from casual inquiry. There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed. No such problem exists here, however, where there is a specific claim of injury arising from a publication that is alleged to have been knowingly or recklessly false.

The Supreme Court made clear that it was not formally creating an "editorial process privilege." 441 US at 174 n23, 60 L Ed 2d at 133 n23. The impact of the Court's dicta on California cases outside the defamation area is uncertain. See *Mitchell v Superior Court* (1984) 37 C3d 268, 278, 208 CR 152.

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E. Proceedings and Records of Health Care Professional Review Committees

§3.134 1. General Rule

The proceedings and records of certain specified health care review committees or bodies are not subject to discovery in civil actions; Evidence Code §1157 provides "a blanket exclusion from discovery to proceedings and records of committees of hospital medical staffs concerned with evaluation and improvement of the quality of care in the hospital." *University of S. Cal. v Superior Court* (1996) 45 CA4th 1283, 1288, 53 CR2d 260; Evid C §§1157(a), 1157.5-1157.7. It should be noted, however, that this statute creates only a privilege against discovery from medical staff committees, but does not bar the introduction of evidence otherwise properly obtained. *Fox v Kramer* (2000) 22 C4th 531, 539, 93 CR2d 497, quoting *Matchett v Superior Court* (1974) 40 CA3d 623, 629 n3, 115 CR 317 ("[l]iterally, §1157 establishes an immunity from discovery but not an evidentiary privilege in the sense that medical staff records are excluded from evidence"). Thus, in a medical malpractice case, for example, a plaintiff may discover whether a hospital evaluated its physicians and may seek a hospital's administrative records and files that do not encompass medical staff committee documents or proceedings. See 40 CA3d at 628; *Brown v Superior Court* (1985) 168 CA3d 489, 501, 214 CR 266.

The purpose of the statutes is to promote a full and frank evaluation of health care professionals and facilities by members of a peer group and to insulate that evaluation from scrutiny in actions for damages. See *Matchett v Superior Court* (1974) 40 CA3d 623, 115 CR 317. Unless subject to an exception, no person in attendance at a meeting of these committees can be required to testify about what transpired at that meeting. Evid C §§1157(b), 1157.5-1157.7. The statutes do *not,* however, prohibit voluntary disclosure of such information. See *West Covina Hosp. v Superior Court* (1986) 41 C3d 846, 854, 226 CR 132.

In deciding whether the protection afforded by the statutes applies to a specific situation, courts will generally determine whether the legislative intent underlying the statutes would be furthered by allowing or disallowing discovery. See *Cedars-Sinai Med. Ctr. v Superior Court* (1993) 12 CA4th 579, 588, 16 CR2d 253; *Brown v Superior Court* (1985) 168 CA3d 489, 214 CR 266.

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§3.135 2. Entities Subject to Statutory Protection

The protection afforded to health care review committees by Evid C §§1157(a) and 1157.5-1157.7 applies to the records and proceedings of:

- Medical, medical-dental, podiatric, registered dietician, psychological, marriage and family therapist, licensed clinical social worker, or veterinary hospital staff committees, and peer review bodies, under Bus & P C §805, for physicians, surgeons, podiatrists, clinical psychologists, marriage and family therapists, clinical social workers, or dentists, having responsibility for evaluating and improving the quality of health care rendered in the hospital or for that peer review body (Evid C §1157(a));

NOTE: It has been held that Evid C §1157 applies to "correctional treatment facilities," which include the Jail Mental Health Services Division that oversees or provides mental health services to the inmates at the Los Angeles County Jail. *County of Los Angeles v Superior Court* (2006) 139 CA4th 8, 42 CR3d 390.

- Medical-dental, dental hygienist, chiropractic, podiatric, registered dietitian, psychological, veterinary, or acupuncturist review committees of local professional societies (Evid C §1157(a));
- An organized committee of any nonprofit medical care foundation or professional standards review organization that is organized in a manner that makes available professional competence to review health care services with respect to medical necessity, quality of care, or economic justification of charges or level of care (Evid C §1157.5);
- A committee established under Welf & I C §§4070 and 5624 having the responsibility of evaluation and improvement of the quality of mental health care rendered in county-operated and contracted mental health facilities (Evid C §1157.6);
- Any committee established by a local governmental agency to monitor, evaluate, and report on the necessity, quality, and level of specialty health services, including trauma care services provided by a general acute care hospital that has been designated or recognized by that governmental agency as qualified to render specialty health care services (Evid C §1157.7).

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§3.136 3. What Constitutes a "Committee"

To qualify as an organized committee under Evid C §1157, a meeting or conference need not comply with specific formalities. The meeting can be attended by persons who are not physicians, and it need not include minutes. The determining factor is whether the meeting satisfies the purpose of an organized committee under the statute: *i.e.,* the improvement of patient care and the evaluation of medical personnel by their peers. *County of Los Angeles v Superior Court (Martinez)* (1990) 224 CA3d 1446, 274 CR 712. Although the court's decision in *Martinez* applied specifically to committees under Evid C §1157, the logic of its analysis also applies to committees under Evid C §§1157.5-1157.7.

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§3.137 4. Scope of Protection

Scope of protection. The protections afforded by Evid C §1157 include deliberations relating to the use of a particular medical procedure (*St. Francis Hosp. v Superior Court* (1988) 205 CA3d 438, 252 CR 380) and the identity of the physicians who participated in the committee (*Cedars-Sinai Med. Ctr. v Superior Court* (1993) 12 CA4th 579, 588, 16 CR2d 253). It does not, however, protect whether a hospital screened and evaluated the competence of its medical staff and whether the hospital required a particular doctor to have medical malpractice insurance. *Brown v Superior Court* (1985) 168 CA3d 489, 214 CR 266.

Protection of health care peer review committee records and proceedings under Evid C §1157 does not apply to discovery in criminal cases. *People v Superior Court* (*Memorial Med. Ctr.*) (1991) 234 CA3d 363, 286 CR 478. (But see *Scripps Mem. Hosp. v Superior Court* (1995) 37 CA4th 1720, 44 CR2d 725, disagreeing with scope of decision in *Memorial Med. Ctr.*)

The Evid C §1157 protections may not apply in federal 42 USC §1983 actions. At least one court has found that the Evidence Code provision conflicts with liberal federal discovery rules. See *Leon v County of San Diego* (SD Cal 2001) 202 FRD 631. But see *County of Los Angeles v Superior Court* (2006) 139 CA4th 8, 42 CR3d 390 (plaintiffs failed to show that denying discovery of documents generated by chair of quality assurance committee for county's jail mental health services agency would affect their federal rights).

Additionally, the protection does not apply to certain types of research and studies. Hospital medical or medical-dental staff committees may engage in research study for the purpose of reducing morbidity or mortality, and written records of interviews, reports, and memoranda may be discoverable, except for the patient identities, but may not be admitted as evidence in administrative proceedings. See Evid C §1156. A similar provision exists for psychiatric research and study. See Evid C §1156.1.

Certain documents. Evidence Code §1157 protects documents submitted to and generated by a hospital or medical staff review committee as long as the documents filed with the committee are properly related to the committee's functions. These include applications for hospital staff privileges. *Alexander v Superior Court* (1993) 5 C4th 1218, 23 CR2d 397, overruled in part on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 724 n4, 3 CR3d 623.

Only material that is properly part of committee's function is protected. Evidence Code §1157 does not bar access to administrative records and proceedings as distinguished from those properly a part of a medical staff committee's functions as defined by the statute. Hospital administrators cannot prevent disclosure of relevant hospital records by placing them in the files of medical staff committees or by delegating administrative duties to such committees. *Willits v Superior Court* (1993) 20 CA4th 90, 101, 24 CR2d 348; *Santa Rosa Mem. Hosp. v Superior Court* (1985) 174 CA3d 711, 724, 220 CR 236. To the extent that hospital administrative files contain records of medical staff review committees, the files are immune from discovery; and, to protect both parties, the trial court should hold a hearing in chambers to review each item requested. *Saddleback Community Hosp. v Superior Court* (1984) 158 CA3d 206, 208, 204 CR 598.

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5. Exceptions to Protection for Health Care Review Committees

§3.138 a. When No Protection for Health Care Review Committees Under Evid C §1157

Statements by party to action the subject of which was reviewed at meeting. There is no protection under Evid C §1157 for statements made at a committee meeting by a person who is a party to an action or proceeding, the subject matter of which was reviewed at the meeting (Evid C §1157(c)). The purpose of this exception is to set aside immunity in, *e.g.,* a suit brought by a doctor for wrongful or arbitrary exclusion from staff privileges; the exception does not permit discovery in malpractice actions against doctors and hospitals, even though they are parties "to an action or proceeding the subject matter of which was reviewed at that meeting." *Schulz v Superior Court* (1977) 66 CA3d 440, 445, 136 CR 67. See also *Henry Mayo Newhall Mem. Hosp. v Superior Court* (1978) 81 CA3d 626, 146 CR 542; *Matchett v Superior Court* (1974) 40 CA3d 623, 115 CR 317. Nor does this exception permit discovery of hospital peer review committee records and proceedings sought by a hospital employee suing for injuries caused by negligent training of hospital staff. See *Willits v Superior Court* (1993) 20 CA4th 90, 24 CR2d 348.

There is also no protection from discovery under Evid C §1157(c) for statements made at a committee meeting by anyone requesting hospital staff privileges. However, Evid C §1157(c) does not apply if the doctor has already been reinstated and thus is not a person requesting staff privileges. See also *California Eye Inst. v Superior Court* (1989) 215 CA3d 1477, 1481, 264 CR 83 (exception does not permit discovery in doctor's action for damages against hospital for past restrictions on hospital staff privileges). See also *University of S. Cal. v Superior Court* (1996) 45 CA4th 1283, 1289, 53 CR2d 260 (exception does not apply to postgraduate resident seeking readmission to staff training program; physician resident enrolled in postgraduate surgical training program is not "physician" within meaning of exception). But see *Roseville Community Hosp. v Superior Court* (1977) 70 CA3d 809, 139 CR 170 (exception permits discovery in action against hospital by group of physicians seeking damages for exclusion from hospital staff privileges).

Other §1157 exceptions. The protection under Evid C §1157 does not extend to statements made at a committee meeting in an action against an insurance carrier alleging a bad faith refusal to accept a settlement offer within the policy limits. Evid C §1157(c). Nor does it extend to a medical, dental, dental hygienist, dietetic, psychological, veterinary, acupuncture, or chiropractic society committee that exceeds 10 percent of the membership of the society, or to any of those committees if any person serves on the committee when his or her own conduct or practice is being reviewed. Evid C §1157(d).

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Source: Civil Litigation/California Civil Discovery Practice/3 Evaluating Privileges, Work Product, and Other Protections/§3.139 b. When No Protection for Health Care Review Committees Under Evid C §1157.5

§3.139 b. When No Protection for Health Care Review Committees Under Evid C §1157.5

There is no protection under Evid C §1157.5 for actions involving a claim of a provider of health care services for payment for such services (Evid C §1157.5).

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Source: Civil Litigation/California Civil Discovery Practice/3 Evaluating Privileges, Work Product, and Other Protections/ §3.140 c. When No Protection for Health Care Review Committees Under Evid C §1157.6

§3.140 c. When No Protection for Health Care Review Committees Under Evid C §1157.6

There is no protection under Evid C §1157.6 for:

- Statements made by any person in attendance at a meeting who is a party to an action or proceeding, the subject matter of which was reviewed at such meeting; or
- Any person requesting facility staff privileges.

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§3.141 6. Waiver

Because Evid C §1157 technically does not create a "privilege," the waiver provisions of Evid C §912 do not apply to the statute. To the extent the statute can be waived, it must be waived by all persons who participated in the review process whose comments were part of the requested discovery. *University of S. Cal. v Superior Court* (1996) 45 CA4th 1283, 53 CR2d 260. But see *West Covina Hosp. v Superior Court* (1986) 41 C3d 846, 855, 226 CR 132 (statutes do not prohibit voluntary testimony).

The privilege is not waived because an outside investigator reviews the records during an administrative investigation. For example, a party cannot discover the records by subpoenaing the investigator who had access to those records and then require that investigator to provide "expert" testimony at trial regarding the records. *Fox v Kramer* (2000) 22 C4th 531, 540, 93 CR2d 497.

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§3.142 F. Self-Critical Analysis

The privilege for self-critical analysis, in its broadest definition, extends to any critique by a person or entity of its own operations, policies, or processes. Federal courts have split on whether a self-critical analysis privilege exists. See *Etienne v Mitre Corp.* (ED Va 1993) 146 FRD 145, 147 ("[t]he privilege is generally invoked when a litigant attempts to discover committee or peer review reports in academic or medical settings, corporate internal investigation documents, and affirmative action documents voluntarily recorded in compliance with federal and equal employment opportunity statutes"). Courts in the Ninth Circuit, along with a majority of federal courts, have not recognized the privilege. See *Agster v Maricopa County* (9th Cir 2005) 422 F3d 836, 839 (no federal "peer review privilege" for county jail mortality reports); *Union Pacific R.R. Co. v Mower* (9th Cir 2000) 219 F3d 1069, 1076 n7. But see *Dowling v American Haw. Cruises, Inc.* (9th Cir 1992) 971 F2d 423 (suggesting in dictum that privilege might be applicable to postaccident, but not routine preaccident, safety investigations). One California court has expressly held that the privilege does not exist in California state courts. See *Cloud v Superior Court* (1996) 50 CA4th 1552, 1558, 58 CR2d 365.

Although California does not recognize the self-critical analysis privilege, at least one court has held that the preparation of routine accident reports that were not necessarily prepared for the purpose of defending the hospital, but rather were prepared by a hospital risk manager and forwarded to attorneys for purposes of determining potential reserves under the hospital's self-insurance program, may be considered a protected attorney-client communication. See *Scripps Health v Superior Court* (2003) 109 CA4th 529, 534, 135 CR2d 126.

JUDGE'S PERSPECTIVE: This is an issue most often seen in employment discrimination cases when companies have undertaken personnel training, *e.g.*, on gender bias after a lawsuit claiming sexual harassment has been filed. Although the self-critical analysis privilege has not been recognized in California courts, this question raises the same policy issues as subsequent remedial measures (see §3.145) and, even if discoverable, may not be admissible at trial.

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§3.143 G. Confidential Informants

A public entity can refuse to disclose the identity of a person who has furnished information about a violation of the law. Evid C §1041. This privilege typically relates to confidential informants employed by the government, and all the reported cases discussing the privilege for confidential information appear to be criminal matters. The disclosure must have been in confidence and must have been made to a law enforcement officer, a representative of an administrative agency charged with the enforcement or administration of the law alleged to be violated, or any other person for the purpose of transmitting such information to such officer or representative. Furthermore, disclosure of the informant's identity must be forbidden by California or federal statute or it must be against the public interest (*i.e.,* confidentiality of the informant's identity outweighs the necessity for disclosure in the interest of justice). The privilege will yield when disclosure of an informant's identity, or the contents of his or her communications, is "relevant and helpful" to an accused's defense or to a fair determination of the cause. *People v Navarro* (2006) 138 CA4th 146, 163, 41 CR3d 164. There is no privilege that prevents the informant from voluntarily disclosing his or her identity. Evid C §1041.

Many of the civil implications of Evid C §1041 appear to be covered by the newsperson's "shield law," discussed in §§3.124-3.126 or by the "whistleblower's privilege," discussed in §3.144.

NOTE: There is an unqualified privilege from tort liability under CC §47(b) for communications made by citizens who contact a law enforcement officer or agency to report suspected criminal activity or to instigate governmental investigation into wrongdoing. *Hagberg v California Federal Bank* (2004) 32 C4th 350, 362, 7 CR3d 803 (statements made to law enforcement personnel to report suspected activity cannot be basis of tort liability unless plaintiff can establish elements of malicious prosecution).

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§3.144 H. Whistleblowers

Who is a whistleblower? In general, "[a] whistleblower is either (a) an employee who is asked by his superior to commit a violation of statutory policy and not only refuses but also discloses the request to his employer or a government agency… or (b) an employee who has been discharged for reporting to his employer or a government agency that other employees or his employer are violating the law." *Gonzalez v Superior Court* (1995) 33 CA4th 1539, 1545 n4, 39 CR2d 896. California does not recognize a "whistleblower's privilege" as such. 33 CA4th at 1547. Nonetheless, courts have been willing to protect the identity of the whistleblower, and prevent the disclosure of that identity, based on public policy grounds. 33 CA4th at 1548. Such protection has generally stemmed from the court's broad authority to protect persons from unwarranted annoyance, embarrassment, or oppression, which has been interpreted to include the protection of the identity of an informant whose safety would be jeopardized by disclosure. See, *e.g.*, Lab C §1102.5 and Govt C §§8547-8547.12, which protect whistleblowers from employer reprisals. See also Wrongful Employment Termination Practice §§4.7-4.7B, 5.24-5.26 (2d ed Cal CEB 1997).

Concealing whistleblower's identity. To determine whether the whistleblower's identity is to remain confidential, the informant's interests must be balanced against the litigant's need for the information. *John Z. v Superior Court* (1991) 1 CA4th 789, 791, 2 CR2d 556; *Management Info. Technols., Inc. v Alyeska Pipeline Serv. Co.* (1993) 151 FRD 478, 482.

Federal courts. In federal courts, when the government has sought the identity of whistleblowers, courts have linked the protection of whistleblowers to the First Amendment protection afforded an organization not to reveal its membership. Under this analysis, disclosure of a whistleblower's identity is required only when the government can show a compelling need that cannot be served by alternative means. *U.S. v Comley* (1st Cir 1989) 890 F2d 539, 543; *U.S. v Garde* (D DC 1987) 673 F Supp 604, 607. When the federal Freedom of Information Act (5 USC §552) is at issue, federal courts have analyzed the case under Exemption 7 to that Act (5 USC §552(b)(7)). *Kay v FCC* (D DC 1994) 867 F Supp 11, 16; *Alyeska Pipeline Serv. Co. v EPA* (DC Cir 1988) 856 F2d 309, 312.

On the Freedom of Information Act, see §§2.49, 3.111.

State Public Records Act. Analogous state protection is provided under the exemptions to the Public Records Act (see Govt C §6254(f)). On the Public Records Act, see §§2.48, 3.110.

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§3.145 I. Subsequent Remedial Conduct

Although not specifically classified as a privilege for discovery purposes, public policy generally precludes introduction of evidence of subsequent remedial repairs to prove negligence or the existence of an unsafe condition. Evid C §1151. However, evidence of subsequent repairs may be introduced to impeach a party or witness who asserts that no unsafe condition existed. *People v Lockheed Shipbuilding & Constr. Co.* (1975) 50 CA3d Supp 15, 123 CR 778. On related topic of self-critical analysis, see §3.142.

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§3.146 J. Settlement Negotiations

Public policy prohibits the admission at trial of evidence of settlement negotiations or of offers to compromise, subject to certain specified exceptions. Evid C §§1152, 1154. (Examples of exceptions include CCP §998 (statutory offer of compromise not accepted before either an arbitration or a trial) and a bad faith action against an insurance carrier based on the carrier's alleged failure to make a reasonable offer of settlement.)

The exclusionary rule is grounded in the state's strong policy encouraging out-of-court settlement of disputes and candor in those settlement negotiations; there is concern that parties may be deterred from negotiating if the contents of these negotiations may later be used against them in court. *Caira v Offner* (2005) 126 CA4th 12, 32, 24 CR3d 233; *Spencer Kennelly, Ltd. v Bank of America* (1942) 19 C2d 586, 122 P2d 552.

The cases are divided, but the better view recognizes that the public policy underlying Evid C §§1152 and 1154 may be subverted as much by discovery of settlement negotiations as by use at trial. *Covell v Superior Court* (1984) 159 CA3d 39, 42, 205 CR 371. Unless a litigant can bring the case within one of the recognized exceptions, discovery of the content or substance of settlement negotiations should not be allowed. But see *Young v Keele* (1987) 188 CA3d 1090, 233 CR 850 (allowing discovery at judgment debtor's examination of settlement negotiations that occurred after judgment).

Discovery of mediated settlement negotiations is permitted when necessary to protect a minor's constitutional right to impeach an adverse witness in a subsequent juvenile delinquency proceeding. *Rinaker v Superior Court* (1998) 62 CA4th 155, 74 CR2d 464 (court must conduct review in chambers to weigh confidentiality provisions of Evid C §1119 against minor's constitutional right to fair trial). On mediation confidentiality, see §3.147.

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§3.147 K. Mediation Proceedings

With limited statutory exceptions, all communications, negotiations, settlement discussions, and assessments or findings of any kind resulting from a mediation are confidential. Evid C §§1115-1128. Except when due process is implicated, there can be no judicially created exceptions to mediation confidentiality, and unlike statutory or common law privileges, the mediation confidentiality right is not subject to implied waiver. See *Simmons v Ghaderi* (2008) 44 C4th 570, 582, 80 CR3d 83 (party cannot impliedly waive mediation confidentiality through litigation conduct); *Eisendrath v Superior Court* (2003) 109 CA4th 351, 363, 134 CR2d 716.

The confidentiality of mediation proceedings is "broadly framed and strictly construed." *In re Marriage of Kieturakis* (2006) 138 CA4th 56, 85, 41 CR3d 119 (mediated marital settlement agreement). See also *Wimsatt v Superior Court* (2007) 152 CA4th 137, 152, 61 CR3d 200 (mediation confidentiality statutes are applied broadly). No writing prepared for the purpose of, in the course of, or pursuant to a mediation or mediation consultation is admissible at trial or subject to discovery. Evid C §1119(b). "Writings" includes witness statements, analysis of raw test data, and photographs prepared during mediation. *Rojas v Superior Court* (2004) 33 C4th 407, 416, 15 CR3d 643. Under Evid C §1119, documents prepared for mediation are inadmissible and not subject to discovery. *Rojas v Superior Court* (2004) 33 C4th 407, 417, 15 CR3d 643 (Evid C §1119(b) protects all types of "writings" used in mediation, including photographs).

In *Rojas*, the California Supreme Court reaffirmed the holding in *Foxgate Homeowners Ass'n, Inc. v Bramalea Cal., Inc.* (2001) 26 C4th 1, 108 CR2d 642, that a mediator may not report to the court about the conduct of participants in a mediation session, and reversed an order imposing sanctions on the basis of such report. See also *Eisendrath v Superior Court* (2003) 109 CA4th 351, 134 CR2d 716 (on motion to correct spousal support agreement reached through mediation, no testimony may be taken from mediator through deposition or otherwise).

NOTE: The California Supreme Court granted review in *Cassel v Superior Court* (review granted Feb. 3, 2010, S178914; superseded opinion at 179 CA4th 152, 101 CR3d 501). *Cassel* presents the following issues: (1) Are the private conversations of an attorney and client for the purpose of mediation entitled to confidentiality under Evid C §§1115-1128? (2) Is an attorney a "participant" in a mediation such that communications between the attorney and the client for purposes of mediation must remain confidential under Evid C §§1119(c) and 1122(a)(2)?

For more information on mediation confidentiality, see A Litigator's Guide to Effective Use of ADR in California, chap 7 (Cal CEB 2005).

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§3.148 L. Clergyperson-Penitent Privilege

A person has a privilege to refuse to disclose, and to prevent others from disclosing, confidential communications made to a member of the clergy who, under the custom of the clergyperson's church or organization, has a duty to keep such communications secret. Evid C §§1030-1034. A clergy member may invoke this privilege even if he or she is not a party to the litigation. Evid C §1034. In order for a statement to be privileged, all conceptual requirements of penitential communication must be satisfied: (1) The communication was intended to be in confidence; (2) the communication was made to a member of the clergy who is authorized or accustomed to hearing such communications in the course of his or her religious discipline; and (3) the clergy member has the duty under the tenets of his or her religious organization to keep the communication secret. *Doe 2 v Superior Court* (2005) 132 CA4th 1504, 1516, 34 CR3d 458.

Whenever a privilege is claimed for a communication on the ground of clergyperson-penitent privilege, the communication is presumed to have been made in confidence and the one opposing the claimed privilege has the burden of proving otherwise. Evid C §917(a). As with many other privileges, confidentiality is not lost by electronic communication or because persons involved in the electronic communication may have access to its content. Evid C §917(b). If the communication does not even remotely resemble a religious confession, it is not privileged. *People v Edwards* (1988) 203 CA3d 1358, 1364, 248 CR 53 (holding unprivileged discussion between defendant and clergyperson regarding help in ensuring that certain bad checks would not bounce).

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§3.149 M. Sexual Assault Victim-Counselor Privilege

A victim of sexual assault, whether or not a party to the action at issue, has a privilege to refuse to disclose, and to prevent others from disclosing, a confidential communication between the victim and a sexual assault counselor. Evid C §§1035-1036.2.

The purpose of this privilege is to protect confidences between sexual assault victims and their counselors, as well as to encourage people who believe they have been assaulted to come forward. *People v Gilbert* (1992) 5 CA4th 1372, 1391, 7 CR2d 660.

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§3.150 N. Domestic Violence Victim-Counselor Privilege

A victim of domestic violence, whether or not a party to the action at issue, has a privilege to refuse to disclose, and to prevent others from disclosing, a confidential communication between the victim and a domestic violence counselor. Evid C §§912, 1037-1037.8. The domestic violence counselor must inform the victim of any applicable limitations on confidentiality of communications between themselves. This can be done orally. Evid C §1037.8. A court may compel discovery of information received by a domestic violence counselor that constitutes relevant evidence of facts and circumstances involving a crime allegedly perpetrated against the victim or another household member, and that is the subject of criminal proceedings, if the probative value outweighs the effects of disclosure. Evid C §1037.2. There are as yet no published opinions analyzing this privilege.

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Source: Civil Litigation/California Civil Discovery Practice/3 Evaluating Privileges, Work Product, and Other Protections/ §3.151 O. Voter Privilege

§3.151 O. Voter Privilege

Under Evid C §1050, a person has a privilege to refuse to disclose how he or she voted at a public election if:

- Voting is by secret ballot;
- The voter voted legally; and
- The voter has not made an unprivileged disclosure of such information.

Based on this, one court has held that an attorney cannot ask potential jurors in voir dire how they voted on a particular ballot proposition. *People v Wells* (1983) 149 CA3d 721, 726, 197 CR 163.

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§3.152 P. Private Investigators

Under Bus & P C §7539(a), a private investigator is prohibited from divulging information acquired during investigations, except as required by law or directed by the investigator's client. The name of the client, however, does not fall within the scope of the statute. In an action for invasion of privacy, the defendant, a private investigator, was required to disclose a client's identity in response to a deposition question. *Flynn v Superior Court* (1997) 57 CA4th 990, 67 CR2d 491.

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§3.153 Q. Department of Mental Health

The information and records obtained by California's Department of Mental Health in the course of providing services to voluntary or involuntary patients are confidential. Welf & I C §5328. The protection given such information and records is separate and distinct from the patient-physician and patient-psychotherapist privileges. Evid C §§994, 1014. There are multiple exceptions to the confidentiality of such records and information, including disclosure to courts when necessary in the administration of justice. See Welf & I C §5328(f). When there has been no showing by the person claiming confidentiality that the records were generated in the course of receiving treatment under the applicable Welfare and Institutions Code subsections, discovery is not governed by Welf & I C §5328. *Devereaux v Latham & Watkins* (1995) 32 CA4th 1571, 1585, 38 CR2d 849, disapproved in part in *Moran v Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 C4th 780, 785 n7, 55 CR3d 112.

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§3.154 R. Welfare Proceedings

One extension of the attorney-client privilege is found in Welf & I C §10950, which expands the right of legal representation to "authorized representatives," including nonattorney representatives. *Welfare Rights Org. v Crisan* (1983) 33 C3d 766, 770, 190 CR 919. The legislature recognized that welfare recipients have a federal due process right to an evidentiary hearing before their benefits are terminated, and "attorneys alone could not satisfy the representational needs of the state's welfare claimants and… assistance through representation was necessary to ensure the meaningfulness of the 'fair hearing' right provided by statute." For this reason, the legislature expanded the definition of attorney to include lay representation of welfare claimants in this very limited circumstance.

The privilege for authorized representatives is a narrow privilege and only applies in the context of representation for welfare claimants and recipients in administrative fair hearings under the Aid to Families with Dependent Children program. The court specifically limited the expansion of attorney-client privilege in the welfare context and warned that its decision was based on the specific terms of the statute and would be inapplicable to protect communications between litigants and lay representation before other tribunals. 33 C3d at 772.

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§3.155 S. Union Representatives

No federal or California privilege precludes disclosure of communications between union representatives and union members in a civil action. *American Airlines, Inc. v Superior Court* (2003) 114 CA4th 881, 890, 8 CR3d 146 (court refused to create privilege to protect communications between union representative and union member regarding information about union members' wrongful termination claims).

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§3.155A T. State Secrets Privilege

The common law state secrets privilege permits the government to bar the disclosure of information if "there is a reasonable danger" that disclosures will "expose military matters which, in the interest of national security, should not be divulged." *Al-Haramain Islamic Found., Inc. v Bush* (9th Cir 2007) 507 F3d 1190, 1196, quoting *U.S. v Reynolds* (1953) 345 US 1, 10, 97 L Ed 727, 734, 73 S Ct 528. If the subject matter of the suit itself is a state secret, then the question of the evidentiary privilege is not reached. 507 F3d at 1197.

In *Al-Haramain*, the plaintiffs challenged the government's Terrorist Surveillance Program under several theories, including violation of the Foreign Intelligence Surveillance Act of 1978 (FISA) (50 USC §§1801-1811, 1821-1829, 1841-1846, 1861-1862), which sets procedures for the application, approval, and extension of orders authorizing the use of electronic surveillance for foreign intelligence purposes and provides a detailed scheme to determine whether surveillance was lawfully authorized and conducted. Although the court held that the subject matter of the suit was not itself a state secret, it concluded that the privilege protected a certain "Sealed Document," which had been inadvertently disclosed to plaintiffs, and prevented the plaintiffs from testifying about their memory of it. The court remanded the case, however, so that the district court could consider whether the FISA preempts the state secrets doctrine.

In *Mohamed v Jeppesen Dataplan, Inc.* (9th Cir 2009) 563 F3d 992, 1004, the Ninth Circuit explained that "*Reynolds* applies to evidence, not information." The privilege does not prevent the litigation of allegations simply because the government regards the truth or falsity of the allegations to be secret. The state secrets privilege is similar to the attorney-client privilege, which protects only disclosure of communications, not disclosure of underlying facts that can be proved without resort to the privileged materials. 563 F3d at 1005.

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IX. RIGHT OF PRIVACY

§3.156 A. Source of Right of Privacy

Even when a litigant cannot assert a statutory privilege, matters might still be protected from compelled disclosure by the constitutional right of privacy. California Constitution art I, §1, establishing a right of privacy, is self-executing and needs no legislation to create a legal and enforceable right of privacy for every Californian. *Davis v Superior Court* (1992) 7 CA4th 1008, 1014, 9 CR2d 331. The right of privacy is also implicitly guaranteed in the United States Constitution. See, *e.g., Griswold v Connecticut* (1965) 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678. The state constitutional right of privacy, however, may be invoked against intrusions by private as well as by governmental entities. *Sheehan v San Francisco 49ers, Ltd.* (2009) 45 C4th 992, 999, 89 CR3d 594; *Hill v National Collegiate Athletic Ass'n* (1994) 7 C4th 1, 15, 26 CR2d 834; *Heller v Norcal Mut. Ins. Co.* (1994) 8 C4th 30, 43, 32 CR2d 200.

NOTE: Federal statutes may preclude disclosure even when California statutes permit such disclosure. See *Rim of the World Unified Sch. Dist. v Superior Court* (2002) 104 CA4th 1393, 1399, 129 CR2d 11 (although Ed C §48918 allows records of expelled student to be disclosed, student could nevertheless assert Federal Education Rights and Privacy Act to preclude disclosure of his or her education records).

In addition to the constitutional right of privacy, statutes may protect privacy rights in specific contexts. See, *e.g.,* Health & S C §120975, discussed in *Irwin Mem. Blood Bank v Superior Court* (1991) 229 CA3d 151, 279 CR 911 (taking depositions of possible AIDS-infected blood donors cannot occur without violating their right to privacy). However, such statutes may be subject to limitation, and discovery may still be allowed. See, *e.g., Irvington-Moore, Inc. v Superior Court* (1993) 14 CA4th 733, 741, 18 CR2d 49 (Insurance Information and Privacy Protection Act (Ins C §§791-791.28) does not create a privilege against discovery for insured party); *Johnson v Superior Court* (2000) 80 CA4th 1050, 1070, 95 CR2d 864 (sperm donor has no absolute right of privacy that would prevent his medical information, medical history, or even his identity from being disclosed on order of court for good cause shown).

PRACTICE TIP: The client may be able to assert a privilege claim in addition to the privacy claim. For example, disclosure of financial records, especially about sources of income, may involve the privilege against self-incrimination as well as the privilege not to disclose tax returns, among other privileges. On self incrimination see §§3.123-3.129. On tax returns, see §§3.116-3.119.

In addition to a party asserting a privacy interest on its own behalf, a party to an action may assert the privacy rights of third parties; the third party then has a right to notice and an opportunity to be heard on the subject. See *Doe 2 v Superior Court* (2005) 132 CA4th 1504, 1520, 34 CR3d 458; *Valley Bank v Superior Court* (1975) 15 C3d 652, 125 CR 553; *Weingarten v Superior Court* (2002) 102 CA4th 268, 125 CR2d 371.

JUDGE'S PERSPECTIVE: A mistake often seen in courts is the failure to recognize that a subpoena duces tecum seeking the records of third parties is governed by the procedures in CCP §1985.3. Notice to the consumer is absolutely required. A motion to quash must be granted if it is demonstrated that no notice to consumers was served that would alert third parties that their records are being sought. See §5.125.

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§3.157 B. Types of Privacy

The constitutional right of privacy has two dimensions—information privacy, *i.e.,* the right to preclude the dissemination or misuse of sensitive and confidential information, and autonomy privacy, *i.e.,* an interest in making intimate personal decisions and conducting personal activities without observation, intrusion, or interference. See *Tom v City & County of San Francisco* (2004) 120 CA4th 674, 679, 16 CR3d 13; *Hill v National Collegiate Athletic Ass'n* (1994) 7 C4th 1, 35, 26 CR2d 834. Discovery into constitutionally protected areas that are irrelevant to the case at hand will not be allowed simply because it might lead to admissible or relevant evidence. *Juarez v Boy Scouts of Am., Inc.* (2000) 81 CA4th 377, 391, 97 CR2d 12; *Binder v Superior Court* (1987) 196 CA3d 893, 900, 242 CR 231; *Kahn v Superior Court* (1987) 188 CA3d 752, 770, 233 CR 662; *Board of Trustees v Superior Court* (1981) 119 CA3d 516, 174 CR 160.

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§3.158 C. Informational Privacy in General

Even if the private information sought is directly relevant to the subject matter of the litigation, discovery should not be required without a balancing of the individual's privacy rights against the need for discovery. There must be some showing of a compelling state interest. *Estate of Gallio* (1995) 33 CA4th 592, 597, 39 CR2d 470. See also *Hofmann Corp. v Superior Court* (1985) 172 CA3d 357, 218 CR 355.

Privacy rights upheld. In several instances, courts have been unwilling to find that discovery is justified. Some notable examples:

- *Krinsky v Doe 6* (2008) 159 CA4th 1154, 1172, 72 CR3d 231 (trial court directed to quash third party subpoena seeking identity of anonymous Internet poster; to protect First Amendment expression, discovery proponent must make prima facie showing posting was libelous);
- *People v Superior Court* (2003) 107 CA4th 488, 132 CR2d 144 (grand jury seeking disclosure of juvenile records is required to demonstrate that records were necessary or relevant to ongoing specific grand jury investigation; public's interest in grand jury having full access to documents does not outweigh minor's privacy rights in juvenile court records);
- *Juarez v Boy Scouts of Am., Inc.* (2000) 81 CA4th 377, 391, 97 CR2d 12 (no right to discovery of information on individuals in an "ineligible volunteer" file when that information was not directly relevant to any disputed issue in the case);
- *Stony Brook I Homeowners Ass'n v Superior Court* (2000) 84 CA4th 691, 101 CR2d 67 (order requiring expert witness to produce summary showing his total compensation for defense work and for plaintiffs' work, or providing access to his patient files to allow third party to compile that summary, impermissibly intruded on expert's legitimate privacy interests);
- *Rancho Publications v Superior Court* (1999) 68 CA4th 1538, 1550, 81 CR2d 274 (plaintiff hospital suing individuals for defamation could not obtain subpoenaed information from third party newspaper identifying anonymous authors of advertisements that were critical of hospital);
- *Garstang v Superior Court* (1995) 39 CA4th 526, 46 CR2d 84 (former employee suing private educational institution could not compel further deposition answers pertaining to communications made to ombudsman in impliedly confidential mediation session);
- *In re Tiffany G.* (1994) 29 CA4th 443, 451, 35 CR2d 8 (mother's and stepfather's distribution of confidential court documents to third persons violated minor's right of privacy);
- *Harding Lawson Assoc. v Superior Court* (1992) 10 CA4th 7, 12 CR2d 538 (plaintiff's counsel not entitled to view third party personnel files absent proof of compelling need for disclosure or showing that information could not be obtained from alternative sources);
- *Brutsch v City of Los Angeles* (1992) 3 CA4th 354, 359, 4 CR2d 456 (city had legitimate interest in protecting privacy of interviewers in connection with interview evaluations and test results of city employees);
- *Kahn v Superior Court* (1987) 188 CA3d 752, 233 CR 662 (in case alleging defamation and tortious interference with business relationship, court held that constitutional right of privacy protected private tenure committee discussions from discovery).

Information privacy rights have also been found in circumstances similar to the discovery arena. See, *e.g., Teamsters Local 856 v Priceless, LLC* (2003) 112 CA4th 1500, 5 CR3d 847 (although newspapers have right in general to obtain information about salaries paid to government employees at various levels, salaries of individually identifiable employees are not subject to disclosure under the California Public Records Act). But see *International Fed'n of Prof. & Tech. Eng'rs v Superior Court* (2007) 42 C4th 319, 329, 64 CR3d 693 (disclosure of salaries of public employees earning more than $100,000 a year not unwarranted invasion of privacy).

Privacy rights not upheld. In some cases, however, courts have been willing to find that a right to privacy is outweighed by a legitimate state interest.

For example, in *Pioneer Electronics (USA), Inc. v Superior Court* (2007) 40 C4th 360, 53 CR3d 513, the California Supreme Court applied the analytical framework of *Hill v National Collegiate Athletic Ass'n* (1994) 7 C4th 1, 35, 26 CR2d 834 to determine that contact information about potential class members who had complained to defendant seller about defective DVD players was discoverable and adequately protected by the trial court's order that they be provided the opportunity to opt out from disclosure of their information to plaintiff's counsel. See *Alch v Superior Court* (2008) 165 CA4th 1412, 1431, 82 CR3d 470 (in age discrimination suit, plaintiffs' request for work history and demographic information from third parties to conduct statistical analysis was sufficiently compelling to overcome third parties' privacy interest); *Crab Addison, Inc. v Superior Court* (2008) 169 CA4th 958, 969, 87 CR3d 400 (public policy concerns weigh in favor of enforcing unwaivable statutory wage and overtime rights through class action litigation over right to privacy in relatively nonsensitive contact information); *Puerto v Superior Court* (2008) 158 CA4th 1242, 1260, 70 CR3d 701 (in wage and hour case, plaintiffs were entitled to phone numbers and addresses of employees identified by name as potential witnesses in defendant's response to interrogatory); *Fredenburg v City of Fremont* (2004) 119 CA4th 408, 14 CR3d 437 (under Megan's Law, disclosure of sex offender's general location does not violate sex offender's right to privacy, and, under California Constitution, there is no right of privacy in general location of one's residence). Additionally, courts have allowed discovery of communications relating to the proceedings of a termination review board when no confidentiality agreement was signed and the information sought did not relate to the private affairs of other employees (*Saeta v Superior Court* (2004) 117 CA4th 261, 273, 11 CR3d 610), and when the amount of money that a minor received from a public school district in a court-approved settlement was contained in a sealed superior court file (*Copley Press, Inc. v Superior Court* (1998) 63 CA4th 367, 376, 74 CR2d 69).

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§3.159 D. Autonomy Privacy in General

The right of associational privacy is well established in both federal and state law. See *NAACP v Alabama ex rel Patterson* (1958) 357 US 449, 2 L Ed 2d 1488, 78 S Ct 1163; *Britt v Superior Court* (1978) 20 C3d 844, 143 CR 695; *Save Open Space Santa Monica Mountains v Superior Court* (2000) 84 CA4th 235, 100 CR2d 725.

NOTE: Although an organization may have a sufficient relationship to its nonparty members to assert the members' constitutional rights (see, *e.g., NAACP v Alabama ex rel Patterson, supra*), that right did not extend to third parties in *Matrixx Initiatives, Inc. v Doe* (2006) 138 CA4th 872, 42 CR3d 79. Plaintiff Matrixx sought information about anonymous Internet posters who had allegedly defamed it. After third party Yahoo! responded to a subpoena with information that traced two of the anonymous posters to certain third parties, these third parties resisted discovery on the ground that the request improperly impeded the posters' First Amendment right to speak anonymously on the Internet. The court held that the third parties lacked standing to oppose the discovery order. As a general rule, litigants must assert their own legal rights; in *Matrixx,* none of the tests for a limited exception to this rule existed. The third parties did not have a close enough relationship with the anonymous posters to warrant judicial consideration (in fact, they had *no* relationship), and there was no hindrance preventing the two posters from protecting their own interests. On motions to compel in general, see chap 15.

Any need for identification of potential third party witnesses may be satisfied by use of pseudonyms when associational and residential privacy rights are involved and identification may subject third parties to threats, force, or violence. *Planned Parenthood Golden Gate v Superior Court* (2000) 83 CA4th 347, 99 CR2d 627.

JUDGE'S PERSPECTIVE: If counsel is seeking information on which a claim of privacy is asserted, it is helpful to show both that it is vital to have the information and that, without disclosure, the information is unobtainable.

Nonetheless, discovery may be allowed pertaining to the donations that a group receives, including the names of donors; in at least one case, the court has found that the state's interest in promoting truth in litigation, and in ensuring that any fees paid under the private attorney general statute (CCP §1021.5) are appropriate and not an abuse of the statute, outweighs the privacy interests of the individual donors. *Save Open Space Santa Monica Mountains v Superior Court* (2000) 84 CA4th 235, 254, 100 CR2d 725.

With respect to the attorney-client relationship, a client's right of privacy has been found to bar disclosure of information pertaining to the identities of undisclosed clients, but that privacy right disappears once a legal matter is made public (*e.g.,* through the filing of unsealed legal documents). *Hooser v Superior Court* (2000) 84 CA4th 997, 1005, 101 CR2d 341.

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§3.160 E. Privacy in Medical Records

In addition to the physician-patient privilege (see §§3.84-3.106) and the statutory Confidentiality of Medical Information Act (CC §§56-56.37), there is a constitutionally protected right to privacy regarding one's medical records. In *Pettus v Cole* (1996) 49 CA4th 402, 57 CR2d 46, the court determined that a person does not forfeit his or her "right of medical self-determination by entering into an employment relationship, or by requesting paid leave under a benefit plan that is voluntarily provided by the employer," and thus an employer violates autonomy and informational privacy by terminating employment when the employee refuses to comply with the employer's suggested medical treatment. 49 CA4th at 459. Somewhat similarly, a parent's privacy interests have been found to preclude a court-ordered psychological evaluation of the parent for discovery purposes before his or her child has been found a dependent under Welf & I C §300. *Laurie S. v Superior Court* (1994) 26 CA4th 195, 31 CR2d 506. The right to privacy in medical records may be trumped when the state has a compelling interest in the records, such as promoting the best interests of a minor. *Manela v Superior Court* (2009) 177 CA4th 1139, 1150, 99 CR3d 736.

Waiver. A constitutional right of privacy with respect to medical records may be waived, however, if the patient voluntarily tenders the issue, *e.g.,* by filing a lawsuit alleging medical malpractice. See *Heller v Norcal Mut. Ins. Co.* (1994) 8 C4th 30, 42, 32 CR2d 200; *California Consumer Health Care Council v Kaiser Found. Health Plan, Inc.* (2006) 142 CA4th 21, 31, 47 CR3d 593 (once patient signals intent to bring malpractice claim against health care provider, patient cannot reasonably expect to keep details of his or her professional relationship with that health care provider secret from health care provider's defense attorney).

At least one court has found that any waiver of the right to privacy in one's medical records must be construed narrowly. In *Bearman v Superior Court* (2004) 117 CA4th 463, 11 CR3d 644, the court found that simply presenting a peace officer with a physician's written recommendation for the medical use of marijuana did not constitute a waiver of the patient's privacy rights in his medical records, when the records were sought in connection with an investigation of the physician by a state medical licensing agency.

A privacy right may not be found in a medical study, however, when deletion of names or other information identifying individual participants is feasible. *Kizer v Sulnick* (1988) 202 CA3d 431, 439, 248 CR 712.

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§3.161 F. Privacy in Financial Records

There is a well-established right to privacy in one's financial records. See, *e.g., In re Marriage of Burkle* (2006) 135 CA4th 1045, 1063, 37 CR3d 805. This right places an obligation on financial institutions to take reasonable steps to notify their customers of the pendency and nature of civil discovery proceedings related to their confidential customer information, and to afford them a fair opportunity to object to the disclosure. *Valley Bank v Superior Court* (1975) 15 C3d 652, 125 CR 553.

When discovery into financial records is allowed, a protective order may be appropriate to ensure that the information is "revealed only to counsel for the discovering party or to counsel's representative, and that once so revealed, the information may be used only for the purposes of the lawsuit." *Richards v Superior Court* (1978) 86 CA3d 265, 272, 150 CR 77 (discussing financial privacy in connection with claim for punitive damages).

Finally, the discovery of a third party's financial records in connection with spousal or child support proceedings may be allowed, depending on the circumstances. In *Babcock v Superior Court* (1994) 29 CA4th 721, 35 CR2d 462, the court found that the financial records of a third party living with the former husband were discoverable by the former wife in spousal and child support proceedings, but were subject to an in camera review and a protective order if ordered disclosed. Conversely, in *Harris v Superior Court* (1992) 3 CA4th 661, 4 CR2d 564, the court determined that a third party deponent's right to privacy outweighed the former wife's interest in discovering the third party's confidential financial affairs for purpose of determining the deponent's financial contributions in support of her former husband.

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§3.162 G. Sexual Privacy

Discovery that intrudes on a witness's or party's sexual privacy is especially difficult, as courts have repeatedly held that "there is a right to privacy in sexual matters and that it is not limited to the marital relationship." *Morales v Superior Court* (1979) 99 CA3d 283, 290, 160 CR 194. Requests for discovery invading sexual privacy must be justified by practical necessity and narrowly drafted to prevent undue intrusion into the sexual privacy of parties and nonparties to the litigation. *Boler v Superior Court* (1987) 201 CA3d 467, 247 CR 185. The plaintiff in *Boler,* a workplace sexual harassment suit, sought by deposition to determine the defendant's sexual relations with other company employees, including flirtation, fondling, intimacy, and socializing outside of work; the court of appeal held that discovery was impermissible when there was a less intrusive way of obtaining the same information, *e.g.,* by obtaining a list of present and former company employees and by contacting and interviewing them. The court reasoned that women who had been sexually harassed by the defendant would presumably say so; those involved in totally innocent sexual relationships could choose not to respond and preserve their sexual privacy.

A litigant's interest in sexual privacy, however, is not absolute and must in some circumstances yield to the state's overriding interest in determining the truth in legal proceedings. *John B. v Superior Court* (2006) 38 C4th 1177, 1198, 45 CR3d 316 (constitutional right to privacy did not allow defendant to refuse to answer questions concerning his HIV status and sexual history when his HIV status was known and defendant accused plaintiff of infecting him). Thus, in an action for defamation, in which the plaintiff alleged that he was falsely accused of raping a 14-year-old girl, the court held that statements made by the victim to police were discoverable. *Rider v Superior Court* (1988) 199 CA3d 278, 244 CR 770. The court noted that the statements made by the victim to the police and the prosecutor would be discoverable in a criminal action, and that there was no rational basis for withholding those statements in a civil suit for defamation. Consequently, the appellate court vacated the trial court's order denying production of statements made by the alleged rape victim to police.

In *Morales v Superior Court, supra,* the appellate court found that fair resolution of a wrongful death lawsuit required consideration of the marital relationship. Accordingly, discovery into the husband's extramarital sexual conduct was allowable as long as it was narrowly tailored to avoid invading the privacy of third persons (such as those with whom the husband might have had relationships), who had not forfeited any right to privacy. *Morales,* 99 CA3d at 292.

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§3.163 H. Privacy Rights of Corporations

The right of privacy under Cal Const art I, §1 protects the privacy rights only of people, not of corporations. *Roberts v Gulf Oil Corp.* (1983) 147 CA3d 770, 195 CR 393. In *Roberts,* the court rejected the contention that the corporation has a fundamental right of privacy under federal law that would require the showing of a compelling state interest when a court balances the party's need for discovery against the corporation's privacy rights. Although a corporation does have a general right of privacy under the United States Constitution through a combination of the Fourth and Fourteenth Amendments, the strength of the right depends on the relationship between the corporation and human beings and the context in which the controversy arises.

In the factual context of *Roberts, i.e.,* an assessor's attempt to obtain information for tax purposes, the court ruled that "the nexus between a corporation's right to privacy and an individual's right to be left alone is all but nonexistent." 147 CA3d at 797. In an example of corporate privacy yielding to the right to discovery, the California Supreme Court found that a wife in a divorce proceeding was entitled to discover a close corporation's business records, tax returns, and quarterly tax returns of her husband, a shareholder, since "whatever right [the husband] has to inspect records of the corporation, [the wife] also has, either indirectly through [her husband], or directly, as in this case, by means of third party discovery." *Schnabel v Superior Court* (1993) 5 C4th 704, 715, 21 CR2d 200.

Corporations, however, enjoy limited protection for sensitive information that they wish to keep confidential, even though such information may be relevant and not privileged. *Hofmann Corp. v Superior Court* (1985) 172 CA3d 357, 218 CR 355 (court of appeal overturned trial court order in product liability action that compelled disclosure of defendant corporation's customer lists). See also *Ameri-Med. Corp. v WCAB* (1996) 42 CA4th 1260, 50 CR2d 366 (although they have no state constitutional right to privacy, corporations are accorded some privacy rights depending on nature and purposes of corporate entity and interest sought to be protected).

Considering the privacy rights of a law firm structured as a limited liability partnership, one court has held that the law firm's records were not immune from discovery on privilege grounds when, on balance, the records were material to essential issues in the case. *Hecht, Solberg, Robinson, Goldberg & Bagley v Superior Court* (2006) 137 CA4th 579, 595, 40 CR3d 446.

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§3.164 I. Data Stored Electronically

That a computer or other electronic storage device contains information protected by the right of privacy, as well as information relevant to the subject matter of an action, does not prevent discovery of relevant portions. For example, in an employment termination case, the plaintiff was compelled to produce a computer purchased for him by the employer defendant. The plaintiff had agreed that the home computer would be the property of the company and not be used for personal purposes. See *TBG Ins. Servs. Corp. v Superior Court* (2002) 96 CA4th 443, 454, 117 CR2d 155 (without waiver of plaintiff's claim to privacy, production was made in manner ensuring compliance with protective order preventing copying of nonrelevant, personal material).

JUDGE'S PERSPECTIVE: Despite the fast-paced changes taking place in the electronic storage of information, courts will continue to apply basic discovery rules and the appropriate balancing tests when determining whether the right to privacy inhibits disclosure.

Specific statutes may prevent discovery of some electronic information, however. For example, it has been held that under the federal Stored Communications Act (18 USC §§2701-2712), a civil discovery subpoena to an e-mail service provider cannot be enforced. See *O'Grady v Superior Court* (2006) 139 CA4th 1423, 1443, 44 CR3d 72 (statute "clearly prohibits any disclosure of stored email other than as authorized by enumerated exceptions"; there is no implicit exception for civil discovery subpoenas).

On discovery of electronically stored information (ESI), see chap 4. On inadvertent disclosure of information, see §§3.183-3.190.

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§3.165 X. WAIVER OF PRIVILEGE GENERALLY

The means by which an evidentiary privilege may be waived under California law are controlled by the Evidence Code. *Motown Record Corp. v Superior Court* (1984) 155 CA3d 482, 492, 202 CR 227. In the federal courts, waiver of the attorney-client privilege is a matter of federal common law and, in some cases, state law.

Generally, an evidentiary privilege may be waived by voluntary or consensual disclosure of the privileged information to a third person, or by failure to make a timely objection. Evid C §912(a) (any person's right to claim a privilege provided under Evidence Code is "waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone").

Waivers of privilege have been found in the following circumstances:

- Advance waiver by contract;
- Waiver by voluntary disclosure of a significant part of the communication;
- Waiver by making the statement in the known presence of unnecessary third parties, thus manifesting an intent to make a nonconfidential communication;
- Waiver by failure to assert the privilege in a timely fashion in any litigation or other proceeding in which the holder has the legal standing and opportunity to do so;
- Waiver through use of privileged materials to refresh a witness's memory;
- Waiver by placing privileged matter in issue;
- Waiver by inadvertent disclosure.

These methods are discussed in detail in §§3.166-3.190.

Note that some California cases hold that, like the waiver of any other important right, waiver of either a privilege or the work product doctrine "must be a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences." *Roberts v Superior Court* (1973) 9 C3d 330, 343, 107 CR 309; *San Diego Trolley, Inc. v Superior Court* (2001) 87 CA4th 1083, 1092, 105 CR2d 476. In contrast, under federal law there is no requirement that the waiver be intentional and knowing. The attorney-client privilege may be waived through a careless, inadvertent, or unintentional act. This rule is frequently encountered in the context of inadvertent (or negligent) disclosure of privileged documents during discovery. *In re Sealed Case* (DC Cir 1989) 877 F2d 976, 980; *Scott v Glickman* (ED NC 2001) 199 FRD 174, 178. Some federal courts have employed a "balancing test" to avoid the harsh results of a finding of inadvertent waiver. *Hartford Fire Ins. Co. v Garvey* (ND Cal 1985) 109 FRD 323, 329; *KL Group v Case, Kay & Lynch* (9th Cir 1987) 829 F2d 909, 918. Waiver through inadvertent disclosure is discussed in greater detail in §§3.183-3.190.

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§3.166 A. Advance Waiver by Contract and Selective Waiver

An evidentiary privilege may be expressly waived in advance by contract. For example, an application for an insurance policy may include a broad form consent to the disclosure of medical records to the insurance company. Such clauses have been enforced by the courts as an effective waiver of applicable privileges. See *Torbensen v Family Life Ins. Co.* (1958) 163 CA2d 401, 404, 329 P2d 596. Such waivers, however, are narrowly construed. See *Roberts v Superior Court* (1973) 9 C3d 330, 343, 107 CR 309 (waiver was limited to medical records relating to physical injury when client did not understand that psychotherapist records might also be sought); *Kaiser Found. Hosps. v Superior Court* (1998) 66 CA4th 1217, 1225, 78 CR2d 543 (court enforced stipulation permitting hospital to produce its prelitigation investigatory file without waiving privilege concerning attorney-client communications); *Turner v Redwood Mut. Life Ass'n* (1936) 13 CA2d 573, 578, 57 P2d 222 (waiver on insurance application applied only to past communications). Although often discussed in terms of waiver, the question is more properly analyzed on the basis of contract law: Was there or was there not an express or implied agreement to disclose some or all of the communications or documents?

NOTE: Using a contract analysis, some courts have held that a party may agree to selectively disclose privileged information, or agree to disclose it for specifically articulated, limited purposes, and thus avoid a blanket waiver of the privilege. *Diversified Indus., Inc. v Meredith* (8th Cir 1977) 572 F2d 596, 611 (privileged documents voluntarily disclosed to SEC could nevertheless be withheld from private parties in civil case); *Akamai Technols., Inc. v Digital Island, Inc.* (ND Cal 2002) 2002 US Dist Lexis 13515 (court enforced implied contract that privileged document was being disclosed solely for purposes of negotiating settlement, and did not waive privilege generally). The Eighth Circuit has since rejected selective waiver in the context of non-opinion work product. See *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.* (8th Cir 1988) 860 F2d 844, 845. Most other federal courts have refused to recognize the selective waiver doctrine. *Genentech, Inc. v U.S. Int'l Trade Comm'n* (Fed Cir 1997) 122 F3d 1409, 1417; *Westinghouse Elec. Corp. v Republic of Philippines* (3d Cir 1991) 951 F2d 1414, 1425.

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§3.167 B. Waiver by Voluntary Disclosure

If the holder of a privilege voluntarily and without coercion discloses a significant part of a confidential communication, any privilege attached to that communication is generally waived. Evid C §912(a). See *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 72 CR 74; *City of Los Angeles v Superior Court* (1985) 170 CA3d 744, 754, 216 CR 311; *People v Gillard* (1997) 57 CA4th 136, 162 n15, 66 CR2d 790 (when client's current attorney questions former attorney at trial concerning privileged discussions, privilege is waived for those discussions). See also *Weil v Investment/Indicators, Research & Mgmt., Inc.* (9th Cir 1981) 647 F2d 18, 25 (disclosing party could not claim privilege after attorney-client privileged document was voluntarily sent to federal agency); *In re Kidder Peabody Sec. Litig.* (SD NY 1996) 168 FRD 459, 468 (privileged report used in responding to SEC investigation).

In many cases, the scope of the voluntary waiver of a privilege depends on the circumstances and purpose of the disclosure. If a privileged communication is voluntarily disclosed in the course of a judicial proceeding (in a declaration, in a deposition, or in trial testimony), the waiver may extend not only to the disclosed communication, but also to all other communications on the same subject matter. *Smith v Alyeska Pipeline Serv. Co.* (D Del 1982) 538 F Supp 977, 979 ("if a client chooses to disclose some privileged communications between the attorney and himself, then he waives the remainder of the communication[s] which relate to the same subject matter"). A client may not "pick and choose," *i.e.,* disclose favorable communications and withhold unfavorable communications. *Permian Corp. v U.S.* (DC Cir 1981) 665 F2d 1214, 1221. However, an *extrajudicial* disclosure (the privileged communication is not being disclosed in court to further the client's legal cause or disadvantage his adversary) may not require a finding of subject-matter waiver. *In re von Bulow* (2d Cir 1987) 828 F2d 94, 102 (disclosure of some confidential communications in book does not waive privilege concerning other communications if not used or placed in issue in litigation).

See also Evid C §912(a), which specifically governs waiver of the attorney-client, confidential marital communications, physician-patient, psychotherapist-patient, clergyman-penitent, sexual assault counselor-victim, and domestic violence counselor-victim privileges.

CAUTION: A voluntary waiver of privilege is potentially hazardous and may have drastic and unforeseen consequences. Attorneys should think carefully and research thoroughly before advising a client to make a voluntary waiver. The courts are unsympathetic with a client who attempts "to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." *Permian Corp. v U.S., supra*.

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§3.168 1. There Must Be Significant Disclosure

Evidence Code §912(a) speaks of waiver of a privilege "with respect to a communication protected by the privilege." Analysis of any waiver must therefore focus on the *communication* concerning which the waiver is claimed to have occurred.

Generally, waiver by voluntary disclosure will occur only if the holder of the privilege voluntarily discloses *a significant part* of a confidential communication. *Julrik Prods., Inc. v Chester* (1974) 38 CA3d 807, 811, 113 CR 527; *Tsai-Son Nguyen v Excel Corp.* (5th Cir 1999) 197 F3d 200, 207. Once a significant part of a confidential communication is disclosed, the general rule is that the privilege is lost concerning that communication for all time and for all purposes. *U.S. v Suarez* (11th Cir 1987) 820 F2d 1158, 1160. However, in one case, the court held that disclosure of a portion of a document or conversation does not necessarily waive the privilege regarding other portions of the privileged document or conversation. In *Rodriguez v Superior Court* (1993) 14 CA4th 1260, 1270, 18 CR2d 120, the court ruled that partial disclosure of a psychologist's report in an in limine motion to prove that certain statements by the defendant were made involuntarily and should be excluded at trial did not waive the attorney-client or psychologist-patient privilege regarding the remaining redacted portion of the report, provided that the disclosed portion did not reference or rely on the undisclosed portion.

As noted above, most federal courts have refused to recognize the selective waiver doctrine. *Permian Corp. v U.S.* (DC Cir 1981) 665 F2d 1214, 1221 ("[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others"); *Genentech, Inc. v U.S. Int'l Trade Comm'n* (Fed Cir 1997) 122 F3d 1409, 1417; *Westinghouse Elec. Corp. v Republic of Philippines* (3d Cir 1991) 951 F2d 1414, 1425; *U.S. v Shibley* (SD Cal 1953) 112 F Supp 734, 742 ("when the client and attorney themselves, for purposes beneficial to the client, lift the veil, they cannot lower it again").

With certain exceptions noted below, a waiver of the privilege concerning one communication by voluntary disclosure will *not* necessarily result in a waiver concerning other privileged communications. *Chevron Corp. v Pennzoil Co.* (9th Cir 1992) 974 F2d 1156, 1162.

NOTE: Some commentators have said and federal courts have held that a voluntary waiver of the privilege concerning one communication operates as a waiver of the privilege concerning all communications *on the same subject matter*. See 8 Wigmore, Evidence §2328 (rev ed 1961); *Handgards, Inc. v Johnson & Johnson* (ND Cal 1976) 413 F Supp 926, 929; *In re Sealed Case* (DC Cir 1982) 676 F2d 793, 809 (voluntary submission of investigative report to SEC waived privilege concerning underlying privileged documents on which report was based); *Lee Nat'l Corp. v Deramus* (D Del 1970) 313 F Supp 224, 227. Other federal courts have refused to require blanket disclosure of all communications on the same subject matter. *In re Grand Jury Proceedings, Oct. 12, 1995* (6th Cir 1996) 78 F3d 251, 255; *SNK Corp. of Am. v Atlus Dream Entertainment Co.* (ND Cal 1999) 188 FRD 566, 571.

A voluntary waiver of privilege is potentially hazardous and may have drastic and unforeseen consequences. Attorneys should think carefully and research thoroughly before advising a client to make a voluntary waiver. See §3.167.

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§3.169 2. There Must Be Actual Disclosure

The mere intent to disclose a privileged communication will not constitute a waiver unless there is actual disclosure. *Lohman v Superior Court* (1978) 81 CA3d 90, 95, 146 CR 171. Disclosing that a confidential communication has occurred, or that certain subjects were discussed during consultation, is not a disclosure of such a significant part of the communication that it constitutes a waiver. *Mitchell v Superior Court* (1984) 37 C3d 591, 601, 208 CR 886. See also *People v Hayes* (1999) 21 C4th 1211, 1265 n14, 91 CR2d 211 (explaining *Mitchell*). Nor does a *promise* to waive constitute waiver. In *Tennenbaum v Deloitte & Touche* (9th Cir 1996) 77 F3d 337, 340, the Ninth Circuit Court of Appeal, applying California law, held that the provision in a settlement agreement of one lawsuit to waive the attorney-client privilege, without subsequent disclosure, does not waive the holder's right to claim the privilege in a separate lawsuit because waiver of the attorney-client privilege turns largely on the unfairness of permitting selective disclosures without revealing all privileged communications on the particular subject in question. For example, when an attorney in a legal malpractice case responded to interrogatories by indicating that he had reported the potential malpractice claim to his insurers, the court found this response not wide enough in scope or deep enough in substance to result in a waiver of the attorney-client privilege. *Travelers Ins. Cos. v Superior Court* (1983) 143 CA3d 436, 444, 191 CR 871. Furthermore, testimony that certain subjects were not discussed during consultations with two psychiatrists did not constitute a disclosure of a confidential communication for purposes of waiver. *People v Perry* (1972) 7 C3d 756, 783, 103 CR 161.

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§3.170 3. Holder of Privilege Must Consent

Only the holder of the privilege may waive it; disclosure by another person constitutes a waiver only if it is made with the consent of the holder. Evid C §912(a); *Roberts v Superior Court* (1973) 9 C3d 330, 341, 107 CR 309; *Rudnick v Superior Court* (1974) 11 C3d 924, 932, 114 CR 603. Consent may be implied if the person making the disclosure does so in his capacity as an agent for the holder. *Klang v Shell Oil Co.* (1971) 17 CA3d 933, 938, 95 CR 265 (waiver of privilege implied when attorney acting on behalf of client disclosed privileged statements to police officer). See *Weil v Investment/Indicators, Research & Mgmt., Inc.* (9th Cir 1981) 647 F2d 18, 23 (waiver by corporate officer during deposition testimony attributed to corporation).

JUDGE'S PERSPECTIVE: That the person making the disclosure is an agent of the holder of the privilege is not alone sufficient. For example, an attorney cannot unilaterally waive the privilege. The court normally wants to be satisfied that the principal was aware of the privilege and of the implications of disclosure, *i.e.,* that the authorization to waive the privilege, whether express or implied, was knowing.

Under California law, the holder's waiver must be truly voluntary. In other words, the disclosure must be "without coercion." Evid C §912(a). One court has held that corporations that were under federal criminal and regulatory investigation when they disclosed privileged documents in response to federal government subpoenas did not waive the attorney-client and work product privileges. *Regents of Univ. of Cal. v Superior Court* (2008) 165 CA4th 672, 683, 81 CR3d 186. The federal government policy under which corporations could avoid indictment or regulatory sanctions if they cooperated by disclosing privileged material amounted to "coercion" under Evid C §912(a); it would not have been reasonable for the corporations to resist or challenge the government's requests. 165 CA4th at 684.

A party who inadvertently discloses attorney-client privileged documents during discovery has not waived the privilege. *O'Mary v Mitsubishi Electronics Am., Inc.* (1997) 59 CA4th 563, 577, 69 CR2d 389. The court refused to adopt a "gotcha" theory of waiver in the discovery process when counsel had inadvertently produced a privileged document. Because discovery is coercive by nature, there is no voluntary consent to produce an inadvertently disclosed document and no waiver of a privilege.

By contrast, in the federal courts, there is no requirement that the waiver be intentional and knowing. The attorney-client privilege may be waived through a careless, inadvertent, or unintentional act. *In re Sealed Case* (DC Cir 1989) 877 F2d 976, 980; *Scott v Glickman* (ED NC 2001) 199 FRD 174, 178. Some federal courts have employed a "balancing test" to avoid the harsh results of a finding of inadvertent waiver. *Hartford Fire Ins. Co. v Garvey* (ND Cal 1985) 109 FRD 323, 330. See also *KL Group v Case, Kay & Lynch* (9th Cir 1987) 829 F2d 909, 918. Waiver through inadvertent disclosure is discussed in greater detail in §§3.183-3.190.

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§3.171 4. Disclosure to Third Persons When Necessary to Further Purpose of Confidential Consultation

Disclosure of confidential information to a third party does not waive the privilege if the disclosure was reasonably necessary to accomplish the purpose for which the lawyer, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted. Evid C §912(d). This provision has been interpreted liberally to protect the privilege. For example, in *Blue Cross v Superior Court* (1976) 61 CA3d 798, 801, 132 CR 635, disclosure of patients' names and ailments to the third party operator of a prepaid health plan by the patients' treating physician when disclosure was a prerequisite to the doctors' receiving their fees did not result in a waiver of the physician-patient privilege. But see *Brillantes v Superior Court* (1996) 51 CA4th 323, 342, 58 CR2d 770, which held that such disclosure may constitute waiver.

Similarly, disclosure by a psychiatrist to his patient's internist does not constitute a waiver. *Huelter v Superior Court* (1978) 87 CA3d 544, 548, 151 CR 138 (exchange of patient records by treating physicians in course of treatment does not waive privilege). Certain disclosures by a litigant to business associates directly affected by the pending litigation were held not to be a waiver of the attorney-client privilege. *Cooke v Superior Court* (1978) 83 CA3d 582, 588, 147 CR 915.

The attorney-client privilege is not waived by disclosing the substance of a protected communication to an attorney's investigator, legal secretary, summer associate, paralegal, or receptionist. These people stand in the same position as an attorney for purposes of analysis and operation of the privilege. Evid C §952; *People v Clark* (1990) 50 C3d 583, 621, 268 CR 399; *Insurance Co. of N. Am. v Superior Court* (1980) 108 CA3d 758, 771, 166 CR 880; *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 236, 231 P2d 26.

A lawyer may (with the client's consent) disclose privileged documents to a lawyer for a co-defendant or an aligned party in litigation without waiving the privilege. The theory is that this type of disclosure to third parties does not constitute a waiver if the disclosure was "reasonably necessary for the accomplishment of the purpose for which the lawyer… was consulted." Evid C §912(d). See §§3.19-3.21 for a discussion of the "joint defense" or "common interest" privilege. Parties entering into a joint defense arrangement may find it advisable to memorialize their understanding in a written agreement. See §3.21.

CAUTION: The "common interest" privilege cannot be claimed if the interests of the parties are not in fact shared. See *McKesson HBOC, Inc. v Superior Court* (2004) 115 CA4th 1229, 1239, 9 CR3d 812. When responding to an SEC probe, McKesson agreed to disclose internal reports subject to a confidentiality agreement that it intended would preserve McKesson's attorney-client privilege. 115 CA4th at 1233. In a subsequent civil action, the court held that McKesson had waived its privilege by disclosing the reports to the government because the interests between McKesson and the government were not aligned in any litigation at the time of disclosure. The existence of a written confidentiality agreement was not controlling. 115 CA4th at 1238.

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§3.172 5. Effect of Voluntary Waiver

If the holder of a privilege waives it, he or she can be compelled to testify about the otherwise privileged communication, and the lawyer to whom the confidential communication was made may be called to corroborate the testimony. *Agnew v Superior Court* (1958) 156 CA2d 838, 841, 320 P2d 158; *People v Ottenstror* (1954) 127 CA2d 104, 110, 273 P2d 289. Once a privilege has been waived, neither the privilege holder nor the lawyer to whom the confidential communication has been made can assert the privilege in any subsequent proceeding. *People v Superior Court (Roderick)* (1991) 231 CA3d 584, 590, 282 CR 418; *American Mut. Liab. Ins. Co. v Superior Court* (1974) 38 CA3d 579, 598, 113 CR 561; *People v Garaux* (1973) 34 CA3d 611, 613, 110 CR 119. See *In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wisconsin Steel* (ND Ill 1987) 666 F Supp 1148, 1153. Note that a voluntary waiver of the privilege by disclosure of a confidential communication in a judicial proceeding may result in a finding of waiver concerning all communications on the same subject matter. See §3.162.

However, waiver of the privilege for a client's communications with one professional, *e.g.,* an attorney, does not constitute a waiver of the privilege for confidential communications with subsequent professionals (*e.g.,* a physician or even other attorneys who succeed to the representation of the client). *Lohman v Superior Court* (1978) 81 CA3d 90, 97, 146 CR 171.

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§3.173 6. Examples of Waiver

A verified response to a written discovery request may be treated as express consent to disclosure under Evid C §912(a). For example, when a plaintiff informed the defendant in a verified response to discovery requests of the existence of a video and said that the defendant was "welcome" to a copy, the plaintiff waived the attorney-client privilege applicable to a videotaped conversation with her attorney. *Hiott v Superior Court* (1993) 16 CA4th 712, 719, 20 CR2d 157; *Hawkins v Stables* (4th Cir 1998) 148 F3d 379, 381 (waiver occurs when wife testifies about conversation with lawyer). See §3.158 on waiver by failure to assert the privilege.

If the holder of the privilege elicits testimony about a privileged matter, the privilege is considered voluntarily waived concerning that matter. *People v Dubrin* (1965) 232 CA2d 674, 680, 43 CR 60. See *People v Gillard* (1997) 57 CA4th 136, 66 CR2d 790. If a client provides privileged documents or actually testifies as an expert, the privilege is waived. *Shooker v Superior Court* (2003) 111 CA4th 923, 930, 4 CR3d 334 (party does not waive attorney-client privilege when expert designation withdrawn before providing opinions in deposition).

Calling the person who is subject to a confidential privilege to testify as a witness does not waive an otherwise valid privilege as long as testimony that reveals a significant part of the privileged communication is not elicited. *In re Lifschutz* (1970) 2 C3d 415, 437, 85 CR 829.

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§3.174 C. Waiver by Failure to Assert Privilege

When disclosure of a privileged document or communication is sought by an adverse party, the failure to object in a timely manner may constitute an implied waiver of the applicable privilege. *Lissak v Crocker Estate Co.* (1897) 119 C 442, 445, 51 P 688; *Brown v Superior Court* (1986) 180 CA3d 701, 710, 226 CR 10; *People v Dorsey* (1975) 46 CA3d 706, 718, 120 CR 508. Even during cross-examination, failure to assert a privilege may constitute a complete waiver. *Julrik Prods., Inc. v Chester* (1974) 38 CA3d 807, 811, 113 CR 527; *People v Perry* (1972) 7 C3d 756, 783, 103 CR 161. See *Hollins v Powell* (8th Cir 1985) 773 F2d 191, 196 (city could not claim privilege when its attorney was called as witness, because mayor had testified without objection to communications he had with attorney). On objecting during deposition on the basis of privilege, see §§6.94, 6.97.

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§3.175 1. Holder Must Have Legal Standing and Opportunity to Object

Failure to assert the privilege results in a waiver only when the holder has the legal standing to claim the privilege *and* opportunity to object. Evid C §912(a). Thus the privilege is not waived by disclosure in a proceeding in which there is no legal standing to claim it. See *Glade v Superior Court* (1978) 76 CA3d 738, 744, 143 CR 119 (waiver may not be predicated on fact that nonparty asserting privilege has failed to appear at hearing in which claim of privilege is determined).

NOTE: A nonparty is entitled to appear specifically to oppose an order requiring disclosure of confidential information. *American Mut. Liab. Ins. Co. v Superior Court* (1974) 38 CA3d 579, 598, 113 CR 561. On making a special appearance, see §1.54.

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§3.176 2. To Avoid Waiver, Privilege Must Be Properly Asserted

Make objection to disclosure. A claim of privilege is waived unless a specific objection to disclosure is timely made during a deposition. CCP §2025.460(a). A party to whom interrogatories, a demand for inspection, or requests for admission have been directed who fails to serve a timely response, or otherwise fails to assert the privilege, is considered to have waived any privilege unless the court relieves that party from the waiver as provided by statute. CCP §§2030.290(a), 2031.300(a), 2033.280(a). *Scottsdale Ins. Co. v Superior Court* (1997) 59 CA4th 263, 272, 69 CR2d 112 (holding that waiver of attorney-client privilege occurs by failing to raise privilege in written response to request for production of documents). See also *Stadish v Superior Court* (1999) 71 CA4th 1130, 1142, 84 CR2d 350 (trade secret privilege waived by production of 40 boxes of documents without objection). *Fox v California Sierra Fin. Servs.* (ND Cal 1988) 120 FRD 520, 527 ("[a] client may not knowingly allow his attorney to testify without objection and later claim that the matters testified to were subject to the attorney-client privilege and that he did not waive the privilege").

Minor technical shortfall. The courts, however, have held that if a claim of privilege has been asserted, it will not be considered waived because of a minor technicality. In *Blue Ridge Ins. Co. v Superior Court* (1988) 202 CA3d 339, 347, 248 CR 346, the court of appeal stated:

> Where there is a timely assertion of the attorney client privilege putting the other side on notice, a forced waiver for some technical shortfall is at odds with Evidence Code section 912 and is an excessive sanction not reasonably calculated to achieve the purpose of effecting compliance with discovery.

In *Blue Ridge,* the defendant asserted the attorney-client privilege in a response that was timely but unverified. The court held that the failure to provide a verification could not be considered a waiver of the attorney-client privilege under Evid C §912. See also *Hernandez v Superior Court* (2003) 112 CA4th 285, 294, 4 CR3d 883 (trial court erred in considering privileges waived when privilege log was filed and served 1 day before hearing on motion to compel); *Korea Data Sys. Co. v Superior Court* (1997) 51 CA4th 1513, 1516, 59 CR2d 925 (trial court erred in finding attorney-client privilege waived by untimely filing of privilege log; waiver is not sanction authorized by Discovery Act).

In another case, *Deary v Superior Court* (2001) 87 CA4th 1072, 1078, 105 CR2d 132, the court held that a party's failure to raise a claim of privilege initially in response to an ambiguously worded document request did not constitute waiver. The document request could reasonably be construed as not requesting privileged documents—in this case, federal and state tax returns.

When attorney, not party, verifies discovery response. When an attorney, rather than a party, verifies a response to written discovery, the party is considered to have waived any attorney-client privilege and any protection for work product under CCP §§2018.010-2018.080 during any later discovery directed at the attorney about the identity of the sources of the information in the response. CCP §§2030.250(b), 2031.250(b), 2033.240(b).

NOTE: In light of these provisions, an attorney should probably *never* verify written discovery responses. See §§7.61, 8.84.

Privilege log. When a privilege log is requested but not produced, the court may compel further responses. If the responding party fails to comply with such an order, CCP §2031.310(e) sets out various remedies and sanctions for use by the court, including terminating sanctions. *Best Prods., Inc. v Superior Court* (2004) 119 CA4th 1181, 1189, 15 CR3d 154. See also Note in §8.75.

Disclosure under erroneous court order. The privilege is also preserved if a claim of privilege is made and disclosure is under compulsion of an erroneous court order, even if no review is sought. Evid C §919(b). See *In re Grand Jury Proceedings (Vargas)* (10th Cir 1983) 723 F2d 1461, 1466 (court-ordered production of privileged documents does not necessarily constitute waiver of privilege).

Erroneous waiver in reliance on incorrect legal opinion. Furthermore, if a party, relying on an incorrect legal opinion, erroneously waives the attorney-client privilege (or erroneously concedes that it does not apply), there is no intentional relinquishment or waiver of the privilege, and the party may thereafter litigate the issue on appeal. *BP*

Alaska Exploration, Inc. v Superior Court (1988) 199 CA3d 1240, 1252, 245 CR 682 (no intentional waiver of work product doctrine based on erroneous legal conclusion made by parties and trial court).

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§3.177 3. Relief From Failure to Properly Assert Privilege

Relief based on mistake, inadvertence, or excusable neglect. A party or attorney may be rescued from waiver based on a failure to assert the privilege in a timely fashion in response to a demand for inspection. CCP §2031.300(a) (court, on motion, may relieve party from waiver *if* party has subsequently served response to demand that substantially complies with statute *and* has shown that failure to serve timely response was "result of mistake, inadvertence, or excusable neglect"). See *Motown Record Corp. v Superior Court* (1984) 155 CA3d 482, 492, 202 CR 227 (1-day-late compliance with court order requiring submission of privilege log does not result in waiver of otherwise proper privilege objections). See §8.75.

However, in *City of Fresno v Superior Court* (1988) 205 CA3d 1459, 1467, 253 CR 296, the court of appeal held that the terms "mistake, inadvertence or excusable neglect" used in former CCP §2031(k) (now CCP §2031.300(a)) have the same meaning as under CCP §473, and refused to grant relief to an attorney whose failure to file a timely response to interrogatories was attributable to the attorney's mistake "on a relatively simple and undebatable matter." 205 CA3d at 1467. See also *Scottsdale Ins. Co. v Superior Court* (1997) 59 CA4th 263, 275, 69 CR2d 112 (holding that counsel's alleged mistake of law in not raising attorney-client privilege objection at first opportunity is insufficient basis for granting relief).

JUDGE'S PERSPECTIVE: A court will not look with favor on a request for relief from an attorney who failed to respond to a discovery request, failed to object in the response, or failed to provide a privilege log when asserting privileges. If the failure to assert the privilege was inadvertent or resulted from mistake or excusable neglect, counsel should seek affirmative relief rather than making the request in response to a motion to compel.

Seeking protective order. A party or an attorney may also be rescued from some of the effects of waiver by seeking a protective order. As explained in *Stadish v Superior Court* (1999) 71 CA4th 1130, 1142, 84 CR2d 350, even if a privilege such as trade secret has been waived by production of documents, a protective order can be sought at any time to limit the dissemination of the information. The protective order had been properly granted by the trial court when trade secret protection was asserted after production and review of 40 boxes of documents.

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§3.178 D. Waiver Through Use of Privileged Materials to Refresh Witness's Recollection

If privileged documents are used to refresh a witness's recollection before testifying, there is a danger that a court will find a waiver of the privilege. See *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 413, 72 CR 74. The deponent in *Kerns* testified that he had no independent recollection of the facts and used otherwise privileged accident reports to refresh his recollection regarding the accident. Relying on Evid C §771, the court of appeal held that the privilege was waived. See also Fed R Evid 612.

In *Mize v Atchison, Topeka & Santa Fe Ry.* (1975) 46 CA3d 436, 449, 120 CR 787, a witness refreshed his recollection by reviewing a file that contained both privileged and nonprivileged matter. The court of appeal held that the work product doctrine and the attorney-client privilege were waived because the claim of privilege was not properly asserted and no adequate foundation was laid. However, the court also noted that allowing a witness to refresh his recollection by reviewing a communication made to his attorney does not necessarily result in a waiver of the attorney-client privilege, if the privilege is claimed at the first opportunity. 46 CA3d at 449. See *Sullivan v Superior Court* (1972) 29 CA3d 64, 72, 105 CR 241 (distinguishing *Kerns Constr. Co. v Superior Court, supra,* and finding no waiver of attorney-client privilege when plaintiff used transcription of recorded conference with attorney to refresh recollection before giving deposition).

Federal courts. Several federal courts have likewise held that the attorney-client privilege or work product doctrine may be waived if otherwise privileged materials are used to refresh a witness's recollection before deposition or trial testimony. *James Julian, Inc. v Raytheon Co.* (D Del 1982) 93 FRD 138, 144; *Marshall v United States Postal Serv.* (D DC 1980) 88 FRD 348, 350 (waiver limited to particular document consulted, not to entire course of confidential communications on subject); *Wheeling-Pittsburgh Steel Corp. v Underwriters Labs., Inc.* (ND Ill 1978) 81 FRD 8, 10 (document used to refresh recollection *before* testimony is no different from one used *during* testimony and is discoverable under Fed R Evid 612); *Berkey Photo, Inc. v Eastman Kodak Co.* (SD NY 1977) 74 FRD 613, 615. But see *Joseph Schlitz Brewing Co. v Muller & Phipps Ltd.* (WD Mo 1980) 85 FRD 118, 120 (no waiver when attorney merely reviewed correspondence file before giving deposition).

PRACTICE TIP: In light of this authority, it is questionable whether privileged documents should *ever* be shown to a witness before testifying. Absent compelling reasons, clients should be warned not to review privileged documents before a deposition or testimony at trial, to avoid the risk of a finding of waiver. On preparing clients for deposition, see §§6.11-6.17.

Similarly, federal district courts in the Ninth Circuit have adopted the majority view requiring disclosure when otherwise protected work product is communicated to a testifying expert and considered in the formation of the expert's opinion. See, *e.g.*, *South Yuba River Citizens League v National Marine Fisheries Serv.* (ED Cal 2009) 257 FRD 607, 615 (any material, including attorney opinion, considered by testifying expert in formation of expert's testimony not protected by work product rule); *Association of Irritated Residents v Dairy* (ED Cal, June 23, 2008, No. 1:05-cv-00707-AWI-SMS) 2008 US Dist Lexis 57459 (everything communicated to and considered by expert in forming opinion must be disclosed even if it constitutes opinion otherwise protected as work product). See also *Elm Grove Coal Co. v Dir., Office of Workers' Compensation Programs* (4th Cir 2007) 480 F3d 278, 302 n24; *Regional Airport Auth. v LFG, LLC* (6th Cir 2006) 460 F3d 697, 715; *In re Pioneer Hi-Bred Int'l* (Fed Cir 2001) 238 F3d 1370, 1375. But see *Bogosian v Gulf Oil Corp.* (3d Cir 1984) 738 F2d 587, 593 (attorney work product reflecting mental impressions and legal theories not discoverable even though shown to expert witness).

The majority view is consistent with the 1993 amendments to Fed R Civ P 26(a)(2), which require disclosure of information considered by testifying experts in forming their opinions. As the Advisory Committee Notes to Fed R Civ P 26(a)(2) explain:

> Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

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§3.179 E. Waiver of Privilege by Tender of Issues

Waiver often occurs when the party holding the privilege makes the confidential communication an issue in litigation. A prime example is when a patient waives the physician-patient or psychotherapist-patient privilege by placing his or her own medical condition in issue. See Evid C §§996, 1016. By placing his or her physical condition in issue, the plaintiff creates a need for evidence probative of that condition. Thus, the plaintiff who commences a personal injury action loses (or impliedly waives) the physician-patient privilege at the moment he files the complaint, even though he has not disclosed any privileged information and does not intend to rely on it at trial. *San Francisco Unified Sch. Dist. v Superior Court* (1961) 55 C2d 451, 454, 11 CR 373.

When an attorney is retained to investigate alleged sexual harassment, and the adequacy of the investigation is raised as an affirmative defense in a subsequent action, the injection of the issue into the lawsuit results in a waiver of the attorney-client privilege and work product protection. *Wellpoint Health Networks, Inc. v Superior Court* (1997) 59 CA4th 110, 128, 68 CR2d 844. When one of the employer's nonattorneys has conducted the investigation and produced the results, however, except for specific attorney-client communications, there is no waiver. *Kaiser Found. Hosps. v Superior Court* (1998) 66 CA4th 1217, 1225, 78 CR2d 543.

The federal courts have likewise held that a litigant may not place privileged matters into issue and at the same time assert that those matters remain privileged and not subject to discovery. *U.S. v Mendelsohn* (9th Cir. 1990) 896 F2d 1183, 1188 (defendant who disclosed conversation with attorney to detective waived privilege). Waiver by tender of issues frequently arises when the defendant asserts an "advice of counsel" defense. *Henderson v Heinze* (9th Cir 1965) 349 F2d 67, 71; *Handgards, Inc. v Johnson & Johnson* (ND Cal 1976) 413 F Supp 926, 929.

The implied waiver created by placing the matter in issue is not necessarily absolute. In *Britt v Superior Court* (1978) 20 C3d 844, 863, 143 CR 695, the defendant sought a discovery order directing a class of plaintiffs who complained of nervous ailments allegedly caused by airport noise and pollution to reveal their lifetime medical histories. Ruling that this order was overbroad, the supreme court held that the waiver of the physician-patient privilege should be limited to communications directly related to the specific condition placed in issue by the lawsuit. See also *In re Lifschutz* (1970) 2 C3d 415, 435, 85 CR 829; *Allison v WCAB* (1999) 72 CA4th 654, 660, 84 CR2d 915; *Hallendorf v Superior Court* (1978) 85 CA3d 553, 566, 149 CR 564. Similarly, the client does not waive the attorney-client privilege or put the attorney's work product in issue when the client asserts the litigation privilege as a defense to a libel claim. *Aronson v Kinsella* (1997) 58 CA4th 254, 269, 68 CR2d 305 (whether client's statements were made as part of ongoing litigation and whether client made statements in good faith, believing they were true, does not place attorney's thoughts, conduct, or communications with client in issue). When the client raises advice of counsel as an affirmative defense, the attorney-client privilege is waived. See, however, *Venture Law Group v Superior Court* (2004) 118 CA4th 96, 105, 12 CR3d 656, in which the court held that former officers and shareholders of a corporation could not raise the advice of counsel defense and impliedly waive the privilege because they were not the holders of the privilege.

The implied waiver provisions of Evid C §912 are applicable only if the particular privilege is enumerated in the section, *i.e.,* the privilege of a defendant in a criminal case, the privilege against self-incrimination, the lawyer-client privilege, the spousal privilege, the privilege for confidential marital communications, the physician-patient privilege, the psychotherapist-patient privilege, the clergyman-penitent privilege, the sexual assault victim-counselor privilege, the domestic violence victim-counselor privilege, the privilege regarding official information and identity of informers, the political vote privilege, and the trade secret privilege. This section does not apply to mediation confidentiality rights. *Eisendrath v Superior Court* (2003) 109 CA4th 351, 362, 134 CR2d 716. On mediation confidentiality, see §3.147.

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§3.180 1. Attorney's Conduct or State of Mind Put in Issue

When the attorney's conduct or state of mind is placed in issue by the client's filing a lawsuit, courts are likely to find an implied waiver of the attorney-client privilege and work product doctrine. Evid C §958 provides that "[t]here is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." See *Durdines v Superior Court* (1999) 76 CA4th 247, 255, 90 CR2d 217 (when attorney's competence is assailed by former client, "[i]t is only fair" that the attorney be allowed to "adequately defend his professional reputation, even if by doing so he relates confidences revealed to him by the client"); *Rutgard v Haynes* (SD Cal 1999) 185 FRD 596, 599 (by suing former attorney for damages, plaintiff waived attorney-client privilege by putting "in issue" the attorney's actions in defending him and in recommending settlement). Submitting a lawyer's affidavit in opposition to a motion for summary judgment operates to waive the privilege. *McLaughlin v Lunde Truck Sales, Inc.* (ND Ill 1989) 714 F Supp 916, 919.

A habeas corpus petitioner impliedly waives the attorney-client privilege as to all communications with his allegedly ineffective attorney by claiming ineffective assistance of counsel. *Bittaker v Woodford* (9th Cir 2003) 331 F3d 715, 716. However, the waiver appears to apply only to the litigation of the habeas petition, not to other proceedings. 331 F3d at 722. This rule has been approved by the California Supreme Court as well. See *People v Ledesma* (2006) 39 C4th 641, 695, 47 CR3d 326 ("attorney-client privilege continues to apply for purposes of retrial after otherwise privileged matters have been disclosed in connection with habeas corpus proceedings" under Evid C §958). See *U.S. v Amlani* (9th Cir 1999) 169 F3d 1189, 1195 (waiver found when defendant alleged "disparagement of counsel" by government attorney).

NOTE: When one lawyer sues another lawyer over services rendered to the same client, Evid C §958 does not apply. See *Solin v O'Melveny & Myers, LLP* (2001) 89 CA4th 451, 463, 107 CR2d 456 (when second lawyer could defend himself in malpractice action by first lawyer only by revealing client confidences, case was dismissed rather than breaching privilege); *Schlumberger Ltd. v Superior Court* (1981) 115 CA3d 386, 391, 171 CR 413 (client's communications with its present counsel were privileged from disclosure in malpractice action against former attorneys).

The same "fairness" principle applies to lawsuits between lawyers and clients over legal fees for services rendered. Bus & P C §6202 (statutory privilege does not prohibit disclosure of any relevant communication in arbitration or lawsuit over legal fees).

In *Merritt v Superior Court* (1970) 9 CA3d 721, 730, 88 CR 337, the plaintiff brought an action against his insurer for bad faith failure to settle a claim within policy limits. The court of appeal expressly declined to find that a plaintiff who brings an action for bad faith refusal to settle a personal injury claim automatically waives the attorney-client privilege with respect to the prior action. But the court found an implied waiver in the fact that the plaintiff had alleged that the insurance company's conduct had so confused his attorneys as to prevent them from making a settlement offer.

Merritt, however, has been distinguished in several cases in which the *client's* rather than the attorney's, state of mind was alleged to be in issue. *Miller v Superior Court* (1980) 111 CA3d 390, 168 CR 589 (mere fact that plaintiff's state of mind is in issue does not waive privilege regarding confidential communications with attorney). The decisive issue is whether a client has placed in issue "the decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters." *Mitchell v Superior Court* (1984) 37 C3d 591, 605, 208 CR 886 (distinguishing *Merritt*).

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§3.181 2. Reliance on Advice of Counsel

The attorney-client privilege may also be waived if the client asserts reliance on advice of counsel as an affirmative defense in litigation. *Transamerica Title Ins. Co. v Superior Court* (1987) 188 CA3d 1047, 1053, 233 CR 825; *Handgards, Inc. v Johnson & Johnson* (ND Cal 1976) 413 F Supp 926, 929 (antitrust suit in which defendant intended to call attorneys to testify to show prior actions were brought in good faith); *SNK Corp. of Am. v Atlus Dream Entertainment Co.* (ND Cal 1999) 188 FRD 566, 571 ("[f]airness dictates that a party may not use the attorney-client privilege as both a sword and a shield").

Nonetheless, the attorney-client privilege regarding counsel's advice is waived only if the client puts the otherwise privileged communication directly at issue, and disclosure is essential for a fair adjudication of the action. *Southern Cal. Gas Co. v PUC* (1990) 50 C3d 31, 265 CR 801; *Rockwell Int'l Corp. v Superior Court* (1994) 26 CA4th 1255, 1268, 32 CR2d 153 (no waiver when insured sues insurer for denying coverage on third party claim; insured does not place at issue privileged communications between insured and counsel provided to insured under reservation of rights). A city employee asserting an advice of counsel defense in a civil rights action does not waive the city's attorney-client privilege, because the city is the client and thus the holder of the privilege. *Ross v City of Memphis* (6th Cir 2005) 423 F3d 596, 604.

In another context, a taxpayer who sued accountants for negligent tax advice has been held to waive the privilege against disclosure of federal and state income tax returns. *Wilson v Superior Court* (1976) 63 CA3d 825, 830, 134 CR 130. However, in putting his or her financial condition in issue, such a plaintiff waives the right of privacy regarding that condition only to the extent necessary for the lawsuit's fair resolution. 63 CA3d at 830; *Moskowitz v Superior Court* (1982) 137 CA3d 313, 316, 187 CR 4. Regarding personal financial information, the plaintiff is presumptively entitled to a protective order limiting the use of such information to the lawsuit and to persons having a legitimate interest in the information for that purpose. 137 CA3d at 317.

A special instance of implied waiver of the attorney-client privilege arises in cases alleging fraud. Because the plaintiff's "reasonable reliance" on the alleged misrepresentation is an essential element of the cause of action, a defendant may be entitled to inquire whether the plaintiff's attorney provided information that might have a bearing on the reliance issue. *Chicago Title Ins. Co. v Superior Court* (1985) 174 CA3d 1142, 1152, 220 CR 507.

Although courts in other states have held that a "cooperation clause" in an insurance contract may operate to waive any privilege that would otherwise be applicable as between the insurer and insured (see, *e.g., Waste Mgmt., Inc. v International Surplus Lines Ins. Co.* (Ill 1991) 144 Ill2d 178, 198), California courts have expressly refused to follow this rule. See *Rockwell Int'l Corp. v Superior Court* (1994) 26 CA4th 1255, 1261, 32 CR2d 153.

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§3.182 F. Implied Waiver of Work Product Protection

As with the attorney-client privilege, the protection of the work product doctrine is impliedly waived when a party relies on the work product as a basis for a claim or defense in litigation. See *Handgards, Inc. v Johnson & Johnson* (ND Cal 1976) 413 F Supp 926, 929 (once client decides to call attorneys as witnesses, work-product protection must give way to full disclosure on any issue on which they will testify).

Use of a confidential work-product document to prepare a witness or refresh a witness's recollection will likewise result in a finding of implied waiver of the work product doctrine. *U.S. v 22.80 Acres of Land* (ND Cal 1985) 107 FRD 20, 25 (documents shown to witness before deposition ordered produced under Fed R Evid 612(2)).

In *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 165 CR 748, the court considered whether a law firm's interoffice memos prepared during a previous action could be discovered in a subsequent malicious prosecution action. The court held that asserting an affirmative defense of probable cause did not impliedly waive the protection of the work product doctrine because the burden of proving lack of probable cause rests with the plaintiff. In other words, the assertion of "probable cause" as an affirmative defense was "redundant," and effected no implied waiver. 107 CA3d at 503.

Filing a suit against an insurer for an alleged bad faith refusal to settle uninsured motorist claims has been held not to constitute an implied waiver of the attorney work product protection by the plaintiffs with respect to the contents of the file of the attorney who represented them in the prior dispute. *Fellows v Superior Court* (1980) 108 CA3d 55, 166 CR 274.

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§3.183 G. Waiver by Inadvertent or Mistaken Disclosure

The question of waiver of privilege through inadvertent disclosure is analyzed differently by the California and federal courts. See §§3.184-3.185.

Federal "claw-back" provisions. Federal Rules of Civil Procedure 26(b)(5)(B) as amended effective December 1, 2006, provides a remedy for a party that produces information during discovery that is subject to a claim of privilege or of protection as trial-preparation material. See §3.185. On so-called "claw-back" provisions, see also §4.33. The producing party may notify the receiving party of the claim of privilege or protection and the basis for it. The receiving party must then

> promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Fed R Civ P 26(b)(5)(B). It is important to note that Rule 26(b)(5)(B) does not address whether a privilege that is asserted after production is in fact waived by the production. See Advisory Committee Notes to Rule 26. See §3.185. On the amended federal rules in general, see §8.104.

California "claw-back" provision for electronically stored information. California has a similar statutory claw-back provision for electronically stored information (ESI) produced in discovery that is subject to a claim of privilege or protection as attorney work product. CCP §2031.285. The producing party may notify the receiving party of the claim of privilege or protection and the basis for the claim. CCP §2031.285(a). The receiving party must then sequester the information and either return it or present the information conditionally under seal to the court for a determination of the claim. The receiving party may not use or disclose the information until the claim of privilege is resolved. CCP §2031.285(b)-(d). A receiving party who disclosed the information before being notified must immediately after notification take reasonable steps to retrieve the information. CCP §2031.285(c). Like Fed R Civ P 26(b)(5)(B), California's provision does not address whether the privilege or protection that is claimed after production was waived by the production.

Protective orders or stipulations. Whether in state or federal court, especially when discovery will involve ESI (see §§4.1-4.2), many attorneys obtain protective orders or enter into stipulations about possible inadvertent disclosure. Such an order might provide, *e.g.,* that inadvertent or mistaken disclosure of confidential information does not constitute a waiver of any claim of confidentiality if, within a certain designated time period, the producing party notifies the receiving party of the inadvertent or mistaken disclosure and sends the recipient properly redesignated documents. The order could then provide that on receipt of the redesignated documents, the receiving party will return all unmarked or incorrectly designated documents and other materials to the producing party, retain no copies, and treat the information in the documents and materials as redesignated.

On discovery of ESI, see chap 4.

On stipulation for production of documents, see §8.43.

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1. Inadvertent Disclosure During Document Production

§3.184 a. California Cases

Inadvertent disclosure is not waiver. California authority squarely holds that under Evid C §912, "'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." *State Compensation Ins. Fund v WPS, Inc.* (1999) 70 CA4th 644, 654, 82 CR2d 799. See *O'Mary v Mitsubishi Electronics Am., Inc.* (1997) 59 CA4th 563, 577, 69 CR2d 389 ("[plaintiff] invites us to adopt a 'gotcha' theory of waiver, in which an underling's slip-up in a document production becomes the equivalent of actual consent. We decline. The substance of an inadvertent disclosure under such circumstances demonstrates that there was no *voluntary* release").

The theory of these cases is that the attorney-client privilege and attorney work product protections are not waived unless there has been knowing, voluntary disclosure or consent to disclosure by the holder of the privilege. *American Mut. Liab. Ins. Co. v Superior Court* (1974) 38 CA3d 579, 595, 113 CR 561. The attorney-client privilege can be waived only by the client. Evid C §953. See *State Compensation Ins. Fund v WPS, Inc.* (1999) 70 CA4th 644, 652, 82 CR2d 799 (declining to find any statement or conduct of client indicating consent to counsel's inadvertent disclosure of attorney-client privileged documents). See also Jefferson's California Evidence Benchbook §42.21 (4th ed CJA-CEB 2009) ("lawyer-client privilege is *not* lost through an *accidental* or *unauthorized* out-of-court disclosure of" a lawyer-client communication) (emphasis added).

Because waiver is the intentional relinquishment of a known right, disclosure of privileged documents based on an honest mistake of law is not a waiver and provides a possible basis for relief in connection with discovery. In *Wells Fargo Bank, N.A. v Superior Court* (2000) 22 C4th 201, 211, 91 CR2d 716, a trustee produced confidential communications with its attorney about trust administration but withheld attorney-client communications on the beneficiaries' claims of trustee misconduct. Although the law differs in other states, in California a trustee need not disclose attorney-client communications relating to trust administration. Because the trustee had made an "honest mistake of law, where the law is unsettled and debatable," the California Supreme Court found no waiver of the attorney-client privilege. 22 C4th at 211.

Concerning attorney work product, inadvertent disclosure by the attorney "to a person other than the client who has no interest in maintaining the confidentiality" of the work product will destroy the protection of the work product doctrine. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1261, 245 CR 682.

JUDGE'S PERSPECTIVE: Counsel in the unenviable position of having accidentally produced to the opposing party documents that constitute work product should be sure to provide the court with a declaration specifying the documents that are protected (under seal if necessary), the due diligence and procedures used to protect against inadvertent disclosure, and how the documents came to be inadvertently disclosed.

Inadvertent disclosure of documents during a document production does not demonstrate a voluntary consent to disclosure, but rather demonstrates that a "poor paralegal or junior associate who was lumbered with the tedious job of going through voluminous files and records in preparation for a document production may have missed something." *O'Mary v Mitsubishi Electronics Am., Inc.* (1997) 59 CA4th 563, 577, 69 CR2d 389 (declining to adopt "gotcha" theory of waiver in which underling's slip-up becomes equivalent of actual consent to disclosure).

PRACTICE TIP: Counsel should attempt to recover the materials immediately on discovering the inadvertent disclosure. Counsel should also make certain to identify and attempt to recover all copies.

JUDGE'S PERSPECTIVE: If electronically stored information (ESI) is inadvertently disclosed, counsel should immediately seek return of the materials from opposing counsel and, if necessary, seek immediate relief from the court, providing a detailed declaration by information technology personnel that explains the measures that counsel took to protect against inadvertent disclosure and the unanticipated nature of the breakdown in those measures. For issues that may arise in the discovery of ESI, see chap 4. For a possible stipulation between counsel about inadvertent disclosure, see §3.183.

When counsel receives apparently privileged material. When an attorney receives documents that appear to be privileged, he or she should immediately notify opposing counsel and try to resolve the situation. *Rico v Mitsubishi Motors Corp.* (2007) 42 C4th 807, 817, 68 CR3d 758, adopting the approach of *State Compensation Ins. Fund v WPS, Inc.* (1999) 70 CA4th 644, 654, 82 CR2d 799 and affirming the disqualification of plaintiffs' counsel who read and made full use of inadvertently obtained privileged document. In *State Compensation Ins. Fund v WPS, Inc.,* the court of appeal explained that when an attorney receives documents that appear to be privileged, and "it is reasonably apparent that the materials were provided or made available through inadvertence," the attorney must refrain from further review of the documents and immediately notify the producing party that he or she appears to have privileged documents. 70 CA4th at 656. If the parties cannot resolve the issue by agreement, they may seek court assistance. The producing party has the burden "to persuasively demonstrate inadvertence." 70 CA4th at 657.

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§3.185 b. Federal Cases

The principles that many federal courts have developed to determine questions of waiver in these circumstances follow a strict responsibility approach, finding that once a privileged document is disclosed to an adverse party, even inadvertently, the privilege is automatically waived. *Underwater Storage, Inc. v United States Rubber Co.* (D DC 1970) 314 F Supp 546, 548; *Amgen Inc. v Hoechst Marion Roussel, Inc.* (D Mass 2000) 190 FRD 287, 292 (privilege waived by inadvertent copying and production of 200 privileged documents among total of 70,000 documents produced; "a knowledgeable attorney or legal assistant should quickly have reviewed the performance of the vendor to ensure that the proper documents were copied").

Other federal cases hold that because waiver implies the intentional relinquishment of a known right, "[i]nadvertent production is the antithesis of that concept." *Mendenhall v Barber-Greene Co.* (ND Ill 1982) 531 F Supp 951, 955.

Still other courts make a "case by case determination of waiver based on a consideration of all the circumstances." See *Hartford Fire Ins. Co. v Garvey* (ND Cal 1985) 109 FRD 323, 329 (recognizing that "[t]he majority of cases do hold, or take for granted, that inadvertent disclosure of privileged documents may waive the privilege," but applying multi-factor test to determine that "there was a complete failure to take reasonable precautions," which resulted in waiver); *Cunningham v Connecticut Mut. Life Ins. Co.* (SD Cal 1994) 845 F Supp 1403, 1409 (waiver found when attorney took only "minimal precautions" against inadvertent disclosure).

A recurring theme in the federal decisions that have considered this issue is whether the disclosing party has taken reasonable precautions to preserve confidentiality and prevent inadvertent disclosure. In one frequently cited case, the court concluded that the disclosure was inadvertent and the privilege was not waived when only 22 documents out of 16,000 produced for inspection were claimed to be privileged. *Lois Sportswear, U.S.A., Inc. v Levi Strauss & Co.* (SD NY 1985) 104 FRD 103, 105 ("[b]y a narrow margin the balance tips in Levi's favor… Levi only just adequately protected its privilege").

In *Hartford Fire Ins. Co. v Garvey* (ND Cal 1985) 109 FRD 323, 330, the federal court set forth a calibrated approach, which attempts to weigh the degrees of excusable and inexcusable carelessness or neglect. The factors to be considered are:

- The reasonableness of the precautions to prevent inadvertent disclosure;
- The number of inadvertent disclosures;
- The extent of the disclosure and the scope of the discovery;
- The measures taken to rectify the disclosure, including any delays in taking such measures; and
- Whether the overriding interests of justice would be served by relieving a party of its error.

On the usefulness of negotiating before production an agreement ("claw-back agreement") with opposing parties that each party may retrieve privileged material inadvertently produced to the other without waiver of privilege or work product protection, see *Hopson v Mayor & City Council of Baltimore* (D Md 2005) 232 FRD 228 and the discussion in §4.33.

Rule 26(b)(5)(B). Under Fed R Civ P 26(b)(5)(B), a party may assert a claim of privilege after information is produced in discovery. To assert the claim, the party making the disclosure must notify all parties that received the information of the claim and its basis. After notification, the party or parties that received the information must either promptly return, sequester, or destroy it and may not use or disclose it until the matter is resolved by the parties or the court. Rule 26(b)(5)(B) does not, however, address whether a privilege that is asserted after production is in fact waived by the production. The 2006 Advisory Committee Notes to Rule 26 state that "courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information." Thus, until courts have an opportunity to interpret and apply the new provision in Fed R Civ P 26(b)(5)(B) for asserting an objection after information has been produced, counsel should consider the possibility that federal courts will continue to follow the "strict responsibility" approach.

PRACTICE TIP: Prudent counsel should take reasonable precautions to avoid the inadvertent disclosure of privileged

documents and should act promptly to salvage the privilege if confidential documents are inadvertently produced in the course of discovery.

The courts often make a fact-intensive examination of the circumstances leading to the inadvertent disclosure in order to determine whether there has been a waiver. See Comment, *Inadvertent Disclosure of Confidential Information: What Does a California Lawyer Need to Know?* 37 Santa Clara L Rev 547 (1997); Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 Mich L Rev 598 (1983); Ayres, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 Pac L J 59 (1986). Because responsibility for an inadvertent disclosure is often laid at the attorney's doorstep, great care is necessary.

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§3.186 c. Requesting Return of Inadvertently Produced Privileged Documents, and Responding to Requests

Inadvertent disclosure of privileged documents during litigation presents headaches for both parties. On a possible stipulation between counsel on how to handle such disclosure, see §3.183.

A lawyer who discovers that privileged documents have been inadvertently produced should *immediately* request their return, along with any copies that may have been made. See CCP §2031.285 and Fed R Civ P 26(b)(5)(B). See also §3.185. Failure to take immediate steps to retrieve or request the return of the privileged documents may itself be taken as evidence of waiver. *Permian Corp. v U.S.* (DC Cir 1981) 665 F2d 1214, 1220 n11. The lawyer should consider whether to seek a court order compelling return of the inadvertently produced documents and barring their use as evidence. There are numerous cases in which such motions have been granted. *U.S. ex rel Bagley v TRW, Inc.* (CD Cal 2001) 204 FRD 170, 184; *Lazar v Mauney* (ND Ga 2000) 192 FRD 324, 331; *Sampson Fire Sales, Inc. v Oaks* (MD Pa 2001) 201 FRD 351, 360.

The lawyer who receives the privileged documents should not celebrate the windfall too quickly. When an attorney receives documents that appear to be privileged, and "it is reasonably apparent that the materials were provided or made available through inadvertence," the attorney must refrain from further review of the documents and immediately notify the producing party that he or she appears to have privileged documents. *State Compensation Ins. Fund v WPS, Inc.* (1999) 70 CA4th 644, 656, 82 CR2d 799. If the parties cannot resolve the issue by agreement, they may seek court assistance. The producing party has the burden "to persuasively demonstrate inadvertence." 70 CA4th at 657. See *Rico v Mitsubishi Motors Corp.* (2007) 42 C4th 807, 817, 68 CR3d 758 (*State Compensation Ins. Fund* rule is "a fair and reasonable approach" that applies to documents protected by attorney-client privilege and work product doctrine).

In one case a California trial court awarded $22,000 in sanctions against a law firm employing a lawyer who received obviously privileged documents, kept them, used them in a deposition, eventually destroyed them, and never informed opposing counsel or the special discovery master appointed by the court. The trial court found the lawyer had "acted unethically and in bad faith in failing to immediately notify opposing counsel of his receipt of the documents, and using information contained therein to his own advantage." *Aerojet-General Corp. v Transport Indem. Ins.* (1993) 18 CA4th 996, 991, 22 CR2d 862. Although the award of sanctions was ultimately overruled on appeal, the case remains a cautionary tale. 18 CA4th at 1006.

In *Lazar v Mauney* (ND Ga 2000) 192 FRD 324, privileged documents were inadvertently produced during a document production by one law firm to another. The privileged documents were in fact returned following an immediate request from counsel. Apparently, however, "defense counsel secretively retained a copy" of the privileged documents and later relied on the copy and even quoted it in a motion filed with the court. In addition to ordering return of all copies of the privileged documents within 24 hours, the court excoriated the defense lawyers at length for their "unprofessional and dishonest course of conduct" and referred the matter to the state bar. 192 FRD at 330.

PRACTICE TIP: Counsel who receive privileged materials should notify opposing counsel immediately. See ABA Model Rules of Prof Cond 4.4(b) ("[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender"). Note that the Comment to Rule 4.4(b) states the rule also applies to a fax inadvertently sent by opposing counsel; the recipient is prohibited from reading the document and must notify the sending party and abide by that person's instructions.

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§3.187 2. Misappropriation of Privileged Documents

There is no waiver of the attorney-client privilege or attorney work product doctrine when privileged documents are stolen or otherwise misappropriated. See *U.S. ex rel Mayman v Martin Marietta Corp.* (D Md 1995) 886 F Supp 1243, 1245 (privilege not lost when document stolen by trusted employee). In such cases, the aggrieved party can move for a return of the documents. The court can take corrective action, requiring the return of all "fruits" of the documents, such as notes, records, summaries, and document descriptions. Failure to comply with such an order may be punishable as contempt under CCP §1218 and may provide grounds for sanctions under CCP §128.5. *Conn v Superior Court* (1987) 196 CA3d 774, 784, 242 CR 148. See also *Cooke v Superior Court* (1978) 83 CA3d 582, 587, 147 CR 915 (party who received surreptitiously copied privileged documents was ordered to deliver copies to court clerk, pending further consideration of privilege issues); *Sakman v Liggett Group, Inc.* (ED NY 1997) 173 FRD 358, 365 (disclosure of document by disloyal paralegal employed by law firm representing tobacco manufacturer did not waive attorney-client privilege); *Resolution Trust Corp. v Dean* (D Ariz 1993) 813 F Supp 1426, 1429 (privileged memo inexplicably leaked did not lose privileged status).

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§3.188 3. Eavesdroppers and Trash Scavengers

The comments to some statutory privilege provisions expressly state that no waiver occurs when disclosure is inadvertently made to eavesdroppers or other wrongful interceptors of confidential communications. See, *e.g.,* Comments to Evid C §§954 (attorney-client), 980 (marital communications), 994 (physician-patient), and 1043 (clergyman-penitent). See also Comment to Evid C §1014 (psychotherapist-patient), which notes that the Comments to Evid C §§990-1007 are pertinent. Because the sexual assault counselor-victim privilege expressly states that a sexual assault victim has a privilege to prevent someone else from disclosing confidential communications, eavesdropper disclosure can also be prevented under Evid C §1035.8.

At least one federal court has concluded that there was a waiver of the privilege for documents found in a trash can, reasoning that the means of preserving secrecy were in the client's hands. *Suburban Sew 'N Sweep, Inc. v Swiss-Bernina, Inc.* (ND Ill 1981) 91 FRD 254, 256.

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§3.189 4. Privileges and Electronic Communications

As part of the Electronic Communications Privacy Act of 1986 (ECPA), 18 USC §2517(4) provides: "No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

In *Shubert v Metrophone, Inc.* (3d Cir 1990) 898 F2d 401, the Third Circuit Court of Appeals declined to find that a cellular telephone company's mere act of transmitting messages without encryption was an intentional disclosure of the communication's content. The court relied heavily on the language of the ECPA and said "we cannot equate transmission to divulgence, even though the transmission may be readily intercepted." 898 F2d at 406. See also *U.S. v Maxwell* (US Air Force Ct of Crim App 1995) 42 MJ 568, 576 (holding that sender of e-mail messages had objective expectation of privacy with regard to messages to other subscribers of private online service, America Online, who had individually assigned passwords: "[T]here was *virtually no risk* that… computer transmissions would be received by anyone other than the intended recipients") (emphasis added).

In *Edwards v Bardwell* (MD La 1986) 632 F Supp 584, however, the district court held that the interception of a conversation between an attorney and his client in which the attorney was on his telephone and the client was on his mobile phone did not violate the ECPA, because "there is no reasonable expectation of privacy in a communication which is broadcast by radio in all directions to be overheard by countless people who have purchased and daily use receiving devices such as a 'bearcat' scanner." 632 F Supp at 589. *Edwards* did not involve an analysis of waiver of the attorney-client privilege because the opposing counsel (a prosecutor) expressed no interest in using the intercepted information as evidence. Instead, the case arose when the client sought to bring a private action under the ECPA. However, the court's reasoning in the case implies that it would have had no problem in finding that waiver had occurred.

JUDGE'S PERSPECTIVE: Under Evid C §917(b), a communication does not lose its privileged character solely because it is "communicated by electronic means" or because persons involved in its electronic delivery, facilitation, or storage may have access to its content. As a practical matter, the content of the communication determines whether it is privileged and the measures taken to preserve confidentiality during its transmittal determine if there has been a waiver. Courts will look at whether or not counsel, *e.g.,* interviewed a client on an unprotected cell phone line or failed to include on e-mails labels of confidentiality and notice that unintended recipients should notify the sender.

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§3.190 5. Unauthorized Newspaper Disclosure

The federal courts have held that unauthorized newspaper publication of privileged documents does not necessarily constitute a waiver. *Resolution Trust Corp. v Dean* (D Ariz 1993) 813 F Supp 1426, 1429 (publication of plaintiff's internal litigation evaluation memorandum resulting from unauthorized and criminal act does not amount to waiver of attorney-client privilege or work product protection); *In re Dayco Corp. Derivative Secs. Litig.* (SD Ohio 1984) 102 FRD 468, 470 (publication of document protected by attorney-client privilege and work product immunity, obtained by newspaper without holder's permission from unidentified source, does not constitute waiver). However, a voluntary disclosure of a substantive component of otherwise privileged communications in a news release will result in a waiver of the privilege. *Electro Scientific Indus., Inc. v General Scanning, Inc.* (ND Cal 1997) 175 FRD 539, 541 n2.

There are limits on what a court may do to protect rights of privacy once the confidential information has been published. In *Hurvitz v Hoefflin* (2000) 84 CA4th 1232, 1245, 101 CR2d 558, confidential medical records were already widely published when the trial court attempted to restrict their use by means of a protective order. The court of appeal held that if the information "is already public, the harm to the patients' privacy has already occurred and cannot be prevented by" a protective order. The court noted that "neither the state nor the federal Constitution permits the court to lock the barn door after the horse is gone." 84 CA4th at 1245.

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XI. PROCEDURES FOR ASSERTING AND CHALLENGING PRIVILEGES

A. Written Forms of Discovery

§3.191 1. Interrogatories and Requests for Admission

A privilege is asserted as a written objection in responses to special interrogatories or form interrogatories, or in responses to requests for admission. The response should include language such as the following:

- The objection (*e.g.*, "plaintiff objects to this interrogatory on the grounds that it seeks information protected by the attorney-client privilege"); or
- The objection and a response without waiving the privilege (*e.g.,* "plaintiff objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege. Without waiving such objection, plaintiff responds as follows: White Ford Bronco").

JUDGE'S PERSPECTIVE: There can be a tension in providing nonprivileged information and preserving the privilege. Although disclosure of all nonprivileged information in response to a discovery request is required, counsel should make sure the information does not so significantly involve the privileged information that the court finds a waiver of the privilege. For example, an interrogatory response stating "plaintiff first learned of this defect in a conversation with plaintiff's counsel" may be an inadvertent first step down a slippery slope.

The party propounding any of these discovery requests can challenge an assertion of privilege by filing a motion to compel a response. See chaps 7 (interrogatories) and 9 (requests for admission).

NOTE: The existence of a document containing privileged information is not privileged. *Hernandez v Superior Court* (2003) 112 CA4th 285, 293, 4 CR3d 883. A party responding to interrogatories need not supply a privilege log when answering interrogatories seeking the identification of documents. However, the trial court may order the responding party to provide further responses that adequately describe the documents—which may be the functional equivalent of a privilege log. 112 CA4th at 293. On responding to interrogatories by identifying documents, see §§7.78-7.80.

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§3.192 2. Privilege Logs for Documents

California Code of Civil Procedure §2031.240(b) requires that a party objecting to a demand for inspection set forth the extent of, and the specific ground for, the objection. If the objection is based on a claim of privilege or the work product doctrine, the particular privilege must be stated.

Although CCP §2031.240(b)(2) does not state the kind of identification that is required when asserting a privilege for a document, the usual practice is to prepare a "privilege log" in which the objecting party records specific information. Generally, a privilege log is sufficient if it identifies (a) the nature of the document (*e.g.,* letter, memorandum), (b) date, (c) author, (d) recipients, (e) the document's sequential number (or document control number, if any), and (f) the privilege claimed. See *Wells Fargo Bank, N.A. v Superior Court* (2000) 22 C4th 201, 91 CR2d 716.

The information in the log "must be sufficiently specific to permit the trial court to determine whether each withheld document is or is not privileged." *Kaiser Found. Hosps. v Superior Court* (1998) 66 CA4th 1217, 1228, 78 CR2d 543. If the log is not sufficiently specific, the trial court may order the objecting party to prepare a new log containing more information about the nature of the document in question. 66 CA4th at 1228. Although a privilege log (or something like it) is required by CCP §2031.240(b), one court has held that the failure to serve a privilege log concurrently with the response does not constitute a waiver of the privilege, as long as the privilege is timely claimed, at least in general terms, in the response. *Korea Data Sys. Co. v Superior Court* (1997) 51 CA4th 1513, 1517, 59 CR2d 925. But see *Scottsdale Ins. Co. v Superior Court* (1997) 59 CA4th 263, 275, 69 CR2d 112 (privilege waived when no objection was asserted and no privilege log served).

The federal courts generally find a waiver of the privilege if a privilege log is not timely served and no excuse is offered. *Burlington Northern & Santa Fe Ry. Co. v U.S. Dist. Court* (9th Cir 2005) 408 F3d 1142, 1149 (privilege log served 5 months late).

Although not required by statute, California courts routinely require a public agency responding to a petition for writ of mandate under a Public Records Act request (Govt C §6254) to prepare a privilege log, listing all documents that the agency claims are exempt from disclosure. *Haynie v Superior Court* (2001) 26 C4th 1061, 1073, 112 CR2d 80.

Because descriptions of privileged documents, however general in nature, inevitably convey some information about the purpose of the attorney-client relationship, counsel must take care to avoid disclosure of more information than is minimally necessary to establish the basis for the privilege claim. See *In re Horn* (9th Cir 1992) 976 F2d 1314, 1318.

JUDGE'S PERSPECTIVE: Courts require a privilege log in connection with a motion to compel discovery of allegedly privileged material or a motion for protective order. See CCP §2031.240(b).

The party propounding a demand for inspection can challenge an assertion of privilege by filing a motion to compel a response. CCP §2031.310(a)(3). See §§8.92, 8.126-8.129. The propounding party can also move to compel further responses under CCP §2031.310, contesting a party's conclusory privilege objections. The responding party must produce a privilege log containing sufficient detail so the trial court can determine whether a specific document is privileged. *Best Prods., Inc. v Superior Court* (2004) 119 CA4th 1181, 1189, 15 CR3d 154.

PRACTICE TIP: A privilege log is an excellent vehicle that can be very helpful to the lawyer preparing it, notwithstanding the effort required: (a) The privilege log may head off a motion to compel or a motion for protective order by demonstrating that the documents being withheld are legitimately privileged; (b) if a motion does become necessary, the privilege log furnishes a basis on which the court can make a determination without actually reviewing the documents in camera; and (c) preparation of the privilege log forces the lawyer to examine and carefully consider each document listed—this is a far more rigorous exercise than a boiler-plate assertion of "privilege."

Although interrogatories may require the identification of privileged documents, unlike a demand for inspection, a formal privilege log that describes the nature of the privileged documents in question is not required. *Hernandez v Superior Court* (2003) 112 CA4th 285, 293, 4 CR3d 883. On responding to interrogatories by identifying documents,

see §§7.44-7.46, 7.102.

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§3.193 3. Privilege Log for E-Mail Communications

Demands for inspection, copying, testing, or sampling now routinely include a request for production of e-mail communications between certain parties, or regarding certain subjects. This is hazardous territory because e-mail communications are often informal and not as carefully considered as letters or memorandums. E-mails must be treated the same as traditional correspondence, and those being withheld on grounds of privilege must be identified on a privilege log. See, *e.g., Newport Pac., Inc. v County of San Diego* (SD Cal 2001) 200 FRD 628, 634 (analyzing privilege claims concerning individual e-mails identified on privilege log). Hard copies of the privileged e-mails should be prepared and segregated from the documents being produced for inspection. On demand for inspection in general see chap 8. On production of electronically stored information (ESI), see §§4.33-4.35, 8.43, 8.49-8.51, 8.62, 8.65.

PRACTICE TIP: Evidence that a party neglected to take reasonable precautions to maintain the confidentiality of an electronic communication could result in waiver, *e.g.,* if privileged e-mail is sent to the appropriate party but later forwarded to a third party who is not necessary to the communication or intended to interact with the attorney, the privilege may be waived. An organization that stores e-mail in a manner that permits easy access by third parties (*e.g.,* publicly accessible computer directories) could also be considered to lack the intent to keep the contents of the communication confidential. On importance of keeping client electronic information secure, see §4.28.

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B. Depositions

§3.194 1. Objections by Parties

A party objecting to a question on grounds of privilege can seek a protective order before, during, or after the deposition (CCP §2025.420) or can assert the privilege during the deposition and instruct his or her client not to answer. See chap 6. Failure to assert the privilege in a timely manner constitutes a waiver of the privilege. CCP §2025.460(a).

JUDGE'S PERSPECTIVE: After the deponent has asserted a privilege, the questioning party should place on the record all the questions that he or she intended to ask about the assertedly privileged area. On a motion to compel, the court can compel only an answer to a question known to the court. See §6.76.

To challenge the assertion of a privilege, the party taking the deposition may file a motion to compel within 60 days after the completion of the record of the deposition. CCP §2025.480(b).

To object to a subpoena for records, a party whose personal records are being sought "may, prior to the date for production, bring a motion under [CCP §]1987.1 to quash or modify the subpoena duces tecum." CCP §1985.3(g).

NOTE: If, on a motion to compel, the court determines that the claim of privilege was not proper, the court will direct that the deponent appear for a resumption of the deposition to answer the question and any other questions that may arise from the answer. Unless there was good cause for the dispute over whether the question was privileged, the court will probably award monetary sanctions under CCP §2025.480(f).

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§3.195 2. Objections by Nonparties

Object or seek protective order. The procedure for assertion of a privilege by a nonparty is similar to that for parties, *i.e.,* counsel should object orally during the deposition, object in writing to a subpoena for consumer or employment records, or seek a protective order.

Move to quash. Another option is to file a motion to quash the subpoena in whole or in part. CCP §§1985.3(g), 1985.6(f), 1987.1. The motion to quash must be filed before the production date set in the subpoena, and notice must be given to the witness and deposition officer at least 5 days before the production. CCP §§1985.3(g), 1985.6(f). The filing of a motion to quash a subpoena seeking consumer records automatically stays the deposition until the court renders an order; for other subpoenas, a stay must be obtained by agreement with the party who served the subpoena or from the court on ex parte application. CCP §§1985.3(g), 1985.6(f).

Challenging assertion of privilege. To challenge a nonparty's assertion of privilege, the subpoenaing party may move for an order to enforce the subpoena within 20 days after service of a written objection. CCP §§1985.3(g), 1985.6(f). Alternatively, the requesting party may file a motion to compel attendance. CCP §2025.480.

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Source: Civil Litigation/California Civil Discovery Practice/3 Evaluating Privileges, Work Product, and Other Protections/ §3.196 C. Asserting and Challenging Privileges at Trial

§3.196 C. Asserting and Challenging Privileges at Trial

A party seeking to prevent disclosure of privileged information at trial may wish to consider filing a motion in limine to bar disclosure of the privileged information. A party challenging the privilege can file opposition to the motion in limine or can file its own motion in limine regarding that issue.

JUDGE'S PERSPECTIVE: Even if the court withholds a ruling on the motion in limine, counsel will at least have alerted the court to be cognizant of the issue as the trial progresses.

At trial, the party seeking to assert or preserve a privilege should make an oral objection on the record, preferably outside the jury's presence. Nonparty witnesses are entitled to assert the privilege on their own behalf.

For further discussion, see California Trial Objections (Cal CEB Annual).

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§3.197 D. Court's Ruling on Privileges

A trial court cannot usually compel disclosure of the contents of privileged documents in order to rule on a claim of privilege. Evid C §915(a); *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 740, 101 CR3d 758; *Solin v O'Melveny & Myers, LLP* (2001) 89 CA4th 451, 465, 107 CR2d 456. This is because "the court's factual determination does not involve the nature of the communications or the effect of disclosure but rather the existence of the relationship at the time the communication was made, the intent of the client and whether the communication emanates from the client." *Cornish v Superior Court* (1989) 209 CA3d 467, 480, 257 CR 383.

Section 915(a) applies to a variety of privileges based on confidential relationships, including the attorney-client privilege, the physician- and psychotherapist-patient privileges, and the clergy-penitent privilege. *Costco*, 47 C4th at 737 n3. It does not, however, apply to the work product doctrine (*Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 215, 91 CR2d 716), which is governed instead by Evid C §915(b).

When necessary to determine whether the work product doctrine applies, Evid C §915(b) provides that the court may require "the person from whom disclosure is sought or the person authorized to claim the privilege, or both," to disclose the allegedly privileged information to the court in camera so that the court may rule on the claim of privilege. *Costco*, 47 C4th at 736; *Wells Fargo Bank, supra*. See also *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 983, 98 CR3d 422 (court need not review all documents claimed as protected work product when court only needed to determine whether attorney sought to be disqualified was privy to *some* confidential work product reasonably shared among defense counsel in furtherance of common interests).

Without requiring disclosure, the court should first determine if the information is subject to the attorney-client privilege; if the privilege does not apply, the court may then consider whether to order disclosure at an in camera hearing to decide if the information is protected work product. *Costco*, 47 C4th at 737 n4.

In Camera Review. When document review by the court in camera is necessary to determine a work product doctrine issue, the court should make a record of its findings that will be adequate for review of its ruling. The court may not delegate this task, except by stipulation of the parties. *In re Keisha T.* (1995) 38 CA4th 220, 241, 44 CR2d 822. For an example of a case in which the court of appeal remanded the case because the trial court's in camera review of documents subject to a claim of privilege was found inadequate, see *Lipton v Superior Court* (1996) 48 CA4th 1599, 56 CR2d 341. The determination of whether waiver of the attorney-client privilege has occurred is a critical pretrial matter, and the court may not decide the issue without affording the parties a full hearing with oral argument. *Titmas v Superior Court* (2001) 87 CA4th 738, 744, 104 CR2d 803.

Appellate Review. Court orders implicating the attorney-client privilege and the work product doctrine are particularly appropriate for immediate review by way of a petition for extraordinary writ in the court of appeal. See *Spectra-Physics, Inc. v Superior Court* (1988) 198 CA3d 1487, 1493, 244 CR 258 (writ relief is particularly appropriate because "the damage done by improperly allowing such discovery cannot readily be cured after it has occurred").

PRACTICE TIP: Counsel faced with an order compelling disclosure of privileged information or subjecting him or her to a deposition should consider filing a petition for writ of mandate in the court of appeal. See *Carehouse Convalescent Hosp. v Superior Court* (2006) 143 CA4th 1558, 1566, 50 CR3d 129.

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§3.198 E. Third Party's Assertion of Attorney-Client Privilege and Work Product Protection

The holder of the attorney-client privilege or attorney work product doctrine has standing to assert the privilege or doctrine in a case in which the holder is not a party. The holder may bring a motion seeking an appropriate order to prevent improper use or dissemination of protected information. *Mylan Labs., Inc. v Soon-Shiong* (1999) 76 CA4th 71, 80, 90 CR2d 111. A motion to intervene is unnecessary. 76 CA4th at 82. If necessary to prevent the disclosure of confidential communications, the holder may request a dismissal of a lawsuit, even when the holder is not a party. *Solin v O'Melveny & Myers, LLP* (2001) 89 CA4th 451, 457, 107 CR2d 456 (malpractice lawsuit between two attorneys could not be resolved without disclosing third party client's confidential communications; therefore, client was warranted in requesting dismissal of lawsuit).

Note that in federal court a nonparty to the litigation that consents to provide depositions of witnesses and documents cannot necessarily rely on the parties' stipulated protective order to keep the information confidential; such an order does not necessarily overcome the presumption of access to court records or show the good cause necessary to keep discovery documents under seal. There is a strong presumption in favor of public access to judicial records and documents and a party seeking to overcome this presumption must state "compelling reasons" supported by specific factual findings. *Kamakana v City & County of Honolulu* (9th Cir 2006) 447 F3d 1172, 1183 (third party could not rely on stipulated protective order to protect confidentiality of documents because judge signed order without making individualized "good cause" finding as to each specific document and order provided that parties would have to obtain court order to file materials under seal). On protective orders, see §§15.59-15.84.

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§3.199 XII. TABLE: MISCELLANEOUS STATUTORY PRIVILEGES

California Constitution

Art I, §1	Constitutional right to privacy.
Art I, §7(b)	Privileges and immunities may be granted, altered, or revoked by the legislature.
Art I, §15	Privilege against self-incrimination.
Art IV, §14	Legislators' immunity from civil process.
Art VI, §18(h)	Immunity for Commission on Judicial Performance.

Business and Professions Code

805(c), (g)	Required reporting to the state of disciplinary action against licensed health care personnel is not a waiver of the confidentiality of medical records.
2225(a)	Physician-patient confidentiality and waiver of privilege in investigations by State Board of Medical Examiners (and other agencies listed in statute).
2395, 2398	Physician's immunity for good faith emergency care.
2918	Psychologist-patient communications are privileged.
2960(h)	Sanctions for breach of psychologist-patient confidentiality.
6068(e)	Attorney's duty to maintain confidentiality of client communications.
6168	Confidential investigations of law corporations.
6180.10	Attorney-client privilege extends to substitute attorneys.
6202	Limitation on attorney-client privilege and work product rule in disputes over arbitration fees or awards.
6726.4	Members of professional engineers investigative committees have same immunity as public employees.
7067.5	Confidentiality of contractor's license applications.
7539(a)	Private investigator or security officer may not disclose information about criminal offenses other than to client or law enforcement officers.
16606	Customer lists of telephone answering services are considered trade secrets.
16607	Customer lists of employment agencies are considered trade secrets.
16758	Witness immunity in restraint of trade investigations or proceedings.
17087	Witness immunity in unfair trade practices investigations or proceedings.
17530.5	Confidentiality of client information furnished to tax preparers.

Civil Code

43.7	Functional immunity of hospital staff or peer review

	committee.
43.95	Immunity for professional referral services.
43.96(b)	Immunity for persons communicating information to the Medical Board of California or the California Board of Podiatric Medicine.
47	Publications or broadcasts immune from civil liability: legislative or judicial proceedings, statements of officials, etc. Qualified and absolute privileges for statements defined.
1714.2	Limited immunity for persons administering cardiopulmonary resuscitation.
1785.15	Guidelines for disclosure of consumer credit reporting agency files.
1798.3(a)	Information Practices Act of 1977: defines "personal confidential information" for purposes of the privacy laws.

Code of Civil Procedure

129	Autopsy and postmortem photographs and video recordings are confidential; see statute for exceptions.
411.35(e)	Attorney may refuse to identify architect, engineer, or land surveyor who certifies professional negligence complaint.
1263.520	Provisions regarding disclosure of state tax returns of businesses in eminent domain proceedings.
2017.010	Discovery by deposition is limited to nonprivileged matter.
2018.030(b)	Attorney's work product not discoverable except on court finding of undue prejudice to party requesting discovery or that it will result in injustice.
2033.410(b)	Admissions made in one pending action may not be used against the same party in another action.

Corporations Code

13406(a)	Financial statements of professional corporations are confidential; see statute for exceptions.
25100(q)(5)	Witness immunity in investigations or proceedings concerning physician's malpractice insurance cooperatives.
25531(e)	Witness immunity in securities investigations or proceedings.
31401(d)	Witness immunity in franchise investigations.
31504	Commissioner of corporations may withhold franchise applications and reports from public inspection only if necessary to protect investors or not in the public interest.

Education Code

10606(d)	Department of Education may restrict access to confidential education information.
44949(a)	Confidential notice of hearing for dismissal of probationary education employee.
45345	Confidentiality of pupil information known to

	instructional aides.
49060	Confidentiality of pupil records.
49450	Confidentiality of physical examination of pupils by school districts.
49492(c)	Nondisclosure of the identity of children benefiting from school breakfast and lunch program.

Elections Code

14282(b)	Persons assisting disabled voters required to keep voter's choices confidential.

Evidence Code

404	Burden for establishing admissibility of evidence after a claim of privilege against self-incrimination.
910	The statutory privileges encompassed in Evid C §§900-1070 apply in all proceedings.
911	Obligation to testify or produce evidence unless protected by a specific statutory privilege.
912	Waiver of privilege by disclosure; joint privilege holders cannot waive the privilege for each other.
913	No inference can be drawn from exercise of a privilege.
915(b)	In camera disclosure may be required of claimant of privilege for official information; identity of informant or trade secret, or attorney work product.
916(a)	Presiding officer must recognize privilege even when persons who could assert it are not before the court.
917	Communications with one's lawyer, doctor, psychotherapist, clergyman, spouse, sexual assault victim counselor, or domestic violence victim counselor are presumed to be confidential.
918	Only a party claiming to hold a privilege may assert error against a court denying it (except in the case of marital privilege).
930	Criminal defendant's privilege not to testify.
1043	Discovery of police officer personnel records.
1156	Confidentiality of hospital morbidity or mortality studies.
1157	Confidentiality for health care professional or peer review committees or professional standards review organizations.
1157.5	Nonprofit medical care foundation records are confidential.
1158	Written authorization to disclose patient's medical records to patient's attorney or representative.

Family Code

1818	Confidentiality of hearings and communications to conciliation courts.
3111-3114	Confidentiality of child custody investigations or proceedings.
3551	Marital privilege does not apply to support actions.
4930(h)	Uniform Support Act: inapplicability of marital privilege

	in support proceedings.
7613(a)	Sealing of artificial insemination records.
7805	Petitions and reports in child custody actions are confidential.
9200	Confidentiality of child adoption files and records.
17505	Guidelines for disclosure of confidential information to state agencies for the purpose of locating parents of abandoned or abducted children.

Financial Code

1582(c)	Trustees and employees are not to disclose information concerning private trust without court order.
8500	Federal savings and loan shareholders have same privileges and immunities as state savings and loan investors.
18496(b)	Financial reports of a thrift guaranty corporation or industrial loan company are privileged.

Fish and Game Code

7923	Fishing party licensee's records are confidential.
8022	Confidentiality of commercial fisheries reports.

Food and Agricultural Code

18908	Witness immunity in state agriculture investigations.
56254	Confidentiality of state-required financial statements of commission merchants and dealers in agricultural products.

Government Code

818.7	Nondisclosure of identity of narcotics law violators, even when other data is provided for educational or statistical purposes.
820.2	Immunity of public employees in discretionary functions.
856.6(a)	Immunity of public entities, employees, and volunteers administering influenza inoculation program.
955.1	Immunity for earthquake predictions by public agencies.
3303(f)-(g)	Confidentiality of investigations of public safety officers.
3307	No testimony may be admitted in any proceeding regarding a public safety officer's refusal to submit to a polygraph examination.
3544(b)	Proof of majority support in an election to unionize public school employees is confidential.
6254	Specific exceptions to the public inspection of records provision of Govt C §§6250-6270.
6254.7(d)	Trade secrets are not "public records" subject to inspection.
7460-7493	California Right to Financial Privacy Act (especially Govt C §§7470 (confidentiality of financial records), 7474 (administrative subpoena of financial records)).
8201.5	Confidentiality of applications for notary public appointments.

8655-8660	Immunities for governmental units, officials, volunteers, and medical personnel during a state of emergency.
9054	Witness immunity in legislative bribery proceedings.
9410	Witness immunity in senate or assembly hearings.
10207	Attorney-client privilege between legislative counsel, legislators, or governor.
11183	Limited confidentiality of information gathered by state agencies about personal or business transactions of a confidential nature.
11513(e)	Privilege rules apply in administrative adjudication hearings.
12932(b), 12933	Confidentiality of information received by Department of Fair Employment and Housing during conciliation assistance activities.
15619	Confidentiality of Board of Equalization audits and investigations.
18676-18677	Witness immunity in state civil service investigations or proceedings.
20230	State retirement system records are confidential.
31532	County retirement system records are confidential.
83119	Witness immunity before the Fair Political Practices Commission.
90005	Limited confidentiality of Franchise Tax Board audits of political campaign funds.

Health and Safety Code

1370	Immunity for participants in medical peer review committees; confidential nature of records of committees.
1419	Confidential informants alleging violations in nursing homes.
1439	Nondisclosure of names of persons included in state reports of nursing homes.
11367	Peace officers and those working under their direction in narcotics investigations are immune from prosecution under narcotics laws.
17956	Immunity of public entities enforcing the state housing law.
25170(l), 25173, 25175	Protection of trade secrets in hazardous wastes reports to Department of Public Health.
34283	Leases and master lists of tenants in a public housing authority are confidential, except for inspection by any government agency.
43206	Protection of trade secrets in motor vehicle pollution control reports.
100330	Confidentiality of Department of Public Health morbidity and mortality studies.
102135	State may demand vital statistics information from doctors, judges, clergy, funeral directors, and others.
102455	Confidential character of optional medical history on birth certificates.

102760	Records of acknowledgment of paternity are available only by court order.
103430(d)	Disclosure of sex change operations is not permitted in new birth certificates issued after surgical change.
103585	Prohibited disclosure of certain vital statistics.
103885(g)	Confidentiality of cancer incidence reporting data.
110165	Protection of trade secrets of food and drug producers who must file reports with Department of Public Health.
120455	Nonliability for injuries due to mandated immunization of children.
120705	Confidentiality of prenatal syphilis test.
123380	Confidentiality of pregnancy tests.
124110	Confidentiality of records of child health and safety programs.
124980(c)	Confidentiality of certain records of state programs on hereditary disorders.

Insurance Code

657(c)	Immunity for contents of rejection notices to motor vehicle insurance applicants, and for evidence submitted to Insurance Commissioner regarding applicants.
770.1	Confidentiality of information in fire or casualty insurance policies.
784	Witness immunity in unfair insurance practices investigations.
1215.7	Confidential state investigations of insurance corporations.
10097	Confidentiality and immunity for FAIR Plan property insurance inspections.
11754	Confidentiality of notices of noncompliance to workers' compensation insurance rating organizations.
11759	Immunity for workers' compensation rating inspectors.
12919	Confidentiality of communications to the Insurance Commissioner concerning licensees; immunity for informants.
12924(b)	Witness immunity before the Insurance Commissioner.

Labor Code

65	Confidentiality of Department of Industrial Relations records regarding labor disputes.
432.7-432.8	Nondisclosure to potential employers of records of arrest or detention not resulting in conviction and conviction for specified marijuana offenses.
1101-1106	Employers may not infringe employees' privileges of political belief and activities.
1151.2	Witness immunity before the Agricultural Labor Relations Board.
1197.5	Confidential informants of sex discrimination in wages.
1309.5	Confidential records required of retailers who have

	reason to suspect suppliers of using minors in pornographic materials.
6309	Confidential informants of unsafe labor conditions.
6322	Protection of trade secrets in occupational safety investigations.

Penal Code

14	Permitting use of witness's testimony against him- or herself in prosecution for perjury.
290.019(a)(2)	Confidential declaration by person convicted before Jan. 1, 1976, of decriminalized conduct between consenting adults.
414a	Witness immunity regarding illegal boxing event.
632	Criminal invasion of privacy, eavesdropping, or recording of confidential communications.
851.7	Sealing of a minor's misdemeanor arrest record.
924.3	Grand juror's privilege as to matters legally pending before grand jury.
930	Grand jurors' comments about unindicted persons not privileged.
938.1(b)	Petition for sealing grand jury transcript.
1016(3)	Plea of nolo contendere to charges of crime punishable as a misdemeanor may not be used as an admission in a civil suit (but such a plea to a charge punishable as a felony is admissible in a civil suit).
1203.03(c)	Diagnostic records of Department of Corrections are confidential.
1203.45	Sealing of a minor's misdemeanor conviction record.
1324	Witness immunity in felony proceeding.
1324.1	Witness immunity in misdemeanor proceeding.
3042(d)	Confidentiality of information in parole reports that could endanger the security of persons or institutions.
3063.5	Nondisclosure of confidential information in police reports provided to parolee in parole revocation proceeding.
11075-11081, 11105	Dissemination of criminal records only to authorized agencies.
11167(d)-(e)	Identity of persons reporting child abuse may be disclosed only to certain agencies or persons.
11172	Immunity for those required to make reports or photographs of suspected victims of child abuse or molestation.
13301-13305	Confidentiality of identity in criminal records released for statistical purposes.

Public Resources Code

2207(g), 2207.1	Confidentiality of producers and consumers whose data is included in public reports of the State Geologist on mineral production and use.
3234	Limited confidentiality of well records.

6826	Confidentiality of geological survey results furnished to state.
21160	Protection of trade secrets in environmental impact reports and agency releases.

Public Utilities Code

583	Confidentiality of information furnished to the Public Utilities Commission.
5258	Witness immunity in moving company investigations.
21693	Division of Aeronautics investigative reports may not be used in civil litigation other than by the Department of Transportation.

Revenue and Taxation Code

451	Confidentiality of information submitted to property tax assessor.
833	Confidentiality of State Board of Equalization records.
1605.4	Protection of trade secrets at State Board of Equalization hearings.
7056	Sales and use tax reports are confidential.
11655	Confidentiality of information submitted for private railway car tax.
19452	Criminal sanctions for disclosure of Franchise Tax Board records.
19554	Confidentiality of information used to locate owners of unclaimed land.
30455	Confidentiality of cigarette tax records.
32455	Limited confidentiality of winegrowers' reports to Alcoholic Beverage Control Board.
38705	Confidentiality of timber tax records and information.

Streets and Highways Code

27177	Confidential nature of highway patrol accident reports.

Unemployment Insurance Code

1955	Witness immunity at unemployment insurance hearings.
2714	Confidentiality of medical records obtained for unemployment insurance purposes.

Vehicle Code

1808.2	Confidentiality of home addresses of any inspector or investigator regularly employed by district attorney or peace officer.
1808.4	Nondisclosure of home address of any peace officer or other public employee listed in statute.
5003	Confidentiality of registration of law enforcement vehicles (absent court order).
16005, 20012, 20014	Limited confidentiality of submitted accident reports.

Water Code

1106	Witness immunity before Water Resources Control Board.

6028(a)-(b)	Immunity of state and state employees for dam approval or operation.
8576	Immunity of Reclamation Board for planning decisions.
12519	Confidential nature of Colorado River Board executive sessions.

Welfare and Institutions Code

389	Petition to seal juvenile court records.
630(b), 702.5	Privilege against self-incrimination extends to minor in juvenile court proceedings.
781	Petition to seal records of proceeding to make a minor a ward of the court.
827	Confidentiality of juvenile court case files.
1767.6	Confidential security information may be excluded from police reports furnished to parolee in the course of parole revocation proceedings.
3152.5	Confidential security information may be excluded from police reports furnished to outpatient in outpatient revocation proceedings.
4135	Confidentiality of records concerning mentally abnormal sex offenders.
5328, 5328.06, 5328.6	Confidentiality of records of state mental patients.
5330	Civil sanctions for improper release of confidential state mental patient records.
10810	Nondisclosure of confidential welfare records to volunteer social workers.
10850	Confidentiality of welfare records.
17006	Confidentiality of county welfare records.
18491	Confidentiality of county welfare investigations.
18909	Confidentiality of food stamp program records.
19016	Department of Rehabilitation empowered to restrict access to its records.

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XIII. FORMS

§3.200 A. Form: Sample Written Agreement to Preserve Confidentiality of Information Exchanged in Course of Joint Defense

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Re: Anderson v Ajax Corp., et al.
(Los Angeles County Superior Court No. B_____)

Dear Counsel:

This letter sets forth and confirms the agreement among Ajax Corp., Mr. John Smith, and Ms. Jane Jones regarding the exchange of documents and information and joint communications and discussions regarding the above-entitled case.

1. The parties will preserve the confidentiality of all documents and information that they may provide to one another. Disclosure of the documents and information shall be limited to the parties, their counsel, and employees of counsel, subject to the further provisions of this letter.

2. All disclosures of documents and information among us are and will be made solely for purposes of furthering the interests of our clients in the above-entitled case, and shall be used only for that purpose.

3. The exchange of documents and information and any communications or discussions among us will not constitute a waiver of any privilege from disclosure, including the attorney-client privilege and the work product doctrine. Execution of this agreement constitutes our mutual agreement that any consultations among us or our clients, and any sharing or pooling of work product or other confidential documents are reasonably necessary for the accomplishment of the purpose for which we, as lawyers, have been consulted and retained. We agree that any consultations among us or our clients, and any sharing or pooling of work product or other confidential documents are in reliance on the joint defense privilege. *U.S. v Austin* (9th Cir 2005) 416 F3d 1016, 1021 ("[t]he joint defense privilege, in fact, protects not only the confidentiality of communications from a party to his or her attorney but also from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel [citation omitted]); *Hunydee v U.S.* (9th Cir 1965) 355 F2d 183, 185; *Waller v Financial Corp. of Am.* (9th Cir 1987) 828 F2d 579, 583 n7 ("[t]he joint defense privilege, which is an extension of the attorney client privilege, has been long recognized by this circuit"); *Raytheon Co. v Superior Court* (1989) 208 CA3d 683, 687, 256 CR 425 ("a disclosure in confidence of a privileged communication is not a waiver of the privilege 'when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer… was consulted…,'" quoting Evidence Code §912(d)); *Insurance Co. of N. Am. v Superior Court* (1980) 108 CA3d 758, 771, 166 CR 880; Evidence Code §§912(d), 952. The execution of this letter constitutes our agreement, on behalf of our clients, that the contents of our consultations as well as databases or other attorney work product will be maintained in strictest confidence and used only for purposes of litigation of the above-entitled case, with the consent of our clients.

4. Absent an order of the Court compelling disclosure, documents and information exchanged may not be disclosed to any other person without the consent of all signatories to this letter. Execution of this letter constitutes agreement on behalf of our clients that the joint defense privilege as it relates to the consultations, information, databases, and other documents covered by this letter may not be waived except with the consent of all signatories to this letter. *John Morrell & Co. v Local Union 304A* (8th Cir 1990) 913 F2d 544, 556 (citing *Ohio-Sealy Mattress Mfg. Co. v. Kaplan* (ND Ill 1980) 90 FRD 21, 29 ("[i]t is fundamental that 'the joint defense privilege cannot be waived without the consent of all parties to the defense'"). The signatories to this agreement shall make all appropriate objections and motions with respect to any discovery requests that purport to seek documents or information covered by this agreement.

5. On request, all documents and materials exchanged, including any copies, will be returned to the party who originally furnished the documents and materials.

6. Nothing in this agreement shall obligate any party to exchange documents or information with any other party.

7. By this letter, the undersigned and our clients each acknowledge and agree that cooperation in the preparation and presentation of the case at trial necessarily involves the communication and sharing of confidential information and further agree that the interests of our respective clients are not adverse. Each of the parties has had full opportunity to consult with privately retained separate counsel, is fully informed, and has concluded that the risk of any potential conflict of interest is outweighed by the benefits and economies of cooperation and shared information in the preparation of the above-entitled case. The parties consent to this sharing of confidential information among counsel, waive any potential conflict of interest created thereby, and mutually agree that this sharing of confidential information and cooperation in the preparation and presentation of the case at trial shall not constitute a grounds for seeking disqualification of counsel in the above-entitled case or any other action. The individuals signing this letter agreement in a representative capacity warrant that they have the authority to do so on behalf of the entity they represent.

If the foregoing accurately sets forth the agreement of the parties, please sign at the places indicated below.

Very truly yours,

WASHINGTON, ADAMS & JEFFERSON
By _____
John Adams
Attorney for Defendant,
Ajax Corp.

AGREED TO AND ACCEPTED:

MADISON, MONROE & ADAMS
By _____
James Monroe
Attorney for Defendant,
John Smith

JACKSON, VAN BUREN & TYLER
By_____
John Tyler

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§3.201 B. Form: Sample Document Privilege Log

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SAMPLE DOCUMENT PRIVILEGE LOG

DATE	DOCUMENT	AUTHOR	ADDRESSEE	COPIES	PRIVILEGE
1/21/05	Letter	Jane Jones, Ajax Corp.	John Adams, Washington, Adams & Jefferson		Attorney-Client
8/28/04	Facsimile	John Smith, Ajax Corp.	John Adams, Washington, Adams & Jefferson		Attorney-Client
10/7/04	Facsimile	John Adams, Washington, Adams & Jefferson	John Smith, Ajax Corp.	Jane Jones, Ajax Corp.	Attorney-Client; Attorney Work Product
12/11/98	Facsimile	John Smith, Ajax Corp.	John Adams, Washington, Adams & Jefferson		Attorney-Client
9/3/2000	Memorandum (with handwritten marginalia)	Jane Jones, Ajax Corp.	John Adams, Washington, Adams & Jefferson		Attorney-Client; Attorney Work Product
1/12/05	Letter	John Smith, Ajax Corp.	Thomas Jefferson, Washington, Adams & Jefferson	John Adams, Washington, Adams & Jefferson	Attorney-Client
1/14/03	Facsimile	David Thomas, C.P.A.	John Adams, Washington, Adams & Jefferson	John Smith, Ajax Corp.	Attorney-Client; Attorney Work Product
11/26/04	Letter	John Smith, Ajax Corp.	John Adams, Washington, Adams & Jefferson		Attorney-Client; Attorney Work Product
11/24/99	Facsimile	John Smith, Ajax Corp.	John Adams, Washington, Adams & Jefferson		Attorney-Client; Attorney Work Product
9/3/04	Facsimile	John Smith, Ajax Corp.	John Adams, Washington, Adams & Jefferson	James Monroe, Monroe, Madison & Adams	Attorney-Client; Attorney Work Product; Joint Defense
11/5/03	Facsimile (with handwritten notations)	John Smith, Ajax Corp.	John Adams, Washington, Adams & Jefferson		Attorney-Client; Attorney Work Product
11/4/03	Letter	Jane Jones, Ajax Corp.	John Adams, Washington, Adams & Jefferson	John Smith, Ajax Corp.	Attorney-Client

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4

Conducting Discovery in an Electronic World: Electronic Data and Discovery

Browning E. Marean III
Mary Pat Poteet

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§4.1 I. SCOPE OF CHAPTER

The discovery of electronically stored information (ESI), also referred to in this chapter as electronic data, or e-data, is the focus of much current attention. ESI differs in its nature from paper, the data storage medium with which counsel are most familiar, and conducting discovery in a case involving ESI requires counsel to become familiar with new terms, practices, and procedures. Moreover, electronic data is preserved, stored, and produced differently from paper data. Although counsel understand how to preserve, store, and produce paper documents—which are often kept within paper folders filed in metal file cabinets—they do not always understand how to preserve, store, and produce electronic data, which can be altered easily, contained in a variety of electronic devices in many locations, and produced by means that may not be easily understood.

Even though unfamiliarity with ESI may give rise to attention and concern, the discovery of ESI remains discovery, the same basic process litigators know so well. To aid counsel in gaining familiarity with conducting discovery in the electronic world, this chapter supplies information about the nature of ESI (see §§4.2-4.5) and then discusses six steps in ESI discovery, *i.e.*:

- Preserving data (§§4.6-4.13);
- Identifying data (§§4.14-4.15);
- Collecting data (§§4.16-4.19);
- Processing data (§§4.20-4.23);
- Reviewing and analyzing data (§§4.24-4.32); and
- Producing data to opposing counsel (§§4.34-4.35).

NOTE: The Electronic Discovery Act (Stats 2009, ch 5), effective June 29, 2009, established procedures for the discovery of ESI that are integrated into the existing framework of the Civil Discovery Act. See generally chap 8.

NOTE: Although the chapter is written from the point of view of an organizational defendant in litigation, the principles discussed apply equally to a plaintiff or an individual defendant who must also preserve and collect evidence and respond to discovery demands. The nature and volume of the evidence, however, may be different.

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§4.2 II. UNDERSTANDING THE NATURE OF ELECTRONIC DATA

Most data is generated and stored electronically. A University of California study on the volume of information generated worldwide revealed that in 2002, approximately 92 percent of new information was stored on magnetic media, primarily hard disks. Paper represented only 0.01 percent of the total. *Executive Summary, How Much Information?* (UC Regents 2003). See http://www.sims.berkeley.edu/research/projects/how-much-info-2003.

In the future even more data will be created electronically and even less will be printed, requiring counsel to pay attention to electronic data discovery in the most ordinary of litigation matters, no matter how simple the case may appear.

JUDGE'S PERSPECTIVE: Discovery of ESI can easily become extremely expensive and disruptive. If mismanaged, costs escalate further. The key to effective management of discovery of ESI is to engage in early and ongoing discussions with opposing counsel about what to search for, how to search, where to look, and in what sequence and in what format(s) to produce the information. The parties should always keep in mind potential benefits versus costs, as well as how each party's position will look to a judge if the parties cannot agree.

Attorneys conducting discovery in this electronic world must "take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search." *Qualcomm Inc. v Broadcom Corp*. (SD Cal, Jan. 7, 2008; No. 05 CV 1958-B (BLM)) 2008 US Dist Lexis 911, *31 (magistrate judge imposed sanctions of $8,568,633.23 on defendant that withheld over 46,000 critical electronic documents), aff'd and remanded (9th Cir) 548 F3d 1004:

> In this age of electronic discovery when attorneys may not physically touch and read every document within the client's custody and control… attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents.

Qualcomm Inc. v Broadcom Corp., supra. The district court later vacated and remanded the sanctions order as to defendant's individual attorneys in *Qualcomm*, holding that because Qualcomm employees in their declarations had introduced "accusatory adversity" into the proceedings, the federal common law self-defense exception to the attorney-client privilege applied and the attorneys could defend themselves in the sanctions hearing. See *Qualcomm Inc. v Broadcom Corp*. (SD Cal, Mar. 5, 2008; No. 05 CV 1958-RMB (BLM)) 2008 US Dist Lexis 16897.

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§4.3 A. Electronic Data Is Not Easily Discarded

One of the basic differences between electronic and paper data is the disposability of each. To rid oneself of a paper document, one need only shred it, recycle it, burn it, or throw it in the wastebasket for disposal by the janitorial staff. When one strikes the delete key to rid oneself of an electronic document, however, the electronic file most likely does not disappear. Because of the way data is stored on a hard drive none of the data may have been deleted at all, or only bits and pieces may be deleted, while the remaining pieces might be recoverable using forensic tools.

NOTE: A computer's hard drive or hard disk is an internal disk containing one or more inflexible platters coated with material in which data can be recorded magnetically, together with read/write heads, a head-positioning mechanism, and a spindle motor in a sealed case. Microsoft Computer Dictionary (5th ed 2002) (referred to hereafter as Microsoft Comp Dict).

In general, computers discard stored information by "overwriting" that information with new information that is to be stored in the same space. Robins, *Computers and the Discovery of Evidence—A New Dimension to Civil Procedures*, 17 J Marshall J Comp & Info L 411, 417 (1999). Striking the delete key means that the computer will change an indexing file on the hard disk so that it no longer points to the file that is to be overwritten with new information. But the file itself may not be overwritten for some time, and even if it is soon overwritten, the overwriting process may not wipe out the entire original file. The same is true of reusing a magnetic tape. 17 J Marshall J of Comp & Info L, *supra*.

NOTE: For cases discussing access to hard drives (also called hard disks) to recover deleted files, see, *e.g., Playboy Enters., Inc. v Welles* (SD Cal 1999) 60 F Supp 2d 1050, 1052, aff'd in part and rev'd in part on other grounds in *Playboy Enters., Inc. v Welles* (9th Cir 2002) 279 F3d 796 (court allowed plaintiff access to defendant's hard drive to attempt to recover deleted files); *Thompson v HUD* (D Md 2003) 219 FRD 93, 97; *Simon Prop. Group v mySimon, Inc.* (SD Ind 2000) 194 FRD 639, 640.

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§4.4 B. Electronic Data Proliferates

Another difference between electronic and paper data is that electronic data proliferates to a substantially greater degree than does paper data. For example, a copy of a paper document might be mailed to a hundred people and stored in a hundred different paper file folders. If that same single document in an electronic file were e-mailed to a hundred different people, however, it could be saved on more than a hundred computer hard drives, in many different file folders, backed up to several different backup systems, or it could be saved to other storage devices. For discussion of possible electronic storage devices, see §§8.19-8.27, 8.49-8.51. Considering the multitude of places where the electronic data could be stored, whether on a computer or a portable storage device, a server directory, or backup tapes, the challenge of recovering every copy of that document would be great indeed.

Moreover, it is substantially easier and faster to send electronic data than it is paper. An electronic file can easily be attached to an e-mail message and sent instantly to a virtually unlimited number of people without the necessity of envelopes, stamps, or messengers, and each of them may, in turn, forward the item to uncounted others. Various recipients may then edit some of their copies. These new recipients may, of course, store the electronic file in a multitude of places or, in turn, send it along to additional recipients, all of which can be traced.

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§4.5 C. Electronic Data Is Three-Dimensional

Paper is two-dimensional, but electronic data is three-dimensional. A paper document is classic WYSIWYG ("what you see is what you get"). There is far more to an electronic document, however, than what appears on its surface.

Metadata. Electronic data includes "metadata" that gives it three-dimensional characteristics. Metadata, or data about data (see Microsoft Comp Dict), is created by the computer systems utilized but generally not displayed with an electronic file. Often the person who creates the file does not know the metadata exists. In word processing programs, for example, metadata may include such information as when created, last modified, last accessed, and last printed dates and times, blind copy recipients, and authors. This data is embedded in the file but much of it is not readily viewable. E-mail metadata generally includes the date and time the e-mail was sent, received, and last modified, and may also include when an e-mail was opened and read (or not), where it was forwarded to, and when it was deleted.

Some metadata is very easily changed. The simple act of turning on a computer and opening a file can change the number of different metadata fields within the computer. Once the metadata has changed, there is often no way to restore the document to its previous state. On the changeable nature of metadata, see, *e.g., Williams v Sprint/United Mgmt. Co.* (D Kan 2005) 230 FRD 640, 646 (metadata can be changed intentionally or inadvertently).

CAUTION: Because of the changeable nature of metadata, it is prudent to be careful to collect electronically stored information (ESI) in such a way that metadata is not changed.

In *Williams v Sprint/United Mgmt. Co., supra,* the court considered an application for sanctions against a defendant who stripped metadata from documents and "locked" cells of a spreadsheet. Although the court found no precedent requiring the production of metadata, and citing The Sedona Conference, *The Sedona Principles for Electronic Document Production*, Principle 12 (July 2005), to the contrary, the court held that in the specific case before it, all electronic documents had to be produced in native format, *i.e.,* with metadata intact so that the document would be produced in the manner in which it was used in the ordinary course of business. On defining the ordinary course of business, see §4.34.

Under California state law, a demand for ESI may specify the form or forms in which the information is to be produced. CCP §2031.030(a)(2). If the form is not specified, the ESI must be produced in the form in which it is ordinarily maintained or in a form that is reasonably usable. CCP §2031.280(d)(1). See §§8.48, 8.51.

On formatting, see §§4.20, 4.33. Printing out an electronic document provides only a portion of the available information.

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III. PRESERVING ELECTRONIC DATA

§4.6 A. Duty to Preserve

Preservation of data is a legal responsibility that can arise in a variety of ways. For example, a business may have a statutory duty to preserve certain records for a particular period of time. See, *e.g., Elwell v Univ. Hosp. Home Care Serv.* (6th Cir 2002) 276 F3d 832, 843 (duty to preserve employment records under 29 USC §211(c) of the Fair Labor Standards Act); *Rozen v Dist. of Columbia* (DC Cir 1983) 702 F2d 1202, 1204 (duty to preserve employment records when discrimination claim filed against employer). See also Govt C §12946 (unlawful for employer, labor organization, or employment agency not to maintain certain employment records for 2-year period). Similarly, the Sarbanes-Oxley Act imposes obligations to preserve data that is potentially relevant to an investigation or other matter within the jurisdiction of any federal department or agency. 18 USC §1519.

The pendency of litigation or the possibility of future litigation may also trigger the duty to preserve data. See *Zubulake v UBS Warburg LLC* (SD NY 2003) 220 FRD 212, 216 (duty to preserve data arises when a party "has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation"). For discussion of *Zubulake,* see §§8.107, 8.116. See also *Rambus, Inc. v Infineon Tech. AG* (ED Va 2004) 220 FRD 264, 281 (once litigation contemplated, corporation had duty to preserve potentially relevant documents); *Fujitsu Ltd. v Fed. Express Corp.* (2d Cir 2001) 247 F3d 423, 436; *Danis v USN Communications, Inc.* (ND Ill 2000) 53 Fed R Serv 3d 828, 860 (as of date litigation commenced, defendant had duty to preserve documents that might be discoverable in the litigation).

It is the responsibility of a party's counsel to advise the party to take reasonable measures to preserve evidence. Case law varies on determining the point the duty to preserve commences, but the most common statement on this duty is that the obligation to preserve evidence begins when the party has notice that the evidence is potentially relevant or reasonably likely to be requested during discovery. See *Applied Telematics, Inc. v Sprint Communications Co.* (ED Pa, Sept. 17, 1996) 1996 US Dist Lexis 14053. See also *Rambus, Inc. v Infineon Tech. AG,* 220 FRD at 281 (duty to preserve begins when party reasonably should know that evidence may be relevant to anticipated litigation). As the California Supreme Court said in *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248:

> As a practical matter, modern civil discovery statutes encourage a lawyer to marshal and take charge of the client's evidence, most often at an early stage of the litigation. In doing so, a lawyer customarily instructs the client to preserve and maintain any potentially relevant evidence, not only because it is right for the client to do so but because the lawyer recognizes that, even if the evidence is unfavorable, the negative inferences that would flow from its intentional destruction are likely to harm the client as much as or more than the evidence itself.

See also Bus & P C §6106 ("commission of any act involving moral turpitude, dishonesty or corruption… constitutes a cause for disbarment or suspension"); Cal Rules of Prof Cond 5-220 ("[a] member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce"). On sanctions for spoliation of evidence, see §§8.108, 15.100.

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§4.7 1. Scope of Duty to Preserve

When the duty to preserve evidence arises and how far it extends can be the subject of heated dispute. In *Willard v Caterpillar, Inc.* (1995) 40 CA4th 892, 921, 48 CR2d 607, disapproved on other grounds in *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 17, 74 CR2d 248, the court described the duty to preserve evidence as existing along a continuum, with criminal liability for "willfully destroying" documentary evidence as "it is about to be produced at trial" (Pen C §135) at one end. On the continuum is the common understanding that a defendant's destruction of relevant evidence after notice of the plaintiff's injury and contemplated litigation is "unfair or immoral" and thus sanctionable. 40 CA4th at 921. Then comes the notion that the good faith destruction of evidence before litigation if "pursuant to a bona fide consistent and reasonable document retention policy" may sometimes justify the failure to produce documents in discovery. 40 CA4th at 921, citing *Lewy v Remington Arms Co* (8th Cir 1988) 836 F2d 1104, 1111. For example, in *Arthur Andersen LLP v U.S.* (2005) 544 US 696, 161 L Ed 2d 1008, 1017, 125 S Ct 2129, the United States Supreme Court unanimously reversed Arthur Andersen's criminal conviction and dismissed the indictment against it, holding that document deletion policies can overcome the inference that documents were shredded with the intent to destroy evidence for the purpose of thwarting or otherwise interfering with a government investigation. On the other end of the continuum is the view of some courts that there is no duty to preserve documents before a party has notice of their relevance to litigation likely to be commenced. *Willard v Caterpillar, Inc.* (1995) 40 CA4th 892, 922, 48 CR2d 607, disapproved on other grounds in *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 17, 74 CR2d 248.

NOTE: Although *Willard* involved tort liability for intentional spoliation of evidence arising out of a products liability case, a tort that is no longer viable (see *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 17, 74 CR2d 248), *Willard*'s discussion of the duty to preserve documents remains useful in understanding the general duty to preserve evidence. Outside of California, courts have levied significant sanctions against parties who failed to preserve electronic data potentially relevant to litigation. *Rambus, Inc. v Infineon Tech. AG* (ED Va 2004) 220 FRD 264; *Mastercard Int'l, Inc. v Moulton* (SD NY 2004) 2004 US Dist Lexis 11376 (sanctions awarded on the basis of company's destruction of e-mails received during 6-month period after litigation filed).

The Federal Rules of Civil Procedure differentiate between a party's obligations to produce "accessible" and "inaccessible" data (Fed R Civ P 26(b)(2)(B)) and create a so-called "safe harbor" provision, protecting a party from discovery sanctions if it loses data through the routine, good faith operation of an electronic information system (Fed R Civ P 37(e)). However, this safe harbor provision does not permit a party to "exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve." Advisory Committee Note to Rule 37(f) [now Rule 37(e)]. See also The Sedona Conference, *The Sedona Principles for Electronic Document Production,* Principle 14 (July 2005) (spoliation findings should be considered only if, among other things, court finds an intentional or reckless failure to preserve and produce relevant evidence).

On the Federal Rules of Civil Procedure, see §8.104.

California makes a similar distinction between accessible and inaccessible data (CCP §2031.210(d)) and has similar safe harbor provisions. Absent exceptional circumstances, sanctions may not be imposed for failure to provide electronically stored information (ESI) that has been "lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system." These safe harbor provisions are not to be construed to alter any obligation to preserve discoverable information. CCP §§2031.060, 2031.300, 2031.310, 2031.320. See also CCP §1985.8.

JUDGE'S PERSPECTIVE: A judge reviewing a "good faith" argument is likely to review, among other things, the efficacy, reasonableness, and timing of actions taken to preserve electronic data. Allowing a routine operation to continue in order to destroy electronically stored information will not qualify for safe harbor treatment.

Because the failure to preserve evidence can have extraordinary consequences in terms of sanctions, most attorneys

consider it best to counsel their clients to preserve electronic data whenever an event has occurred that may trigger a duty to preserve, even before receiving formal notification that data may be relevant to a dispute. On triggering events, see §4.8. On sending a "legal hold" letter, see §§4.9, 8.107. For a sample letter, see §4.41. Moreover, whatever uncertainty there may be about the boundaries of the duty to preserve electronic data in general or in any particular case, some duty will likely be found to exist, just as there is a duty to preserve documents. As the court said in *General Atomic Co. v Exxon Nuclear Co.* (SD Cal 1981) 90 FRD 290, 295, quoting *Bowman Instrument Corp. v Texas Instruments, Inc.* (ND Ill 1972) 25 Fed R Serv 2d 423, 428:

> Although a potential litigant is under no obligation to preserve every document in its possession, whatever its degree of relevance, prior to the commencement of a lawsuit,… some duty must be imposed in circumstances such as these lest the fact-finding process in our courts be reduced to a mockery.

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§4.8 2. How Duty to Preserve May Be Triggered

A variety of events may give a party notice that data is "relevant to litigation" or that it "may be relevant to future litigation," as expressed in *Zubulake v UBS Warburg LLC* (SD NY 2003) 220 FRD 212, 216. For discussion of the *Zubulake* case, see §8.107. On the debate about the scope of the duty to preserve, see §4.7. Such events may include, *e.g.*:

- The receipt or sending of a demand letter (see, *e.g.*, *Goodman v Praxair Servs.* (D Md 2009) 632 F Supp 2d 494, 511 (receipt of letter openly threatening litigation triggered duty to preserve));
- The receipt of oral notification that a complaint might be filed (see, *e.g., Capellupo v FMC Corp.* (D Minn 1989) 126 FRD 545, 551 (employee told company EEO manager that she was contemplating a class-action gender discrimination suit and EEO officer relayed this to others at company headquarters));
- The receipt of a complaint in a case (see, *e.g., Clark Constr. Group v City of Memphis* (WD Tenn 2005) 229 FRD 131, 137 (on date complaint was filed, at the latest, city knew it must safeguard documents));
- The receipt of a court order (see *E-Trade Sec. LLC v Deutsche Bank AG* (D Minn 2005) 230 FRD 582, 589 (defendants knew about potential for litigation involving certain transactions when they received bankruptcy order));
- The receipt of a subpoena;
- The receipt of notice of a governmental investigation;
- The awareness of an accident or incident that may give rise to litigation (see, *e.g., Stevenson v Union Pac. R.R.* (8th Cir 2004) 354 F3d 739, 747 (railroad had been involved in numerous grade crossing collisions and knew taped conversations between train crew and dispatch would be relevant to any potential litigation about accident); *Broccoli v Echostar Communications Corp.* (D Md 2005) 229 FRD 506, 510 (employee's oral and e-mailed complaints of harassing behavior gave employer actual notice to preserve all documents, including e-mail and personnel files, relating to the complaints));
- The awareness of an enforcement proceeding or investigation that may target the party (see, *e.g., Alliance to End Repression v Rochford* (ND Ill 1976) 75 FRD 428, 440 (defendants had duty to preserve records when paid informants told defendants that plaintiffs seemed ready to proceed with lawsuit)).

Institutional notice. The notice to the party of litigation or possible future litigation that triggers the duty to preserve is *institutional* notice, *i.e.,* the question is whether a party and its agents, servants, and employees can be said to have such knowledge, not whether the particular employee who destroyed documents had such knowledge. See *Testa v Wal-Mart Stores, Inc.* (1st Cir 1998) 144 F3d 173, 178 (jury instruction properly told jury it could draw negative inference if plaintiff proved that when defendant destroyed documents, it had notice both of potential lawsuit and of documents' relevance to claim).

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§4.8A 3. Manner of Preservation

Courts continue to grapple with the question of whether, once the duty to preserve electronically stored information (ESI) is triggered, the information must be preserved in the same format in which it was created or whether a party can convert it to an inaccessible format, which makes later discovery of the information more difficult and expensive. Compare *Treppel v Biovail Corp.* (SD NY 2006) 233 FRD 363, 372 n4 (conversion of electronic evidence to less accessible form is violation of preservation obligation), with *Quinby v WestLB AG* (SD NY 2005) 2005 US Dist Lexis 35583, *27 n10 (declining to sanction defendant for converting electronic evidence to inaccessible format, even though defendant should have anticipated litigation).

JUDGE'S PERSPECTIVE: This issue is likely to be determined by application of the rules that govern destruction of data generally. See §4.7.

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§4.8B 4. Consequences of Failure to Preserve

If a party is under a duty to preserve electronically stored information (ESI) and fails to do so, that party can face sanctions for the spoliation of the ESI. *In re Napster, Inc. Copyright Litig.* (ND Cal 2006) 462 F Supp 2d 1060. Those sanctions can include:

- An inference that the destroyed evidence would have been unfavorable to the party responsible for its destruction;
- The exclusion of witness testimony proffered by the party responsible for destroying the evidence; and
- The dismissal of the claims or defenses of the party responsible for destroying the evidence.

For further discussion of spoliation of electronic evidence, see §8.108. On spoliation sanctions in state court, see §15.100.

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§4.9 B. Communicating Duty to Preserve Data

The party's affirmative obligation to preserve data requires that "agency or corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials." *National Ass'n of Radiation Survivors v Turnage* (ND Cal 1987) 115 FRD 543, 558. If data is destroyed after the duty to preserve has arisen, it is no defense that the particular employees in possession of the records did not know about the lawsuit. 115 FRD at 557 (after more than 3 years of litigation, defendant could "hardly assert that it was not on notice of the issues involved in the lawsuit"; to hold that the particular employees possessing the data were not on notice would "permit an agency, corporate officer, or legal department to shield itself from discovery obligations by keeping its employees ignorant").

The preservation phase of discovery can be costly depending on the scope of the matter and the nature of data involved. To ensure that the cost of preservation is not prohibitive, all reasonable efforts should be made to have meaningful negotiations with opposing counsel and thus avoid the need for judicial intervention.

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§4.10 1. Identifying Data Retention or Destruction Policies

It is important that counsel identify any formal and informal data retention or destruction policies (*e.g.,* the rotation of backup tapes or the use of auto-delete features on e-mail servers) that the client may have adopted. Once any such policies have been identified, counsel should determine whether or not they have been routinely followed. Counsel must also make certain that the client halts any data or document destruction under such policies, at least until it can be determined that no material potentially relevant to current or contemplated litigation will be destroyed. All automated destruction protocols must be halted until it is determined that it is unnecessary to preserve the information or that a modified destruction or retention policy should be adopted. On backup tapes, see §§8.10, 8.21. On the utility of having a formal data retention or destruction policy, see, *e.g., Carlucci v Piper Aircraft Corp.* (SD Fla 1984) 102 FRD 472, 486 (court suggested that disposal of documents pursuant to a reasonable document retention program might justify failure to produce documents in response to discovery requests).

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§4.11 2. Placing "Legal Hold" on Data Destruction

If the circumstances are such that counsel believes the client has the responsibility to preserve evidence, counsel should consider sending (or ensuring that the client sends) a "legal hold" or data preservation letter to all potential custodians of the client's data that may be relevant to the subject of the case. See *Zubulake v UBS Warburg LLC* (SD NY 2003) 220 FRD 212, 216. The legal hold letter should specify that no data that could potentially be useful in or responsive to discovery requests in a specific matter—whether it exists on, *e.g.,* company or personal computers, shared network directories, document management systems, proprietary systems, or any type of removable media—should be deleted or otherwise destroyed. On where electronic data may be stored, see §§8.19-8.27. For full discussion of the *Zubulake* case, see §8.107.

The preservation letter should identify a person, usually inside or outside counsel, to contact if the recipient has questions; make clear that the client (usually the employer of the data custodian) supports the request; and identify serious consequences if the data custodian fails to comply.

Generally speaking, counsel should make sure that the legal hold letter is also sent to the client's information technology (IT) department so that IT can stop implementing any automatic document or information destruction policy that may exist. Before sending the legal hold letter, counsel should also consider the following matters:

- When the legal hold letter should be sent;
- To whom it should be sent (at the least, the letter should be sent to all the persons who reasonably can be identified as most likely to have information that is relevant to the pending or possible litigation or that may be responsive to a discovery request, including third parties who manage the client's data);
- Whether the legal hold letter clearly identifies what should be preserved or whether additional instruction is necessary;
- Whether the legal hold letter covers both hard copy and electronic files;
- Whether the legal hold applies to data that may be stored, *e.g.,* on removable storage devices, distributed data devices, or employee home computers; and
- How to send the legal hold letter.

Sample letter. Counsel must prepare a legal hold letter that addresses the issues unique to each case, but certain issues will be common to most legal hold letters. For a sample legal hold letter, see §4.38.

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§4.12 3. Following Up

Counsel must consider how to follow up on the legal hold letter to ensure that the message has reached all who should be involved in the preservation effort and that compliance with the legal hold has been achieved.

PRACTICE TIP: Although a legal hold letter may be protected either by the attorney-client privilege or as attorney work product (see chap 3), counsel drafting a legal hold letter should keep in mind that the letter may need to be used later in litigation as evidence of compliance with a legal hold.

Careful records of the steps taken by counsel and the client's employees to preserve evidence should be kept, so that if necessary later in the litigation, a declaration of compliance with the legal hold and with the responsibility to preserve evidence can be prepared.

JUDGE'S PERSPECTIVE: The obligation to preserve relevant evidence is imposed as much on the plaintiff as on the defendant. A plaintiff who destroys documents it should have known would be discoverable is subject to the same sanctions as defendants who do likewise.

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§4.13 C. Forming Discovery Team

After the legal hold on document destruction is in place, counsel should consider forming a cross-disciplinary team to help plan and implement discovery. Such a team should have members who are knowledgeable about the core facts of the case and members who are knowledgeable about the client's IT applications, structure, and records systems. For example, a determination may need to be made about how best to handle a discovery request about a database (for definition, see §4.26), and whether it is responsive to give a "snapshot" or other point-in-time information about it. (A "snapshot" is a copy of the main computer memory or video memory at a given instant that is sent to a printer or hard disk. Microsoft Comp Dictionary.) Whether counsel represents the plaintiff or defendant in the matter, in a case in which electronic data is important, counsel may need to form a discovery team. On planning discovery, see chap 2.

JUDGE'S PERSPECTIVE: A technically knowledgeable e-discovery management team will enhance counsel's ability to manage discovery cooperatively with opposing counsel, if possible. The benefits of cooperation are self-evident when the parties are symmetrical with respect to e-discovery, *i.e.,* when the parties are relatively equally matched in terms of their need to obtain e-discovery from the other side and the potential cost and burdens of responding to e-discovery requests. This symmetry is usually present, for example, in complex business litigation between two large companies.

Yet it is equally important to cooperate when the parties are asymmetrical in their need for and exposure to e-discovery. For example, in the typical securities class-action suit or suit by an individual employee against a large employer, the plaintiff has little electronic data to produce, but the defendant may have vast amounts of data that are potentially relevant. In this case, the defendant should try to agree with the plaintiff early in the litigation on the scope of the search to be done, the way to do it (*e.g.,* search terms to search certain employees' or departments' e-mails), and the format for production, to avoid starting off on one path only to be second-guessed by a court later and have to duplicate efforts. It is useful for each party to designate an individual, not necessarily a lawyer, who is knowledgeable about the party's electronic systems and capabilities and who can confer with his or her counterpart.

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IV. IDENTIFYING ELECTRONIC DATA

§4.14 A. Understanding Client's Data

After counsel has ensured that all potentially relevant or responsive data has been and is being preserved, counsel should identify what data needs to be collected for potential use in the litigation, including for production in discovery. Making this identification requires counsel to gain a clear understanding of the client's data by finding out, *e.g.:*

- Who creates or generates data;
- What kind of data is created or generated;
- For what purpose the data is created or generated;
- How the data is used; and
- Where the data is stored.

Once the nature of the client's data is understood, counsel can create a map of the spots on the network that are likely to hold information relevant to the case. On network maps or topology, see §8.20.

PRACTICE TIP: Although most IT departments maintain maps of their computer networks, the maps are often out of date and counsel should ask for a new map to be created.

JUDGE'S PERSPECTIVE: Because disputes that are not worked out between the parties will ultimately be decided by the court, it is important to be knowledgeable, reasonable, and candid about your client's electronic capabilities, limitations, and burdens. Counsel should be prepared to suggest reasonable alternatives that are likely to capture key evidence while minimizing the burden on the producing parties. The consequences of misleading the court about a client's data management and retrieval capabilities can be severe.

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Source: Civil Litigation/California Civil Discovery Practice/4 Conducting Discovery in an Electronic World: Electronic Data and Discovery/§4.15 B. Interviewing Data Custodians

§4.15 B. Interviewing Data Custodians

Counsel should identify and interview all key data custodians, *i.e.,* those individuals who are most likely to have custody of data that is relevant to the client's case or responsive to discovery requests. It is important to interview IT personnel, particularly the person whom an organizational client has designated to be deposed on its behalf about data matters "known or reasonably available" to the organization. See CCP §2025.230; Fed R Civ P 30(b)(6). On deposition of an entity, see §§5.8, 5.26-5.28, 5.40-5.41. This person should have a thorough understanding of the network and how information is stored across the network.

NOTE: Counsel may also want to make these same inquiries in the deposition of the key data custodian(s) for the opposing party in the litigation. The same information this chapter suggests that counsel obtain from his or her own client can also be important information to obtain from the opposing party.

General questions. Counsel should obtain information about the nature of each custodian's position and the type of information each creates or uses. For example, a CFO (chief financial officer) may rely on spreadsheets, while an employee in marketing may use PowerPoint presentations and graphic designer packages. One custodian may use an application for word processing, while another may use an application to manage inventory.

Among the questions counsel should ask about the custodians' positions and the nature of their work are the following:

- What applications (*i.e.,* computer programs) does the custodian commonly use to create information?
- What kind of reports does the custodian generate?

Another important series of questions to ask each custodian relates to where the data he or she creates is stored, *e.g.,* whether on a hard drive or on the server. Counsel should also obtain from each custodian information about the type of workstation he or she uses; whether it is desktop, laptop, or home PC (personal computer); and whether the custodian uses portable storage devices, *e.g.,* floppy disks, compact disks (CDs), digital video disks (DVDs), ZIP drives (compressed archive files stored on disk), a portable thumb drive (a pocket-sized data storage device), or an Apple iPod. Counsel should also ask whether the custodian uses any external hard drives (*i.e.,* free-standing hard disks with their own case and power supplies).

Counsel should pay attention to whether the custodian uses a mobile phone or a "palmtop" computer (a small portable personal computer usually powered by batteries and without a disk drive; see Microsoft Comp Dict), a personal digital assistant (PDA), a pager (a pocket-sized electronic device that uses radio signals to record incoming phone numbers or short text messages), or a Blackberry (a device that allows the user to have remote access to an e-mail account) or similar device. Each of these devices may contain relevant or responsive information.

Counsel should also ask whether the custodian has access to any flash drives (used as a supplement or replacement for hard disks in portable computers) or uses any other systems in which data may be retained, *e.g.,* such as "telephony," which includes telephone technology, such as voicemail and universal mobile telecommunications system (UMTS) data. Voice messages and text messages are usually recoverable data. Counsel should also ask about the custodian's use of copiers, fax machines, and printers, each of which may contain stored electronic data.

Operating system. In the interview, counsel should ask about the operating system, *i.e.,* the software that controls the allocation and usage of hardware resources such as the memory, central processing unit (CPU), and disk space. See Microsoft Comp Dict. Counsel should acquire information about the operating system's name (common operating systems include Windows XP, Mac OSX, and Linux), the date when it was deployed, and the dates of upgrades.

Standard user configurations. Counsel should also obtain from the custodian information about the client's standard user configurations and any variance from this standard. Questions should be asked about the drive mapping, *i.e.,* the assignment of a letter or name to a disk drive. It is customary to assign the letters "A:" and "B:" to floppy disk drives and "C:" to the hard disk. Counsel should find out if there is a variance from this standard and ask about size limits, as well as obtain information about any protocol for sharing files outside of a DMS (document management

system). A DMS is a server-based network facility designed to store and handle an organization's documents. Counsel should obtain information about the DMS, *i.e.,* its name, database engine, version and date deployed, date of upgrades, enforcement of use, who has access to it, and possible reports that can be created from it.

Supported applications. Counsel should also ask questions about the client's standard supported applications, such as, *e.g.,* MS Word or Excel, or Adobe Acrobat. It is also important for counsel to ask whether any applications are proprietary, *i.e.,* developed by the client organization privately and owned by it or whether the client organization uses an application service provided for designing and maintaining software. The data used by proprietary applications usually cannot be viewed without a copy of the proprietary software.

Offsite document retrieval. Counsel should determine whether relevant company employees use personal computers or other devices off-site to access office files, data, or e-mail.

E-mail. Counsel should include in his or her questioning the organization's e-mail system and gather information about the hardware that it uses, the server specifications, the number and location of servers, the number of e-mail accounts, the account size limits, any retention and backup settings and policy, the location of potential custodian e-mail boxes, and the types of access to the e-mail system, *e.g.,* whether it can be accessed via the Internet. Counsel should obtain the name of the network or technical support specialist assigned to manage e-mails and ask about any communications protocols, *i.e.,* the rules or standards that enable computers to connect with one another and exchange information with as little error as possible. See Microsoft Comp Dict. For example, counsel might ask whether the client uses the Post Office Protocol (POP) (a popular protocol for clients on computers that connect to Internet servers to download and upload e-mail), or the Internet Message Access Protocol (IMAP), which allows an e-mail program to gain access to e-mail and bulletin board messages stored on a mail server. Part of the POP protocol is the Simple Mail Transfer Protocol (SMTP) that routes e-mail on the Internet. Counsel should also ask whether the e-mail server or client e-mail software is configured to automatically remove older e-mails or if there are any automated e-mail "cleanup" programs running that could delete data.

Checklist. For a checklist containing the questions counsel may ask and the information counsel may obtain, see §4.40.

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§4.16 V. COLLECTING ELECTRONIC DATA

The collection of electronic data often overlaps with data preservation (see §§4.6-4.13) and data identification (see §§4.14-4.15) because the duty to preserve evidence on notice of litigation or potential litigation may well be broader than the duty to produce, that is, the universe of documents preserved may exceed the scope of what the other side requests in discovery. For example, the court may restrict discovery that is unduly burdensome or expensive or obtainable from a more convenient source (CCP §2019.030(a)-(b)) or may find that the evidence sought is protected by a privilege or the attorney work product doctrine. See chap 3. Although a party need not necessarily produce all the data that it preserves, the party nevertheless must preserve and collect it.

NOTE: Regardless of how data is collected, counsel must document the methodology used and the chain of custody.

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§4.17 A. Dangers When Collecting E-Data

Counsel and parties must use caution when collecting e-data. Counsel should consider retaining a consultant who specializes in electronic discovery to assist in gathering and producing electronic data. Although it may seem quick and easy to, *e.g.,* log on to a person's computer, look at what it contains, and pick and choose what to "grab," doing so is unwise. It is also unwise to load a person's e-mail file onto another person's computer to take a quick look at it. Because the simple act of opening a file changes several metadata fields, some of which could be critical to the case, the "quick look" may irretrievably alter the data and result in sanctions for altering the data that has been reviewed. On metadata, see §4.5. See also §§8.22, 8.24, 8.31, 8.44. For this crucial reason, methods of collection (or of processing and review; see §§4.20-4.32) that alter metadata should be strictly avoided unless senior counsel in the litigation has expressly approved them.

CAUTION: In particular, counsel and parties should avoid collecting e-mail by forwarding the e-mail or dragging and dropping it into a folder, because doing so changes the metadata.

There is also the additional risk that a virus may infect the files being reviewed. Moreover, a quick look at e-mail, whether on the client's computer or on counsel's own, creates the risk that any e-mails stored in the outbox will be sent (an automatic feature in most e-mail systems).

NOTE: Although sometimes it may seem more expensive, in fact the most cost-effective way to collect electronic data is to safeguard the integrity of the data, thus avoiding the risks of spoiling data and incurring sanctions.

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§4.18 B. Role of E-Data Team

If counsel has not already done so (see §4.13), counsel should form a cross-disciplinary team that understands the legal issues, the type of data the client generates, and where that data may be found within the client's technology infrastructure.

E-discovery stipulation. The team should serve as a resource to assist counsel in considering how and when to communicate with the opposing party to reach agreement about the scope of the e-data-gathering effort, including whether the case requires the preservation and possible production of metadata.

Scope of data collection. The team should also consider the scope of data collection, *e.g.,* whether data should be collected from across the entire organization or only from certain departments or individuals. The team should also consider whether the collection of data involves only data that is presently online and immediately accessible ("live" data) or whether archived forms (such as backup tapes or optical disks) are involved. The team must evaluate and list which backups, servers, desktops, and remote devices (such as PDAs, cell phones, laptops, fax machines, voice mail storage, and home computers) are involved.

Manner of collection. Another issue for the team to decide is how the electronic data will be gathered, *e.g.,* whether it can be gathered across the network from a central location or whether it must be copied at local workstations.

The team should also consider whether the individual custodians of particular data can be asked, and trusted, to preserve and archive relevant electronic data without affecting or changing the files and the metadata associated with them. If not, the team must decide whether the client's IT staff is capable of doing the gathering or whether a data management vendor will be required to gather material at the client sites.

Using the client's IT staff can be time- and cost-effective for the client. However, there are still many corporate IT infrastructures that are unable to collect data with speed and completeness while maintaining the authenticity of the data. Many vendors have proved skilled at carefully collecting data.

Handling e-data. The team should consider and decide how to make a record of the data collection process. The team should evaluate the likelihood of chain-of-custody issues, and those responsible for gathering must be prepared to keep logs to substantiate their efforts and to keep the collection data secure throughout the process. It must be decided whether the appropriate records can be kept by the client's own IT staff or whether a vendor is necessary.

Other issues to consider and decide include how to collect the data so that issues of password protection and encryption are eliminated or at least minimized, thus allowing the e-discovery team to access the content of the data. On encryption, see §8.23.

Outside expert. The teams should also consider whether there may be reasons to employ the services of an outside computer forensics expert to preserve, analyze, and extract data using specialized software. Computer forensics may be necessary, for example, when a former employee is suspected of taking trade secrets. On computer forensics, see §§8.19, 8.66.

PRACTICE TIP: Having an outside expert who handles the collection and production of data and who can testify about the methods used can be very useful for demonstrating a good faith effort to comply with the client's discovery obligations. Involving an outside expert also frees up client resources from what can be a very demanding and time-consuming task that often requires specialized knowledge or tools.

JUDGE'S PERSPECTIVE: Outside forensic experts will be needed if the internal resources are inadequate to meet the demands of litigation or if the internal resources are accused of being involved in document or data destruction.

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§4.19 C. Forensic Images

A forensic image (or mirror image) is an exact copy (bit for bit) of a hard drive. This kind of image of a hard drive captures all deleted files and slack space as well as all active data. (Slack space is empty space that cannot be used, but may contain remnants of deleted files.) Creating a forensic image of a drive ensures that the client has gathered all of a computer user's data. It provides visibility into all communications generated on the computer in question, including file copying, deletion, or other unusual activity.

Forensic images are often used in criminal matters and quasi-criminal regulatory matters. They are also frequently used in employment matters in which there is the possibility of theft or destruction of intellectual property or the abuse of company policies, or when an employee has left under contentious circumstances. Whether to use forensic imaging must be determined by the need for preservation in each case. In some cases, although it may be necessary to create a mirror image of a hard drive, it may not be necessary to process (*i.e.,* manipulate) the data on that hard drive. See §4.20. In fact, the report that is generated by the forensic process can provide great insight about what is on the drive and can be used as a tool to decide what needs to be processed. In most of the cases requiring forensic imaging, it is usually only necessary to take a mirror image of the hard drives of a few key data custodians.

NOTE: Some IT professionals use the terms "mirror" and "ghost" interchangeably. There is, however, a crucial distinction between these two operations when data is being gathered. Unlike mirroring, the ghost process generally involves copying only live files and their associated metadata and thus can be misinterpreted as being a "mirror image" when in fact it is not. Counsel should forestall any misunderstanding by making clear to those collecting the data which operation is desired.

If forensic imaging is necessary, the e-data team should consider whether to retain an experienced forensics consultant or expert. The creator of the forensic imaging must be qualified and prepared to act as a witness in the matter. Most counsel prefer that law firm personnel do not act as witnesses in the case. In addition, bringing in an experienced, qualified consultant will provide the technical expertise needed for these complicated forensic procedures.

NOTE: In most civil litigation matters, forensic imaging will be unnecessary. However, whatever method of e-data collection is selected, counsel must ensure that a record is kept of the methodology used and the chain of custody so that the collection withstands judicial scrutiny.

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§4.20 VI. PROCESSING ELECTRONIC DATA

During the processing stage, the collected data is refined and culled so that it can be more easily reviewed. Some processing or refinement may already have occurred when the e-data was gathered, *e.g.,* if only data generated between particular relevant dates or data of a particular type was collected. To "process" the e-data is to put it into a format that permits easy search and review of the data. To "convert" the e-data is to change it from one format to another, *e.g.,* by creating an image file. (An image file is a copy of all or part of a hard drive, floppy disk, program, or data and is often in TIF or TIFF (Tagged Image File Format) or PDF (Portable Document Format).) See §4.34.

In addition to refining the e-data, the other major component of the processing stage is loading the data into an online environment for attorney review and assessment of the data for privilege and other pre-production issues.

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§4.21 A. De-Duplication

One way in which e-data is processed is by "de-duplication," *i.e.,* the removal of identical copies of documents or e-mail from the data that will be reviewed. De-duplication can be horizontal (across the data of multiple custodians) or vertical (within the data of a single custodian). Horizontal de-duplication removes far fewer records, but keeps intact the population of records gathered for each custodian. Some processes also offer "near de-duplication," which suppresses earlier e-mails within an e-mail chain and retains only the last, most complete message for review. There are also technologies available that group all near duplicates together so that they can all be reviewed together. De-duplication does not eliminate data such as who received the same message and when they received it.

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§4.22 B. Keyword Filtering

Keyword filtering is the process of identifying specific data on the basis of specified terms. When counsel drafts a list of terms for the purpose of filtering data, it is important to consider, *e.g.:*

- Plural and possessive forms of words;
- Both acronym and nonacronym forms of words; and
- The use of restrictive logic (such as Boolean operators).

To determine the effectiveness of the terms being used, counsel and the e-data team should sample the data to find out what types of documents the keywords are selecting and make adjustments as necessary. Counsel should be aware that the creation of a keyword list for filtering is not only a legal or conceptual task, but also involves significant technical considerations, some of which may be obscure to an attorney or which may depend on the type of computer system involved.

JUDGE'S PERSPECTIVE: The choice of keywords is important and is likely to be disputed if, for example, opposing counsel believes that different keywords would have yielded different documents or data for production. To avoid adversarial challenges, counsel should try to reach agreement with opposing counsel about the keywords used, or data may have to be searched more than once.

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§4.23 C. Date Range Restriction

Date range restriction is the process of examining the date of a document or e-mail and retaining for further processing only those records that fall within the qualifying date range.

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§4.24 VII. REVIEWING AND ANALYZING ELECTRONIC DATA

After the data has been collected and processed, it must be put somewhere so that counsel can review and analyze it for, *e.g.,* its importance to the client's case, its responsiveness to discovery requests, or its nature as a privileged communication.

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§4.25 A. Hosting E-Data

To "host" data is to provide services such as data storage and provision of software to client computers that connect from remote locations, *e.g.,* from the computers of experts or co-counsel or from different computers within the same firm. Before counsel decides to host the data that has been collected and processed, whether within the firm's network or on a third party data-hosting service, it is important for counsel to consider whether, among other things:

- Counsel's computer infrastructure will support hosting. The infrastructure must have, *e.g.,* the necessary servers (computers that control access to a network or its resources), bandwidth (data transfer capacity or transmission speed), connectivity (ability to transmit data between devices), and security;
- The infrastructure will support multioffice reviews;
- It will be possible to use the infrastructure to share data with co-counsel, experts, or clients;
- Counsel has staff to load data into the database and support the users;
- There are options other than hosting.

There are several "off-the-shelf" applications and customizable applications that can be used if counsel decides to host data internally. Regardless of which application is selected, because the application will play a vital part in the discovery process, counsel must be sure to have the software vendor's full support. Even the best in-house litigation support professional will not be able to solve every problem and will need to turn to the software company for a rapid solution. Should counsel decide not to host the data, there are many reliable Application Service Providers (ASPs) and forensic consulting companies that can host the data.

PRACTICE TIP: There are many benefits in using an ASP, the most important of which is that an ASP usually provides round-the-clock support.

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B. Selecting Review Tools

§4.26 1. Litigation Support Tool

A litigation support tool, for purposes of this chapter, is a database designed specifically for use with discovery data. A database is a file composed of records, each of which contains fields of information and a set of operations for searching, sorting, recombining, and performing other functions. Microsoft Comp Dict. Most litigation support tools or databases store records, each of which is a discovery document, and each of which may contain information about the document (*i.e.,* its metadata), such as document type, date, creation date, revision dates, topic, author, and recipient, that was pulled from the electronic document during the e-data processing phase and put into specific fields. A "field" is the place in a record where a particular type of data (*e.g.,* name of the author) is stored. The fields are automatically pulled from the electronic document by manual or auto-coding. In manual coding, a person looks at the document and enters the information into the database. In autocoding, the information is automatically pulled from the text of the document by optical character recognition (OCR) and imported to the designated fields. On e-data processing phase, see §§4.20-4.23.

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§4.27 2. Scalability

Whether counsel decides to host or outsource the data, there are certain essentials that the review tool (the database or litigation support tool) must have. Foremost of these essentials is that the database must be scalable, *i.e.,* it must be able to expand or shrink to accommodate future needs. A case initially may have only 10 gigabytes worth of material or approximately 750,000 documents. See §4.37. But if the client calls to say that it has just found 20 backup tapes, and a good portion probably contain responsive material, then all these documents must be loaded into the database. A database capacity that is too small can spell disaster.

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§4.28 3. Data Integrity

The data must be kept safe—physically as well as electronically. The server containing the data must be in a safe and secured location. For example, many law firms and ASPs (application service providers) have keycard or keypad security along with cameras on the door to the "server room." Most server rooms are also equipped with fire safeguards in case of a fire. Electronic safety is just as important. Counsel must make sure that the data has the highest level of encryption and firewall protection. Often counsel will be reviewing data that is not only crucial to the case but that also contains highly confidential information. Counsel must be sure that the strongest precautions are taken to safeguard client data.

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§4.29 4. Customization

Litigation support tools are not identical and some can be customized more easily than others. Counsel should be sure that the selected review tool has the ability to perform these tasks:

- Add or change fields;
- Add or change tags (a tag is like an electronic "yellow sticky" that relates to a specific designation such as "responsive" or "privileged");
- Change the user interface (*i.e.,* to resize screens and utilize the available screen space); and
- Use dual monitors.

Other important features to a review system are its handling of e-mail chains, duplicate documents, multiple time zones, and combination data (*i.e.,* data that includes both paper and e-data).

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§4.30 C. Speeding Up E-Data Review

It is impossible for counsel to look at every single document that is part of a large-scale e-data review. Although doing so would be prohibitively costly and time-consuming, it is also unacceptable to blindly produce documents to the opposing party. Counsel can safeguard clients without excessive expense by taking time at the beginning of the case to make some determinations about how to conduct the review. For example, counsel can use discovery requests and meet-and-confer meetings to help refine the scope of the review. Counsel should discuss with opposing counsel the search terms and document custodians or locations that can be used to focus review on the most likely documents and reach agreement with opposing counsel on those terms.

NOTE: Fed R Civ P 26(f) requires the parties, at the mandatory initial meet-and-confer conference, to "discuss any issues about preserving discoverable information" and to develop a proposed discovery plan regarding "any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." See Fed R Civ P 26(f)(2),(3)(C). In California practice, the civil case management rules require discussion of issues relating to the discovery of electronically stored information (ESI) when the parties meet and confer in preparation for the initial case management conference. See Cal Rules of Ct 3.724 discussed in §2.25.

Counsel should also discuss with opposing counsel the use of advanced search technology. Some advanced technology, such as concept or keyword searching, can assist in grouping data into logical clusters and provide another method of targeting the data most likely to be useful. Concept searching is technology that is programmed to consider the search terms and the context in which they are used. For example, in an employment matter, the use of the term "strike" would be understood to mean a cessation of work by the workforce, not a strike in a baseball game or a lucky hit in oil exploration. A search for the term "strike" would also disclose documents that refer to a strike using words other than that actual search term. Counsel should also consider "quick peeks" and other sampling devices to determine whether further, more expensive analysis of a database is warranted.

NOTE: Several concept tools are currently available, and they operate differently. Selecting the right one requires counsel to have a good understanding of how they work. When in doubt, counsel should seek a second opinion, talk to others who have used the product, and consider using experienced forensic technology consultants.

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§4.31 1. Dividing Up E-Data

After refining the scope of review and reducing the volume of data, counsel must decide who will review which parts of the data. Depending on the type of matter, reviewers might review data on the basis of the custodian (*i.e.,* review an individual's documents) or the issues of the case. It is advisable to break up the data into small manageable groups so that reviewers can understand the data and give feedback on what they encounter. This information can aid counsel in setting the direction that the review will take.

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§4.32 2. Tags and Issue Codes

Tags and issue codes can be used interchangeably or separately. Tags are typically radio button or check box options that are the electronic equivalent of a yellow sticky. Issue codes are typically an additional field in the database. On database fields, see §4.26. Tags tend to be easier for a reviewer to use because they require only a simple click, whereas an issue code requires clicking into a field and selecting a code from a drop down list. Some common tags that a reviewer might use are "privileged," "responsive," and "hot."

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§4.33 VIII. PRODUCING ELECTRONIC DATA

The production of electronically stored information (ESI) has become the topic of much debate. Like other aspects of litigation, decisions about ESI production can be subject to strategic considerations. Generally speaking, each side prefers to produce only that which is necessary.

PRACTICE TIP: Because the likelihood of inadvertently producing privileged material increases when the parties are dealing with large volumes of e-data, counsel should negotiate an agreement before production that each side may retrieve privileged material inadvertently produced to the other without the necessity of judicial intervention and without waiver of the applicable privileges. This type of agreement is often referred to as a "claw-back agreement." See also CCP §2031.285 (statutory claw-back provision for inadvertently produced ESI) and Fed R Civ P 26(b)(5)(B) (making postproduction claim of privilege), discussed in §§3.183, 3.185-3.186. On inadvertent waiver of privilege, see §3.183.

Parties that reach agreement as to a claw-back provision may want to include it as part of a court order to help them defend against a third party claim that the privilege or protection has been waived. See *Hopson v Mayor & City Council of Baltimore* (D Md 2005) 232 FRD 228. Although not a guaranteed protection against a finding of waiver, parties producing electronic data under a court's discovery management order can be said to be producing it not voluntarily, but at the court's compulsion, and after following reasonable procedures as set out in the order to protect against waiver. See 232 FRD at 239.

An important issue is how to get the data into a format that is acceptable to opposing counsel. Thus, it is wise for counsel to address the issue of format as soon as possible, *e.g.,* during the meet-and-confer meetings required by state and federal practice. See Fed R Civ P 26(f)(3)(C). Under Cal Rules of Ct 3.724(8), counsel must consider format and other issues relating to the discovery of ESI when they meet and confer before the initial case management conference. See §2.25. Counsel should not leave the decision about format until late in the e-data discovery process because how the data will be produced determines the manner of processing and review.

The demand may specify the form or forms in which ESI is to be produced. CCP §2031.030(a). If the form is not specified, the information must be produced in the form in which it is ordinarily maintained or in a form that is reasonably usable, unless the parties otherwise agree or the court orders otherwise. The same ESI need not be produced in more than one form absent court order. CCP §2031.280(d).

JUDGE'S PERSPECTIVE: More than one format for production may be necessary. In some cases, it will be more difficult to review and analyze documents in their native format than to first convert them into a different format. This is so if, for example, viewing the files in their native format requires the use of an old and now unavailable program. The conversion of data into other formats may, however, strip out valuable information such as formulas in spreadsheets or other metadata. If a party produces data in a format unreasonably difficult for the other party to search and analyze, the court may require the party to produce the data in a more useful form. As a separate matter, the court may allocate the costs of such production to either side. See *Toshiba Am. Electronic Components, Inc. v Superior Court* (2004) 124 CA4th 762, 21 CR3d 532. See also §§8.16, 8.31, 8.33, 8.116.

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§4.34 A. Producing Images

When producing images (TIFF or PDF; see §4.18) with metadata, a party provides a scanned reproduction or image of every page of every document as well as the metadata associated with the file. For a definition of "metadata," see §4.5. The image file, usually produced on disc or tape is, essentially, an electronic version of the boxes of documents that change hands during paper discovery. The main difference between production of images and paper document production is that additional important information (the metadata) may be produced along with the documents.

Metadata. How much metadata must be produced varies from case to case, and there are differing views about what is required. For example, in *Williams v Sprint/United Mgmt. Co.* (D Kan 2005) 230 FRD 640, 652, the court ordered the defendant to produce Excel worksheets with the metadata, stating that

> when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order. [Footnotes omitted.]

See also *Pueblo of Laguna v U.S.* (2004) 60 Fed Cl 133 (government required to preserve all documents, including metadata, that contained relevant information or that might lead to the discovery of relevant information). But see The Sedona Conference, *The Sedona Principles for Electronic Document Production*, Principle 12 (July 2005) ("Unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court").

JUDGE'S PERSPECTIVE: Metadata should be preserved. Whether it should be produced is a fact-specific inquiry. For example, if blind copy recipients of e-mails and how drafts were edited (or by whom) are important to the case, the court may order metadata produced for relevant recipients or authors on relevant dates. Counsel should also recall that apparently identical documents may have different sets of associated metadata, and thus multiple apparently identical documents may need to be reviewed and/or produced to the other side.

The basic principle is that documents produced in response to an inspection demand must be produced "as they are kept in the usual course of business" or be organized and labeled to correspond with the categories in the request. See CCP §2031.280(a). Arguably, data as it is kept in the usual course of business means data is produced with the metadata intact, not stripped of it. As a practical matter, however, the definition of "ordinary course of business" is up to the parties and the presiding judge.

NOTE: Under Fed R Civ P 34(b) the requesting party may specify the form of production of electronic data. If the responding party "objects to a form—or if no form was specified in the request—the party must state the form or forms it intends to use." Fed R Civ P 34(b)(2)(D). The party submitting the request may then move for an order under Rule 37(a) compelling production. The amendments also provide that if an inspection demand does not specify the form of production of electronic evidence, the responding party must produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable (Fed R Civ P 34(b)(2)(E)(i)-(ii)); the responding party need not produce the same electronically stored information in more than one form. Fed R Civ P 34(b)(2)(E)(iii).

California has similar provisions. The demand may specify the form or forms in which ESI is to be produced. CCP §2031.030(a). If the responding party objects to the specified form, or if no form is specified in the demand, the party must state the form in which it intends to produce the information. CCP §2031.280(c). If the form is not specified in the demand, the information must be produced in the form in which it is ordinarily maintained or in a form that is reasonably usable, unless the parties otherwise agree or the court orders otherwise. The same ESI need not be produced in more than one form absent court order. CCP §2031.280(d).

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§4.35 B. Producing Native Format

"Native" refers to the original file in its original format. For example, if the original document originated from a word processing program such as Word or WordPerfect, to produce the data in native format would mean producing a copy of the original Word or WordPerfect file in Word or WordPerfect. There are drawbacks to producing or receiving native documents, such as the difficulty of numbering the documents. Traditionally, when paper documents are produced, the parties will affix a control number (often called a "Bates number," after the "Bates" brand stamper traditionally used to number documents). With native documents, however, to add a control number to every page is to change and thus spoil the document. Thus, instead of giving a number to each page within the document, usual practice is to give one control number to the entire document.

It is possible to use a method called the "MD5 hash value" as the control number for native documents. MD5 hash, which stands for Message-Digest algorithm 5 with a 128-bit hash value, is a formula used to create a digital signature that is specific to each file and each document and that is thus the electronic fingerprint of the document. The value is generated on the basis of the total content of the document. No two documents should have the same MD5 hash value.

PRACTICE TIP: Counsel should be mindful that producing e-data in its native format but without the associated metadata may be considered tampering or spoliation or may be otherwise deemed an incomplete production.

Another drawback to receiving native format files is that specific software must be used to review the files. This can be costly, cumbersome, and in some cases impossible, if the reviewing party does not have access to the particular software needed. For example, the reviewing party might not have access to the software needed to review the native file (*e.g.,* trying to open a Linux StarOffice word processing file using Microsoft Word). In some cases, the software needed is no longer commercially available and the costs of developing an application to read and analyze the native format may be prohibitive. As a result, the costs associated with processing native files for review can tip the scales in a litigation budget.

NOTE: Federal Rules of Civil Procedure 26(f)(3)(C) requires the parties, at the mandatory initial meet-and-confer conference, to discuss the form or forms in which electronic data will be produced. It is highly advisable for litigants in state court to do the same.

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§4.36 IX. STORAGE AND REUSE AFTER COMPLETION OF CASE

Although disk space is becoming ever cheaper, counsel should develop a plan to move the data to offline storage at the end of the case. This can be as simple as burning everything to a DVD or moving it to an external hard drive and storing it with other case files. If the case involves a client who might be expected to be involved in litigation again, counsel should consider keeping a detailed index of what has been collected and processed for that client so that the data can be reused in another matter if necessary. Clients should not have to pay to process the same data more than once.

Counsel should store all of the data by client name/number and by matter name/number in one location. All discovery data should be organized in this manner so that counsel is able to archive the data easily and destroy it if a destruction order issues in the case.

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Source: Civil Litigation/California Civil Discovery Practice/4 Conducting Discovery in an Electronic World: Electronic Data and Discovery/ X. FORMS/§4.37 A. Electronic Data to Page Estimation

X. FORMS

§4.37 A. Electronic Data to Page Estimation

Table 1[*]

Volume of Data	Estimated Pages
1 gigabyte	75,000 pages (or 30 boxes)

Table 2[**]

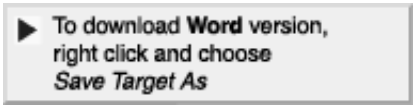
Document Type	Estimated Pages per File	Estimated Pages per Gigabyte
Word	8	64,750 (26 boxes)
E-mails	1.5	100,099 (40 boxes)
Spreadsheet	50	165,800 (66 boxes)
Lotus	55	287,250 (115 boxes)
PowerPoint	14	17,500 (7 boxes)
Text files	20	677,963 (271 boxes)
Images	1.4	15,477 (6 boxes)

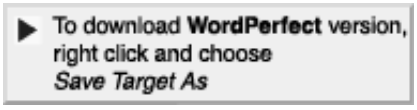
[*] Table 1: Refers to the general estimation of hard copy pages per gigabyte, assuming mixed document types.

[**] Table 2: Refers to hard copy pages per gigabyte for specific document types.

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§4.38 B. Form: Legal Hold Letter





THE COMPANY has been named in a lawsuit relating to _ _[*supply information about the matter*]_ _. You may have records or information relating to this lawsuit. This memo contains important directions about preserving relevant records and information. Make sure you understand these directions. These directions supersede all other records retention policies—even records that would ordinarily be destroyed as part of THE COMPANY'S routine records management program must be preserved. Please contact me if you have any questions regarding these directions.

Retain all records that contain any information relating to this matter. These records must be retained and maintained until you are informed by the Legal Department that the matter has been concluded and the records no longer need to be retained.

"Records" means anything that stores information:

In any medium: paper, electronic, and video- and audiotape, including e-mails, voice mail, text messages, and any other electronic files;

In any form: handwritten or typed, draft or final, desk or electronic calendars;

Created at any time, including documents you created in the past, as well as any documents you may create from this date forward;

Wherever maintained: whether on your computer, in your office, in departmental files, in a home office, on a home computer, in your car, or elsewhere.

You must retain any and all records that contain any information that has any connection whatsoever to this matter or to any of the issues summarized in the paragraph below. Even if the relevant information is only a small portion of a particular record—for example, a single bullet point in a comprehensive business or strategic plan—you must retain the entire record. If you are uncertain whether a document relates to this matter, retain it, and then check with me to determine whether to continue to retain it.

This matter involves _ _[*supply information about the matter*]_ _. The Plaintiff(s), _ _[*name(s)*]_ _, allege(s) that _ _[*state the allegations*]_ _. You must retain any records that relate to these issues, including the following records: _ _[*Name any specific records*]_ _.

If the specified records exist in paper form, you must keep them, without alteration, organized in the way you would normally keep them for business purposes (for example, if you normally keep them in file folders, continue to do so). Unless your home office is your principal office, the records should be kept at a company location within the control of you or your department. Electronic records should generally be kept in electronic form. To the extent that any such records involve data that continually changes, you may satisfy the retention requirements by printing and retaining a monthly summary. If electronic files were created but not retained, please contact me and we will determine how best to recover these documents, including e-mails sent and received.

If you believe this memo should be provided to anyone else, please advise me. If you are aware of other individuals not on this distribution list who might have documents relating to this matter, including outside contractors and vendors, please let me know and I will send them a copy of this memo. Please do not send the memo to other company employees; I want to keep a record of all individuals to whom the memo is sent.

Please notify me promptly in the event you are leaving THE COMPANY or changing jobs within THE

COMPANY. I will make arrangements to appropriately preserve the documents you are maintaining pursuant to this notice.

I have attached some important reminders about document creation and inquiries from third parties regarding this matter.

Thank you for your cooperation in this important matter. If you have any questions, please contact me, _ _[*name*]_ _, at _ _[*state, e.g., phone number or e-mail address*]_ _.

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§4.39 C. Form: Document Creation Reminders

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

1. Keep in mind that all documents and records that you create or prepare may be provided to opposing counsel and the opposing party in litigation. As with all documents and records that already exist, we may be required to produce new documents, created after litigation commenced. You should keep this in mind as you create and as you make decisions about whether or not documents need to be prepared. In general, try to limit any documents you prepare that may be relevant to this case to statements of facts, not opinions. Also be especially conscious of the possibility that the statements contained in the documents may be taken out of context. If you have any questions about whether to create certain documents, please contact me.

2. Do not pass on the legal opinions of other people, including other people within THE COMPANY.

The Attorney-Client Privilege protects us from being required to disclose the legal advice we provide to you and that you seek from us. However, this privilege protects only confidential communications between lawyers and clients, so if you pass that advice on to any other person, or discuss questions for which you seek legal advice with other nonattorneys, it could cause us to lose the privilege. It is particularly important that you not communicate any requests for answers regarding legal advice in writing, including e-mail, other than directly with me or at my instruction. All such communications should be designated "Confidential Attorney-Client Privileged Communication." If you believe that someone else in THE COMPANY needs to hear the advice or participate in the communication, please ask me directly.

3. You already know not to discuss THE COMPANY's confidential information with individuals outside of THE COMPANY. Information relating to this case is confidential and should not be discussed with anyone who does not need to know it. This includes customers, vendors, brokers, suppliers, external manufacturers, ex-employees, and the media. If anyone asks you for information, you should tell him or her you have no comment. If you receive media inquiries, refer them to Corporate Affairs. If anyone from the opposing side contacts you to discuss this matter, please do not share any information and contact me immediately.

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Source: Civil Litigation/California Civil Discovery Practice/4 Conducting Discovery in an Electronic World: Electronic Data and Discovery/§4.40 D. Checklist: Identifying Data

§4.40 D. Checklist: Identifying Data

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Name of Data Custodian

_____

Job Title and Description

- IT Manager

Other _____

Types of Storage

- Type of computer used (desktop, laptop, home PC):

_____

- Portable storage devices used:

_____

- Floppy disks
- CDs
- DVDs
- ZIP drives
- Thumb drives
- External hard drives
- Pen drives
- Mobile phones
- Palmtop computers
- PDAs
- Pagers
- Smartpasses
- Flash drives

Other systems used where data may be retained:_____

_____

_____

Telephony (voicemail and UMS data):_____

- Copiers
- Fax machines

- Printers

General Questions:

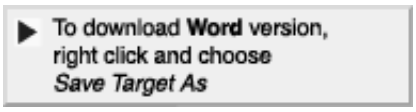
- What applications do you commonly use to create information?
- What kind of reports do you generate?
- Where do you store the data? On a local hard drive or the server?

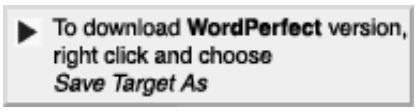
Specific Information:

- What operating system do you use?
- Name
- Date deployed
- Dates of upgrades
- What are the standard user configurations?
- Do the configurations used vary from this standard?
- Drive mappings
- Size limits
- Protocol for sharing files outside of a DMS (document management system)
- What document management systems are in use?
- Name
- Database engine
- Version
- Date deployed
- Dates of upgrades
- Enforcement of use
- Who has access
- Possible reports
- What are the standard supported applications (MS, Adobe, Proprietary, etc.)
- What are the details of the e-mail system?
- Hardware used
- Server specifications
- Number and location of servers
- Number of accounts
- Account size limits
- Retention and backup settings and policy
- Location of potential custodian e-mail boxes
- Types of access to the system (web access?)
- Protocol (POP, IMAP, SMTP)
- Any automated "cleanup" programs running
- Name of e-mail administrator

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§4.41 E. Form: Preservation Letter





_ _[*Name of matter*]_ _

Dear _ _[*name*]_ _

The purpose of this letter is to notify you and your client, _ _[*name*]_ _, not to destroy, conceal, or alter any information stored in electronic form or generated by your client's computer systems or electronic devices. This information may be relevant to the above matter and be unavailable from any other source. As you may know, such electronic information can easily be inadvertently destroyed, and the failure to take reasonable measures to preserve it pending the completion of discovery can result in sanctions being imposed against you or your client. See, *e.g., Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 74 CR2d 248; *Zubulake v UBS Warburg LLC* (SD NY 2003) 220 FRD 212, 216.

In order to comply with the discovery requests that we will make in this matter, your client will need to provide electronic evidence in its native format. Your client will also need to provide electronic documents, along with the metadata or information about data that is contained in those electronic documents. Even when a paper copy of a document or file exists, we will also seek the documents or files in their electronic format so that we also receive the information in the metadata. Our discovery requests will include certain data on your client's hard drives, floppy disks, and backup files, and will include data not usually available to the ordinary computer user, such as deleted files and file fragments.

Thus, the electronic data and the storage devices in which they are kept that you and your client are obligated to maintain and preserve during the pendency of discovery in this case include all of the following data and devices:

1. Electronic files, including deleted files and file fragments, stored in machine-readable format on magnetic, optical, or other storage media, including hard drives or floppy disks in your client's desktop computers, laptop computers, home personal computers, and the backup media used for each;

2. E-mail, both sent and received, internally or externally;

3. Telephone files and logs such as voicemail and universal mobile telecommunications system (UMTS) data;

4. Word processing files, including drafts and revisions;

5. Spreadsheets, including drafts and revisions;

6. Databases;

7. Electronic files in portable storage devices, such as floppy disks, compact disks, digital video disks, ZIP drives, thumb drives, or pen drives;

8. Computer-aided design files;

9. Presentation data or slide shows, such as PowerPoint;

10. Graphs, charts, and other data produced by project management software;

11. Data generated by calendaring, task management, and personal information management software, such

as Microsoft Outlook;

12. Data created with the use of personal data assistants, such as PalmPilot;

13. Data created with the use of document management software;

14. Data created with the use of paper and electronic mail logging and routing software;

15. Internet and web-browser-generated history files, caches, and "cookies" files generated at the workstation of each employee in your client's employ and on any and all backup storage media;

16. Logs of network use by your client's employees, whether kept in paper or electronic format;

17. Copies of your client's backup tapes and the software necessary to reconstruct the data on those tapes on each and every personal computer or workstation and network server in your client's control and custody;

18. Electronic information in copiers, fax machines, and printers.

Thank you for your attention to this letter.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

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5

Deposition Procedures

Marjorie E. Manning

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§5.1 I. SCOPE OF CHAPTER

This chapter sets out the procedure for obtaining a deposition of a party or nonparty. The chapter includes discussion of:

- Who may be deposed (§§5.6-5.15), including the one-deposition rule (see §5.15);
- When a deposition may be taken (§§5.16-5.23);
- Where a deposition may be taken (§§5.24-5.30);
- Strategy considerations when planning depositions (§§5.31-5.49), including whom to depose when a party is an entity, not an individual (see §§5.24-5.43);
- Setting up oral depositions (§§5.50-5.84), including drafting notices and subpoenas (see §5.57-5.62);
- Depositions for production of a nonparty's business records (§§5.85-5.107);
- Depositions requesting personal records (§§5.108-5.131);
- Responding to a deposition notice or subpoena (§§5.132-5.136);
- Deposition motions (§§5.137-5.146), including motions to quash (see §§5.137-5.138) and motions for a protective order (see §§5.139-5.141);
- Depositions to perpetuate testimony (§§5.147-5.155); and
- Depositions pending appeal (§§5.156-5.159).

This chapter also includes procedures for taking depositions on written questions (see §§5.5, 5.160-5.199) and an overview of depositions in federal court (see §§5.200-5.215). For forms, see §§5.126-5.232.

On depositions in other states, see chap 12. On discovery in foreign countries, see chap 13.

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II. TYPES OF DEPOSITIONS

§5.2 A. Oral Deposition

Definition. The term "deposition" most often refers to the oral interrogation of a party or nonparty witness, under oath, before a deposition officer. At an oral deposition, the witness appears and testifies. The deposition yields sworn testimony, preserved in writing, that may be admissible thereafter at trial or for other purposes. CCP §2025.010. See §§5.50-5.84.

The method of compelling deposition testimony depends on whether the witness is a party or a nonparty. Party witnesses can be compelled to appear and testify by proper service of a deposition notice alone. CCP §2025.280(a). A deposition subpoena is necessary to compel the testimony of a nonparty. CCP §§2020.010(b), 2025.280(b). See §5.55.

Compare with insurer's examination under oath. In *Brizuela v Calfarm Ins. Co.* (2004) 116 CA4th 578, 592, 10 CR3d 661, the court distinguished between an examination under oath required by the insurance policy and a pretrial deposition, saying that the two "serve vastly different purposes." The purpose of an examination under oath is for the insurer to obtain information to process the insured's claim rather than to prepare for litigation; an examination under oath is not subject to the Code of Civil Procedure and the insured's counsel has no right to examine the insured; and, in an examination under oath, the insured is obligated to volunteer relevant information. 116 CA4th at 592.

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§5.3 B. Deposition With Document Production

If desired, counsel may demand production of documents at an oral deposition by specifying the items to be produced in a deposition notice served on a party or in a deposition subpoena served on a nonparty. CCP §2025.280. See §§5.58, 5.61. The witness appears, testifies, and produces the documents demanded (which may be attached as exhibits to the deposition transcript). CCP §2025.330.

NOTE: A subpoena may require the production of electronically stored information (ESI). CCP §1985.8. See Fed R Civ P 45, discussed in §§8.98, 8.104. The subpoenaing party may specify the form in which the ESI is to be produced. If the form is not specified, the subpoenaed person must produce the ESI in the form in which it is ordinarily maintained or in a form that is reasonably usable. CCP §1985.8(c).

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§5.4 C. Custodian of Records Deposition

A custodian of records may be compelled to give an oral deposition. CCP §2020.510. However, a party interested in obtaining only production of a nonparty's business records can compel production by the custodian of those records under CCP §2020.410, without requiring the testimony of the custodian. For business-records-only procedures, see §§5.85-5.107.

Special procedures when certain personal records are sought. When the deposition notice or subpoena requires the production of consumer records, employment records, or certain private records held by government agencies, the person whose records are sought must be given notice and an opportunity to object to production. CCP §2020.510(c)-(d). These procedures are covered in §§5.108-5.131.

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§5.5 D. Deposition on Written Questions

A party may take a deposition by posing written questions to a party or nonparty. See CCP §§2028.010-2028.080. The deposition officer reads the questions aloud to the witness at the deposition and the witness answers under oath. The written deposition procedure is a rarely used discovery vehicle. It may be worthwhile if the witness is in a remote location, the information sought concerns relatively noncontroversial matters, and there is no other convenient means of obtaining the testimony. Although the procedure is relatively less expensive than an oral deposition, it should be employed only as a last resort if the deponent's testimony is expected to be important to the case, particularly if the deponent is a party. On procedures for taking a deposition on written questions, see §§5.160-5.199.

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III. WHO MAY BE DEPOSED

§5.6 A. Parties

Generally, a party may take the deposition of any person, including any other party to the action. CCP §2025.010. A party may even take his or her own deposition to preserve testimony in the event of unavailability at trial. CCP §§2035.020(a), 2035.060. See §§5.147-5.155. If the action is classified as a limited civil case, there are limits on the number of depositions allowed. See chap 14.

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§5.7 B. Nonparties

The deposition is the only authorized discovery method for compelling the testimony of a nonparty. CCP §2020.010. See *San Mateo County Dept. of Child Support Servs. v Clark* (2008) 168 CA4th 834, 844, 85 CR3d 763 (deposition subpoena may be used to compel nonparty to appear and produce genetic samples for paternity testing and to command deponent's attendance at court session on any issue arising from refusal to produce specified items).

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§5.8 C. Organizations

A deposition may be taken of an entity (*e.g.*, a corporation, partnership, association, or governmental agency) that is either a party or nonparty by questioning an officer, director, managing agent, or employee who is designated by the entity to testify on its behalf. CCP §§2020.310, 2025.230. The deposition notice (or subpoena, in the cases of a nonparty) obligates the organization to designate and produce the individual most qualified to testify on its behalf. CCP §2025.230. The deponent is the entity itself, not the individual who appears to testify about the subjects identified in the deposition notice. CCP §2025.230. On procedural requirements, see §5.62. On questioning a designated individual during deposition, see §6.51.

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D. Limits on Right to Depose Some Individuals

§5.9 1. Witness Invoking Fifth Amendment Privilege

In some situations, a witness is entitled to object to being deposed on constitutional grounds. A defendant in a civil case who is facing, or anticipates facing, criminal or quasi-criminal charges related to the subject matter of the litigation must not be required to choose between the due process right to a civil defense and the Fifth Amendment right to remain silent. See CCP §2017.010; Evid C §940; *Pacers, Inc. v Superior Court* (1984) 162 CA3d 686, 208 CR 743. See §§3.123-3.129.

If giving testimony in the civil case might tend to incriminate the witness, and criminal charges have been filed or are reasonably anticipated, the deponent's counsel should seek a stay of the client's deposition on Fifth Amendment grounds until the criminal case concludes, the statute of limitations governing the anticipated charge expires, or a grant of immunity is extended. See *Pacers*, 162 CA3d at 690.

PRACTICE TIP: Because criminal cases can result in lengthy delays due to appeals, judges in civil cases may be reluctant to grant a stay. That creates a dilemma for the civil litigant who has criminal charges pending who must either assert the Fifth Amendment and not testify in the civil case, or waive his or her Fifth Amendment right in the civil case and provide pre-criminal trial testimony.

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§5.10 2. Debtor in Bankruptcy

The initiation of a bankruptcy proceeding automatically stays actions to create or enforce any judgment against the debtor for claims that arose before the petition was filed. 11 USC §362. Thus, if a defendant files for bankruptcy, the automatic stay precludes proceeding with the defendant debtor's deposition. 11 USC §362(a)(1). If there are other defendants in the action, however, they may be deposed, as the automatic stay applies only to the debtor defendant and not to the remaining defendants. *Wedgeworth v Fibreboard Corp*. (5th Cir 1983) 706 F2d 541, 544. Further, although litigation against the debtor is stayed, the stay does not prohibit taking discovery from the debtor on matters relating to claims against other defendants. *Groner v Miller (In re Miller)* (BAP 9th Cir 2001) 262 BR 499, 503.

NOTE: Counsel should refer to bankruptcy law with respect to seeking relief from the automatic stay, filing a creditor's claim in the bankruptcy action, determining whether the claim in litigation is dischargeable in bankruptcy, and related issues.

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§5.11 3. Attorneys Possessing Privileged Information

Depositions of counsel concerning potentially privileged matters are disfavored because the procedure tends to disrupt the adversarial process, increases the time and cost of litigation, and potentially invades the work product and attorney-client privileges. *Spectra-Physics, Inc. v Superior Court* (1988) 198 CA3d 1487, 1493, 244 CR 258. "Depositions of opposing counsel are presumptively improper, severely restricted, and require 'extremely' good cause—a high standard." *Carehouse Convalescent Hosp. v Superior Court* (2006) 143 CA4th 1558, 1562, 50 CR3d 129.

According to the court in *Titmas v Superior Court* (2001) 87 CA4th 738, 744, 104 CR2d 803, citing 1 McCormick on Evidence (5th ed 1999) §87, p 346:

> A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business.

Nonetheless, there are situations in which it is entirely appropriate to depose an attorney of record. That the deponents are lawyers rather than lay witnesses is not in itself good cause to prevent their depositions. *Meritplan Ins. Co. v Superior Court* (1981) 124 CA3d 237, 241, 177 CR 236. In considering the propriety of attorney depositions, the court uses a three-prong test (*Carehouse Convalescent Hosp. v Superior Court* (2006) 143 CA4th 1558, 1562, 50 CR3d 129):

- Whether the proponent has other practicable means to obtain the information;
- Whether the information is crucial to the preparation of the case; and
- Whether the information is subject to a privilege.

A party may be precluded from taking an attorney's deposition if doing so would add to the length and expense of litigation and sidetrack the parties into collateral disputes. *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 424, 61 CR3d 295.

EXAMPLE: A defendant in a malicious prosecution or insurance bad faith case who asserts reliance on the advice of counsel as an affirmative defense has effectively waived the attorney-client privilege concerning the communications that motivated its conduct. *Fireman's Fund Ins. Co. v Superior Court* (1977) 72 CA3d 786, 790, 140 CR 677. Under these circumstances, the counsel on whose advice the party relied should be deposed. 72 CA3d at 790. For motions challenging attorney depositions, see §5.145.

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§5.12 4. Judges and Administrative Hearing Officers

Judges and administrative hearing officers are seldom deposed, because the mental processes by which they reach a decision are not subject to discovery. See *U.S. v Morgan* (1941) 313 US 409, 422, 85 L Ed 1429, 1435, 61 S Ct 999; *City of Fairfield v Superior Court* (1975) 14 C3d 768, 772, 122 CR 543. In addition, because privileges attach to statements made in a judicial proceeding (CC §47(b)(2)) and to offers to compromise (Evid C §1152), it is unlikely that any litigation related discussions involving a judge would be admissible. But see *Volkswagen of Am., Inc. v Superior Court* (2006) 139 CA4th 1481, 1490, 43 CR3d 723 (Evid C §§1152 and 1154 not absolute bars to admissibility of settlement document, because it may be admissible other than to prove liability). However, it may be appropriate for discovery on other topics to be obtained in such a deposition, and refusals to answer improper questions can be evaluated by the court on a question-by-question basis. See *Department of Health Servs. v Superior Court* (1980) 104 CA3d 80, 85, 163 CR 414.

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§5.13 5. Prisoners

A prisoner confined to prison or jail may be deposed. Pen C §2623 (state prison); CCP §§1995-1997 (county jail). To take a prisoner's deposition, counsel must obtain an order from the court in which the matter is pending, unless the matter is pending in small claims court, in which case an order must be obtained from the superior court. Pen C §2623; CCP §1995. The motion must be accompanied by a declaration showing the nature of the action or proceeding, the subject of the testimony, and its materiality to the action. Pen C §2623 (state prison); CCP §1996 (county jail). The deposition in state prison proceeds under Pen C §2622.

PRACTICE TIP: Before noticing the deposition of a prisoner, counsel should telephone the authorities of the institution in which the prisoner is confined to arrange the time and place of the deposition that will take place inside the prison and to inform them who, in addition to the deponent and security personnel, will be present (*e.g.,* court reporter, opposing counsel). For a list of the mailing addresses and telephone numbers of California state prisons, see Appeals and Writs in Criminal Cases §13.5 (3d ed Cal CEB 2007).

Counsel should also check with the institution to determine what implements can be brought into the prison by the attorneys and court reporters. For example, some institutions may prohibit pens, pencils or any sharp objects for safety reasons, which will prevent taking notes.

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§5.14 6. Unnamed Members of Class Actions

Although members of the class are parties to a class action, the right to full discovery of all unnamed members is not absolute. Allowing full scale discovery defeats the class action device by making the action as expensive as individual litigation. *National Solar Equip. Owners' Ass'n v Grumman Corp.* (1991) 235 CA3d 1273, 1283, 1 CR2d 325 (only reasonable number of class members may be deposed). It is not clear whether it is required, but it is certainly good practice for the defendant to obtain a court order confirming the "reasonable number" of such class members who may be deposed. See 235 CA3d at 1284. On the use of interrogatories in class actions, see §§7.19, 7.23, 7.70.

CAUTION: Because the named plaintiff, as the class representative, does not know or have control of all the class members, notice served on the plaintiff is insufficient to compel other class members to attend their depositions. Defendant should serve deposition subpoenas on all members of the class sought to be deposed. See *Southern Cal. Edison Co. v Superior Court* (1972) 7 C3d 832, 842, 103 CR 709.

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§5.15 7. Individuals Previously Deposed in Pending Action

A natural person whose deposition has been completed cannot be compelled to attend a subsequent deposition in the same case unless (CCP §2025.610):

- The party noticing the second deposition is neither (1) the party that took the first deposition nor (2) a party that was served with notice of the first deposition (CCP §2025.610(a));

NOTE: Because all parties who have appeared in the action must be served with notice of a deposition (CCP §2025.240(a)), CCP §2025.610(a) means that only parties that appear thereafter may take a subsequent deposition of a party whose deposition has been completed, unless one of the other exceptions in CCP §2025.610 applies.

- The parties, with the consent of any nonparty witness, agree to the second deposition (CCP §2025.610(b));
- The witness was first deposed as a designee of a corporation under CCP §2025.230 rather than as an individual (CCP §2025.610(c)(1));
- The witness was examined pursuant to a court order under CCP §485.230 and the subsequent deposition is being taken for the limited purpose of discovering information about property in which the deponent has an interest under CCP §485.230 (CCP §2025.610(c)(2)); or
- The court issues an order for good cause authorizing the second deposition (CCP §2025.610(b)).

NOTE: Section 2025.610 precludes taking more than one subsequent deposition to discover information about property in which the deponent has an interest under CCP §485.230.

Section 2025.610 applies to *subsequent* depositions of an individual whose first deposition has been completed. It does not prohibit multiple sessions of the same deposition, even if substantial time elapses between sessions. But see Fed R Civ P 30(d)(1) (absent stipulation or court order, deposition limited to 1 day with 7 hours of testimony). See §5.203. A deposition is completed when those present indicate they have no further questions. That indication may be explicit (*e.g.,* "I have no further questions") or implicit (*e.g.,* "Thank you, Mr. Smith").

PRACTICE TIP: To avoid any doubt as to whether a deposition is completed, examining counsel who anticipates additional sessions should announce on the record at the conclusion of the first day of questioning that the deposition is not finished and will be resumed on a later date. If opposing counsel believes the examining attorney is unprepared to complete the deposition and is attempting to delay conclusion for purely strategic reasons, one approach is to demand that the examination continue. If the examining attorney refuses to proceed, opposing counsel may announce that the deposition is over, leaving the examiner to file a motion to compel. CCP §§2025.420(b)(16), 2025.480. On moving to compel, see §5.146.

On protective orders, see §§5.139-5.141.

On adjourning a deposition, *e.g.,* to seek a protective order, see §6.77.

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IV. WHEN DEPOSITIONS MAY BE TAKEN

A. Commencing Discovery by Statute

§5.16 1. Defendant's Earliest Time to Serve Notice of Deposition Without Leave of Court

A defendant may serve a deposition notice at any time after being served with summons or appearing in the action, whichever occurs first. CCP §2025.210(a). This applies to depositions of both parties and nonparties because both require service of a deposition notice on the plaintiff and all other parties who have appeared. CCP §2025.240(a).

NOTE: Under limited circumstances, it is possible (with leave of court) to take a deposition before the lawsuit is filed. CCP §§2035.010(a), 2035.020(a). See §5.18.

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§5.17 2. Plaintiff's Earliest Time to Serve Notice of Deposition Without Leave of Court

A plaintiff must wait 20 days after any defendant is first served with summons or appears in the action before serving a notice of deposition. CCP §2025.210(b); *California Shellfish, Inc. v United Shellfish Co.* (1997) 56 CA4th 16, 23, 64 CR2d 797 (absent court order, plaintiff cannot subpoena independent witness for deposition or production of documents until 20 days after defendant has been served with summons or appeared). The waiting period imposed on the plaintiffs prevents their compelling discovery before defendants have had time to consult with counsel and conduct an investigation. See *Waters v Superior Court* (1962) 58 C2d 885, 892, 27 CR 153.

PRACTICE TIP: In cases in which it is to the defendant's advantage to commence discovery before the plaintiff does, defense counsel may want to consider noticing and conducting depositions during the plaintiff's 20-day waiting period. In the majority of cases, however, that approach is neither practical nor advisable from a preparation standpoint. If the plaintiff obtains leave of court to notice a deposition before the end of the waiting period, opposing counsel may consider moving for a protective order. See *O'Grady v Superior Court* (2006) 139 CA4th 1423, 1454, 44 CR3d 72; §15.69.

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§5.18 3. Ex Parte Application to Shorten Time for Serving Notice of Deposition

For good cause shown, the plaintiff may apply ex parte for an order shortening the 20-day waiting period. CCP §2025.210(b). See *Bernson v Browning-Ferris Indus.* (1994) 7 C4th 926, 930 n2, 30 CR2d 440 (plaintiff seeking to name "Doe" defendants responsible for plaintiff's injury before statute of limitations runs). If a deponent is preparing to leave the jurisdiction of the court before normal service can be completed or a deponent's testimony is needed for an imminent pretrial hearing, such facts may qualify as good cause. But the desire to gain a tactical advantage by obtaining early discovery does not constitute "good cause" for seeking such relief. *Rosemont v Superior Court* (1964) 60 C2d 709, 714, 36 CR 439.

PRACTICE TIP: If a plaintiff obtains a court order authorizing it to serve a notice of deposition before the 20-day waiting period has elapsed, opposing counsel may want to consider moving the court for a protective order. See *O'Grady v Superior Court* (2006) 139 CA4th 1423, 1454, 44 CR3d 72 and discussion in §15.69.

On requirements for ex parte applications, see Cal Rules of Ct 3.1200-3.1207 and form in §5.219. On orders shortening time, see §§15.11-15.29.

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B. Completion of Discovery by Statute

§5.19 1. General Discovery Cutoff

Non-expert discovery as a matter of right must be completed on or before the 30th day, and discovery motions must be heard on or before the 15th day, before the date initially set for trial (*i.e.,* the first trial date in the case). CCP §2024.020(a). Expert discovery as a matter of right must be completed on or before the 15th day, and discovery motions concerning experts must be heard on or before the 10th day, before the date initially set for trial. CCP §2024.030. If these deadlines fall on a Saturday, Sunday, or court holiday, the discovery deadline is moved forward to the next court day. CCP §2016.060.

Local rules imposing shorter discovery time periods than those allowed by statute are invalid. *Wagner v Superior Court* (1993) 12 CA4th 1314, 1318, 16 CR2d 534; Cal Rules of Ct 2.100, 3.20. Case management orders requiring unilateral early disclosure of experts improperly narrow the statutory requirements of CCP §2034 and are invalid. *Hernandez v Superior Court* (2003) 112 CA4th 285, 296, 4 CR3d 883.

NOTE: Some judges may nevertheless require deadlines to the contrary, and as a practical matter, counsel needs to consider the extent to which he or she is willing to challenge those judges. The most diplomatic approach may be to follow the deadlines set by the court unless doing so will result in prejudice to one's client.

CAUTION: Continuance of trial does not reopen discovery. A continuance or postponement of the trial does not reopen discovery. CCP §2024.020(b). Absent opposing counsel's agreement, an order to reopen is required. See CCP §§2024.050-2024.060. However, a mistrial or reversal on appeal reopens discovery and activates new deadlines. *Province v Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 1684, 25 CR2d 667. See §2.21.

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§5.20 2. Cutoff for Taking Depositions

Absent a court order or written agreement to the contrary, depositions of parties and percipient witnesses must be completed no later than the 30th day before the date initially set for trial. CCP §2024.020(a). The deposition of an expert witness designated under CCP §2034.210 must be completed no later than the 15th day before the date initially set for trial. CCP §2024.030. In the context of these deadlines, a deposition is considered "completed" on the day it commences, whether it lasts 1 day or more. CCP §2024.010.

Counsel should schedule depositions sufficiently early to allow time for bringing any motions pertaining to the depositions before the law and motion cutoff. Any discovery motions concerning party or non-expert witness depositions must be heard by the court no later than the 15th day before the date initially set for trial. CCP §2024.020(a). Any discovery motions concerning expert depositions under CCP §§2034.010-2034.730 must be heard by the court no later than the 10th day before the date initially set for trial. CCP §2024.030. On timing considerations in discovery, see §§2.20-2.28.

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§5.21 3. Exceptions to General Deadlines for Completing Discovery

The statutory requirements for completing discovery do not apply in certain situations:

- **Judicial arbitration.** If a case has been referred to judicial arbitration, all discovery must be completed no later than 15 days before the date set for the arbitration, unless there has been a court order to the contrary, issued on a showing of good cause. Cal Rules of Ct 3.822. See CCP §2024.040(a).
- **Trial de novo after judicial arbitration.** If a trial de novo is demanded after the arbitration award in a case that was ordered to judicial arbitration, the only discovery permitted thereafter without either a stipulation of the parties or a court order on a showing of good cause is that pertaining to exchange of expert witness information under CCP §2034.210. CCP §§1141.24, 2024.040(a). On exchange of expert witness information, see chap 11. The limit on postarbitration discovery applies only to judicial arbitration, not to non-judicial arbitration.

NOTE: For discussion of judicial arbitration, see §1.18-1.20.

- **"Complex" cases.** The court may impose other time schedules for discovery in complex cases. See Cal Rules of Ct App Div I, Standard 3.10(d). On complex cases, see §2.18.
- **Unlawful detainer actions.** Discovery, including depositions, must be completed at least 5 days before trial. CCP §§2024.040(b)(1), 2025.270(b).
- **Eminent domain proceedings.** Expert witness discovery and exchange of valuation date are permitted until 20 days before trial. CCP §§1258.020, 2024.040(b)(2).

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§5.22 4. Modifying Statutory Deadlines by Agreement of Counsel

The parties may agree to the taking of depositions closer to the time of trial or arbitration than statute or rule provides. CCP §2024.060. Parties also may agree to reopen discovery if the original trial date is postponed or the case proceeds beyond arbitration. CCP §2024.060. Such agreements may be informal, but they must be confirmed in writing and must specify the extended date. CCP §2024.060. In no event can such an agreement require as a condition that the court continue or postpone the trial. CCP §2024.060.

NOTE: Unless the court orders otherwise, counsel may stipulate to modify any discovery procedures, including the timing of depositions. CCP §2016.030.

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§5.23 5. Modifying Statutory Deadlines by Court Order

A party may move to complete discovery or have a motion heard closer to the initial trial date. CCP §2024.050(a). A party also may move to reopen discovery after a new trial date has been set. CCP §2024.050(a). In exercising its discretion to grant or deny any such motion, the court must consider (CCP §2024.050(b)):

- The necessity and reasons for the requested discovery;
- The diligence or lack of diligence of the party seeking the discovery or hearing;
- The reasons the discovery was not completed or the motion was not heard earlier;
- Likelihood that granting the motion will prevent the case from going to trial on the date set, otherwise interfere with the trial calendar, or prejudice any other party; and
- The time elapsed between any previous and current trial dates in the action.

The moving party must submit a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. CCP §2024.050(a). The court must impose sanctions against the losing party unless it finds that the party acted with substantial justification or other circumstances make the sanction unjust. CCP §2024.050(c).

On requirements for discovery motions, see chap 15.

PRACTICE TIP: It may be difficult to make the showing necessary for the court to order modification of the statutory discovery deadlines. Thus, the safest approach is to schedule depositions to take place at least 60 days before the initial trial date.

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V. WHERE DEPOSITIONS MAY BE TAKEN

§5.24 A. Convenient Location Preferred

Depositions of local witnesses are usually conducted at the office of the noticing attorney. Counsel can agree on any location that is convenient to the parties and accommodates the number of individuals expected to be present. CCP §2025.250. Health care providers are usually deposed in their own offices to ensure ready access to patient charts, billing files, and medical treatises. In addition, because the hourly charge of the physician frequently exceeds that of the noticing attorney, it usually is cost effective for counsel to travel to the deponent's office. See CCP §2034.430(b).

In cases involving the production of voluminous documents, counsel should consider noticing the deposition for a location where the original records are maintained. This approach allows for retrieval of additional documents without the need to continue the deposition.

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B. Statutory Distance Requirements Within California

§5.25 1. Natural Persons

Witnesses in general. Unless the parties and the witness agree or the court orders otherwise, the deposition of a natural person, whether or not a party to the action, must take place at the noticing party's option, either (CCP §2025.250(a)):

- Within 75 miles of the deponent's residence; or
- Within the county where the action is pending *and* within 150 miles of the deponent's residence.

Where a deponent resides is a factual question. See *In re Morelli* (1970) 11 CA3d 819, 831, 91 CR 72, disapproved on other grounds in *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1287 n6, 100 CR2d 320. On motion for a court order under CCP §2025.260 to take the deposition of a natural person who is party to the action at a more distant location, see §§5.142-5.144.

Expert witnesses. Expert witnesses disclosed under CCP §§2034.010-2034.730 must be deposed within 75 miles of the courthouse in which the action is pending. CCP §2034.420. As a practical matter, however, because travel costs of disclosed experts deposed under CCP §§2034.010-2034.730 are borne by the party who retained the experts, many counsel reach reciprocal agreements for taking depositions that minimize experts' travel time. CCP §2034.440. This approach is usually cost effective because experts' time is usually more expensive than counsel's. CCP §2034.430(b). The experts frequently meet with the retaining attorney immediately before their depositions, and are then deposed at the meeting site, usually either the experts' offices or the retaining party's attorney's office. CCP §2034.420. On discovery of experts, see chap 11.

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2. Organizations

§5.26 a. Party Organizations

The deposition of a party organization must take place (CCP §2025.250(b)):

- Within 75 miles of that party's principal executive or business office in California; or
- Within the county where the action is pending *and* within 150 miles of the party's office.

On motion for court order under CCP §2025.260 to take the deposition of an officer, director, managing agent, or employee of a party to the action at a more distant location, see §§5.142-5.144.

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§5.27 b. Nonparty Organizations

The deposition of a nonparty organization must take place (CCP §2025.250(c)):

- Within 75 miles of that party's principal executive or business office in California; or
- At a more distant place if the organization consents.

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§5.28 c. Organizations Without Designated Offices

Whether or not a party, if the organization has not designated a principal office in California, it may be deposed in the county where the action is pending or within 75 miles of *any* executive or business office of the organization in California. CCP §2025.250(d). For more information on geographical limitations for taking depositions under the Civil Discovery Act, see §§5.24-5.27.

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§5.29 C. Depositions Outside California; Depositions Inside California for Lawsuits Pending Elsewhere

Special rules govern the noticing and taking of depositions outside California or the United States. For required procedures when a deposition is to be taken in another state or in a foreign country, see chap 12 (out of state depositions) and chap 13 (foreign discovery). See CCP §2029.010 regarding taking the deposition of a witness in California for purposes of a proceeding pending in another jurisdiction; see also *H.B. Fuller Co. v Doe* (2007) 151 CA4th 879, 60 CR3d 501.

NOTE: Code of Civil Procedure §2029.010 has been repealed, operative January 1, 2010; on that date, the California version of the Uniform Interstate and International Depositions and Discovery Act (CCP §§2029.100-2029.900) will take effect and will govern depositions in actions pending outside California. See Stats 2008, ch 231, §§1-3.

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§5.30 D. Oral Deposition by Telephone, Video Conference, or Other Remote Electronic Means

A party is entitled under CCP §2025.310(a) and Cal Rules of Ct 3.1010(a) to conduct an oral deposition by telephone, video conference, or other remote electronic means. These procedures can be cost effective, particularly when deponents are located in other parts of the country.

EXAMPLE: A case is pending in Los Angeles but a corporate witness is located in Madison, Wisconsin. Rather than spending 2 or 3 full days for travel and attendance at the witness's deposition in Wisconsin, counsel can take the deposition in two hours by telephone, Internet, or video conference, saving the clients thousands of dollars. However, if the deponent is a key witness, this procedure may not be suitable; there is no substitute for a face-to-face meeting.

Attendance by deponent. A *party* deponent must appear at the deposition in person and testify in the presence of the deposition officer. CCP §2025.310(b); Cal Rules of Ct 3.1010(c). A *nonparty* deponent may appear at the deposition by telephone if the court so orders based on a showing of good cause and the absence of prejudice to any party. CCP §2025.310(b); Cal Rules of Ct 3.1010(d).

NOTE: Section 2016.030 allows the parties to stipulate to modify any discovery procedure unless the court rules otherwise. However, if counsel contemplate a stipulation to allow a party to be deposed outside the presence of the deposition officer, a court order should be sought in light of the mandate of CCP §2025.310.

Attendance by participants. A person may take, and any person other than the deponent may attend, a deposition by telephone or other remote electronic means (CCP §2025.310(a)), provided that (Cal Rules of Ct 3.1010):

- Notice of the intent to take the deposition by telephone/remote means is served with the deposition notice or subpoena;
- The noticing party arranges for any other party to participate in the same manner at the participant's expense;
- Any party may personally attend without giving prior notice; or
- Any party intending to participate by telephone/remote means serves written notice of such appearance by personal service or facsimile at least 3 days before the deposition, and pays all expenses incurred in connection with the appearance. For form of Other Party's Notice of Intention to Appear at Deposition by Telephone, Video Conference, or Other Electronic Means, see §5.221.

NOTE: Although many video-conferencing facilities provide a means for sharing documents, the use of voluminous exhibits may be cumbersome. In such a case, the noticing attorney should consider sending exhibits to each participating attorney and to the court reporter in advance. If counsel refuses to do so, a protective order may be sought.

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VI. STRATEGIC CONSIDERATIONS IN PLANNING ORAL DEPOSITIONS

A. Considering Primary Goals of Depositions

§5.31 1. Discovering What Witness Knows

Counsel use oral depositions most frequently to discover relevant information the deponent knows about the case, including sources of additional discovery, such as the existence and location of percipient witnesses and pertinent documents. See CCP §2017.010. A deposing attorney may ask questions calling for testimony that would not be admissible at trial, *e.g.,* hearsay, because the deposition can cover "any matter, not privileged, that is relevant to the subject matter involved in the pending action … if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." See CCP §§2017.010, 2025.010. On scope of discovery, see chap 1.

Although written discovery to a party (*e.g.,* interrogatories) is designed to achieve the same goal, responses are drafted by counsel and frequently conceal as much information as they disclose. Unlike written discovery, an oral deposition pits the lawyer against the witness. Answers to questions cannot be carefully crafted and edited by opposing counsel, and even the most prepared witness will make mistakes in the rapid give and take of a deposition. As one court observed, "[T]he use of interrogatories is infinitely more time consuming and a poor substitute for deposing what are in fact percipient witnesses to critical events." *Meritplan Ins. Co. v Superior Court* (1981) 124 CA3d 237, 241, 177 CR 236.

On interrogatories, see chap 7.

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2. Preserving Testimony for Future Use

§5.32 a. "Locking In" Party's Testimony

The deposition can be an effective tool for forcing the deponent to commit to a particular version of the events giving rise to liability. This strategy is often used when counsel noticing the deposition anticipates filing a motion for summary judgment or taking the case to trial. The process may yield admissions against the party's interest, the date of discovery of a claim or cause of action, or lack of recollection as to a particular event. See CCP §437c(b)(1). If the deponent is "locked in," subsequent inconsistent testimony provides fertile ground for impeachment at trial. See Evid C §§769-770; CCP §2025.620(a). Similarly, the trial court can disregard sworn declarations of a party in support of or opposition to summary judgment motions when the new testimony is inconsistent with prior deposition testimony. *Princess Cruise Lines, Ltd. v Superior Court* (2009) 179 CA4th 36, 40, 101 CR3d 323; *D'Amico v Board of Med. Examiners* (1974) 11 C3d 1, 21, 112 CR 786. See also *Archdale v American Int'l Specialty Lines Ins. Co.* (2007) 154 CA4th 449, 473, 64 CR3d 632 ("Where a party's self-serving declarations contradict credible discovery admissions and purport to impeach that party's own prior sworn testimony, they should be disregarded"); *Barton v Elexsys Int'l, Inc.* (1998) 62 CA4th 1182, 1191, 73 CR2d 212.

NOTE: The deponent who repeatedly responds, "As I sit here at this moment, I do not presently recall," has been coached to avoid being "locked in." Handling this type of witness is addressed in §6.87.

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§5.33 b. Deposing Witness Unavailable for Trial

If a party or witness is aged or infirm, plans to move beyond subpoena range, or for any other reason is likely to be unavailable for trial, counsel should consider an oral deposition to preserve testimony. CCP §§2035.010-2035.060. Expert witnesses are sometimes deposed with this goal in mind, partly due to scheduling difficulties during trial and also as a cost-saving measure. CCP §§2025.620(d), 2034.410-2034.470. However, counsel should be aware that the presentation of prior recorded testimony, even by video, is rarely as impressive to a jury as the statements of a witness present in court.

Counsel may decide to depose his or her own client for the purpose of preserving testimony. See CCP §2025.620. If advanced age or serious illness threatens to deprive the party of his or her day in court, counsel for the affected party should consider a video deposition. CCP §§2025.330(c), 2025.620(c)(2)(C). Counsel who expect an adverse party or witness to be absent at trial must make a judgment call about whether preserving testimony is likely to help or hurt the case.

NOTE: Counsel deposing a client should remember that the rules for direct examination apply. See CCP §2025.330(d). Leading questions are thus objectionable. On deposing one's own witness, see §§6.22, 6.29, 6.109.

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§5.34 3. Obtaining Testimony to Facilitate Settlement

The deposition of a party or key witness is often an effective method of facilitating settlement of a case early in the litigation. Because the deposition is the only discovery method that enables counsel to view firsthand the demeanor and credibility of a party or witness, it serves to educate both sides about the deponent's probable impact on a jury or other fact finder. Using the deposition for this purpose may be particularly helpful when opposing counsel appears to be unrealistic about the strengths and weaknesses of the case. The same may be true of the headstrong client whose desire to see the case through to the bitter end has precluded meaningful settlement negotiations to date.

CAUTION: That the deposition is taken early with an eye toward settlement does not alter counsel's responsibility to be thoroughly prepared. First, an attorney who is unprepared is unlikely to uncover the weaknesses in the case or enhance his or her client's settlement position. Second, counsel cannot count on another chance to depose the opposing party. CCP §2025.610. See §5.15. Finally, settlement is never a sure thing, no matter how likely it may seem at any point in the litigation.

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§5.35 4. Assessing Witnesses and Opposing Counsel

The discovery of facts, both adverse and favorable, is among the most obvious uses of an oral deposition, but the deposition is also an important tool for demonstrating how poised and believable witnesses are and for learning how capable opposing counsel may be. Apart from the underlying facts and law, these assessments of witness and lawyer strength are factors to weigh in trying or settling a case.

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§5.36 B. Evaluating Expense of Deposition in Light of Potential Benefits

Counsel should make the initial decision to take a particular deposition in the context of an overall discovery plan tailored to the facts, legal issues, value or exposure, and probable resolution of a given case. That plan should include an evaluation of the potential benefit of a deposition in light of its cost, as depositions are invariably expensive. On developing a discovery plan, see chap 2.

The expense of taking many depositions is most easily justified in high exposure cases with complicated legal and factual issues. In a relatively simple case in which the likelihood of settlement is high and potential exposure is low, counsel may opt for alternative means of discovery (*e.g.,* interrogatories and/or witness interviews) or choose to depose only the adverse party before evaluating whether further depositions are necessary to develop or defend the lawsuit as a whole. On planning discovery, see chap 2.

Counsel should be aware that as the cost of discovery increases, it may become increasingly difficult to elicit a reasonable settlement offer or demand simply because more is invested in the case. On the other hand, when the value of the case appears to be high and the likelihood of a reasonable settlement comparatively low, decisions about who to depose are more likely to depend on both sides' assessment of the merits of the case rather than the cost of proceeding.

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C. Considering Whom to Depose

§5.37 1. Adverse Party

If unavailability at trial is not a consideration, and financial constraints allow for only one deposition in a case, it most often should be that of the adverse party. No other discovery device affords counsel the opportunity to assess the opponent's credibility and demeanor, explore the party's contentions in detail, and probe for weaknesses that may be exploited at trial through cross-examination. See CCP §2025.620(a)-(b). The deposition also may provide insight into the plaintiff's or defendant's feelings about the case, which in turn may foster realistic settlement negotiations.

Although the risk of unnecessarily educating the opponent should be considered, it rarely justifies forgoing the deposition altogether. In assessing the scope of examination, counsel planning the deposition should weigh the risk of providing the adversary with a dress rehearsal of the trial against the benefit of using the deposition to discover facts and to lay a foundation. CCP §2025.620(a). Frequently, deposing counsel can strike a balance between confronting inconsistencies directly and saving surprises for cross-examination at trial. CCP §2025.620(a)-(b); Evid C §§769-770. These considerations apply whether the deponent is a party or nonparty individual, corporation, or other entity. On deposing organizations, see §5.8.

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§5.38 2. Adverse Nonparty Witness

A thorough deposition of an adverse nonparty witness is usually advisable as a prelude to realistic settlement negotiations, for the purpose of planning a counterattack at trial, or both. Deposing nonresident witnesses, including a custodian of records, is the only sure way of preserving their testimony for trial. See *Amoco Chem. Co. v Certain Underwriters at Lloyd's of London* (1995) 34 CA4th 554, 561, 40 CR2d 80. In addition, although nonparties may cooperate with counsel and voluntarily relate information about the case, they are not required to do so. The deposition is the only authorized discovery method for compelling the testimony of a nonparty. CCP §2020.010(b).

Although deposing an adverse nonparty witness usually preserves harmful testimony, it is imperative that counsel ascertain the weaknesses in the case. A possible exception is the adverse witness who appears to be unknown to the opposing party. However, given the liberal use of Judicial Council form interrogatories (see *e.g.*, §§7.9, 7.44, 7.49) which call for the identities of all individuals having knowledge of the facts surrounding the litigation, counsel should anticipate that the identity of adverse witnesses eventually will become available to the opposition. The timing of the deposition of an adverse witness, then, may be as important as the issue of whether to depose the individual at all. On timing issues, see §§5.44-5.49.

An alternative to deposing the adverse nonparty witness is an investigator's interview of the individual. This approach allows counsel to preview potentially harmful testimony before deciding whether to depose the witness. If the information is more favorable than anticipated, the investigator should attempt to obtain a recorded statement, which can be used for impeachment purposes if the witness later provides a different version. Evid C §§769-770, 1235. See §2.33. Hostile witnesses usually refuse to provide a recorded statement and may even be unwilling to discuss the case. In that event, counsel should probably depose the individual.

PRACTICE TIP: Counsel should avoid the practice of personally interviewing adverse witnesses when possible, and instead use an investigator for this purpose. If the witness changes his or her story after the interview, and thus is subject to impeachment at trial, evidence of the prior inconsistent statement will be most effective when presented by the investigator rather than by the party's attorney. Evid C §§769-770, 1235.

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§5.39 3. Friendly Nonparty Witnesses

Counsel ordinarily avoid deposing witnesses who support the client's position. Friendly witnesses are usually willing to provide a recorded statement to an investigator, and should be asked to do so. If they refuse, or in any other way cast doubt on their status as "friendly," counsel should reconsider the decision to forgo a deposition. If an individual's testimony is critical to the case or he or she is likely to be unavailable at the time of trial, counsel should conduct a deposition in any event. CCP §2025.620(c)(2)(D).

PRACTICE TIP: Counsel who decide to depose a friendly witness should serve a subpoena on the witness. CCP §2020.010(b). See §5.55. If the witness has not been subpoenaed and fails to appear for the deposition, examining counsel may be subject to sanctions for reimbursement of other parties' expenses incurred in appearing at the deposition. CCP §2025.440(a). See §6.93. The subpoena also impresses the witness with the importance of the proceeding and may help prevent last-minute attempts to reschedule the deposition. CCP §2064. It is a good idea to telephone the witness to explain beforehand that the subpoena entitles him or her to mileage and witness fees (see §5.70) and to arrange for service in an unobtrusive manner, if the witness so desires. CCP §§2020.230(a), 2065. Counsel need not serve a subpoena on the friendly witness, however, who resides outside the subpoena power of the court, cannot be deposed outside the state without great expense, and agrees to travel to California for the deposition. On out-of-state depositions and discovery in foreign nations, see chaps 12-13.

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4. Entities

§5.40 a. Person Most Knowledgeable

Code of Civil Procedure §2025.230 authorizes the deposition of an entity through those individuals designated by the organization as most qualified to testify on its behalf about the subjects identified in the deposition notice or subpoena.

This procedure is a very powerful tool in litigation against corporate or governmental entities. It places the burden on the entity to designate a person, or several people if necessary, to testify on the designated topics. CCP §2025.230. Further, once designated, the deponent is considered to be the entity, and the testimony given is admissible against the entity. CCP §2025.620(a).

For considerations when deposing witness about electronically stored information, see chap 4.

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§5.41 b. Distinguishing Individual Depositions of Organization Representatives

Officers, directors, managing agents, or employees of an organization as well as governmental officials and employees may be deposed as individuals. CCP §2025.010. However, protective orders may preclude the depositions of high-level employees unless (1) the potential witness has personal knowledge of or was directly involved in the case, and (2) the information sought cannot be obtained by other means. See *Liberty Mut. Ins. Co. v Superior Court* (1992) 10 CA4th 1282, 1287, 13 CR2d 363. Counsel should be aware that the deposition testimony of an *individual* employed by the entity may not be admissible against the organization itself. Evid C §1222(a); *O'Mary v Mitsubishi Electronics Am., Inc.* (1997) 59 CA4th 563, 570, 69 CR2d 389 (describing circumstances in which employee can make statement for employer). Thus the deposition of the entity's representatives should not be viewed as a substitute for the deposition of the entity *itself* under CCP §2025.230. See §5.40.

JUDGE'S PERSPECTIVE: Notwithstanding the criteria of personal knowledge and unavailability of information by other means, a judge is usually inclined to permit depositions of high-level corporate officers or government officials if it is known or reasonably anticipated that such high-level witnesses will be testifying at trial. Under these circumstances, a motion for a protective order barring the deposition of a high-level employee is likely to be denied. On protective orders, see §§5.139-5.141. See also §§15.59-15.84.

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5. Experts

§5.42 a. Treating Health Care Providers

If a party's physical or mental condition is in dispute, defense counsel must make a judgment call about when and whether the plaintiff's treating physicians or other health care practitioners should be deposed. It is sometimes a good idea to depose treating physicians early in a case, rather than waiting to see if they are designated as experts under CCP §§2034.010-2034.730. On exchange of expert witness information, see chap 11. On the other hand, if treatment is ongoing and the party's condition remains unstable, a later deposition may be preferred.

Reviewing records of treating physicians. Whenever possible, counsel should obtain and review the records of treating medical professionals before deciding to notice their depositions, for the following reasons:

- The records may provide all the information needed, as physicians rarely contradict unambiguous chart notes.
- The scope of treatment revealed in the records may be substantially different than counsel anticipated. For example, the records of primary care physicians may reflect referral to a specialist who is a better source of information about diagnosis, treatment, and prognosis.
- Careful review of the chart beforehand will alert counsel to key entries and minimize the time spent in deposition.

Serving deposition subpoena for charts and notes. Physicians usually bring their patients' charts to the deposition without being asked to do so. The prudent approach, however, in addition to serving a deposition notice on the party who designated the expert, is to personally serve a deposition subpoena on the expert for the production of all file materials, including the original chart and any notes. CCP §§2020.510, 2020.220. This approach is particularly useful for experts employed by or associated with large health care institutions that have separate medical record departments. For further discussion, see §11.32. The subpoena may require the production of electronically stored information. CCP §1985.8.

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§5.43 b. Other Expert Witnesses

Deposing the adversary's disclosed expert is usually considered essential to effective trial preparation. On disclosing experts as trial witnesses under CCP §§2034.010-2034.730, see chap 11.

NOTE: A party is not entitled to depose an adverse expert consulted during the litigation if that expert will not testify at trial. The opinions of such *consulting* experts are protected by the work product doctrine and thus are not discoverable. *County of Los Angeles v Superior Court* (1990) 222 CA3d 647, 654, 271 CR 698. On work product doctrine, see §§3.52-3.68.

The expert's deposition gives counsel the opportunity to elicit the information necessary to cross-examine this witness at trial, and to prepare counsel's own expert before trial. CCP §2025.620(a). Many attorneys deliberately employ broad language when identifying the scope of opinion testimony in their witness disclosures. Thus, counsel should not view an opponent's expert witness disclosure under CCP §§2034.010-2034.730 as an acceptable substitute for determining the scope of testimony through a face-to-face encounter with the witness in a deposition setting.

CAUTION: If, for financial or other reasons, the client refuses to authorize deposing the opponent's experts, counsel should confirm that fact in writing and reiterate the admonition that proceeding to trial without ascertaining the adversary's experts' opinions and their factual bases is ill-advised. See Cal Rules of Prof Cond 3-110, 3-500.

Cases are often settled on the eve of expert witness depositions because this phase of discovery can be very expensive. If settlement appears likely, counsel may stipulate in writing to postpone expert discovery beyond the statutory cutoff (CCP §§2016.060, 2024.010-2024.060) to avoid unnecessary expense.

JUDGE'S PERSPECTIVE: Some cases stand or fall on the strength of a party's expert. If counsel believe the settlement posture of the case will be affected favorably by allowing one or more expert depositions to proceed, refusing to postpone discovery deadlines may be the better strategy. In any event, counsel should keep in mind that agreements to postpone discovery beyond the statutory cutoff are not grounds for continuing or delaying the trial. CCP §2024.060.

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D. Considering Timing

§5.44 1. Impact of Accelerated Trial Rules

When an action is filed, the court will presume it is subject to disposition within 1 year thereafter. Cal Rules of Ct 3.714(b)-(c). See §§2.25-2.28. The trial court must schedule a case management conference to review each case no later than 180 days after the filing of the initial complaint. Cal Rules of Ct 3.721. At the conference, the parties must address such matters as whether discovery has been completed and, if not, the date by which it will be completed. Cal Rules of Ct 3.727(8). No later than 30 days before the initial case management conference, counsel must meet and confer to consider, among other matters, resolving any discovery disputes, setting a discovery schedule, and issues relating to the discovery of electronically stored information (ESI). See Cal Rules of Ct 3.724, discussed in §2.25. On similar provisions under Fed R Civ P 16(b)(3)(B)(iii), 26(f)(3)(C), see §8.104.

Faced with such time constraints, counsel are usually unable to defer the taking of depositions unless the case is redesignated for disposition past the 1-year deadline. See Cal Rules of Ct 3.714(c). For further discussion of court management rules adopted to reduce delay, see §§2.25-2.28. For the same reason, counsel should develop at least a general discovery plan for the case early and research any unfamiliar legal issues raised by the complaint or the answer before depositions begin. On planning discovery, see chap 2.

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§5.45 2. Whom to Depose Early

The timing of a particular deposition depends not only on an overall discovery plan, but also on factors beyond counsel's control such as a witness's availability, opposing counsel's schedule, and the constraints imposed by the trial court's case management rules. Although each case should be assessed individually, the general guidelines set forth below may prove helpful.

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§5.46 a. Deposing Parties Before Other Witnesses

The substance of a party's testimony often dictates who else should be deposed. Many counsel choose to depose adversary parties first because they are more likely to tailor their testimony to conform to or contradict the statements of nonparty deponents. When resources and the amount at stake are limited, counsel may choose to depose only the opposing party. See §5.37.

PRACTICE TIP: Counsel who is served with an early notice for a client's deposition and is not prepared to proceed should seek a voluntary continuance from opposing counsel. If opposing counsel will not stipulate, and there is inadequate time in which to prepare, counsel should seek a protective order. CCP §2025.420(a). See §§5.139-5.141. On protective orders, see §§15.59-15.84.

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§5.47 b. Deposing Key Witnesses Early

Because percipient witnesses' recollection of events is likely to fade with the passage of time, the deposition procedure is a means of preserving their testimony and may provide the foundation for impeaching them at trial. CCP §2025.620(a). An early deposition of a key witness also may allow counsel to test the evidence before substantial resources are expended. For example, if a client's case depends on the testimony of a particular witness whose eventual deposition is inevitable, and whose statements cannot be obtained through alternative means (*e.g.,* through an investigator; see §2.36), it is best to confront the problem at the outset and depose the witness early.

NOTE: Counsel planning to depose witnesses whose ongoing observations of a party are relevant, such as treating physicians, should consider the plaintiff's current condition and the extent to which it is likely to change, and wait until closer to trial to schedule these depositions.

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§5.48 c. Deposing Witnesses Who May Be Unavailable at Trial

Counsel should depose witnesses whose testimony is helpful to the client's case if such testimony is likely to be lost through illness, death, or geographical relocation. CCP §2025.620(c). It may be a good idea to videotape these depositions. See §§5.75-5.84.

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§5.49 3. No Priority in Sequence of Depositions Under Civil Discovery Act

Unless a local rule or order exists to the contrary, no party has priority in conducting depositions under the Civil Discovery Act (except for plaintiff's initial waiting period (CCP §2025.210(b)); see §5.17). In other words, the methods of discovery may be used in any sequence, *i.e.,* one party noticing a deposition does not prevent another party from doing so, regardless of whether the first-noticed deposition has been completed. CCP §2019.020.

Counsel should check whether local rules affect the sequence of discovery in the county in which the action has been filed. For example, in Los Angeles County Superior Court, guidelines exist to encourage standards of professionalism and discourage abusive deposition tactics. See, *e.g.,* Los Angeles Ct R 7.12(e)(3) (if deposition noticed in reasonably near future, opposing counsel should not ordinarily notice another deposition for earlier date absent agreement of counsel). On the advantages of cooperating with other counsel during the discovery process, see §2.31.

CAUTION: Even when no local rules are in effect, and one party's discovery does not delay another party's under the statute, an attorney may seek a court order establishing the sequence and timing of discovery for the convenience of the parties and witnesses and in the interests of justice. See CCP §2019.020(b). Counsel who unilaterally alters the sequence of depositions by continuing his or her client's deposition, then noticing the opposing party's deposition, risks issuance of a protective order and the imposition of sanctions. See *Young v Rosenthal* (1989) 212 CA3d 96, 106, 260 CR 369.

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VII. SETTING UP ORAL DEPOSITION

A. Cooperation Among Counsel

§5.50 1. Stipulating to Taking of Deposition

Cooperative efforts among counsel can avoid undue expenditure of time, energy, and resources in the taking of depositions and most other forms of discovery. See §2.31. In furtherance of that goal, the law provides that parties may agree, by written stipulation, to modify the deposition procedures provided in the Civil Discovery Act. CCP §2016.030. Such agreements are binding. *Housing Auth. v Gomez* (1972) 26 CA3d 366, 372, 102 CR 657.

PRACTICE TIP: Examining counsel should not rely on an oral stipulation waiving formal notice of a deposition. It is a better practice to follow up any agreement about the date and time of a deposition with service of a deposition notice. This approach places examining counsel in a better position to seek sanctions for expenses if the deponent fails to appear. CCP §§2020.240, 2025.440-2025.450. See §5.39.

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§5.51 2. Finding Mutually Convenient Date

In cases involving more than two parties, the task of scheduling depositions can be extremely frustrating and time-consuming. The simplest way to avoid such problems is to schedule depositions sufficiently in advance that finding mutually convenient dates is relatively easy.

Counsel should be aware that although reasonable accommodation is preferable and makes life easier for all involved, opposing counsel's refusal to accommodate does not justify failure to appear at the deposition. CCP §2025.450(a). If opposing counsel refuses to postpone or otherwise modify the terms of a properly noticed deposition, the party requesting the accommodation should move for a protective order. CCP §2025.420(a)-(b). See §§5.139-5.141.

NOTE: A party that unilaterally notices another party's deposition, and then refuses to confer in good faith to find a mutually convenient date, may face monetary sanctions for abusing the discovery process under CCP §2023.010(c) (using a discovery method in a manner that causes unwarranted annoyance, oppression, or undue burden and expense) or under CCP §2023.010(i) (refusing to meet and confer in good faith). *Leko v Cornerstone Bldg. Inspection Serv.* (2001) 86 CA4th 1109, 1123, 103 CR2d 858 ($950 sanction imposed on attorney for refusing to negotiate mutually convenient date for party's deposition). On sanctions, see chap 15.

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B. Method of Compelling Appearance of Witness

§5.52 1. Deposition Notice Sufficient for Party Appearance and Testimony

Counsel may serve a deposition notice alone, without an accompanying subpoena, to compel the appearance and testimony at deposition of the following individuals:

- A party (CCP §2025.280(a));
- A party-related witness, *i.e.*, an officer, director, managing agent, or present employee of a party (CCP §2025.280(a)).

A managing agent is a person who exercises discretion in dealing with matters of the corporation and identifies with its interests in testifying. See *Waters v Superior Court* (1962) 58 C2d 885, 896, 27 CR 153. If there is doubt whether a particular individual qualifies as a party-related witness, counsel should serve a subpoena. CCP §2020.510. For content and service of deposition notice/subpoena, see §§5.57-5.62.

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§5.53 2. Comparing Notice of Expert Deposition

Service of an expert deposition notice obligates the party retaining the expert to produce the expert. CCP §2034.460. Expert witnesses are not legally obligated to appear at a deposition unless they are served with a subpoena. CCP §2064. Nevertheless, from a strategic standpoint there is little to be gained by subpoenaing the expert. If the expert refuses to appear for a deposition, it is the party retaining the expert who suffers. The noticing party can simply move to exclude the expert's testimony at trial. CCP §2034.300(d). See *Waicis v Superior Court* (1990) 226 CA3d 283, 287, 276 CR 45. For detailed discussion on experts, see chap 11.

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§5.54 3. Deposition Notice Sufficient for Party Attendance and Production of Documents

If the deponent is a party, a deposition notice alone is sufficient to compel appearance, testimony, and production of documents without the necessity of a subpoena. CCP §2025.280(a). The materials or category of materials to be produced need only be described with reasonable particularity in the deposition notice. CCP §2025.220(a)(4). On timing and methods of service, see §§5.123-5.124.

NOTE: Counsel who expect a party deponent to produce complex or voluminous material should consider first serving a demand for inspection, copying, testing, or sampling under CCP §2031.010, allowing sufficient time to review the materials and formulate questions before the deposition. On demands for inspection, see chap 8. Even if the deponent is a party who has already responded to a demand for inspection under CCP §2031.010, it may be a good idea to couple the deposition notice with a request for production if there is any reason to believe the deponent may possess relevant items. See CCP §2025.220(a)(4). Responses to inspection demands under CCP §2031.010 are usually drafted by counsel, whose client may not even be aware the items were requested. (However, the client is required to sign the responses under oath. See CCP §2031.250(a)-(b).) A subsequent deposition notice with a production request allows the noticing party to revisit the issue and also may reveal documents generated or found after the initial demand was made.

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§5.55 4. Deposition Subpoena Required to Compel Nonparty Personal Attendance, Testimony, and Production of Documents

A party who wishes to take the deposition of a California resident who is not a party, party-related witness (*i.e.*, an officer, director, managing agent, or employee of a party), or an expert witness disclosed under CCP §§2034.010-2034.730 must personally serve the deponent with a copy of the deposition subpoena under CCP §2020.010(b). CCP §§2020.220(b), 2025.280(b). For required content of subpoena and service procedures, see §§5.57-5.69.

The deposition subpoena must specify each individual item or describe with reasonable particularity each category of items to be produced. CCP §2020.510(a)(2). On timing and method of service, see §§5.63-5.69.

The statute also authorizes the subpoenaing party to specify any testing or sampling to be performed during the deposition. See CCP §2020.510(a)(3).

NOTE: A subpoena may require the production of electronically stored information (ESI) for inspection, copying, testing, or sampling. CCP §1985.8.

PRACTICE TIP: Personal service of the deposition subpoena is also effective to compel the deponent's attendance at a court session to consider any issue arising from the deponent's refusal to answer any question, produce specified items, permit inspection, or allow specified testing and sampling of the items produced. CCP §2020.220(c).

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§5.56 5. When Documents to Be Produced Are Located Outside California

It is unclear whether a witness may be compelled to produce records in California that are located outside the state. *Boal v Price Waterhouse & Co.* (1985) 165 CA3d 806, 810, 212 CR 42, recognized that obligation on the part of a party served with a trial subpoena, when the documents were apparently under the control of the witness even though the custodian of the records was in New York. On the other hand, the court in *Amoco Chem. Co. v Certain Underwriters at Lloyd's of London* (1995) 34 CA4th 554, 561, 40 CR2d 80, disagreed with *Boal* and characterized the decision as acknowledging the inability of the trial court to compel attendance of an out-of-state witness, even one who is a party.

PRACTICE TIP: If faced with this scenario in the deposition context, counsel should attempt to compel production of the documents at an oral deposition, where the location of all responsive records can be ascertained. CCP §2020.510(a). If the witness refuses to produce any or all records, the noticing attorney can then decide whether to file a motion to compel production, seek production via a deposition outside California, or both. CCP §§2025.480, 2026.010-2027.010. On motions to compel, see chap 15. On depositions in another state or country, see chap 12 (out-of-state depositions) and chap 13 (foreign discovery).

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C. Drafting Notices and Subpoenas for Oral Depositions

§5.57 1. Required Content of Notice of Oral Deposition

The notice of deposition must be in writing and served on all parties who have appeared in the action and must identify the following (CCP §2025.220(a)):

- The date, time, and location (address) of the deposition;
- The name of the deponent;
- The address and telephone number of a nonparty deponent, if known;
- Any intention to audio or video record the testimony, in addition to using the stenographic method;
- Any intention to record the testimony by stenographic method, through the instant visual display of the testimony;
- Any intention to take the deposition by telephone, video conference, or other remote electronic means; and
- Any intention to reserve the right to use a video recording of the deposition of a treating or consulting physician or other expert at trial in lieu of live testimony.

Deposition of organization. In the case of an organization's deposition, the deposition notice must include a description of the matters on which examination is requested. CCP §2025.230.

List all parties or parties' attorneys being served. The notice itself, or the accompanying proof of service, must list all parties or parties' attorneys on whom the deposition notice is being served. CCP §2025.240(a). On timing and methods of service, see §§5.63-5.69.

For a sample form of notice of deposition, see §5.216.

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§5.58 2. Required Content of Notice of Oral Deposition With Production of Documents

If a party requires oral testimony and production of documents at the deposition, then in addition to the requirements listed in §5.57, above, the deposition notice must specify each individual item or describe with reasonable particularity each category of items to be produced. CCP §2025.220(a)(4). If the deponent is a party, the deposition notice itself is sufficient to compel the appearance, testimony, and production of documents without the necessity of a subpoena. CCP §2025.280(a). If the deponent is a nonparty, personal service of a subpoena on the deponent is required to compel attendance, testimony, and production of documents. CCP §2025.280(b). In addition, a copy of the subpoena must be attached to the deposition notice served on the parties who have appeared in the action. CCP §2025.240(a). On timing and method of service, see §§5.63-5.69.

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§5.59 3. Optional Content of Deposition Notice

Apart from the requirements listed above in §§5.57-5.58, many attorneys include in the notice a statement that the deposition will continue from day to day until concluded. Or, if noticing counsel anticipates a lengthy examination, the notice may specify that the deposition will be taken for 2 or more consecutive days. This practice discourages deponent's counsel from unilaterally refusing to return to the deposition after the end of the first day. *Sprague v Equifax, Inc.* (1985) 166 CA3d 1012, 1041, 213 CR 69 (party unable to complete examination objected at trial and deposition ruled inadmissible in evidence). On issue of whether the entire deposition or only the day's session is completed and whether noticing counsel is entitled to continue the examination at a later date, see the Practice Tip in §5.15.

NOTE: When the deposition will be conducted using instant visual display (realtime), the notice and subpoena should so indicate. CCP §2020.310(d). On realtime, see §6.28.

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§5.60 4. Required Content of Deposition Subpoena for Personal Appearance

A deposition notice is not sufficient to compel a nonparty to appear and testify. CCP §2025.280(b). Rather, to require the personal appearance of a nonparty witness, counsel must serve a subpoena and use Judicial Council Form SUBP-015 (Deposition Subpoena for Personal Appearance). The use of this form is mandatory. Cal Rules of Ct 1.31. For form, see §5.217. Examining counsel should ensure that information is filled in and the proper boxes are checked on the Judicial Council form, so that the deposition subpoena specifies the following (see CCP §2020.310):

- The date, time, and location (address) of the deposition;
- A summary of the nature of the deposition;
- A description of the rights and duties of the deponent;
- An explanation of the penalties for disobedience of the subpoena;
- Whether the deposition, in addition to being recorded stenographically, will also be audio or video recorded by or at the direction of the noticing party;
- Whether the deposition will be conducted using instant visual display of testimony; and
- When the deponent is an organization, a description of the matters on which examination is requested coupled with the directive that the organization is obligated to designate an employee or agent who will attend and testify on its behalf as to the information identified.

A copy of the deposition subpoena must be personally served on the witness. CCP §2020.220. The subpoenaing party may retain the original. CCP §2020.210(b). A copy of the subpoena should be attached to the deposition notice, which in turn must be served on all parties who have appeared in the action. CCP §2025.240(a).

NOTE: The provisions in CCP §§1985-1986 covering subpoenas generally apply to deposition subpoenas, except as modified by CCP §§2020.010-2020.510. CCP §2020.030.

Examining counsel usually signs and issues the Judicial Council deposition subpoena form, without the court's seal. See CCP §2020.210(b). Alternatively, the clerk of the court in which the action is pending issues deposition subpoena forms in blank, already signed and sealed. CCP §2020.210(a). Attorneys seldom use the latter alternative, but it is still used by self-represented parties (those appearing "in propria persona").

NOTE: Counsel may obtain blank Judicial Council subpoena forms from the clerk of the court, unsigned and unsealed, or make copies of the forms in the California Judicial Council Forms Manual (Cal CEB 1981), which is updated regularly, or download them from the court website at http://www.courtinfo.ca.gov/forms.

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§5.61 5. Required Content of Deposition Subpoena for Personal Appearance and Production of Documents and Things

To require the personal attendance of a nonparty witness and the production of documents at the deposition, counsel must serve a subpoena and use Judicial Council Form SUBP-020 (Deposition Subpoena for Personal Appearance and Production of Documents and Things). Cal Rules of Ct 1.31. For form, see §5.218. In addition to the requirements listed in §5.60 for a subpoena for personal appearance, the deposition subpoena must specify each individual item or describe with reasonable particularity each category of items to be produced. CCP §2020.510(a)(2). A subpoena that requires the production of electronically stored information (ESI) may specify the form in which the ESI is to be produced. CCP §1985.8(b). On timing and method of service, see §§5.63-5.69. The subpoenaing party must also specify any testing or sampling to be performed during the deposition. See CCP §2020.510(a)(3).

No affidavit or declaration showing good cause for the production of records is necessary to support the issuance of a deposition subpoena for appearance, testimony, and the production of documents. CCP §2020.510(b); *Terry v SLICO* (2009) 175 CA4th 352, 355, 95 CR3d 900.

NOTE: Special rules apply when consumer records, employment records, or other "private" records are sought. CCP §§1985.3-1985.4, 1985.6. See §§5.108-5.131.

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§5.62 6. Special Considerations When Deponent Is Not a Natural Person

When the named deponent is not a natural person, the deposition notice or subpoena must specify "with reasonable particularity" the matters on which examination is requested, and must advise the organization of its duty to designate an employee or agent to attend. CCP §§2020.310(e), 2025.230. The procedure obligates the entity to designate and produce those officers or employees most qualified to testify on the entity's behalf who are currently in its employ and who have knowledge of the designated subject areas.

PRACTICE TIP: Some organizations may designate individuals to testify who possess no more than rudimentary knowledge of the subject matter at hand. Whether this is due to design or inadvertence, it is less likely to occur if counsel avoids an overly broad description of the subject matter on which testimony is sought. If the person who appears is not knowledgeable concerning the specified areas despite counsel's particularized description, a court order compelling compliance with the statute may be sought. See *Maldonado v Superior Court* (2002) 94 CA4th 1390, 1395, 115 CR2d 137 (witnesses for corporate defendant appeared at deposition unprepared and failed to bring requested documents; defendant was ordered to produce documents and to bring witnesses back to deposition after they familiarized themselves with areas designated in notice).

NOTE: Although the Civil Discovery Act does not specifically impose sanctions for an organization's failure to designate a knowledgeable individual to testify, a deposing party's motion to compel the organization to meet its statutory obligation may include a request for monetary sanctions in the form of costs and fees incurred in deposing the designated but unknowledgeable representative. CCP §2023.030.

Electronically stored information. Electronically stored information (ESI) may be subpoenaed for inspection, copying, testing, or sampling. CCP §1985.8. For individuals who might be designated to testify on an entity's behalf as custodian of ESI, see §4.15. For a checklist of information that might be obtained from such a custodian, see §4.40.

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D. Complying With Timing Requirements

§5.63 1. Amount of Notice Required for Oral Deposition Only

The deposing party must give notice of the oral deposition of any person (party or nonparty) to all parties who have appeared in the action. CCP §2025.240(a). Absent a court order shortening time, this notice of oral deposition must be served at least 10 days before the date set for the deposition. CCP §2025.270(a). The 10-day notice period applies only if the deposition notice is personally served; if service is made by other means, *e.g.,* by mail, the amount of notice is extended as provided in CCP §1013(a). For extended notice periods, see §2.22.

NOTE: The statutes addressed above dictate the minimum notice that must be given to all parties who have appeared in the action. CCP §2025.240(a). In addition to that notice, the party noticing the deposition must serve a subpoena on a nonparty deponent sufficiently in advance to allow the deponent a reasonable time to travel to the deposition. CCP §2020.220(a).

Unlawful detainer actions. Shorter periods apply in unlawful detainer actions. Notice must be given at least 5 days before the deposition, which may be taken no later than 5 days before trial. CCP §2025.270(b).

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2. Amount of Notice Required for Oral Deposition With Documents

§5.64 a. Notice to Party Deponent

The 10-day notice period (assuming personal service) addressed in §5.63 is sufficient to compel a party to appear and produce documents. CCP §2025.280(a).

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§5.65 b. Notice to Nonparty Deponent When Documents to Be Produced Are Not Business, Employment, or Personal Records

If the production of records by a nonparty is requested at the deposition, and the documents to be produced are not business records, employment records, or personal records of a consumer, the subpoenaing party must give the deponent a reasonable opportunity to locate and produce the records. CCP §2020.220(a) The Civil Discovery Act does not define "reasonable opportunity." However, unless the deponent must travel a considerable distance, or locate and produce voluminous documents, it is probably reasonable to give at least the notice that is required for oral depositions.

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§5.66 c. Notice to Nonparty Deponent When Employment Records to Be Produced

If the noticing party seeks production of employment records, the noticing party must serve the employee at least 10 days before the records are to be produced (CCP §1985.6(b)(2)) and at least 5 days prior to service on the custodian of records, plus additional time under CCP §1013 if service is by mail. CCP §1985.6(b)(3). For other special requirements involving the production of employment records, see §5.130. On extension of time for service by mail, see §2.22.

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§5.67 d. Notice to Nonparty Deponent When Consumer Records to Be Produced

If the noticing party seeks production of "personal records" of a "consumer" within the purview of CCP §1985.3, the deponent should be served with a subpoena at least 20 days before the deposition. CCP §2025.270(c). (Although §2025.270(c) refers to "issuance" rather than "service" of the subpoena, the prudent approach is to provide 20 days' notice following service.) For other special requirements governing subpoenas seeking production of consumer, employment and other "private" records, see §§5.108-5.131.

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E. Serving Notices and Subpoenas for Oral Depositions

§5.68 1. Service of Deposition Notice on All Parties

All notices for oral depositions, regardless of whether accompanied by subpoenas, and regardless of whether documents are sought in addition to testimony, must be served on counsel for all parties who have appeared in the action (or on the parties themselves, if unrepresented). CCP §2025.240(a). Service may be made by personal service, mail, or overnight delivery. CCP §1013. Personal service on the parties (as opposed to the deponent) is not required. Service by fax is permissible only if there is a written agreement to that effect. CCP §1013(e). On extensions of time under CCP §§1005 and 1013, see §2.22.

NOTE: The basic rule applies to all *oral* depositions. If counsel requests a nonparty's production of business records *without* personal appearance under CCP §2020.410, the deposition is not oral and the deposition subpoena serves as the notice of deposition. CCP §2025.220(b). See §§5.85-5.93.

Notice to deposition officer if instant video display. If the deposition notice states an intention to conduct the deposition using instant visual display, a copy of the notice also must be given to the deposition officer. CCP §2025.220(a)(5).

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§5.69 2. Service of Subpoena on Nonparty for Appearance or Appearance and Production of Documents

Service of subpoena. Counsel who wish to depose a nonparty natural person (with or without requesting production of documents) must personally serve the deponent with a deposition subpoena. CCP §§1987(a), 2020.220(c).

- **On nonparty minor.** A minor is served by personally serving the minor's parent, guardian, conservator, or other fiduciary. If one of them cannot be located with reasonable diligence, service must be made on a person having the care or control of the minor, or with whom the minor resides, or by whom the minor is employed, or on the minor if the minor is 12 years of age or older. CCP §1987(a).

  NOTE: If the minor is alleged to be within the jurisdiction of the juvenile court under Welf & I C §300, §601, or §602, and is not in the custody of a parent or guardian, service must be made on a designated agent for service of process at the County Child Welfare Department or Probation Department under whose jurisdiction the minor is placed. CCP §1987(a).

- **On nonparty organization.** If a deposition subpoena names the corporation as the deponent, the subpoena can be served on any officer, director, custodian of records, agent, or employee authorized by the organization to accept service. CCP §2020.220.
- **On nonparty representative.** A subpoena is served on a named representative of an organization by personally delivering a copy of the document to the individual who is to be deposed. CCP §1987(a).
- **On nonparty consumers.** A nonparty consumer is served personally, or "at his or her last known address," or under any of the general methods for service of notice and other papers provided for in CCP §§1010-1020. CCP §1985.3(b)(1). The statute does not specifically state whether delivery "at his or her last known address" requires delivery to any particular person at that address.
- **On government employees.** Specified government officers and employees (sheriffs, police officers, fire fighters, district attorneys, inspectors, probation officers, and building inspectors) are served by delivering two copies of the deposition subpoena to the official's immediate superior at the public entity with which the official is employed, or to an "agent designated by that immediate superior to receive that service." Govt C §68097.1(a). The service of subpoenas on other state employees is governed by Govt C §68097.1(b), which identifies the same procedures as in §68097.1(a).

On contents of deposition notices, see §§5.57-5.59; on deposition subpoenas, see §§5.60-5.61.

NOTE: Witnesses can and frequently do agree to accept service of a subpoena by mail, particularly when the deponent is a professional who prefers not to be interrupted at work by a visit from a process server. Treating physicians are frequently served in this manner. Counsel should confirm in writing any agreement with the deponent to accept a subpoena by mail in lieu of personal service.

Copy of subpoena must be attached to notice served on all parties. The fact that a deposition is being taken pursuant to subpoena does not eliminate the need to serve a deposition notice. Notice of the deposition must be served on all parties who have appeared in the action, and the noticing party must attach a copy of the deposition subpoena served (or to be served) on the nonparty deponent. CCP §2025.240(a), (c). On timing and methods of service, see §§5.63-5.69.

PRACTICE TIP: Parties who receive no notice of a deposition and who thereafter appear in the action are entitled to take a subsequent deposition of that same deponent. CCP §2025.610(a). See §5.15. If the number of parties to the action is uncertain, the deponent's attorney should consider moving for a protective order staying the deposition until all parties to the action, including any "Doe" defendants, have appeared or been served. See CCP §§2025.420(a), 2025.610(a). On protective orders, see §§5.139-5.141.

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F. Payment of Witness Fees and Mileage

§5.70 1. Procedures for Nonparty Deponents in General

The deposing party must pay to every subpoenaed nonparty deponent the same witness fees and mileage as would be paid if the witness were subpoenaed to testify in court. CCP §§1986.5, 2020.230(a). The payment, which can be made in cash or by check, *must be tendered regardless of whether the deponent requests it*. CCP §2020.230(a). At the option of the noticing party, the payment may be made in advance or when the deponent appears for the deposition. CCP §2020.230(a). The witness cannot be compelled to testify until the fees are paid. Govt C §68097. The amount of witness fees and mileage to be tendered is governed by Govt C §68093 (currently $35 per day; $0.20 per mile). Counsel should check this provision periodically for revisions.

In addition to witness fees and mileage, the reasonable cost of producing business records at the deposition must be paid to the nonparty witness by the subpoenaing party. Evid C §1563(b). See §§5.103-5.107.

NOTE: Subpoenaing counsel may, but need not, compensate any nonparty witness for expenses and lost wages beyond that which is required to be paid by statute. See ABA Model Rules of Prof Cond 3.4(b) and Comment (3). The compensation must bear a reasonable relationship to the deponent's actual expenses, and counsel should balance the risk of the appearance of bias at trial against the element of fundamental fairness to the deponent.

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§5.71 2. Special Procedures for Government Employees

Peace officers, fire fighters, and state or county employees who are subpoenaed as witnesses receive from their public employer, *instead of* the witness fees described in Govt C §68097, the salary or compensation to which they are normally entitled while traveling to and from the deposition and testifying. The public entity that employs the deponent is also required to reimburse the witness for the actual and reasonable traveling expenses incurred in complying with the subpoena. Govt C §68097.2(a).

It is the subpoenaing party's obligation to reimburse the public entity, not the deponent, for these sums in advance of the deposition. Govt C §68097.2(b). To do so, the subpoenaing party tenders $150.00, together with the subpoena, for each day the employee is required to testify. Govt C §68097.2(b). If the actual expense proves to be less than the amount tendered, any excess will be refunded to the subpoenaing party by the public entity. Govt C §68097.2(c). If the actual expense proves to be more than the amount tendered, the difference must be paid to the public entity by the party who issued the subpoena. Govt C §68097.2(d).

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G. Selecting Deposition Officer and Method of Recording

§5.72 1. Officer-Reporter's Qualifications

All oral depositions must be conducted under the supervision of an officer authorized to administer an oath. CCP §2025.320. The officer cannot be financially interested in the action or be a relative or employee of any of the parties or their counsel. CCP §2025.320(a).

Unless the parties stipulate otherwise, the reporter of a stenographically recorded deposition must be a certified shorthand reporter (CSR) certified by the Certified Shorthand Reporters Board of the Department of Consumer Affairs. CCP §2025.330(b); Bus & P C §8016. Every shorthand reporter certified under Bus & P C §§8022-8027.5 has the power to administer oaths and affirmations, and perform the duties of a deposition officer under CCP §§2025.320-2025.330.

As a practical matter, the same individual usually performs the functions of both deposition officer and reporter. On assisting the officer-reporter to make an accurate record of the deposition, see §§6.26-6.30.

Audio or video recording. If the deposition is audio or video recorded, the deposition officer also may be the video operator if all requirements are met, although this would be unusual. See CCP §2025.340(c). On video recording depositions, see §§5.75-5.84.

Business records only. A deposition solely for the production of business records for copying is usually taken by a professional photocopier registered under Bus & P C §§22450-22463, who is not financially interested in the action, and is neither a relative nor an employee of any attorney or party to the action. CCP §2020.420. On business records, see §§5.85-5.107.

On the qualifications of a person supervising depositions conducted in another state, see CCP §2026.010(d); chap 12; in another nation, see CCP §2027.010(d)-(e); chap 13.

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2. Stenographic Recording Required

§5.73 a. Meeting Statutory Requirements

Absent a court order or the parties' agreement to the contrary, all oral depositions must be recorded stenographically. CCP §2025.330(b). Unless the parties agree otherwise, the deposition must be transcribed. CCP §2025.510(a).

Noticing party bears cost. The cost of recording and transcription (the original and one copy) is ordinarily borne by the noticing party, with other parties paying for additional copies if desired. CCP §2025.510(b)-(c). However, the court can order that the costs of transcription (*i.e.,* of translating the stenographic symbols into text) be shared, on a showing of good cause. CCP §2025.510(b). Once completed, original deposition transcripts are sealed by the court reporter and should remain in that condition until they are submitted to the court for use at trial (or in some cases, in connection with summary judgment motions). The court can also order the cost reduced if the fee is determined to be unreasonable under CCP §2025.510(c). *Serrano v Stefan Merli Plastering Co.* (2008) 162 CA4th 1014, 1035, 76 CR3d 559.

Timely payment to deposition officer. The attorney requesting the deposition, or the party, if appearing in pro per, must timely pay the deposition officer for the transcription or copy and for any other requested deposition products or services, unless responsibility for payment is otherwise provided by law or if, at the time the services are requested, the deposition officer is given written notice that the party or another identified person is responsible for payment. CCP §2025.510(h)(1)-(2). Nothing in CCP §2025.510(h) prohibits the attorney and a party from allocating responsibility for the payment of deposition costs to the party. CCP §2025.510(h)(3).

On correcting the transcript and other matters concerning its handling, see §§6.126-6.140.

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§5.74 b. Instant Visual Display (Realtime)

If both the deposition reporter and the participating attorneys have the appropriate software, instant visual display of deposition questions and answers (sometimes called "realtime") may be available as a feature of stenographic recording. The deposition reporter typically provides cables at the deposition to connect the stenographic machine to the laptop computers of attorneys attending the deposition. This service is also available to remote participants in the deposition through an appropriate hook-up on the Internet. See §6.28.

When the deposition will be conducted using instant visual display, the notice and subpoena must so indicate. CCP §§2020.310(d), 2025.220(a)(5). See §§5.57, 5.68. Any party requesting instant visual display of testimony is required to pay the reasonable cost of those services, which may not exceed the cost charged to any other party or attorney for the same service. CCP §2025.220(a)(5).

PRACTICE TIP: Some attorneys find it helpful during the deposition (*e.g.,* in rephrasing a question) to see on their laptop monitors a display of the questions and answers as they will appear in the transcript.

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3. Option of Audio or Video Recording in Addition to Stenographic Recording

§5.75 a. Statutory Requirements

Depositions may be audio or video recorded *in addition* to the required stenographic recording if (CCP §2025.330(c)):

- All parties agree; or
- The noticing party so indicates in the deposition notice; or
- Another party serves written notice on all other parties and any nonparty deponent of the intent to make a simultaneous recording of the deposition.

If a non-noticing party wants to audio or video record the deposition, he or she must serve notice of that intent on all other parties, and on a nonparty deponent, at least 3 calendar days before the deposition. CCP §2025.330(c). See form of notice in §5.220. If service occurs only 3 days before the deposition, *personal* service is required. See CCP §§1011, 2025.330(c).

The party who requests an audio or video recording bears the cost of the operator. See CCP §§2025.330(c), 2025.510(b), (h)(1). The original recording is maintained in the operator's possession, although any party may obtain a copy on payment of the "reasonable cost" of duplicating the recording. CCP §2025.560(a)-(b).

If a deposition is recorded both by a court reporter and by audio or video recording, the written transcript is the official record for purposes of trial and appeal. CCP §2025.510(g).

On timing requirements for giving notice that the deposition will be video or audio recorded, see §5.75. On the video operator's qualifications, see §5.83.

NOTE: Special rules apply to video recording the deposition of a treating or consulting physician or any expert witness. CCP §2025.220(a)(6). These rules govern the right to reserve the deposition for use at trial even if the physician or other expert is available to testify. See CCP §§2025.220(a)(5)-(6), 2025.620(d). On expert witness discovery, see chap 11.

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§5.76 b. Considering Benefits of Audio or Video Recorded Deposition

Audio and video recording are more effective in capturing the demeanor of a witness than is a written transcript. Although video recording is the more expensive of the two methods, it can be well worth the cost in a variety of circumstances. The most common reasons for video recording a deposition are set forth below. Although audio recording achieves some of the same goals, it is rarely employed unless cost is the determining factor.

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§5.77 (1) Portraying Demeanor of Unavailable Witness

If counsel expects a client or an important witness to be unavailable at trial, due to, *e.g., serious* illness or an expected move outside subpoena range, it is crucial to memorialize the deponent's testimony. CCP §2025.620(c)(2)(C). Although a deposition transcript serves this purpose, most people find it tedious to listen as a deposition transcript is read into the record at trial. Receiving the information from a television monitor is more effective and more interesting. It is also more likely to capture the nuances of facial expressions, hesitations, and tone of voice, all of which are important factors in weighing witness credibility and are not reflected in a written transcript.

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§5.78 (2) Curtailing Attorney or Witness Misconduct

Some counsel and witnesses who appear quite comfortable obstructing the deposition process when their words are transcribed become dramatically less likely to engage in such behavior when they realize that a jury or judge may actually see them in action. Thus, video recording has the inherent benefit of controlling or inhibiting abusive conduct, such as coaching the witness, interrupting or arguing with counsel, making unnecessary objections or intimidating remarks, shouting, and the like. Similarly, an intransigent deponent may find it harder to be evasive or uncooperative on video; this can make the added expense of recording a key deposition well worth it.

NOTE: A novel attempt to video record opposing counsel during a deposition was frustrated in *Green v GTE Cal., Inc.* (1994) 29 CA4th 407, 34 CR2d 517. The apparent rationale for the video was to record or else inhibit the opposing counsel's alleged habit of intimidating witnesses with facial expressions and gestures that otherwise would not appear on a reporter's transcript. 29 CA4th at 409. Upholding the trial court's award of sanctions against the attorney who attempted the recording, the court of appeal cited the recording attorney's failure to comply with the notice requirements of former CCP §2025(*l*)(1) (now CCP §2025.330(c)) and also questioned whether former CCP §2025 (now CCP §2025.330(c)) permitted a party to video record opposing counsel to control anticipated obstructive behavior. The court, however, raised the possibility that if opposing counsel behaves improperly, a party could move the trial court for an order to allow the party to video opposing counsel. 29 CA4th at 410.

JUDGE'S PERSPECTIVE: As an alternative to videotaping the deposition, counsel should consider bringing a motion for the appointment of a discovery referee under CCP §639. On using a discovery referee, see §§2.68-2.72.

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§5.79 (3) Recording Physical Reenactment Planned During Examination

A potential reason to take a video deposition is to provide a record of a physical reenactment of an incident relevant to the case. A party can be compelled to participate in a reenactment at a deposition. *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 1106, 68 CR2d 883. See §6.66.

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§5.80 (4) Discouraging Change of Venue Motion

If the noticing party wishes to discourage a change of venue motion on the ground of inconvenience to the witnesses, video recording those witnesses where they reside may obviate the need for travel to the trial. CCP §2025.620(c)(1), (2)(D).

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§5.81 (5) Making Better Use of Experts

Expert witness. If counsel plans to use the video recording of an expert witness's deposition in lieu of live testimony at trial, the cost of the expert's appearance at trial may be avoided. CCP §§2025.620(d), 2034.430; Govt C §68093.

Expert consultants. Particularly when psychological issues are involved, defending counsel should consider video recording the deposition of plaintiff. Counsel can then ask an expert consultant to view the video recorded deposition. The consultant's observations and tentative diagnoses may be helpful if it appears the plaintiff is malingering, exaggerating symptoms, or acting in a manner inconsistent with observations reflected in medical records. The consultant may be able recommend additional areas of discovery, including psychiatric testing, if appropriate. On mental and physical examinations, see chap 10. On keeping intact the confidentiality of an expert consultant, see §11.5.

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§5.82 (6) Surprising Deponent With Facts; Impeachment

Counsel can seek to admit deposition testimony recorded on video into evidence as a part of the case in chief at trial. See CCP §2025.620(b); Evid C §1220; *Haluck v Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 1004, 60 CR3d 542 (CCP §2025.620(b) is exception to Evid C §1291(a)(2) requirement that deponent be unavailable; however, because deponent in instant case was neither party nor employee of party when deposition was taken, testimony was inadmissible). A videotape is particularly effective if a party's or nonparty's testimony at trial is inconsistent with statements made at deposition. CCP §2025.620(a). In that event, counsel can seek to show the video rather than simply read the transcript to impeach the deponent. See CCP §2025.620(a); Evid C §1235.

NOTE: To present portions of a video recording effectively at trial, however, counsel probably will need a technician to assist in the editing and selection of various excerpts for playback on demand, such as putting the video on a CD-ROM.

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§5.83 c. Video or Audio Operator's Qualifications

The operator of the audio or video recording equipment must be competent to set up, operate, and monitor the equipment. CCP §2025.340(b).

Absent a stipulation among the parties to the contrary, if the noticing party intends to reserve the right to use a video recording of the deposition of a treating or consulting physician or expert witness at trial, the operator must be authorized to administer the oath and must be neither financially interested in the action nor a relative or employee of any of the parties' attorneys. CCP §§2025.220(a)(6), 2025.340(c). Otherwise, the operator may be an employee of the noticing attorney unless the operator is also the deposition officer. CCP §2025.340(b).

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§5.84 d. Checklist: Video Recording Procedures

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

Video recording procedures are set forth below. If the statutory requirements are not met, a party may adjourn the deposition to seek a protective order. CCP §2025.420(a). See §5.139-5.141. On sanctions for using a discovery method in a manner that does not comply with specified procedures, see CCP §§2023.010(b), 2023.030; §§15.87-15.91.

- Testimony must be taken stenographically, unless the parties agree or the court orders otherwise. CCP §2025.330(b).
- The area for recording the deponent's oral testimony must be suitably large, adequately lighted, and reasonably quiet. CCP §2025.340(a).
- The operator must be competent to set up, operate, and monitor the recording equipment and must not use camera or sound recording techniques that distort the appearance or demeanor of the participants. CCP §2025.340(b), (g).
- The deposition must begin with a statement on audio recording or the video camera that includes the following (CCP §2025.340(h)):
- The operator's name and business address;
- The name and business address of the operator's employer;
- The date, time, and place of the deposition;
- The caption of the case;
- The name of the deponent;
- The name of the party taking the deposition; and
- Any stipulations by the parties.
- Counsel for the parties must identify themselves on camera or on the audio recording. CCP §2025.340(i).
- The oath must be administered to the deponent on camera or on the audio recording. CCP §2025.340(j).
- If the deposition requires more than one unit of tape or electronic storage, the end of each unit and the beginning of each succeeding unit must be announced on camera or on the audio recording. CCP §2025.340(k).
- A statement must be made on camera or on the audio recording that the deposition is ended. CCP §2025.340(*l*).
- At the conclusion of the deposition, a statement must be made setting forth any stipulations about custody of the video or audio recording and the exhibits, or about other pertinent matters. CCP §2025.340(*l*).

NOTE: Counsel should also check local rules of court for any other rules that may apply to video or audio recording a deposition.

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VIII. SETTING DEPOSITION FOR PRODUCTION OF NONPARTY'S BUSINESS RECORDS

§5.85 A. Deposition for Production of Business Records Defined

Discovery conducted by way of a business record subpoena is a "deposition." *Unzipped Apparel, LLC v Bader* (2007) 156 CA4th 123, 131, 67 CR3d 111 (60-day deadline in CCP §2025.480(b) for motion to compel "after the completion of the record of the deposition" applies to business records subpoena). See *California Shellfish, Inc. v United Shellfish Co.* (1997) 56 CA4th 16, 21, 64 CR2d 797 (20-day deposition hold of former CCP §2025(b)(2) applies to business record production).

A party interested solely in obtaining production of a nonparty's business records can take the deposition of the custodian of those records under the procedure specified in CCP §§2020.410-2020.440, without requiring the attendance or testimony of the custodian. The custodian of the records does not give oral testimony, but instead produces the records identified in the subpoena. See CCP §§2020.410(a), 2020.430(a). See *Monarch Healthcare v Superior Court* (2000) 78 CA4th 1282, 1287, 93 CR2d 619 (procedure to obtain documents is "records only" or "records and testimony" deposition subpoena).

On obtaining records from a party, see §§5.54, 5.58 (serving deposition notice specifying materials to be produced under CCP §2025.220(a)(4)) or chap 8 (making a demand for inspection under CCP §2031.010).

"Records" include every kind of record maintained by the business. Evid C §1560(a)(2). Business records may be "an item, collection, or grouping of information *about* a business entity," but do not include the product of a business entity. *Urban Pac. Equities Corp. v Superior Court* (1997) 59 CA4th 688, 693, 69 CR2d 635 (business record subpoena is not proper procedure for obtaining copy of transcript prepared by court reporter).

A party cannot specify any testing or sampling of anything produced under CCP §§2020.410-2020.440; the provisions authorize production for copying only. Testing or sampling requires the presence of the custodian. See CCP §2020.510(a)(3).

Once obtained, the business records may be used in discovery, during trial preparation, or at trial, as with other records.

Electronically stored information (ESI) may be subpoenaed for inspection, copying, testing, or sampling. CCP §1985.8. On possible methods of producing electronic documents, see chap 4.

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§5.86 B. Strategic Considerations

Counsel should consider carefully whether to use the production of business records procedures set forth in CCP §§2020.410-2020.440, or whether to compel the personal appearance of the custodian of records by deposition subpoena under CCP §2020.510(a) by using Judicial Council Form SUBP-020. See §5.61. There is a benefit in obtaining even voluminous records efficiently and at a relatively low cost. However, counsel should not underestimate the importance of deposing a custodian of records to discover facts relating to the documents themselves as well as other aspects of a case. Thus, counsel's decision on how best to obtain production of business records should not be a perfunctory one. It may be important in some cases, particularly those in which stonewalling is suspected, to test the basis for the custodian's response to the document request. Such questioning may include ascertaining, *e.g.,*

- Whether the deponent is indeed the entity's custodian (as opposed to simply being sent to deliver documents);
- Whether the documents delivered encompass all of the existing records in a designated category;
- Whether anything has been withheld or destroyed (and if so, why); and
- Where additional responsive documents and/or related information may be located.

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§5.87 C. Selecting Deposition Officer

The deposition officer for the deposition seeking discovery of business records only must be a professional photocopier registered under Bus & P C §§22450-22463 or a person exempted from registration by the provisions of Bus & P C §22451. CCP §2020.420.

Persons exempted include government employees acting in the course of their employment, attorneys or attorneys' agents specially appointed by the court, employees of professional copiers under Bus & P C §§22450-22463, custodians of records making their own copies, certified shorthand reporters, private detectives, and the Secretary of State. Bus & P C §22451.

The deposition officer must not be financially interested in the action or a relative or employee of any party or attorney of the parties. CCP §2020.420.

PRACTICE TIP: Counsel seeking records from a large institution can save significant time and effort by allowing an established legal support service to handle all procedural aspects of the custodian of records deposition.

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§5.88 D. Preparing and Serving Business-Records-Only Subpoena

Counsel must use Judicial Council Form SUBP-010 (Deposition Subpoena for Production of Business Records) to request production of business records only. See Cal Rules of Ct 1.31. For Form SUBP-010, see §5.223.

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§5.89 1. Describing Each Item

The subpoenaing party must specifically describe each item or reasonably particularize each category of item to be produced under item No. 3 of the form. CCP §2025.410(a). Specific information that is identifiable only to the deponent's records system (*e.g.,* a policy number or the date the consumer interacted with the witness) is not required. CCP §2020.410(a)-(b). The subpoenaing party may specify the form in which electronically stored information (ESI) is to be produced. CCP §1985.8(b). An accompanying affidavit or declaration showing good cause for the production is not required for business records deposition subpoenas. CCP §2020.410(c).

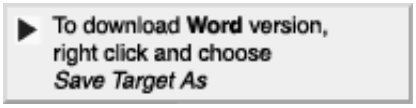
NOTE: Counsel may obtain Judicial Council subpoena forms from the clerk of the court or make copies of the forms in the California Judicial Council Forms Manual (Cal CEB 1981), which is updated regularly, or download them from the court website at http://www.courtinfo.ca.gov/forms.

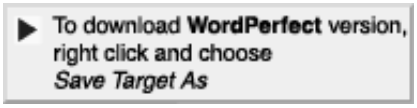
CAUTION: When the deposition subpoena requests the production of records in the category of "personal records" or employment records, special procedures must be followed. CCP §§1985.3-1985.4, 1985.6. See §§5.108-5.131.

On how to describe documents that are stored electronically, see chaps 4, 8.

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§5.90 2. Stating Where and to Whom Custodian Is to Produce Records





At the subpoenaing party's option, the custodian may comply with the subpoena as follows (CCP §2020.430):

- By delivering to the office of the designated deposition officer (see §5.87) a true, legible, and durable copy of the records (CCP §2020.430(a)(1)) (see §§5.95-5.97);
- By delivering to the designated deposition officer at the custodian's address, *i.e.*, at the address of the business whose records are the subject of the subpoena, a true, legible, and durable copy of the records (CCP §2020.430(c)) (see §§5.98-5.99); or
- By making the *original* business records available for inspection and copying by the subpoenaing attorney or the attorney's representative, at the custodian's "business address under reasonable conditions during normal business hours." Evid C §1560(e), incorporated by reference in CCP §2020.430(e). See §5.100.

See Judicial Council Form SUBP-010 (Deposition Subpoena for Production of Business Records), item No. 1. See form in §5.223.

If the subpoena directs delivery of records to a deposition officer, CCP §2020.430(d) requires and Judicial Council Form SUBP-010 provides for the following admonition in boldface type immediately after the date and time specified for production:

Do not release the requested records to the deposition officer prior to the date and time stated above.

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§5.91 3. Preparing Necessary Declarations

The custodian of records, or other qualified witness to whom the subpoena is directed, must include with the business records an affidavit or declaration in compliance with Evid C §1561. CCP §2020.430(a)(2).

NOTE: Unless a copy service or legal support service has been employed to do so, the subpoenaing attorney should prepare this declaration.

The custodian's declaration must identify the records and include the following statements/information (Evid C §1561(a)):

- That the affiant is the duly authorized custodian of the records with authority to certify the records;
- That the copy is a true copy of all the records described in the subpoena or that the records were delivered to the subpoenaing attorney or to the deposition officer for copying at the custodian's or witness's place of business;
- That the records were prepared in the ordinary course of business at or near the time of the act, condition, or event;
- The identity of the records; and
- A description of the manner of preparation of the records.

NOTE: If the records are to be delivered at the custodian's business office to the deposition officer for copying, counsel must also provide a declaration to be signed by the deposition officer authenticating the copies. See §5.99. If the records are produced to the attorney or attorney's representative for copying, counsel must provide a declaration for the attorney or attorney's representative. Evid C §1561(c). See §5.100.

For form of declaration of custodian or other qualified witness accompanying production of business records, see §5.224.

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§5.92 4. Serving and Completing Proof of Service

The deposition subpoena for production of business records must be personally served on the custodian. CCP §2020.220(b). "It shall command compliance in accordance with Section 2020.430 on a date that is no earlier than 20 days after the issuance, or 15 days after the service, of the deposition subpoena, whichever date is later." CCP §2020.410(c).

After the custodian is served, the person who delivered the subpoena should fill out the proof of service information on the back of Judicial Council Form SUBP-010. See §5.223. The attorney for the serving party should retain the original proof of service in the event a motion to compel is necessary. On motions to compel, see §§15.30-15.58.

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§5.93 5. Mailing Copies

The subpoenaing party must serve a copy of the deposition subpoena on all parties who have appeared in the action. CCP §2025.240(a). This copy serves as their notice of the deposition; a separate deposition notice is not necessary. See CCP §2025.220(b). Although the custodian must be personally served, service of the subpoena on the parties may be effected by mail. All parties are entitled to copies of the subpoenaed records (at their expense) and should make arrangements with the photocopier to obtain them. CCP §2020.440. See §5.102.

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E. Responding to Subpoena for Production of Business Records

§5.94 1. Objecting to Qualifications of Deposition Officer

Any objection to the qualifications of the deposition officer must be made before the date specified for production, or as soon after that date as the ground for objection becomes known or could be discovered by reasonable diligence. CCP §2020.420.

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§5.94A 2. Objecting to Production

A nonparty that receives a subpoena to produce business records may move the court for relief in the form of a protective order before the date set for production or it may raise the objections for the first time at the document production. *Unzipped Apparel, LLC v Bader* (2007) 156 CA4th 123, 131, 67 CR3d 111, citing *Monarch Healthcare v Superior Court* (2000) 78 CA4th 1282, 1288, 93 CR2d 619.

NOTE: Objections in response to a business records subpoena that are made on the date set for production *are* the record of deposition under CCP §2025.480(b) and thus the subpoenaing party must bring any motion to compel production no later than 60 days after the production date. *Unzipped Apparel, LLC v Bader, supra.*

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§5.95 3. Delivering Records When Subpoena Demands Delivery at Deposition Officer's Address

If item No. 1a on the business records subpoena is checked, the custodian is required to deliver copies of the documents to the address of the deposition officer specified in the subpoena. CCP §2020.430(b). See Judicial Council Form SUBP-010 in §5.223.

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§5.96 a. Accompanying Declaration

The custodian of records, or other qualified witness to whom the subpoena is directed, must deliver to the deposition officer specified in the subpoena (CCP §2020.430(a)):

- A true, legible, and durable copy of the records; and
- An affidavit or declaration complying with Evid C §1561.

The affidavit required by CCP §2020.430(a)(2) is generally prepared by the subpoenaing attorney. For discussion of contents of affidavit or declaration, see §5.91; for sample, see §5.224.

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§5.97 b. Manner of Delivery

The custodian of records or other qualified witness delivering the copies to a deposition officer must enclose and seal them in an inner envelope or wrapper marked with the title and number of the action, name of the witness, and date of the subpoena. CCP §2020.430(b). This envelope must then be enclosed and sealed in an outer envelope and directed to the deposition officer at the deposition officer's place of business designated in the deposition subpoena. CCP §2020.430(a)-(b); Evid C §1560(c)(2). On costs of production, see §§5.103-5.107.

When the records are voluminous, any practical method of delivery appears to be authorized, *i.e.,* the witness may deliver the records to the deposition officer's address in person, by messenger, or by mail. CCP §2020.430(a).

JUDGE'S PERSPECTIVE: If counsel agree on how to handle the production, it would be prudent to put the agreement in writing.

On possible methods of producing electronic documents, see chap 4.

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4. Delivering Records When Subpoena Demands Delivery at Custodian's Office

§5.98 a. Manner of Delivery

If, instead of directing delivery to the deposition officer's address, the deposition subpoena requires the delivery of the items at the business office of the custodian of records or other qualified witness, the custodian has two options:

- Deliver the records to the deposition officer for copying during normal business hours at the custodian's office (CCP §2020.430(c)(1)); or
- Deliver to the deposition officer photocopies of the records prepared by the custodian, along with an itemized statement of costs. CCP §2020.430(c)(2).

NOTE: Although CCP §2020.430 clearly provides for both options, mandatory Judicial Council Form SUBP-010 (see §5.223) addresses only one, *i.e.*, that reflected in item No. 1b (delivery of a copy to the deposition officer at the custodian's address, etc). Counsel wishing to employ the other option should check with a professional legal support service to ascertain accepted procedure in that area. Although modification of the Judicial Council form is another potential option, counsel should be prepared to encounter the argument that because use of the form is mandatory, modification is inappropriate.

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§5.99 b. Declarations Required

If copies of the records are delivered to the deposition officer at the custodian's business office, affidavits or declarations accompanying the records should be signed by both (CCP §2020.430(a); Evid C §1561):

- The custodian of records or other qualified witness; and
- The deposition officer to whom the copies were delivered.

See Evid C §1562 (when more than one person has knowledge of the facts, more than one affidavit or declaration may be made). For form of these declarations accompanying production of business records, see §§5.224 (custodian or other qualified witness) and 5.225 (deposition officer).

PRACTICE TIP: Unless a copy service or legal support service has been employed to do so, the subpoenaing attorney should prepare the declarations, including the one the custodian signs. See §5.91.

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§5.100 5. Delivering to Attorney or Representative; Declarations

If the deposition subpoena directs the custodian to make the records available for inspection or copying by the attorney or attorney's representative at the custodian's place of business (*i.e.,* if item No. 1c is checked on the business records subpoena; see Judicial Council Form SUBP-010 in §5.223):

- The custodian must so deliver the documents and provide an accompanying affidavit or declaration attesting to the fact that the declarant is the duly authorized custodian (or otherwise qualified to certify), that the records were prepared in the ordinary course of business, and that they were delivered to the attorney/representative for copying. CCP §2020.430(a). In addition, the records must be identified and the manner of preparation described (Evid C §1561(a)); and
- The attorney or the attorney's representative must provide an affidavit or declaration stating that the designated records were delivered for copying at the custodian's place of business and that the copies made are true copies of all records delivered. Evid C §1561(c).

NOTE: The subpoenaing attorney should prepare the declarations, including the one the custodian signs. Evid C §1561(c). See §5.91. For form of declaration of custodian or other qualified representative, see §5.224; for form of declaration of attorney or attorney's representative, see §5.226. It is the preferred practice for a representative, rather than the attorney, to make copies of the records and sign the declaration in case any questions arise and testimony concerning the copying procedures is needed later.

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§5.101 6. Records Delivered at Custodian's Place of Business Need Not Be Sealed

Records delivered at the custodian's place of business need not be sealed. CCP §2020.430(c). See Evid C §1560(e). This includes records delivered to the deposition officer (see §5.98) or to the attorney or attorney's representative for copying. See CCP §2020.430(e); §5.100. See item Nos. 1b and 1c in Judicial Council Form SUBP-010 (Deposition Subpoena for Production of Business Records); for form, see §5.223.

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§5.102 7. Other Parties' Copies

If delivery was made to the deposition officer (see §§5.95-5.99), the deposition officer must promptly provide copies of any records to the subpoenaing party and to any other parties who notify the deposition officer within 6 months following settlement of the case that they wish to purchase copies. CCP §2020.440.

If delivery was made to the subpoenaing party's attorney or attorney's representative (see §5.100), it is the responsibility of that individual to deliver any copy of the records requested. Evid C §1560(e).

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F. Costs of Production

§5.103 1. Payment of Reasonable Costs Incurred

The subpoenaing party is liable, on receipt of copies of the records, for all reasonable costs incurred by the nonparty witness in producing the records. CCP §2020.430(c)(2); Evid C §1563(b). The "reasonable costs" for production of copies under Evid C §1563(b)(1) include, but are not limited to, the following:

- Fixed rates (currently 10 cents per page for standard reproduction of normal sized documents (8½ by 14 inches or less);
- Fixed rates (currently 20 cents per page) for copying of microfilmed documents;
- Actual costs for reproduction of oversized documents and documents requiring special processing;
- A maximum fixed rate (currently $24 per hour per person, to be computed on the basis of $6 per quarter hour or fraction thereof) for clerical services incurred in locating the records and making them available;
- Actual postal charges; and
- Actual costs, if any, charged to the witness by a third person for the retrieval and return of records held by that third person.

The subpoenaing party must take reasonable steps to avoid imposing undue burden or expense on a person subject to a subpoena requiring production of electronically stored information (ESI). CCP §1985.8(j).

On payment of witness fee when custodian delivers original records to subpoenaing attorney or that attorney's representative, see §5.105.

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§5.104 2. Itemized Statement of Costs

By submitting an itemized statement of costs, the witness can demand payment any time the records are available for delivery, and can demand payment simultaneous with actual delivery. Evid C §1563(b)(2)-(3). The witness is under no obligation to deliver the copies until payment is made. Evid C §1563(b)(2).

The witness must submit a statement setting forth the reproduction and clerical costs incurred by the witness in making the copies, and if those costs exceed those authorized by statute, the requesting party may demand that the witness furnish a statement justifying the costs. Evid C §1563(b)(3).

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§5.105 3. Payment of Witness Fee

When the deposition subpoena does not ask for copies of records to be made at the witness's expense but for original records to be delivered to the attorney or attorney's representative for copying (see §5.100), a fee (not to exceed $15 as required by the language of the statutes) should accompany service of the subpoena. See CCP §2020.230(b); Evid C §1563(b)(6). Because the witness is not required to travel to and appear at the deposition, this is not the same as the witness and mileage fee required when a witness is compelled to attend the deposition. See CCP §2020.230(a). For a discussion of combining subpoena with appearance, witness, and mileage fees, see §§5.70-5.71.

In addition to the $15 fee, the witness may be reimbursed for any actual costs charged by a third person to retrieve records held off site. Evid C §1563(b)(6). If the records are retrieved from microfilm, the reasonable cost defined in Evid C §1563(b)(1) also applies. Evid C §1563(b)(6). For additional costs, see §5.103.

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4. When Costs in Dispute

§5.106 a. Subpoenaing Party's Motion to Reduce Excessive Costs

The subpoenaing party may petition the court to recover or reduce all or part of any excessive costs charged by a witness to produce copies of documents. The court may order the subpoenaing party to pay the fees incurred by the witness in defending the petition if it finds that the costs were not excessive. If, however, the court finds that the costs were excessive, it may order them reduced and, if it finds that the costs were charged in bad faith, may excuse the costs entirely and order that the witness pay the party's attorney fees. Evid C §1563(b)(4).

JUDGE'S PERSPECTIVE: As a practical matter, these disputes should almost always be resolved without having to go to court. In most instances, judges would not look favorably on litigants who use the court process to settle cost disputes about the photocopying of documents.

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§5.107 b. Custodian's Motion for Reimbursement

If a deposition subpoena compelling production of business records is subsequently withdrawn or is quashed, limited, or modified on a motion by someone other than the witness, the subpoenaing party is responsible for notifying the witness of the action and remains liable for costs incurred up to the time of notification. If the party does not pay the costs incurred in connection with subpoenas that are withdrawn or quashed within 30 days after demand for payment, the witness may file a motion in the court in which the action is pending seeking payment and attorney fees. Evid C §1563(b)(5).

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IX. DEPOSITIONS REQUIRING PRODUCTION OF PERSONAL RECORDS

A. Consumer Records

§5.108 1. Purpose of Statute

Code of Civil Procedure §1985.3 establishes a notice procedure designed to give the consumer whose personal records are sought an opportunity to move to quash the proposed subpoena. CCP §1985.3(g). The purpose of the law is to protect the consumer or employee from "unreasonable violations" of his or her "right of privacy." See CCP §1987.1(a); *Sasson v Katash* (1983) 146 CA3d 119, 124, 194 CR 46.

NOTE: Code of Civil Procedure §1985.6 establishes the procedure for notice to an employee whose employment records are sought. Code of Civil Procedure §1987.1 covers employee as well as consumer records. On employment records, see §5.130, below.

CAUTION: Although based on a subpoena in a criminal case, the decision in *Susan S. v Israels* (1997) 55 CA4th 1290, 67 CR2d 42, provides a lesson to attorneys who inadvertently receive confidential items intended for a neutral officer of the court. In *Susan S.*, the defendant subpoenaed confidential mental health documents, and the witness accidentally sent them directly to defendant's attorney, who then provided the plaintiff's confidential medical records to defendant's expert and later used the documents to cross-examine the plaintiff at trial. 55 CA4th at 1296. The documents were supposed to have been sent to the court, which would have reviewed them in camera and determined whether the defendant's need for the information outweighed the plaintiff's right of privacy. 55 CA4th at 1296. The *Susan S.* court held that the improper use of plaintiff's confidential records constituted an invasion of plaintiff's privacy, exposing defendant's counsel to liability for damages created by their publication. 55 CA4th at 1298.

The subpoenaing party's noncompliance with the requirements of CCP §1985.3 is sufficient ground for refusing to produce documents demanded by the deposition subpoena. CCP §1985.3(k). See §5.128.

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§5.109 2. Definitions

The definitions in CCP §1985.3(a) determine whether a "witness" has possession of records that are "personal records" of a "consumer." See §§5.110-5.113.

For definitions of employment records of an employee, see CCP §1985.6(a); §5.130.

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Source: Civil Litigation/California Civil Discovery Practice/5 Deposition Procedures/§5.110 a. Witness

§5.110 a. Witness

The requirements of CCP §1985.3 apply to consumer personal records maintained by a "witness" (the deponent), who is defined as follows (CCP §1985.3(a)(1)):

- Physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory;
- Psychotherapist as defined in Evid C §1010, which includes, *e.g.,* psychologists and social workers;
- Veterinarian, veterinary hospital, veterinary clinic;
- State or national bank, state or federally chartered savings and loan association as defined in Fin C §5102, state or federal credit union;
- Trust company, security brokerage firm;
- Insurance company, title insurance company, underwritten title company;
- Escrow agent licensed under Fin C §§17000-17702 or exempt from licensing under Fin C §17006;
- Attorney;
- Accountant;
- Institution of the farm credit system (12 USC §2002);
- Anyone authorized by the state to make or arrange loans that are secured by real property;
- Telephone corporation that is a public utility as defined in Pub Util C §216;
- Private or public preschool, elementary school, secondary school, or postsecondary school as described in Ed C §76244.

NOTE: If a state or local agency as defined in Govt C §6252 (*e.g.*, state office, bureau, or commission) has an employee ("consumer") whose records are being subpoenaed in the action, that state or local agency is also a "witness" for whom the consumer notice procedures must be followed. CCP §1985.4.

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§5.111 b. Personal Records

"Personal records" are the originals or copies of records pertaining to a consumer maintained by any of the witnesses listed in §5.110. "Records" refer to books, documents, other writings, and electronic data. CCP §1985.3(a)(1).

On the preservation, processing, and production of electronically stored information (ESI), see chap 4.

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§5.112 c. Consumer

The "consumer" (the person to whom the records pertain) can be any of the following (CCP §1985.3(a)(2)):

- An individual;
- A partnership of five or fewer persons;
- An association; or
- A trust.

The consumer must have (CCP §1985.3(a)(2)):

- Transacted business with the witness;
- Used the services of the witness; or
- Been a person for whom the w*itness* has acted as an agent or fiduciary.

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§5.113 d. Subpoenaing Party

The "subpoenaing party" is the person or persons causing the subpoena to be issued or served in connection with any civil action or proceeding. CCP §1985.3(a)(3).

State and local agencies are specifically excluded from this definition and exempt from the procedures required by CCP §1985.3 for subpoenaing records. CCP §1985.3(a)(3). These agencies are:

- State or local agencies as defined by Govt C §7465; and
- The California state courts or other entity provided for under Cal Const art VI in any proceeding maintained before an adjudicative body under the State Bar Act (Bus & P C §§6000-6238).

NOTE: Even though CCP §1985.3(a)(3) provides that state or local agencies as defined by Govt C §7465 are not considered "subpoenaing parties" under the statute, at least one court has held that a state or local agency is subject to the requirements of CCP §1985.3 when it subpoenas a consumer's records, unless a subpoena is being issued to a financial institution for financial information about a customer. In such a case, the procedure is governed by the California Right to Financial Privacy Act (Govt C §§7460-7493). *Lantz v Superior Court* (1994) 28 CA4th 1839, 1851, 34 CR2d 358. The court in *Lantz* ruled that the county (the defendant in the case) had to comply with the notice requirements of CCP §1985.3 when it subpoenaed the plaintiff's private medical records. 28 CA4th at 1852.

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§5.114 3. When Consumer Statute Not Applicable

Code of Civil Procedure §1985.3 is inapplicable if the subpoena does not request the records of a particular consumer. It also does not apply if the subpoena requires the custodian of records to delete all information that would in any way identify a consumer whose records are being produced. CCP §1985.3(i).

In addition, the notice to consumer procedures do not apply to requests for the following records (CCP §1985.3(j)):

- Proceedings under Lab C §§50-176 regarding the departments of industrial relations, industrial welfare, labor law enforcement, or industrial accidents;
- Records under Lab C §§3200-6002 of workers' compensation, computation of claims, and proceedings;
- Records under Lab C §§6100-6149 of state employees' coverage by workers' compensation; and
- Records under Lab C §§6200-6208 of the retraining and rehabilitation of injured workers.

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4. Subpoenaing Party's Procedures

§5.115 a. Preparing Subpoena

If both the custodian's appearance and the production of the consumer's records are required at the deposition, counsel for the subpoenaing party must use Judicial Council Form SUBP-020 (Deposition Subpoena for Personal Appearance and Production of Documents and Things), which is reproduced in §5.218.

If only the production of documents, not the custodian's personal appearance, is required, counsel should use Judicial Council Form SUBP-010 (Deposition Subpoena for Production of Business Records), reproduced in §5.223.

NOTE: Counsel may obtain Judicial Council subpoena forms from the clerk of the court or make copies of the forms in the California Judicial Council Forms Manual (Cal CEB 1981), which is updated regularly, or download them from the court website at http://www.courtinfo.ca.gov/forms.

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§5.116 b. Scheduling Date of Production

The deposition subpoena may require the custodian's attendance (CCP §2020.510; see §5.218) or the production of documents only (CCP §2020.410; see §5.223).

- **Appearance and production.** According to CCP §2025.270(c), a deposition requiring both the testimony of the custodian and the production of a consumer's personal records must be scheduled for a date at least *20 days* after issuance of the deposition subpoena. However, because CCP §2020.410(c) provides for a date of production at least 20 days after issuance of the subpoena or 15 days after service, whichever is later, the safest approach is to schedule in accordance with the longer notice period, *i.e.,* 20 days. For discussion of an order shortening time, see §5.120.
- **Production of documents only.** The date for production of a consumer's personal records must be at least *20 days* after the subpoena is issued or *15 days* after service on the custodian, whichever is later. CCP §§1985.3(d), 2020.410(c).

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§5.117 c. Preparing Notice to Consumer

The subpoenaing party must give notice to the consumer using Judicial Council Form SUBP-025 (Notice to Consumer or Employee and Objection), reproduced in §5.227. This form notifies the consumer that (see CCP §1985.3(e)):

- Records about the consumer are being sought from the witness named on the subpoena;
- If the consumer objects to production of the records, he or she must file papers with the court or serve a written objection as provided in CCP §1985.3(g) before the date specified for production in the subpoena;
- If the party who is seeking the records refuses to agree in writing to cancel or limit the subpoena, the consumer should consult an attorney about protecting his or her rights of privacy; and
- The above information should be communicated in a typeface designed to call attention to the referenced provisions.

If a deposition notice is also served, that notice and the consumer notice can be combined in a single document. See CCP §1985.3(e). See *Inabnit v Berkson* (1988) 199 CA3d 1230, 1236, 245 CR 525 (deposition notice contained paragraph that specifically complied with requirements of §1985.3(e)).

NOTE: Counsel for the subpoenaing party should retain the original notice to consumer. Cal Rules of Ct 3.250(b) (papers that may not be filed with the court unless offered as relevant to the determination of an issue in a law and motion proceeding or other hearing, or otherwise ordered filed for good cause).

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§5.118 d. What to Serve on Consumer

The subpoenaing party must serve on a consumer (or employee; see §5.130) (CCP §§1985.3(b), 2025.240(b)):

- Notice to the consumer on Judicial Council Form SUBP-025 (Notice to Consumer or Employee and Objection) (for discussion, see §5.117; for form, see §5.227);
- A copy of the deposition subpoena (for discussion, see §5.115; for forms, see §§5.218, 5.223);
- A copy of the affidavit supporting issuance of the subpoena, if any (CCP §1985.3(b));
- Proof of service on the witness from whom consumer's records are being requested (*i.e.,* the second page of Judicial Council Form SUBP-025 (Notice to Consumer or Employee and Objection); see §5.227) (CCP §1985.3(b)); and
- A notice of deposition, if one was served on the parties (CCP §1985.3(e); see §5.68).

NOTE: When the witness's personal appearance is *not* required, a copy of the deposition subpoena alone serves as the parties' notice, and no other notice of deposition is necessary. See CCP §2025.220(b). See §§5.68, 5.93.

No affidavit or declaration showing good cause for the production of records is necessary to support the issuance of a deposition subpoena. CCP §§2020.410(c), 2020.510(b).

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§5.119 e. What to Serve on Witness

The subpoenaing party must, at the time the deposition subpoena is served on the individual or organization maintaining the consumer records, also serve that individual or organization with either (CCP §§1985.3(c), 2020.410(d), 2020.510(c)):

- A copy of the proof of service on the consumer of the notice in compliance with CCP §1985.3(e); or
- A written authorization to release the records signed by the consumer or the consumer's attorney.

The witness may presume that any attorney who has a signed authorization to release records acted with the consent of the consumer, and that any objection to releasing the records is waived. CCP §1985.3(c)(2).

If the witness is a telephone corporation that is a public utility (Pub Util C §216), the subpoenaing party must serve, in addition to the deposition subpoena, a consent to release the requested records signed by the consumer as required by Pub Util C §2891. CCP §1985.3(f).

CAUTION: Failure to comply with CCP §1985.3 is a sufficient basis for the witness to refuse to produce the personal records listed in the subpoena. CCP §1985.3(k).

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§5.120 f. When Seeking Order to Shorten Time

A subpoenaing party is entitled to apply to the court for an order shortening time for serving either the deposition subpoena or the consumer notice. CCP §1985.3(h). Although the statute uses the term "entitled," the court will not automatically shorten time. The party must show (see CCP §1985.3(h)):

- That the rights of the witness and consumer would still be preserved, if the time were shortened;
- Good cause for the order; and
- Due diligence on the part of the subpoenaing party.

Counsel should present the facts in support of the foregoing in a sworn declaration. For an illustration of an ex parte application and declaration for order shortening time for noticing a deposition that can be adapted for this purpose, see §5.219. On timing of service, see §5.121.

CAUTION: The witness may refuse to produce the personal records if the subpoenaing party fails to comply strictly with the requirements of CCP §1985.3. See CCP §1985.3(k). In addition to serving the witness with the deposition subpoena and consumer notice as required by the statute (see §§5.115, 5.117), counsel should also serve a copy of the court's order shortening time for production. CCP §1985.3(h).

On orders shortening time, see §§15.11-15.29.

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5. Service on Consumer

§5.121 a. Timing

If served personally, at least 10 days before the date scheduled for production *and* 5 days before service on the witness, the subpoenaing party must serve on the consumer the documents (listed in §5.118) that provide the consumer with notice that his or her personal records have been subpoenaed. See CCP §1985.3(b)(2)-(3). If not personally served the time for service must be extended as provided by CCP §1013(a), (e). See §§2.22, 5.63.

EXAMPLE: If the deposition subpoena requests production of records only, *e.g.,* a consumer's personal records or employment records, the witness should be served at least 15 days before the date of production (or the date for production should be at least 20 days after the subpoena is issued, whichever is later). CCP §§1985.3(d), 1985.6(d), 2020.410(c). On serving a witness, see §5.123. Thus the consumer, if personally served, should be served at least 5 days before that, which would be at least 20 days (or 25 days) before the scheduled date for production of the records. See CCP §§1985.3(b)(3), 1985.6(b)(3).

On seeking an application to shorten time, see §5.120. On consumer's opposition to the production of personal records, see §§5.125 (party consumer's motion to quash), 5.126 (nonparty consumer's written objections).

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§5.122 b. Manner of Service

Service on party consumer. If the consumer is a party to the action, the documents should be served on the consumer's attorney of record. CCP §1985.3(b)(1).

Service on nonparty consumer. The subpoenaing party can arrange to serve the required documents on a nonparty consumer personally, or "at his or her last known address," or under any of the general methods for service of notice and other papers provided for in CCP §§1010-1020. CCP §1985.3(b)(1). The statute does not specifically state whether delivery "at his or her last known address" requires delivery to any particular person at that address. See CCP §1985.3(b)(1).

NOTE: If served by mail or fax, the time for service must be extended as provided by CCP §1013(a), (e). See §§2.22, 5.63.

The court, for good cause shown, can shorten the time for service, provided that the rights of the deponent and the consumer are preserved. CCP §1985.3(h). See §5.120.

If nonparty consumer a minor. Special requirements for serving a minor consumer are set out in CCP §1985.3(b)(1).

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6. Service on Witness

§5.123 a. Timing

If the deposition subpoena requests production of records only, the witness should be served at least 15 days before the date of production, or 20 days after the subpoena has been *issued*, whichever is later. CCP §§1985.3(d), 1985.6(d), 2020.410(c).

NOTE: The *consumer* must be served 5 days before the custodian of records is served. CCP §1985.3(b)(3). See §5.121.

If the deposition subpoena for the production of consumer records requires both the witness's oral testimony and production of documents under CCP §2020.510(a), the subpoenaing party should *issue* the subpoena at least 20 days before the deposition date. CCP §2025.270(c) (deposition date must be "at least 20 days after issuance" of subpoena).

The court can shorten the time for service as long as the rights of both deponent and consumer are preserved. CCP §1985.3(h). See §5.120.

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§5.124 b. Manner of Service

Personal service required. The deposition subpoena must be served personally on the witness. CCP §2020.220(b). On obtaining a written agreement waiving personal service, see second Note in §5.69.

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7. Consumer's Opposition

§5.125 a. Party Consumer's Motion to Quash

A consumer who is a party and whose personal records are subpoenaed can move under CCP §1987.1 to quash or modify the subpoena. CCP §1985.3(g). On motions to quash depositions generally, see §§5.137-5.138.

NOTE: Section 1985.3 does not confer a private right of action or legal remedy against a custodian of records who discloses a consumer's records beyond the scope of a subpoena. *Foothill Fed. Credit Union v Superior Court* (2007) 155 CA4th 632, 66 CR3d 249.

A party consumer who moves to quash or modify the subpoena must serve notice of the motion on the witness and the deposition officer at least 5 days before the date scheduled for production. CCP §1985.3(g). Failure to provide notice to the deposition officer does not invalidate the motion to quash or modify the subpoena, but it may be raised by the deposition officer as an affirmative defense in any action for liability for improper release of records. CCP §1985.3(g).

Under CCP §1987.1(a), the motion to quash or modify the subpoena must be "reasonably made"; in *Lee v Swansboro Country Prop. Owners Ass'n* (2007) 151 CA4th 575, 59 CR3d 924, the court held that a judgment debtor's motion filed 7 days before the scheduled debtor's examination was not unreasonable.

A witness or deposition officer who receives such notice of a motion to quash or modify the subpoena is relieved of the requirement to produce the records, except by order of the court in which the action is pending or by agreement of the parties, witness, and consumers affected. CCP §1985.3(g).

The fact that CCP §1985.3(g) allows an objecting consumer to bring a motion to quash or modify a subpoena before the date of production does not deprive the court of jurisdiction to consider a motion to quash brought after that date. The time limit is designed to guide the parties on when the witness with the records can safely honor or not honor the subpoena if the consumer objects. *Slagle v Superior Court* (1989) 211 CA3d 1309, 1312, 260 CR 122.

NOTE: Any party or the witness can also move to quash or modify the subpoena. CCP §1987.1(b).

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§5.126 b. Nonparty Consumer's Written Objection

A consumer who is not a party to the action may serve a written objection on the subpoenaing party, the witness, and the deposition officer before the production date. CCP §1985.3(g). The objection must state the specific grounds on which production of the personal records should be prohibited. CCP §1985.3(g). The witness should not produce the personal records after receipt of a written objection from a nonparty consumer, except on the order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers affected. CCP §1985.3(g).

NOTE: Section 1985.3 does not confer a private right of action or legal remedy against a custodian of records who discloses a consumer's records beyond the scope of a subpoena. *Foothill Fed. Credit Union v Superior Court* (2007) 155 CA4th 632, 66 CR3d 249.

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§5.127 8. Subpoenaing Party's Motion to Enforce Subpoena

Within 20 days after service of a nonparty consumer's written objection, the party who subpoenaed the personal records may move to enforce the subpoena under CCP §1987.1. CCP §1985.3(g). The motion must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of the dispute between the moving party and the consumer or the consumer's attorney. CCP §1985.3(g).

If a party consumer has moved to quash, the subpoenaing party should file opposition papers requesting the court to order compliance with the subpoena. See CCP §§1985.3(g), 1987.1.

The court has discretion to award the amount of reasonable expenses, including reasonable attorney fees, incurred in making or opposing a motion under CCP §1987.1 if the court finds that the motion was made or opposed in bad faith or without substantial justification, or one or more of the requirements of the subpoena were oppressive. CCP §1987.2(a).

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§5.128 a. Subpoenaing Party's Noncompliance With Statutory Requirements

The subpoenaing party's noncompliance with the requirements of CCP §1985.3 is sufficient ground for the witness to refuse to produce documents demanded by the deposition subpoena. CCP §1985.3(k).

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§5.129 b. Consumer's Failure to Pay for Witness's Services Does Not Affect Duty to Produce

Under Health & S C §123110(j), health care providers cannot withhold subpoenaed patient records because the patient has not paid for medical services rendered. Nor can the health care provider withhold patient records until the patient or the patient's attorney executes a lien in favor of the health care provider. *Person v Farmers Ins. Group* (1997) 52 CA4th 813, 818, 61 CR2d 30.

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§5.130 B. Employment Records

Statutory protections also apply to disclosure of employment records. Code of Civil Procedure §1985.6 specifies procedures for subpoenaing employment records. Employment records are "the original or any copy of books, documents, other writings, or electronic data pertaining to the employment of any employee maintained by the current or former employer of the employee." CCP §1985.6(a)(3). An employee under the statute is "any individual who is or has been employed by a witness subject to a subpoena duces tecum. Employee also means any individual who is or has been represented by a labor organization that is a witness subject to a subpoena duces tecum." CCP §1985.6(a)(2).

A party seeking business records that are also employment records must follow the procedures in CCP §2020.510(d), *i.e.*, the party seeking employment records must serve the employee with (CCP §§1985.6(b), 2025.240(b)):

- Notice of his or her privacy rights specified in CCP §1985.6(e) using Judicial Council Form SUBP-025 (Notice to Consumer or Employee and Objection) (for discussion, see §5.117; for form, see §5.227);
- A copy of the deposition subpoena (for discussion, see §5.115; for forms, see §§5.218, 5.223);
- A copy of the affidavit supporting issuance of the subpoena, if any;
- Proof of service on the witness from whom the employee's records are being requested (*i.e.,* the second page of Judicial Council Form SUBP-025 (Notice to Consumer or Employee and Objection); see §5.227);
- A notice of deposition, if one was served on the parties (CCP §1985.6(e); see §5.68); and
- The proof of service on the witness (*i.e.*, the person or entity from whom the records are sought). CCP §§1985.6(b), 2025.240(b).

The procedures for production, including time requirements for notice to the employee and the employee's opposition to the production of employment records, are virtually identical to the procedures under CCP §1985.3 for production of personal consumer records. For discussion of applicable procedures under CCP §1985.3, see §§5.115-5.129.

Noncompliance with the statute is sufficient grounds for the employer-witness to refuse production. CCP §1985.6(j).

PRACTICE TIP: Counsel faced with a subpoena for the production of a client's employment records should review this statute and consider filing a motion to quash the subpoena, or at least request that the court conduct an in-chambers review before production to the subpoenaing party. See *Harris v Superior Court* (1992) 3 CA4th 661, 668, 4 CR2d 564.

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§5.131 C. Private Records Held by Government Agencies

Under CC §1798.24, no agency may disclose any personal information about an individual without that individual's consent, except under the limited circumstances identified in the statute. The Public Records Act (Govt C §§6250-6270), however, recognizes that public employees are not entitled to the same privacy rights as are individuals in the private sector. Counsel faced with discovery about a public employee should consult Govt C §6254(c), which exempts from the disclosure any "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."

For discussion of the Public Records Act, see §2.41.

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§5.131A D. Personal Identifying Information Sought in Connection With Action Involving Free Speech Rights

Effective January 1, 2009, CCP §1987.1 was amended to protect a person whose "personally identifying information," as defined in CC §1798.79.8(b), is sought in connection with an underlying action involving that person's exercise of free speech rights. CCP §1987.1(b)(5). Section 1798.79.8 defines "personally identifying information" as including, *e.g.,* name, address, e-mail address, social security number, or any other information "that, in combination with any other nonpersonally identifying information, would serve to identify any individual." CC §1798.79.8(b)(8).

Code of Civil Procedure §1987.2 was also amended, effective January 1, 2009. New §1987.2(b) provides for an award of attorney fees to a person who moves to quash a subpoena under §1987.1(a) if (1) the moving party's personally identifying information is sought in an action pending in an out-of-state court; (2) the subpoena was served on an Internet service provider or on the provider of another interactive computer service (as defined in 47 USC §230(f)(2)); (3) the underlying action arises from the moving party's exercise of free speech rights on the Internet; and (4) the respondent fails to make a prima facie case showing of a cause of action. If these criteria are met, the trial court must award reasonable expenses, including attorney fees, to the moving party.

These amendments to CCP §§1987.1-1987.2 were designed to protect First Amendment interests in anonymous speech. The amendments target the practice of bringing frivolous lawsuits solely in order to use subpoena power to discover the identity of those making anonymous online statements. See Assembly Judiciary Committee Analysis of AB 2433 (Apr. 8, 2008).

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X. RESPONDING TO DEPOSITION NOTICE OR SUBPOENA

§5.132 A. Analyzing Documents Served

Counsel receiving a deposition notice or subpoena should immediately analyze the documents served to determine whether any defects exist and what steps should be taken to protect the client's interests. If the notice or subpoena is defective, or if the conditions under which the deposition is to be conducted are not satisfactory, counsel should attempt to resolve the problem by informal agreement. See CCP §2023.010(i). On obligation to meet and confer, see chap 15. If agreement cannot be reached, counsel should consider taking one or more of the following actions:

- Serving written objections to the deposition notice (see §5.135);
- Moving to quash the deposition notice (see §5.137);
- Moving to quash the deposition subpoena (see §5.138);
- Moving for a protective order (see §§5.139-5.141).

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§5.133 B. Notifying Party Deponent

A party who is represented by counsel will not receive direct notice of a deposition. CCP §2025.240(a). Thus, it is counsel's obligation to inform the client immediately of the scheduled date and ascertain the client's availability. Cal Rules of Prof Cond 3-500. Because parties not accustomed to litigation usually react with anxiety to legal proceedings, counsel should reassure the client that ample time will be devoted to preparation before the client gives any testimony. Unless seeking a postponement of the deposition or a protective order, counsel should make an appointment with the client to review deposition procedures and probable subject matter and confirm the date and time of the meeting in writing. When a deposition notice is coupled with a request to produce documents or other tangible things, counsel should provide the client with a copy of the request, and ask the client to bring all responsive documents to the predeposition meeting. CCP §2020.510.

PRACTICE TIP: Counsel should schedule the preparation session within a week or so of the deposition. This usually allows sufficient time to handle unforeseen problems, yet it is sufficiently close to the deposition date that the benefits of preparation are not lost. The length of the session depends on the complexity of the case, the client's sophistication, and a variety of other factors. On preparing a deponent for deposition, see §§6.13-6.17.

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§5.134 C. Whether to Contact Nonparty Witness

The decision to contact a nonparty deponent whom opposing counsel has served with a deposition notice is a judgment call that depends in part on whether the witness is expected to be hostile. If the witness will agree to discuss the case, counsel can use the opportunity to preview and plan for the deposition. However, counsel should be mindful that communications with nonclients are not protected by the attorney-client privilege and are discoverable. Evid C §952. In addition, counsel should avoid creating a situation in which he or she may become a witness in the case by virtue of third party communication. Evid C §952. Using an investigator to interview a nonparty witness before a deposition may be the more prudent approach.

NOTE: An attorney whose client is subpoenaed as a nonparty witness should consider contacting the noticing party's counsel or one of the other attorneys in the case to ascertain the scope of examination sought. Depending on the circumstances, counsel may decide to make a motion to quash, if necessary to protect the client's interest. CCP §§2017.020(a), 2025.420(a). Counsel deciding to proceed with the deposition as scheduled should review any subpoenaed documents and seriously consider accompanying the client to the deposition, particularly if there is a possibility that the client may become a defendant in the action, or privilege issues may be raised. On motion to quash deposition subpoena, see §5.138.

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§5.135 D. Objecting to Deposition Notice

Defects in the deposition notice are rarely significant to the outcome of a case and are waived unless promptly challenged. CCP §2025.410(a). A party objecting to a deposition notice that fails to comply with the notice requirements of CCP §§2025.210-2025.280 (see §§5.57-5.58) must serve written objections specifying each impediment. Failure to do so waives any error or irregularity. CCP §2025.410(a).

Objections must be served "promptly" on the noticing party and all attorneys or parties who received notice of the deposition, and in no event less than 3 calendar days before the date scheduled for the deposition. CCP §2025.410(a). When serving objections 3 calendar days before the deposition date, the objecting party must comply with CCP §1011 by personally serving the noticing party. CCP §2025.410(b).

No particular form for the written objection is required. Because the ultimate purpose of objecting is to prevent the deposition transcript from being used at trial, however, it is good practice to use a pleading format with a proof of service attached to establish compliance with the statute. See CCP §2025.410(a).

Counsel retains the original, serving copies on the parties. Cal Rules of Ct 3.250. The objections are not filed with the court unless they are offered in a law and motion proceeding or are ordered to be filed.

PRACTICE TIP: Written objections may not be sufficient to protect the client's interests. In such situations, to preserve the objection, counsel must seek a protective order (see §§5.139-5.141) or file a motion to quash the notice (see §5.137). CCP §§1987.1, 2025.410(c).

As a practical matter, the expense and time involved in such motions are not usually justified. It is better for counsel to negotiate the objection with the attorney who noticed the deposition. Although a party objecting to an improperly noticed deposition may decline to attend, this places the risk of an invalid objection on the objecting party. CCP §§2025.410(b), 2025.440(a). If the party is the deponent, nonappearance may subject that party to sanctions if deponent's counsel is incorrect. CCP §2025.440(a). If the deposition of another party or witness goes forward without counsel present, admissible evidence may be obtained from the adversary in counsel's absence, and counsel who received the notice, albeit defective, may not be able to redepose the witness. CCP §2025.610(a). Counsel who object and refuse to attend take a significant risk. See CCP §2025.610; §5.15. The deposition will be excluded at trial under CCP §2025.620 *only if* the court determines that the objection was valid. CCP §2025.410(b).

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§5.136 E. Objecting to Production

Party deponent. When the description of materials in the deposition notice is not reasonably specified and the deponent cannot identify what should be produced, or if it is otherwise objectionable (*e.g.,* the request is unduly burdensome or seeks documents protected by the attorney-client privilege), counsel for the party or party-related deponent should serve written objections at least 3 days before the deposition as described in §5.135. CCP §§2025.410(a)-(b), 2025.440(a). The client may attend the deposition and refuse to comply with all or some of the requests for production, placing the burden on noticing counsel to move to compel production. CCP §2025.480(a). See chap 15. Or counsel may move beforehand to stay the deposition and quash the notice under CCP §2025.410(a) (see §5.137) or to seek a protective order under CCP §2025.420(a) (see §§5.139-5.141).

Nonparty deponent. If the deponent is a nonparty, the procedures to be employed depend on the type of documents sought and who is objecting to production. If the documents sought are certain types of personal records, a nonparty consumer, employee, or custodian (or his or her attorney) may serve written objections without filing a motion to quash. CCP §§1985.3(g), 1985.6(f). See §§5.108-5.130. But when no such objection is made, any other party objecting to the production of records by a nonparty deponent must file a motion to quash the subpoena or a protective order; merely objecting to the production does not prevent a nonparty from producing them. CCP §1987.1.

Although a nonparty served with a business records deposition subpoena can seek relief from the trial court before the date set for production, the nonparty is not required to do so and can properly raise objections for the first time at the document production. *Unzipped Apparel, LLC v Bader* (2007) 156 CA4th 123, 131, 67 CR3d 111, citing *Monarch Healthcare v Superior Court* (2000) 78 CA4th 1282, 1288, 93 CR2d 619.

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XI. MOTIONS PERTAINING TO DEPOSITIONS

A. Motion to Quash

§5.137 1. Deposition Notice

In addition to serving written objections, a party objecting to the deposition notice may move for an order staying the taking of the deposition and quashing the deposition notice. Filing this motion automatically stays the deposition until the matter is heard and determined. CCP §2025.410(c).

A motion to quash must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution with counsel for the noticing party. CCP §2025.410(c). The court must impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to quash a deposition notice, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the sanction unjust. CCP §2025.410(d).

See forms of notice of motion to quash deposition notice and supporting declaration in §§5.228-5.231.

On meet-and-confer requirement, see chap 15.

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§5.138 2. Deposition Subpoena

The procedure for objecting to a deposition subpoena is identified in CCP §1987.1, which authorizes any party, witness, consumer (as defined in CCP §1985.3(a)(2); see §§5.109-5.113), employee (as described in CCP §1985.6), or person whose personally identifying information (as defined in CC §1798.79.8(b)) is sought in connection with an underlying action involving that person's exercise of free speech rights to move the court for an order quashing the subpoena entirely, modifying it, or directing compliance with it on such terms and conditions as the court directs. However, it is important to note that a nonparty deponent does not need to challenge the subpoena by filing a motion to quash but only needs to object to the production. CCP §1987.1; *Monarch Healthcare v Superior Court* (2000) 78 CA4th 1282, 1287, 93 CR2d 619 (nonparty custodian of records produced some documents but objected to remaining requests, raising trade secret and privacy objections). In addition, the court may make any other order appropriate to protect the parties, the witness, or the consumer from unreasonable or oppressive demands, including unreasonable violations of a witness's or consumer's right to privacy. CCP §1987.1(a).

A subpoenaed party who opposes the production, inspection, copying, testing, or sampling of electronically stored information (ESI) on the basis that the information is not reasonably accessible because of undue burden or expense bears the burden of so demonstrating. CCP §1985.8(d). If it is established that the ESI is from a source that is not reasonably accessible because of undue burden or expense, the court may order discovery on a showing of good cause by the subpoenaing party, subject to any limitations on the frequency or extent of discovery imposed under CCP §1985.8(h). CCP §1985(e). If the court finds that there is good cause for the production of ESI from a source that is not reasonably accessible, it may set conditions for discovery of the information, including allocation of the expense of discovery. CCP §1985.8(f).

The court must limit the frequency or extent of discovery of ESI, even from a source that is reasonably accessible, if the court determines that (1) it is possible to obtain the information from a more convenient, less burdensome, or less expensive source, (2) the discovery sought is unreasonably cumulative or duplicative, (3) the demanding party had ample opportunity by discovery to obtain the information sought, or (4) the likely burden or expense of the discovery outweighs the likely benefit. CCP §1985.8(h).

The court has the discretion to award reasonable expenses incurred in making or opposing a motion to quash or modify a subpoena under CCP §1987.1, including attorney fees, if it finds the motion was made or opposed in bad faith or without substantial justification, or that one or more of the requirements of the subpoena were oppressive. CCP §1987.2(a). There is a safe harbor provision for sanctions related to ESI. Absent exceptional circumstances, sanctions may not be imposed for failure to provide ESI that has been "lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system." The safe harbor provision is not to be construed to alter any obligation to preserve discoverable information. CCP §1985.8(*l*). See §4.7.

Counsel filing a motion to quash a deposition subpoena should follow the ordinary motion procedure of Cal Rules of Ct 2.111(4), 3.1020, 3.1110-3.1116, and 3.1300-3.1310 and may refer to the scope of the court's authority to grant protective orders as well (see §5.139). CCP §§1987.1, 2025.420(b). The form and supporting declaration found in §§5.228-5.229 for a motion to quash deposition notice can be adapted for use in a motion to quash deposition subpoena. On motion procedure, see chap 15.

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§5.139 B. Motion for Protective Order

Protective orders are designed "to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." CCP §2025.420(b). See, *e.g., John Z. v Superior Court* (1991) 1 CA4th 789, 791, 2 CR2d 556 (court's power to protect a person from embarrassment or oppression includes protecting informant's identity to ensure his safety will not be jeopardized by such disclosure).

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§5.140 1. Grounds

Anyone affected may move the court for an order that the deposition not be taken at all or be taken only under specified circumstances. CCP §2025.420(b). An illustrative (but not exclusive) list of orders contemplated by CCP §2025.420(b) includes:

- The deposition not be taken;
- Change in time, date, or location of deposition;
- Change in the manner of recording testimony from that specified in the deposition notice;
- Limitation on scope of examination;
- Limitation on scope of documents to be produced;
- Limitation on disclosure of trade secret or other confidential information; and
- Arrangements for sealing the deposition transcript.

A subpoenaed party who opposes the production, inspection, copying, testing, or sampling of electronically stored information (ESI) on the basis that the information is not reasonably accessible because of undue burden or expense bears the burden of so demonstrating. CCP §1985.8(d). If it is established that the electronically stored information is from a source that is not reasonably accessible because of undue burden or expense, the court may order discovery on a showing of good cause by the subpoenaing party, subject to any limitations on the frequency or extent of discovery imposed under CCP §1985.8(h). CCP §1985(e). If the court finds that there is good cause for the production of ESI from a source that is not reasonably accessible, it may set conditions for discovery of the information, including allocation of the expense of discovery. Proposed CCP §1985.8(f).

The court must limit the frequency or extent of discovery of ESI, even from a source that is reasonably accessible, if the court determines that (1) it is possible to obtain the information from a more convenient, less burdensome, or less expensive source, (2) the discovery sought is unreasonably cumulative or duplicative, (3) the demanding party had ample opportunity by discovery to obtain the information sought, or (4) the likely burden or expense of the discovery outweighs the likely benefit. CCP §1985.8(h).

On similar issues under Fed R Civ P 26(b)(2)(B), see §§8.102, 8.104.

Protective orders may prohibit or limit the depositions of high-level corporate employees who lack personal knowledge or involvement in the litigation, particularly when the plaintiff has not yet exhausted less intrusive means of discovery. *Liberty Mut. Ins. Co. v Superior Court* (1992) 10 CA4th 1282, 1287, 13 CR2d 363 (deposition of corporate president may "raise a tremendous potential for discovery abuse and harassment"). Similarly, depositions of the heads of governmental agencies and other top officials may be prohibited or limited when those individuals have no personal knowledge, even if they are named as parties in the litigation. *Nagle v Superior Court* (1994) 28 CA4th 1465, 1467, 34 CR2d 281.

On protective orders, see §§15.59-15.84.

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§5.141 2. Procedures

A party must make a formal noticed motion for a protective order. The court cannot grant a protective order ex parte. *St. Paul Fire & Marine Ins. Co. v Superior Court (*1984) 156 CA3d 82, 85, 202 CR 571.

The notice of motion must be accompanied by:

- A supporting memorandum (Cal Rules of Ct 3.1113); and
- Counsel's declaration stating (CCP §2025.420(a)):
- Facts showing a reasonable and good faith attempt at an informal resolution of each issue in dispute; and
- Facts showing good cause for granting the motion.

The court must impose a monetary sanction under CCP §§2023.010-2023.040 against any party, person, or attorney who unsuccessfully makes or opposes a motion for protective order without substantial justification for that position, unless the court determines that the imposition of sanctions would be unjust. CCP §2025.420(d). See *Foothill Props. v Lyon/Copley Corona Assoc.* (1996) 46 CA4th 1542, 1558, 54 CR2d 488. However, there is a safe harbor provision for sanctions related to electronically stored information (ESI). Absent exceptional circumstances, sanctions may not be imposed for failure to provide ESI that has been "lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system." The safe harbor provision is not to be construed to alter any obligation to preserve discoverable information. CCP §1985.8(*l*).

PRACTICE TIP: The timing of a motion for protective order, whether made before, after, or even during a deposition, is a matter of practicality and strategy. Orders that change the date, time, or location of depositions obviously should be requested in advance. CCP §2025.420(b)(2), (4). The court is unlikely to issue a protective order based solely on the moving party's *anticipation* that improper questioning or other conduct will occur. However, when a nonparty witness possesses privileged information, and counsel has no standing to instruct the witness not to answer, a party's only recourse may be to seek an order in advance limiting the scope of the deposition. CCP §2025.420(b)(9)-(10). Nonetheless, the strongest evidence of the need for a protective order is a deposition transcript revealing that the moving party has attempted to be reasonable and has requested relief from the court only as a last resort. CCP §2025.420(b). At the very least, such a record lessens the likelihood of sanctions, even if the motion is lost. On seeking protective orders during or after a deposition, see §§6.77, 6.83-6.86, 6.88, 6.95, 6.100, 6.102, 6.106, 6.111, 6.142-6.144.

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§5.142 C. Motion to Compel Deposition at More Distant Location

A party desiring to depose a natural person or organization, whether or not a party to the action, may seek an order authorizing the deposition to proceed at a location more distant than the geographical limitations set out in CCP §2025.250. CCP §2025.260(a). For geographical limitations under CCP §2025.250, see §§5.24-5.29.

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§5.143 1. Grounds

In exercising its discretion to grant or deny the motion, the court must consider "any factor tending to show whether the interests of justice will be served," including the following (CCP §2025.260(b)(1)-(7)):

- Whether the moving party selected the forum;
- Whether the deponent will be present to testify at trial;
- The deponent's convenience;
- The feasibility of conducting the deposition by alternative means, such as by written questions;
- The number of depositions to be taken at geographically distant locations;
- The expense of requiring the deposition to be taken outside the distance limitations provided by statute;
- The whereabouts of the deponent at the time of the anticipated deposition.

The court's order may be conditioned on the moving party's advancing reasonable expenses and costs to the deponent for travel to the deposition. CCP §2025.460(c).

PRACTICE TIP: It is usually cost effective to bring the deponent to the location where the action is pending and to agree to pay the deponent's travel expenses (or agree to split the expenses among counsel). Counsel for the moving party should seek opposing counsel's cooperation in advance, because most judges require the noticing party to pay the deponent's travel expenses as a condition to issuing an order under CCP §2025.460(c).

Counsel seeking to depose party witnesses whose residences or offices are beyond the geographical boundaries prescribed by statute (see §§5.25-5.29) may travel to the witness's location or seek a court order requiring the witness to travel to a designated location. See CCP §2025.260(a); *Glass v Superior Court* (1988) 204 CA3d 1048, 1052, 251 CR 690. On procedures for taking out-of-state depositions of party and nonparty witnesses, see chap 12.

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§5.144 2. Procedures

A motion to take the deposition at a more distant location should be accompanied by a supporting memorandum and a declaration setting forth the factual reasons for the relief sought. See Cal Rules of Ct 3.1113, 3.115. The declaration must also state facts showing a reasonable and good faith attempt at informal resolution with opposing counsel before bringing the motion. CCP §2025.260(a). On motion practice, see chap 15.

The court is required to impose a monetary sanction under CCP §§2023.010-2023.040 against the losing party unless it finds there was substantial justification for the position taken or other circumstances make the imposition of sanctions unjust. CCP §2025.260(d). On sanctions, see chap 15.

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§5.145 D. Motion to Quash Deposition of Attorney

Although the deposition of any person is authorized under CCP §2025.010, the party noticing the deposition of an attorney possessing privileged information should be prepared to show, in opposition to the attorney's motion for protective order, that (*Spectra-Physics, Inc. v Superior Court* (1988) 198 CA3d 1487, 1496, 244 CR 258):

- The information sought is relevant and nonprivileged, or the privilege has been waived;
- The deposition is crucial to preparation of the case; and
- No alternative means of obtaining the information exists.

If the deposition does proceed, the scope of examination likely will be limited by the existing attorney-client privilege and work product protection. CCP §§2018.010-2018.080; Evid C §954. On privileges and work product protection, see chap 3.

NOTE: Because an attempt to take the deposition of an attorney can be highly controversial, deposing counsel should consider applying beforehand for a court order, rather than waiting to respond to a motion for protective order made on behalf of the attorney deponent. See *Estate of Ruchti* (1993) 12 CA4th 1593, 1602, 16 CR2d 151 (protective order granted and sanctions upheld when counsel failed to show information could not be obtained through alternative discovery device, *e.g.,* interrogatories, which was less intrusive to attorney-client privilege and work product protection). See also *Titmas v Superior Court* (2001) 87 CA4th 738, 740, 104 CR2d 803 (with any prima facie claim of attorney-client privilege, court must accord full hearing with oral argument before ordering client confidences to be revealed to other side).

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§5.146 E. Motion to Compel or Prohibit Subsequent Deposition of an Individual

With certain exceptions (see discussion in §5.15), a natural person whose deposition has been completed cannot be compelled to attend a subsequent deposition in the same case. CCP §2025.610. It is not incumbent on the deponent to obtain a protective order to avoid being redeposed. Rather, the burden is on the noticing party to obtain a court order, on a showing of good cause, authorizing the second deposition. See CCP §2025.610(b).

When important defendants have not appeared in the action, however, counsel representing the deponent should consider moving for an order under CCP §2025.420 to protect the deponent's right to give only one deposition. Otherwise, after their appearance, those parties who were neither present at the deposition nor received notice of it may take a subsequent deposition. CCP §2025.610(a).

JUDGE'S PERSPECTIVE: If a deposition is needed to identify records because of a deponent party's failure to agree to a less formal method of identification, the court may be inclined to authorize a second deposition of the same person after the examining party has reviewed the records. See *Calcor Space Facility, Inc. v Superior Court* (1997) 53 CA4th 216, 222, 61 CR2d 567.

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XII. DEPOSITION TO PERPETUATE TESTIMONY

§5.147 A. Purpose

A person who expects to be a party to an action may need to perpetuate testimony or preserve evidence, and may petition the court in which the action will be filed for an order allowing presuit discovery. CCP §§2035.010-2035.060. A person may arrange for the taking of his or her own deposition for this purpose or that of another natural person or organization. CCP §2035.010(a). A deposition taken under CCP §§2035.010-2035.060, or under comparable provisions of another jurisdiction, may be used in court against any person named in the petition as an expected adverse party in any action brought in California involving the same subject matter. CCP §2035.060.

NOTE: Not only may the court permit the petitioner to take oral or written depositions, it also may allow other forms of discovery before suit is filed, *e.g.,* the inspection of documents, things, or places or the performance of mental or physical examinations. CCP §2035.020.

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§5.148 B. Grounds

A petitioner who desires to take a deposition before the action is filed must demonstrate "the present inability … either to bring that action or to cause it to be brought." CCP §2035.030(b)(2). The inability may be practical, *e.g.,* a prospective defendant cannot require suit to be brought. See *Block v Superior Court* (1963) 219 CA2d 469, 475, 33 CR 205. Or it may be legal, *e.g.,* the prospective plaintiff must first exhaust administrative remedies. See *Petition of Ernst* (SD Cal 1942) 2 FRD 447, 451. But see *In re Benjamin* (ED La 1971) 52 FRD 407 (proposition that inability to bring suit is due to failure to exhaust administrative remedies held no longer applicable in tax cases).

The petitioner should indicate that the deposition is being taken to perpetuate testimony or preserve evidence for use only if an action is subsequently filed. CCP §2035.010(a). The statute may not be used to ascertain whether a cause of action or defense exists, or to identify persons who might be parties to an action not yet filed. CCP §2035.010(b). See *Hunt-Wesson Foods, Inc. v County of Stanislaus* (1969) 273 CA2d 92, 94, 77 CR 832 (taxpayer seeking to challenge county assessment could not use former CCP §2017(a) when sole purpose of depositions was discovery); *Block*, 219 CA2d at 475 (petition requiring young child injured in car accident to submit to physical examination satisfied requirements of former CCP §2017(a); court order for deposition not prerequisite to order for physical examination).

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C. Procedures

§5.149 1. Notice of Petition

The petition must be accompanied by a notice of petition stating that the petitioner will apply to the court at a specified time and place for the order requested in the petition. CCP §2035.040(b). Counsel should check local rules and practice before setting the time and place for hearing.

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§5.150 2. Contents of Petition

The petition itself must be titled in the name of the person who desires to perpetuate the testimony or preserve the evidence. CCP §2035.030(b). The petition must be verified. CCP §2035.030(a). On verification of pleadings, see CCP §446.

The verified petition must contain the following information:

- The expectation that the petitioner will be a party in a California lawsuit (CCP §2035.030(b)(1));
- The petitioner's current inability to bring the action or cause it to be brought (CCP §2035.030(b)(2));
- The subject matter of the expected action and the petitioner's anticipated involvement (CCP §2035.030(b)(3));
- The discovery device (*e.g.,* deposition) the petitioner wishes to use (CCP §2035.030(b)(4));
- The facts the petitioner expects to elicit through the proposed discovery (CCP §2035.030(b)(5));
- The reasons the petitioner needs to perpetuate or preserve the described information before an action is filed (CCP §2035.030(b)(6));
- The names or a description of those whom petitioner expects will be adverse parties (CCP §2035.030(b)(7));
- The names and addresses of those from whom discovery is sought (CCP §2035.030(b)(8));
- The substance of the information petitioner expects to elicit from each such person (CCP §2035.030(b)(9)); and
- A request for an order authorizing the petitioner to take a deposition for the purpose of perpetuating testimony or preserving evidence described in the petition (CCP §2035.030(c)).

A supporting memorandum and declarations supporting the factual basis for the petition should be filed with the petition. Cal Rules of Ct 3.1113, 3.115. For forms of petition, motion, and order to take a deposition to perpetuate testimony, see §§5.230-5.232.

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§5.151 3. Where to File

Counsel should file the original petition for presuit discovery, notice, and proof of service with the court in the county of residence of any expected adverse party. If no expected adverse party is a California resident, the petition should be filed in the superior court of the county where the action or proceeding may be filed. CCP §2035.030(a).

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4. Service

§5.152 a. Timing

The notice, petition, supporting memorandum, and declarations must be served on each natural person or organization named in the petition as an expected adverse party in the same manner as a summons is served, but service must be effected at least 20 days before the hearing. CCP §2035.040. On service of summons, see CCP §§413.10-417.40. See also California Civil Procedure Before Trial, chap 17 (4th ed Cal CEB 2004).

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§5.153 b. By Publication; Appointment of Attorney

The petitioner may apply to the court for an order for service by publication on any expected adverse party who cannot, with due diligence, be served. CCP §2035.040(d). At the hearing on the petition, the court must appoint counsel to represent any prospective party served by publication who does not appear and must order the petitioner to pay reasonable attorney fees and expenses resulting from the appointment. CCP §2035.040(e). The appointed attorney also represents the absent party for all purposes in the proceeding, including the cross-examination of any person whose testimony is taken by deposition. CCP §2035.040(e).

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§5.154 D. Order Authorizing Discovery

The court must authorize presuit discovery if doing so "may prevent a failure or delay of justice." CCP §2035.050(a). The order must identify the persons whose deposition may be taken, any documents, things, or places to be inspected, and any person whose physical or mental state may be examined. CCP §2035.050(b).

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§5.155 E. Scheduling and Conducting Deposition

Except as noted in §5.152, the procedures for scheduling and conducting a deposition under CCP §§2035.010-2035.060 are the same as for any other deposition. CCP §2035.050(c).

NOTE: Because an action has not been filed, however, there are no "parties" who can be compelled to testify by deposition notice alone. CCP §2025.220. All prospective deponents must be served with deposition subpoenas. CCP §2020.510. See form in §5.217.

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XIII. DEPOSITION PENDING APPEAL

§5.156 A. Purpose

A party may perpetuate testimony or preserve information for use in the event of further proceedings to prevent a failure or delay in justice. CCP §2036.040(a). The party may conduct discovery while an appeal from judgment in a California court is pending, or before the time to appeal has expired, by obtaining an order under CCP §§2036.010-2036.050.

The methods of discovery authorized under CCP §§2036.010-2036.050 include oral and written depositions; inspection of documents, things, and places; and mental and physical examinations. CCP §2036.020. If the court authorizes discovery under CCP §§2036.010-2036.050, the procedures for conducting the discovery are the same as for pretrial discovery of the same type. CCP §2036.040(c).

A deposition taken under CCP §§2036.010-2036.050 can be used in any later proceeding in accordance with CCP §2025.620. CCP §2036.050.

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B. Procedures

§5.157 1. Noticed Motion

The party must apply to the court to conduct discovery pending appeal by noticed motion. CCP §2036.030(a). The motion must contain (CCP §2036.030(b)):

- The names and addresses of the persons or organizations from whom discovery is sought;
- The methods of discovery to be used; and
- The reasons for perpetuating testimony or preserving evidence.

The motion should be accompanied by a supporting memorandum and declarations identifying the factual bases for the motion. Cal Rules of Ct 3.1113, 3.115. The forms in §§5.230-5.232 for a motion to take a deposition to perpetuate testimony can be adapted for use in requesting discovery pending appeal.

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§5.158 2. Where to File; Service

The motion is filed in the court that entered the judgment, not in the appellate court. The same notice and service requirements govern as apply to discovery motions in preappeal actions pending in that court. CCP §2036.030(a). See §§5.52-5.69.

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§5.159 C. Order Authorizing Discovery

The court may grant the requested relief if it determines that doing so "may prevent a failure or delay of justice in the event of further proceedings in the action in that court." CCP §2036.040(a). The requirements for the order itself are the same as those for an order for discovery before the action is filed. CCP §2036.040(c). See §5.154.

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§5.160 XIV. DEPOSITIONS ON WRITTEN QUESTIONS

A party may take a deposition by posing written questions to a party or nonparty. CCP §2028.010. The deposition officer reads the questions aloud to the witness at the deposition and the witness answers under oath. CCP §2028.080. The method is rarely used. See CCP §§2028.010-2028.080.

CAUTION: The following information regarding written depositions is provided for use in the rare event that counsel takes a written deposition. Better practice, however, is to conduct an oral deposition unless there is no alternative.

Whether the deposition is oral or written, no preliminary showing of good cause is required. *Snyder v Superior Court* (1970) 9 CA3d 579, 585, 89 CR 534.

NOTE: Because CCP §§2028.010-2028.080 and Fed R Civ P 31 are substantially similar, cases construing the federal rule provide a source of guidance on the interpretation of California law; thus, many of the following sections contain discussions of federal cases. See *Southern Cal. Edison Co. v Superior Court* (1972) 7 C3d 832, 839, 103 CR 709. For a brief discussion of Fed R Civ P 31, see §5.215.

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§5.161 A. Timing

A party may notice a written deposition at any time as long as the procedure is completed by the 30th day before the initial trial date. CCP §2024.020(a). No prior court order is required unless the plaintiff notices the deposition within the 20-day period after service of summons or the defendant's appearance. CCP §§2025.210(b), 2028.010.

JUDGE'S PERSPECTIVE: Because of the additional time involved in sending out direct questions and in exchanging any cross, redirect, and recross questions using this discovery method, counsel should anticipate problems and allow substantially more margin than the 30th day before trial to complete the written deposition process.

NOTE: If the plaintiff obtains a court order authorizing it to notice a deposition within the 20-day waiting period, opposing counsel may consider seeking a protective order. See *O'Grady v Superior Court* (2006) 139 CA4th 1423, 1454, 44 CR3d 72, discussed in §15.69.

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§5.162 B. Reasons for Using

Like an oral deposition, a written deposition may be taken for any of the proper purposes of discovery, including for use as evidence in the action. CCP §§2017.010, 2019.010(a); *Beverly Hills Nat'l Bank & Trust Co. v Superior Court* (1961) 195 CA2d 861, 865, 16 CR 236. On considering primary goals of depositions, see §§5.31-5.35.

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§5.163 1. When Written Depositions Suitable

When specific testimony sought. The written deposition method is more suited, however, to obtaining specific testimony in admissible form than to probing for information that could be more effectively discovered at an oral deposition. A written deposition is suitable when counsel is seeking limited and specific information for which the questions can be formulated clearly and unambiguously, *e.g.*, when testimony is limited to a single factual issue in the case. See *Wheeler v West India S.S. Co.* (SD NY 1951) 11 FRD 396, further decision (SD NY 1951) 103 F Supp 631, aff'd (2d Cir 1953) 205 F2d 354 (court allowed written depositions of three witnesses residing in France on issue of plaintiff's intoxication).

PRACTICE TIP: The more complicated the information, the less likely the results of a written deposition will be satisfactory. Because all the questions must be prepared before any answers are given, it may be impossible for counsel to anticipate each answer. CCP §2028.030(a). In many instances, oral examination—with searching follow-up inquiry—is the only feasible course.

To perpetuate testimony. A written deposition may be used to perpetuate testimony before an action is filed (CCP §2035.020(a)) or pending appeal from a judgment in an action (CCP §2036.020(a)). On perpetuating testimony, see §§5.147-5.155.

CAUTION: In reality, written depositions are rarely used. Better practice is to conduct an oral deposition unless there is no alternative.

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§5.164 2. When Written Depositions Not Suitable

If counsel needs to evaluate the deponent's credibility and presentation for trial, a written deposition is rarely suitable. See *Mill-Run Tours, Inc. v Khashoggi* (SD NY 1989) 124 FRD 547, 549.

An unresponsive, evasive, or hostile witness can effectively defeat the purpose of this discovery method by deliberately misinterpreting the written questions and providing useless answers. See, *e.g., V.O. Machinoimport v Clark Equip. Co.* (SD NY 1951) 11 FRD 55, 58. When there is reason to believe that the witness will try to avoid the thrust of the written questions, counsel should conduct an oral deposition and follow up wherever needed to clarify an evasive or biased response and to secure additional information.

PRACTICE TIP: It is almost always better practice to take an oral deposition than to take a deposition on written questions.

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§5.165 C. Comparison to Oral Depositions

Many of the same rules apply to both oral and written depositions. All provisions governing oral depositions in California (see CCP §§2025.010-2025.620), other states (see CCP §2026.010), and other nations (see CCP §2027.010) are expressly incorporated into the procedure and made applicable to written depositions except as modified by CCP §2028.010:

- In both types of deposition, the deponent testifies orally and spontaneously under oath to the questions asked in the presence of a deposition officer. See CCP §§2025.320-2025.340, 2028.080. In a written deposition, the deposition officer, not counsel, propounds each question to the deponent. CCP §2028.080. Counsel for parties to the litigation are normally not present to observe the deponent's demeanor. If counsel are present, they are not allowed to orally examine or cross-examine the deponent without a court order. See CCP §2028.070(b). On moving for oral examination, see §5.180.
- For both types of deposition, the notice requirements of CCP §§2025.220-2025.230 concerning notice of oral deposition must be met, except that a written deposition notice need not include the date, time, and place for commencement of the deposition. These arrangements may be left for the deposition officer to schedule shortly before the deposition. CCP §2028.020(b). In addition, a written deposition notice must state the name or descriptive title and the address of the deposition officer. CCP §2028.020(a). On notice requirements for oral depositions, see §§5.52-5.69.
- Necessarily, the procedures for objecting to written deposition questions differ from the practice during oral depositions in which counsel are usually all present and able to interpose objections on the record. Procedures for objecting to the form of any written question, including timing requirements, are in CCP §2028.040(a)-(b), while CCP §2028.050(a)-(b) governs procedures for objecting to any question on the grounds of privilege or protected work product. See §§5.176-5.178.
- A deposition subpoena to obtain documents and things may be used concurrently with either procedure. See CCP §2020.010(a)(3).

CAUTION: Written depositions should only be use in rare circumstances. Better practice is to conduct an oral deposition unless there is no alternative.

On strategic considerations in planning oral depositions, see §§5.31-5.49.

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D. Combining Oral and Written Depositions

§5.166 1. In Same Examination

The combination of oral and written examination at a single deposition can occur when:

- Both sides so stipulate. CCP §2016.030.
- The initiating party selects one procedure, and another party obtains a court order permitting examination of the same witness by the other procedure. CCP §§2025.420(b)(6), 2028.070(a).
- A party elects to submit written questions to the deposition officer rather than appear to examine the deponent orally. CCP §2025.330(e).
- The court issues a protective order that a portion of a deposition be taken by written rather than oral examination. CCP §2025.420(b)(6).
- The court issues a protective order that a written deposition allow for oral examination, or that the deposition be conducted entirely as an oral deposition. CCP §2028.070(a)-(b). See *Winograd Bros., Inc. v Chase Bank* (SD NY 1939) 31 F Supp 91.

For further discussion of protective orders combining written and oral examination, see §5.180.

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§5.167 2. In Succession

Written and oral depositions may also be combined seriatim (in a series or in succession). For example:

- If a deponent at a written deposition fails to respond fully or sufficiently to the questions, the court may grant leave to take an oral deposition. *DBMS Consultants Ltd. v Computer Assoc. Int'l* (D Mass 1990) 131 FRD 367, 370; *U.S. v National City Bank* (SD NY 1940) 1 FRD 367, 368.
- A court may require a litigant to start with a written deposition when the deponent's apparent or claimed lack of information concerning relevant events makes an oral deposition appear unnecessary. An oral deposition can then be taken if the written deposition reveals a proper basis for requiring an oral deposition. *McGoldrick v Koch* (SD NY 1986) 110 FRD 153, 156 (deponent apparently lacked information); *Capitol Vending Co. v Baker* (D DC 1964) 36 FRD 45, 46 (deponent claimed lack of knowledge and inconvenience from oral deposition).

NOTE: A litigant should not plan to use a written deposition and oral deposition seriatim as a matter of right in the absence of court order. Arguably, the one-deposition rule applies whether that deposition is written or oral. CCP §2025.610(a). See §5.15. Both the deponent and the other parties may also object to a second deposition of the same deponent on the grounds of undue expense, inconvenience, or harassment. CCP §2025.420(b).

For further discussion of protective orders (*e.g.,* including order granting oral deposition following written one), see §§5.179-5.182.

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E. Procedures for Initiating Party

§5.168 1. Drafting Direct Questions

A set of direct questions must accompany the notice of written deposition that will be served on all parties. CCP §2028.030(a).

The deposition officer will read these questions aloud to the deponent during the deposition. CCP §2028.080. Counsel should make the questions as simple and unambiguous as possible to avoid confusion. The questions may include definitional or explanatory language to help put the question in context for the deponent.

CAUTION: Information regarding written depositions is provided for use in the rare event that counsel has takes a written deposition. Better practice, however, is to conduct an oral deposition unless there is no alternative.

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§5.169 2. Selecting Deposition Officer

The provisions specifying the persons before whom an oral deposition can be taken apply to written depositions. CCP §2028.010. See, *e.g.,* CCP §2025.320(a) (deposition officer must not be financially interested in the action and must not be a relative or employee of any party or attorney of a party). See also CCP §§2026.010(d) (depositions conducted before person in another state), 2027.010(d)-(e) (deposition conducted before person in another nation). On selecting deposition officer for oral deposition, see §5.72.

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§5.170 3. Drafting Notice

Except as modified by the section governing the written deposition method, all the procedures for taking oral depositions apply to written depositions. CCP §2028.010. On notice requirements for oral depositions, see §§5.52-5.69. The written deposition notice differs in two major ways from the oral deposition notice (CCP §2028.020):

- The notice of written deposition *must* specify the deposition officer (by name or descriptive title) *and* the officer's address; and
- The notice may, but need *not,* specify the time, date, and place of the deposition.

A party who intends to record the written deposition by audio or video in addition to the stenographic record must specify this intention in the notice. CCP §§2025.220(a)(5), 2028.010. See §§5.73-5.84. It is also good practice to identify by name the operator who will record the officer reading the written questions and the deponent answering them at the deposition so that any objections to that particular operator may be resolved before the deposition. See CCP §2025.340(b)-(f), (h).

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§5.171 4. Serving Papers

Notice and direct questions. The party initiating a written deposition must serve the notice of written deposition and the direct questions on all other parties who have appeared in the action. CCP §§2025.240(a), 2028.030.

The notice or accompanying proof of service must list all parties or attorneys on whom it is served as required by CCP §2025.240(a). Service of the notice and direct questions may be made by mail or in any manner provided in CCP §§1010-1020.

On serving notice and a complete set of questions on the deposition officer, see §5.187.

Deposition subpoena. A deposition subpoena must be personally served on a nonparty deponent. CCP §2020.020(b). See §5.69. The deposition subpoena must state whether the proceedings will be audio or video recorded. See CCP §2020.310(c).

Witness and mileage fees must be paid, at the option of the noticing party, at the time the subpoena is served or at the time the deponent attends the deposition. CCP §2020.230(a). See §§5.70-5.71.

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§5.172 5. When to Serve on Deponent and Parties

A subpoena to compel a nonparty to attend a written deposition cannot be served until the deposition officer has received a copy of all questions exchanged by the parties as required by CCP §2028.080 and then has determined the date, time, and place of the deposition. See CCP §§2025.220-2025.230, 2028.010-2028.020. At that time, the initiating party should serve the deposition subpoena on the deponent by personal service, and copies on all parties who had notice of the written deposition by mail or other convenient method. CCP §2020.020(b). See §5.68-5.69.

The deposition subpoena should be served on the deponent sufficiently before the deposition to provide a reasonable opportunity to locate any documents to be produced and a reasonable time to travel to the place of the deposition. CCP §2020.220(a).

NOTE: The noticing party may forward a copy of the direct questions to the deponent for study before the deposition. See CCP §2028.060(a).

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§5.173 6. Production of Documents

The initiating party must specify in the notice any materials to be produced at the deposition. See CCP §2025.220(a)(4). If the deponent is a nonparty, the initiating party must designate in the deposition subpoena the documents and things to be produced. See CCP §2020.510(a). On compelling production of documents at oral depositions, see §§5.54 (party deponents), 5.55 (nonparty deponents).

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F. Procedures for Responding Party

1. Preparing Cross-Questions

§5.174 a. Preliminary Considerations

If the matters on which the deponent is to be examined are complicated or crucial to the responding party's case, counsel should consider a protective order allowing oral examination. See CCP §§2025.420(b)(8), 2028.070(a). See also §5.180. For federal decisions regarding the rule on which CCP §§2028.010-2028.080 is based, see, *e.g.*, *Fall Corp. v Yount-Lee Oil Co.* (ED Tex 1938) 24 F Supp 765 (impossible to frame cross-questions on complicated kinship ties regarding heirship; court ruled that oral deposition be taken).

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§5.175 b. Time Requirements; Service

A party served with direct questions must serve any cross-questions within 30 days plus statutory time for mailing. CCP §§2028.030(b), 2016.050 (CCP §1013 applies to discovery). On extensions for mailing, see §2.22. Absent a stipulation of the parties (see CCP §2016.030) or a court order extending the time (see CCP §2028.030(e)), a party served with direct questions who fails to submit cross-questions within the statutory 30-day period under CCP §§2028.040(a) and 2028.050(a) waives the right to cross-examine the deponent during the deposition. See, *e.g.*, *Higgins v Shenango Pottery Co.* (WD Pa 1952) 12 FRD 510, 513, rev'd on other grounds (3d Cir 1958) 256 F2d 504.

The party preparing cross-questions must serve them on all other parties entitled to notice of the deposition. CCP §2028.030(b).

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§5.176 2. Objecting to Questions

A party served with written deposition questions must serve any objections within 15 days after service of the questions. CCP §§2028.040-2028.050. The burden of obtaining a court ruling on the objection is allocated differently, depending on the nature of the objection:

- The objecting party has the burden of obtaining a court ruling on the objection when the objection is to the form of the question. CCP §2028.040(b). See §5.177.
- The propounding party has the burden of obtaining a court order overruling an objection on the grounds of privilege or work product protection. CCP §2028.050(b). See §5.178.

Either type of objection must be "a specific objection" to a particular question. CCP §§2028.040(a), 2028.050(a). See *Estate of Doyle* (1932) 126 CA 446, 453, 14 P2d 909 (objections should be specific and direct the propounding party's attention to the defect at issue so that it can be corrected).

Failure to serve an objection in a timely manner waives it. CCP §§2028.040(a), 2028.050(a). See *Brown v Ball* (1932) 123 CA 758, 767, 12 P2d 28 (objection that question called for conclusion of the witness waived when not made before deposition). See also *Baranowski v National Union Fire Ins. Co.* (ND Tex 1992) 141 FRD 55, 56.

Under CCP §2025.460(c), which is expressly incorporated into the written deposition procedure, objections to (1) the competency of the deponent, or (2) the relevancy, materiality, or admissibility at trial of the testimony or the material produced are unnecessary and are not waived by failure to make them before the deposition. CCP §2028.010. See *Gitto v "Italia," Societa Anonima di Navigazione* (ED NY 1940) 31 F Supp 567 (court at pretrial motion concluded that certain questions should be resolved by trial judge); *Awani v Public Nat'l Bank* (SD NY 1952) 12 FRD 263, 265 (objection that witness was not qualified to testify was held not a basis for preventing deposition to proceed; court ruled that objection could be raised when deposition was offered in evidence and, if upheld, would prevent admission).

CAUTION: Choosing to make objections does not obviate the requirement to serve written questions within the 30-day statutory period. See §5.175.

Objecting counsel should:

- Serve cross-questions during the required period if the basis for the objection does not cause difficulty in framing the cross-questions (CCP §2028.030(c)-(d));
- Enter into a written stipulation with other counsel to extend the time for service of any cross-questions until a certain number of days after the court rules on the motion (CCP §2016.030); or
- Seek a court-ordered extension of the period for exchange of written questions (see CCP §2028.030(e); see example of ex parte application in §5.219).

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3. Motion to Sustain or Overrule Objections

§5.177 a. Objection to Form

The manner of making objections and obtaining a ruling on them requires special treatment when the deposition is being taken by written questions. A party objecting to the form of a question (having served the specific objections within 15 days after service of the particular question) must then promptly move the court to sustain the objection. CCP §2028.040(a)-(b).

JUDGE'S PERSPECTIVE: The statute is somewhat ambiguous in that, although mandating the objecting party to make a prompt motion to sustain an objection to the form of any question, CCP §2028.040(b) also provides that if the objection has not been sustained the question will be asked "subject to the objection as to its form." See also CCP §2028.070(c) (providing for protective order sustaining objections under CCP §§2028.040, 2028.050).

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§5.178 b. Objection Based on Privilege or Work Product Protection

A party who objects to any question on the ground that it calls for privileged information or is protected work product under CCP §§2018.010-2018.030 need not make a motion but need only serve a specific objection to that question on all parties within the 15-day period after service of the objectionable question. CCP §2028.050(a).

The party propounding the question may then move for an order overruling the objection. CCP §2025.050(b). See CCP §2028.070(c).

The deposition officer cannot propound any question to which written objection on these grounds has been served unless the court has overruled that objection. CCP §2028.050(b).

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G. Obtaining Protective Order

§5.179 1. Procedures

In addition to sustaining or overruling objections under CCP §§2028.040 and 2028.050 (see CCP §2028.070(c)), the court, for good cause shown, may make any appropriate protective order, including those listed in CCP §2025.420. CCP §2028.070.

Under CCP §2028.070, the court also may order that:

- The deponent's testimony be taken by oral rather than written deposition if the written deposition is insufficient (*DBMS Consultants Ltd. v Computer Assoc. Int'l* (D Mass 1990) 131 FRD 367, 370).
- One or more of the parties attend the written deposition in person or by attorney and propound oral questions to the deponent. See §5.166.
- The deposition be taken before an officer other than the one named or described in the notice. See §5.169.

Any party or the deponent may move the court for a protective order. CCP §§2025.420(a), 2028.070(c).

PRACTICE TIP: When making the motion for a protective order, counsel should consider also requesting an order staying the taking of the deposition until the motion has been heard and, if appropriate, extending the moving party's time to make any objections to written questions and to serve the next set of questions. See CCP §§2028.030-2028.050.

In ruling on the motion for protective order, the court may consider the complete history of the litigation as a whole, and not merely the isolated issue presented by the single deposition. See, *e.g.*, *Alliance to End Repression v Rochford* (ND Ill 1976) 75 FRD 428, 429, in which the court, in denying a defense motion to convert an oral deposition to a written one, considered discovery objections made earlier in the litigation that showed the defendants' intent "to resist any significant disclosure at every step."

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§5.180 2. Motion for Oral Examination

On a showing of good cause, CCP §2028.070(b) expressly authorizes a motion for an order allowing attendance and oral examination by one or more parties. The court need not order that the entire deposition be taken on oral examination, but it may permit both the oral and written examinations to be combined in the same deposition. In *Beverly Hills Nat'l Bank & Trust Co. v Superior Court* (1961) 195 CA2d 861, 867, 16 CR 236, the court ruled that, although the party initiating the deposition proceedings has the choice of designating that the deposition be taken orally or on written questions, the trial court may, after hearing, direct whether the questions will be oral or written. In exercising such discretion, the court may consider elements of convenience and expense. *Hoge v Lava Cap Gold Mining Corp.* (1942) 55 CA2d 176, 187, 130 P2d 470; *New England Terminal Co. v Graver Tank & Mfg. Co.* (D RI 1940) 1 FRD 411, 413. See §5.181.

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§5.181 a. Conditioned on Payment of Costs

Counsel should consider whether a successful motion for oral cross-examination will produce the intended results. CCP §2028.070(a). The court has the discretion to grant such a motion on terms and conditions that it considers just. CCP §2025.420(b). It may determine, for example, that justice requires oral examination to be permitted only if the additional costs of an oral deposition are paid by the moving party.

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§5.182 b. Conditioned on Results of Written Deposition

The court may make the denial of a party's motion for oral cross-examination conditional on the results of the written deposition. See *Winbourne v Eastern Air Lines, Inc.* (2d Cir 1980) 632 F2d 219, 226; *DBMS Consultants Ltd. v Computer Assoc. Int'l* (D Mass 1990) 131 FRD 367, 370; *U.S. v National City Bank* (SD NY 1940) 1 FRD 367 (if answers to written questions were evasive, incomplete, unresponsive, or incompetent as evidence, renewed motion for leave to examine orally would be granted).

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H. Noticing Party's Response to Cross-Questions

§5.183 1. Serving Redirect Questions

Service of redirect questions must be made within 15 days after service of cross-questions on all parties entitled to notice of the deposition. CCP §2028.030(d).

When the noticing party is served at different times with cross-questions from different parties, the 15-day period for serving redirect questions is calculated separately for each set. CCP §2028.030(d). Absent a stipulation or court order to the contrary, the noticing party may not wait for receipt of all cross questions to draft and serve redirect questions. CCP §§2016.030, 2028.030(e).

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§5.184 2. Objecting to Cross-Questions

The noticing party must serve any available objections to the cross-questions within 15 days after the cross-questions have been served. CCP §§2028.040(a), 2028.050(a).

CAUTION: Absent a stipulation or court order, the noticing party's objections do not extend the 15-day period for serving redirect questions. CCP §§2016.030, 2028.030. On objections to direct questions, see §5.176.

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3. Other Options

§5.185 a. Moving for Protective Order

In response to cross-questions, the noticing party may move promptly for a protective order. CCP §§2025.420(a), 2028.070(c). See §5.179.

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§5.186 b. Dispensing With Further Questions or Objections

After receiving cross-questions, counsel may simply make final arrangements for the deposition, serving the notice and complete set of questions exchanged by the parties on the deposition officer. CCP §§2028.030, 2028.080. See §5.187.

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I. Procedures for Taking Written Deposition

1. Responsibilities of Noticing Party

§5.187 a. Serving Notice and Questions on Deposition Officer

Following the exchange of all questions under CCP §2028.030 and the disposition of all objections and motions, the noticing party must deliver a copy of the notice and a complete set of all questions to be propounded to the designated deposition officer. CCP §2028.080.

NOTE: The noticing party should include any question to which objection was made regarding form, unless the court has sustained that objection, because the question is asked subject to that objection. CCP §2028.040(b). See §5.177. The noticing party should ensure that any question to which a party made written objection on the grounds of privilege or protected work product is not included, unless the court overruled that objection. CCP §2028.050(b). See §5.178.

Failure to deliver all the questions (including all cross, redirect, and recross questions) may result in sanctions, including suppression of the deposition at the objection of the party whose questions were omitted. *Lipscomb v Groves* (3d Cir 1951) 187 F2d 40, 44 (error to allow deposition into evidence when recross questions not delivered to deposition officer). See also *Durandy v Fairmont Roosevelt Hotel, Inc.* (ED La 1981) 523 F Supp 1382, 1383 n1 (plaintiff not allowed to introduce documents as depositions because of failure to comply with federal rules of civil procedure regulating depositions by written questions).

PRACTICE TIP: Counsel should provide all parties with copies of any correspondence containing particular directions to the deposition officer concerning the deposition. Other counsel who have received copies of an opponent's correspondence with the deposition officer, arranging certain matters or resolving details concerning the proceedings, are less likely to question the neutrality of the deposition officer.

On selecting the deposition officer, see §5.169.

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§5.188 b. Serving Direct Questions on Deponent

The party initiating the written deposition may forward the deponent a copy of the direct questions for study before the deposition. CCP §2028.060(a). Such predeposition review may be especially helpful if the questions concern factual details requiring research or investigation. Absent a stipulation of all parties (see CCP §2016.030), a party or attorney must not permit the deponent to preview the substance of any cross, redirect, or recross questions. CCP §2028.060(b).

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§5.189 2. Role of Parties at Deposition

Unless the court orders otherwise, none of the parties to the action or their attorneys may attend the written deposition of a nonparty deponent. See CCP §2028.070(b).

After any predeposition objections and motions have been resolved and all written questions have been exchanged and delivered to the deposition officer, the active participation of the parties ceases until the transcript is returned. CCP §§2028.030, 2028.080.

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§5.190 3. Rights of Deponent

A deponent has the right to be represented by counsel at the deposition. Counsel for the deponent, if present, may advise the deponent of his or her rights and assert all the same objections and motions available to a deponent at an oral deposition that are waived if not timely made during the deposition. CCP §§2025.460, 2028.010. See, *e.g.*, *Gatoil, Inc. v Forest Hill State Bank* (D Md 1985) 104 FRD 580, 581 (assertion of Fifth Amendment to the United States Constitution).

If the deposition officer has been designated by descriptive title only in the deposition notice, the deponent or deponent's counsel may object also to the officer's qualifications when his or her identity first becomes known at the time of the deposition. CCP §§2025.320(e), 2028.010, 2028.070(d).

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§5.191 4. Duties of Deposition Officer

After receipt of the notice and all questions served under CCP §2028.030, the deposition officer must proceed promptly to take and record the testimony of the deponent in response to the questions. CCP §2028.080.

The deposition officer must put the deponent under oath, propound each written question to the deponent, and record the deponent's testimony personally or through someone acting under the officer's direction and in the officer's presence. See CCP §§2025.330-2025.340, 2028.010.

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§5.192 5. Recording Observations

Opinion is divided on whether the deposition officer should record any unusual events during the deposition or whether the deposition officer is competent to place information on the record concerning the deponent's conduct during the deposition. No California cases exist on this issue, and federal authority is split. Compare, *e.g.*, *Gill v Stolow* (SD NY 1954) 16 FRD 9, 10 (court struck statements of deposition officer that deponent had frequently referred during deposition to paper containing dates and facts) with *Hamdi & Ibrahim Mango Co. v Fire Ass'n* (SD NY 1957) 20 FRD 181, 184 (court ruled that deposition officer had properly noted deponent's reference to transcript of prior testimony in related proceeding to refresh his recollection during written deposition).

Despite the potential value to the parties in having a record of any unusual events taking place during the deposition reflecting on the deponent's credibility, the deposition officer's recorded observations are not subject to cross-examination. See also CCP §2025.320(c) (deposition officer may not provide any notations or comments "regarding the demeanor of any witness, attorney, or party present at the deposition").

PRACTICE TIP: Given the unsettled state of the law, counsel would be wise to discuss this subject before the written deposition in an attempt to reach a stipulation on the point. CCP §2016.030. Such a stipulation would serve both to direct the conduct of the deposition officer and to guide the court's resolution of the admissibility of any observations made by the deposition officer. It may be sufficient for counsel's purposes, however, simply to video record the written deposition.

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§5.193 6. Video Recording Depositions

Unless the parties stipulate otherwise (see CCP §2016.030), in addition to a stenographic recording, deposition testimony may be audio or video recorded if the deposition notice so stated or any other party promptly served at least 3 days before the deposition a written notice of its intention to record the proceeding. CCP §§2025.330(c), 2028.010. The procedures required for an operator to record the deposition and the rules for custody and use of the recording are set forth in detail in CCP §2025.340(a)-(m). See §§5.75-5.84.

CAUTION: Videotaping a deposition on written questions is not a substitute for an oral deposition. Counsel should always conduct an oral deposition unless there is no alternative.

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§5.194 7. Handling the Transcript

The deposition officer's responsibilities concerning the transcript of the written deposition are the same as for oral depositions. See CCP §§2025.510-2025.570, 2028.010. See also §§6.126-6.140.

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J. Postdeposition Procedures

§5.195 1. Compelling Deponent to Answer or Produce

After the transcript of the deponent's responses to the written questions is available, counsel should review it to ascertain whether all questions were answered. If the deponent failed to answer any question or produce any document or thing specified in the deposition subpoena or notice, counsel has 60 days after completion of the record to move the court for an order compelling the answer or production. CCP §§2025.480(b), 2028.070(c).

The procedures for compelling answers or production of documents, if the deponent refuses to answer or produce at a written deposition, are identical to the procedures for moving to compel the disclosure of further information at an oral deposition. CCP §§2025.470-2025.480, 2028.010, 2028.070(a). See §§5.87-5.97.

PRACTICE TIP: Given the cost of a motion to compel, especially in a distant jurisdiction, if responses to written questions are unsatisfactory, it may be less expensive and more productive simply to move, for good cause shown, to take the deponent's oral deposition. See CCP §§2025.610(b), 2028.010, 2028.070(a).

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§5.196 2. Sanctions Against Attorney for Permitting Deponent to Preview Questions

The section governing the written deposition procedure specifically prohibits any party or attorney from permitting the deponent to preview the form or substance of any cross, redirect, or recross questions. CCP §2028.060(b).

Because the Discovery Commission considered and made an explicit decision on this issue and California law was formerly silent on the matter, a violation of this provision would constitute misuse of the discovery process and result in sanctions under CCP §§2023.010(b) and 2023.030 (using a discovery method in a manner that does not comply with its specified procedures). On sanctions generally, see chap 15.

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§5.197 3. Motion to Suppress Deposition

A motion to suppress a written deposition may be made under the same conditions and on the same grounds as for an oral deposition. See CCP §2028.010. See also §6.130.

A written deposition can be properly suppressed at the option of an aggrieved party if the noticing party failed to transmit all the direct, cross, redirect, and recross questions to the deposition officer. CCP §2028.080; *Lipscomb v Groves* (3d Cir 1951) 187 F2d 40, 44. See *Durandy v Fairmont Roosevelt Hotel, Inc.* (ED La 1981) 523 F Supp 1382, 1383 n1.

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§5.198 K. Using Deposition at Trial

A written deposition may be used at trial in the same manner, for the same purposes, and subject to the same limitations as an oral deposition. CCP §§2025.620, 2028.010. On using deposition at trial, see §§6.136-6.139. See also California Trial Practice: Civil Procedure During Trial §§12.32-12.97 (3d ed Cal CEB 1995).

Absent special circumstances (*e.g.*, against successors in interest), a written deposition is inadmissible against parties not represented or without notice of the deposition. CCP §§2025.620, 2028.010-2028.020; *Castaline v City of Los Angeles* (1975) 47 CA3d 580, 587, 121 CR 786; *Associates Discount Corp. v Tobb Co.* (1966) 241 CA2d 541, 550, 50 CR 738.

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§5.199 L. Checklist: Procedures for Preparing Written Depositions

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Deposing Party

- Serve on all parties (see §5.171):
- Written direct questions to be propounded to deponent (CCP §2028.030(a))
- Notice of written deposition (date, time, and place may be left to future determination by deposition officer) (CCP §2028.020(b))
- State any intention to audio or video record (CCP §§2025.220(a)(5), 2028.010) (see §5.170)
- Specify any materials or category of materials deponent must produce (CCP §§2025.220(a)(4), 2028.010) (see §5.173)
- Serve on nonparty deponent deposition subpoena containing, if sought (CCP §§2020.020, 2028.010) (see §5.173):
- Specification of any documents to be produced (CCP §2020.020(b)-(c))
- Statement of intention to audio or video record (CCP §§2020.030, 2025.220(a)(5), 2028.010)
- Witness and mileage fees (or tender at time deponent attends deposition) (CCP §2020.230)

Party Served

- Serve any cross-questions, within 30 days, on all other parties (CCP §2020.030(b)) (see §§5.174-5.175)
- Serve any objections to direct questions, within 15 days, on all other parties (CCP §§2028.040(a), 2028.050(a)) (see §5.176)
- Move court to sustain objections if objections are made regarding form (CCP §2028.040(b)) (see §5.177)
- Consider moving for protective order (CCP §§2025.420(a)-(b), 2028.010, 2028.070(c)) (see §5.179)

Deposing Party

- If cross-questions are received, serve (see §§5.183-5.184):
- Any redirect questions within 15 days (CCP §2028.030(c))
- Any objections to cross-questions within 15 days (CCP §§2028.040(a), 2028.050(a))
- If objections are made to any direct question on grounds of privilege or protected work product received (CCP §2028.050(a)) (see §5.178):
- Move the court to overrule objections (CCP §2028.050(b))

Party Served

- If redirect questions are received (see §§5.176-5.179):
- Serve any recross questions within 15 days (CCP §2028.030(d))
- Serve any objections to questions within 15 days (CCP §§2028.040(a), 2028.050(a))
- Consider moving for protective order (CCP §§2025.420(a)-(b), 2028.010, 2028.070(c))

Deposing Party

- If recross questions are received (see §5.184):
- Serve any objections to recross questions within 15 days (CCP §§2028.040(a), 2028.050(a))
- If objections are received to redirect questions on grounds of privilege or protected work product (CCP §2028.050(a)):

- Move court to overrule these objections (CCP §2028.050(b)) (see §5.178)
- Serve on deposition officer (CCP §§2028.050(b), 2028.080) (see §§5.187-5.188):
- Copy of deposition notice served on parties (CCP §2028.080)
- All direct, cross, redirect, and recross questions to be propounded to deponent (CCP §2028.080)
- Forward to deponent (see §5.188):
- Copy of direct questions only (optional), but not cross, redirect, or recross questions (CCP §2028.060)

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XV. DEPOSITIONS IN FEDERAL COURT CASES

§5.200 A. Relationship of Fed R Civ P 30 to CCP §§2025.010-2025.620

Of particular importance to depositions are Fed R Civ P 26 and 30, the former defining the scope of permissible discovery and the latter specifically detailing deposition procedures. Although the discovery requirements imposed by the federal rules, particularly those pertaining to depositions, are similar to those under CCP §§2017.010 and 2025.010-2025.620 and the California Rules of Court, there are significant differences. The sections that follow highlight some significant comparisons between state and federal requirements.

NOTE: Discovery in the federal courts is governed by the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and (when applicable) local federal rules. Familiarity with these rules is essential to competent representation. Counsel practicing only occasionally in federal courts should check the current Federal Rules of Civil Procedure and the applicable local rules before commencing, conducting, or responding to discovery. For detailed exposition of federal discovery practice, see 6, 7 Moore, Moore's Federal Practice (3d ed 1997); 8, 8A Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d (2d ed 1994).

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§5.201 1. Rule 26 Discovery Conference

In addition to imposing a number of disclosure requirements on the parties, the federal rules require the parties to engage in a discovery conference to discuss (among other things) the scope and manner of discovery, as well as whether modification of existing rules will be needed. Fed R Civ P 26(f). Generally, absent a court order or written stipulation by the parties, no depositions may be taken prior to the Rule 26 conference. Fed R Civ P 26(d)(1).

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§5.202 2. Number of Depositions

Absent leave of court or a written stipulation by the parties, the plaintiffs are limited to 10 oral depositions, as are defendants and third party defendants. Fed R Civ P 30(a)(2)(A)(i), 31(a)(2)(A)(i).

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§5.203 3. Duration of Deposition

Absent a court order or stipulation by the parties, the duration of each oral deposition is limited to 1 day, consisting of 7 hours of testimony. Fed R Civ P 30(d)(1). However, the court must allow additional time if needed for a fair examination of the deponent. Fed R Civ P 30(d)(1). If conduct of the deponent or other participant has impeded a fair examination, sanctions (including costs and attorney fees) may be awarded against the offender. Fed R Civ P 30(b)(2).

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§5.204 4. Subsequent Depositions

As in state court (CCP §2025.610), the subsequent deposition of a natural person cannot be taken absent a court order or a written stipulation by the parties. Fed R Civ P 30(a)(2)(A), 31(a)(2)(A).

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§5.205 5. Method of Recording Depositions

A deposition may be recorded in a federal court action by audio tape, videotape or stenographic means, in much the same manner as in state court, with one notable exception. There is no federal requirement that audio or video depositions also be transcribed stenographically, although a party may arrange to have a simultaneous stenographic transcription made at its own expense. See Fed R Civ P 30(b)(3). Counsel should bear in mind that if a nonstenographically recorded deposition is to be used at trial, a transcript of the portions to be introduced must be provided. Fed R Civ P 26(a)(3)(A)(ii).

NOTE: In contrast, CCP §2025.330(c) requires that if a video or audio recording of the deposition is made, it must be *in addition to* the stenographic recording. See also CCP §2025.220(a)(5). See §5.75.

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§5.206 6. Telephonic Depositions

Federal Rule of Civil Procedure 30(b)(4) specifically permits telephonic depositions on stipulation of the parties or by order of court. Generally, leave should be granted unless the objecting party is likely to be prejudiced or the method to be employed is of doubtful accuracy. *Advani Enters., Inc. v Underwriters at Lloyds* (SD NY, Oct. 19, 2000, No. 95-CIV-4864) 2000 US Dist Lexis 15421.

A deposition by telephone is deemed to occur in the district and at the place where the deponent is to answer questions. Fed R Civ P 30(b)(4). The court reporter should be in the presence of the witness, not the attorneys.

On telephonic or video-conferencing depositions in state court, see §5.30.

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§5.207 7. Protective Orders and Motions to Compel

In a federal case, both the court in which the action is pending and the court in whose district the deposition is taken have power to limit questioning or compel testimony of a deponent. *Hulvat v Royal Indem. Co*. (ED Wis 1967) 277 F Supp 769, 771. See Fed R Civ P 30(d). In contrast, the California trial court in which the action is pending has exclusive jurisdiction to compel and limit examination of both parties and nonparties throughout the state. See CCP §2016.020(b) (in Civil Discovery Act, "court" means trial court in which action is pending unless otherwise specified).

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§5.208 8. Depositions Outside California

Whether discovery takes place in another state or in a foreign nation, depositions of parties, under both the California Civil Discovery Act and the Federal Rules of Civil Procedure, are governed by the rules of the court in which the action is pending. CCP §§2026.010(a), 2027.010(a). See *Graco, Inc. v Kremlin, Inc*. (ND Ill 1984) 101 FRD 503, 519. However, in both state and federal court, the procedures of the foreign jurisdiction are used to compel attendance, testimony, and production at depositions of nonparties outside California. CCP §§2026.010(c), 2027.010(c); Fed R Civ P 28(b).

There is somewhat greater uniformity with respect to discovery in federal actions because the Federal Rules of Civil Procedure are the same throughout the United States, whereas civil discovery rules vary from state to state. However, depositions outside the United States in both federal and California actions are governed largely by the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention"), although the court in which the action is pending will retain certain enforcement and sanctioning powers. See chap 13.

On the federal rules for out-of-state depositions within the United States, see Fed R Civ P 28(a); chap 12. On the federal rule for depositions in foreign countries, see Fed R Civ P 28(b); chap 13.

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§5.209 B. Procedures for Depositions in Federal Court

The rules governing depositions in federal court cases are addressed in Fed R Civ P 26-32. See also Fed R Civ P 37 (failure to cooperate in discovery), 45 (subpoena of witnesses). Differences between the federal rules and discovery procedures that apply to California state court actions are highlighted in §§5.200-5.208.

JUDGE'S PERSPECTIVE: Before planning discovery in federal court actions, counsel should review Fed R Civ P 26(a)(1), outlining information about the case that a party is required to disclose "without awaiting a discovery request." The scope of required pretrial disclosure covers only information that the disclosing party may use to support its claims or defenses (excluding information that will be used solely for impeachment purposes from the initial disclosure requirement). Fed R Civ P 26(a)(1)(A)(i).

For a detailed discussion of federal deposition procedures, see 1 Moore, Moore's Federal Practice, Rules 26-37, §§26.01-37A.34 (3d ed 1997); 8, 8A Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d §§2001-2300 (2d ed 1994).

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§5.210 1. Notice of Deposition (Fed R Civ P 30)

Unlike the 10-day minimum notice required by CCP §2025.270(a), the federal rules require only that a party give every other party "reasonable written notice" of a deposition. Fed R Civ P 30(b)(1).

The federal rules do not impose a specified waiting period after commencement of the action before initiation of depositions, although the parties cannot take depositions until after the Rule 26 conference. See §5.201. In California state court actions, defendants have no waiting period, but a plaintiff must obtain a court order to serve a deposition notice within 20 days of service of summons or a defendant's appearance. See CCP §2025.210.

Under Fed R Civ P 26(f)(2), however, the parties must confer (but not necessarily meet) "to consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case … and develop a proposed discovery plan." Parties in a federal action cannot seek discovery from any source until the confer requirement is satisfied, unless the rules permit or order otherwise, or the parties agree, or the action is of the type exempted from initial disclosure under Fed R Civ P 26(a)(1)(B), *e.g.,* an action to enforce an arbitration award. Fed R Civ P 26(a)(1)(B)(ix), (d)(1).

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§5.211 2. When Leave of Court Required

Absent a written stipulation of the parties, leave of court is required before taking a deposition in federal court, when (Fed R Civ P 30(a)(2)(A), 31(a)(2)(A)):

- The proposed deposition would result in more than 10 depositions being taken by the parties; or
- The deponent has already been deposed.

If the deponent is confined in prison, a stipulation is not sufficient, *i.e.,* leave of court is required before taking a prisoner's deposition. Fed R Civ P 30(a)(2)(B), 31(a)(2)(B).

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§5.212 3. Deposition Location

The specific distance limitations on the location of depositions in state court actions do not exist in federal court actions. See, *e.g.*, CCP §2025.250. However, the federal courts have discretion to control the location, and guidelines are provided through case law. Generally, a plaintiff will be required to travel to the district in which the action is pending. *U.S. v Rock Springs Vista Dev.* (D Nev 1999) 185 FRD 603, 604. Defendants are usually entitled to be deposed where they work or live. *Rapoca Energy Co. v AMCI Export Corp.* (WD Va 2001) 199 FRD 191, 193. The deposition of an entity typically occurs at its principal place of business. *Custom Form Mfg., Inc. v Omron Corp.* (ND Ind 2000) 196 FRD 333, 336. For further discussion, see 8A Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d §2112 (2d ed 1994).

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§5.213 4. Production of Documents at Depositions (Fed R Civ P 34)

A deposition notice served on a party may be accompanied by a request under Fed R Civ P 34 for the production of documents and tangible things at the taking of the deposition. If so, the request must comply with Rule 34. Fed R Civ P 30(b)(2).

A party served with a request under Rule 34 must serve a written response within 30 days thereafter. Fed R Civ P 34(b)(2)(A). A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. Fed R Civ P 34(b)(2)(A). On Fed R Civ P 34 requests for electronically stored information, see §8.104.

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§5.214 5. Subpoena and Subpoena Duces Tecum Procedures (Fed R Civ P 45)

A nonparty witness's attendance at a deposition may be compelled by subpoena under Fed R Civ P 45. Fed R Civ P 30(a)(1). If a subpoena duces tecum is to be served on the person to be examined, Fed R Civ P 30(b)(2) provides that the "materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment."

The federal procedures for obtaining a subpoena and subpoena duces tecum differ in several material respects from the provisions of CCP §§1985-1997 and 2025.280. See Fed R Civ P 45.

A party receiving a subpoena duces tecum may serve written objections to the inspection or copying of any or all of the designated materials within 14 days after service. Fed R Civ P 45(c)(2)(B). After these objections have been made, the burden is on the party serving the subpoena to file a motion to require the deponent to produce the requested items. Fed R Civ P 45(c)(2)(B).

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§5.215 6. Taking Depositions on Written Questions

Federal Rule of Civil Procedure 31, concerning taking depositions on written questions, is substantially similar to CCP §§2028.010-2028.080. For discussion of CCP §§2028.010-2028.080, see §§5.161-5.199. Unlike the federal rule, however, the California statute explicitly states that the deponent may preview only direct written questions and that no party or attorney may permit the deponent to access the form or substance of cross, redirect, or recross questions. CCP §2028.060. The federal rule is silent on this issue, and there is a split of authority on the matter. See §5.192.

For further discussion of written depositions under the federal rules, see generally 8A Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d §§2131-2133 (2d ed 1994); 4A Moore, Moore's Federal Practice ¶¶31.01-31.07 (3d ed 1997).

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XVI. FORMS

§5.216 A. Form: Notice of Deposition

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**NOTICE OF DEPOSITION**
vs	)	_ _[*AND PRODUCTION OF DOCUMENTS OR THINGS*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**(CCP §§2025.220-2025.230)**

PLEASE TAKE NOTICE that the deposition of _ _[*name*]_ _ will be taken on _ _[*date*]_ _, at _ _[*time*]_ _, at _ _[*address*]_ _.

[*Option 1: Deponent is nonparty*]

The deponent is not a party to this action. _ _[*If known, state deponent's address and telephone number; if deponent's name is unknown, give description sufficient to identify person or class to which person belongs.*]_ _ **A copy of the deposition** _ _[*subpoena/subpoena duces tecum*]_ _ **is attached to this notice.**

[*Option 2: Deponent is corporation or other organization*]

The deponent is not a natural person. The deponent is required to designate one or more individuals to testify on its behalf concerning the following matters which will be covered during the examination:
_ _[*Describe with reasonable particularity to obligate organization to designate and produce employees "most qualified" to testify on its behalf on those matters.*]_ _

[*Add if party-deponent must produce documents or other tangible things*]

The deponent must bring to the deposition the following documents: _ _[*Describe with reasonable particularity.*]_ _

[*Add if deposition will be taken by telephone, video conference, or other remote electronic means*]

This deposition will be taken by _ _[*e.g., telephone*]_ _**.**

[*Add if deposition will include instant visual display of testimony*]

This deposition will be conducted using instant visual display of testimony.

[*Add if deposition to be audio or video recorded*]

This deposition will be _ _[*audio/video*]_ _ recorded in addition to stenographic recording.

[*Add if deponent is a treating or consulting physician or other expert, and noticing party intends to reserve right to use video recorded deposition at trial*]

_ _[*Name of deposing party*]_ _ intends to reserve the right under Code of Civil Procedure §2025.620(d) to use the video recording of this deposition at trial.

[*Continue*]

The attached proof of service lists all attorneys of record and any unrepresented parties on whom this notice of deposition is being served.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (retain with proof of service for filing with court if future motion is made); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This form contains information required by statute. See §5.57. If the parties alter the requirements by written stipulation, the notice should be altered accordingly. See §5.72.

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Source: Civil Litigation/California Civil Discovery Practice/5 Deposition Procedures/§5.217 B. Form: Deposition Subpoena for Personal Appearance (Judicial Council Form SUBP-015)

§5.217 B. Form: Deposition Subpoena for Personal Appearance (Judicial Council Form SUBP-015)



SUBP-015

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/ PETITIONER: DEFENDANT/ RESPONDENT:	
DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE	CASE NUMBER:

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of deponent, if known)*:

1. **YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:**

Date:	Time:	Address:

a. ☐ As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 2. (Code Civ. Proc., § 2025.230.)

b. ☐ This deposition will be recorded stenographically ☐ through the instant visual display of testimony and by ☐ audiotape ☐ videotape.

c. ☐ This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).

2. ☐ If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are as follows:

3. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF $500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PERSON ISSUING SUBPOENA)

(TITLE)

(Proof of service on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-015 [Rev. January 1, 2009]

DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE

CEB

Code of Civil Procedure §§ 2020.310, 2025.220, 2025.230, 2025.250, 2025.620
Government Code, § 68097.1
www.courtinfo.ca.gov

Print

SUBP-015

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE

1. I served this *Deposition Subpoena for Personal Appearance* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:

   b. Address where served:

   c. Date of delivery:

   d. Time of delivery:

   e. Witness fees and mileage both ways *(check one)*:
      (1) ☐ were paid. Amount: . . . . . $ _____
      (2) ☐ were not paid.
      (3) ☐ were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was *(specify)*: . . . . . $ _____

   f. Fee for service: . . . . . $ _____

2. I received this subpoena for service on *(date)*:

3. Person serving:
   a. ☐ Not a registered California process server
   b. ☐ California sheriff or marshal
   c. ☐ Registered California process server
   d. ☐ Employee or independent contractor of a registered California process server
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b)
   f. ☐ Registered professional photocopier
   g. ☐ Exempt from registration under Business and Professions Code section 22451
   h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

Copies: Original (retain with proof of service for filing with court if future motion is made); copies for service (one for

subpoenaed deponent and for each attorney of record and unrepresented party, attached to the deposition notice served on parties); office copies.

Comment: If court has given approval for deposition of nonparty deponent to be taken by telephone, video conference, or other remote electronic means, serve separate notice on deponent in addition to the subpoena (see §§5.30, 5.57), or so state on the face of this Judicial Council form of subpoena. On depositions taken by telephone and other electronic means, see §5.30.

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Source: Civil Litigation/California Civil Discovery Practice/5 Deposition Procedures/§5.218 C. Form: Deposition Subpoena for Personal Appearance and Production of Documents and Things (Judicial Council Form SUBP-020)

§5.218 C. Form: Deposition Subpoena for Personal Appearance and Production of Documents and Things (Judicial Council Form SUBP-020)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
DEPOSITION SUBPOENA **FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS**	CASE NUMBER:

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of deponent, if known)*:

1. **YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:**

Date:	Time:	Address:

a. ☐ As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025.230.)
b. ☐ You are ordered to produce the documents and things described in item 3.
c. ☐ This deponent will be recorded stenographically ☐ through the instant visual display of testimony and by ☐ audiotape ☐ videotape.
d. ☐ This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).

2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.

3. The documents and things to be produced and any testing or sampling being sought are described as follows:

☐ Continued on Attachment 3.

4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:

☐ Continued on Attachment 4.

5. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, *AND* CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**

6. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF $500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: ▶ _____

(SIGNATURE OF PERSON ISSUING SUBPOENA)

(TYPE OR PRINT NAME) (Proof of service on reverse) (TITLE)

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-020 [Rev. January 1, 2009]

DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS

CEB
Code of Civil Procedure §§ 2020.510, 2025.220, 2025.230, 2025.250, 2025.620; Government Code, § 68097.1
www.courtinfo.ca.gov

Print

SUBP-020

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS

1. I served this *Deposition Subpoena for Personal Appearance and Production of Documents and Things* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:
   b. Address where served:
   c. Date of delivery:
   d. Time of delivery:
   e. Witness fees and mileage both ways *(check one)*:
      (1) ☐ were paid. Amount: . . . . . $ _____
      (2) ☐ were not paid.
      (3) ☐ were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was *(specify)*: . . . . . $ _____
   f. Fee for service: . . . . . $ _____
2. I received this subpoena for service on *(date)*:
3. Person serving:
   a. ☐ Not a registered California process server
   b. ☐ California sheriff or marshal
   c. ☐ Registered California process server
   d. ☐ Employee or independent contractor of a registered California process server
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b)
   f. ☐ Registered professional photocopier
   g. ☐ Exempt from registration under Business and Professions Code section 22451
   h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

Copies: Original (retain with proof of service for filing with court if future motion is made); copies for service (one for

the subpoenaed deponent and for each attorney of record and unrepresented party, attached to the deposition notice served on parties); office copies.

Comment: If court has given approval for deposition of nonparty to be taken by telephone, video conference, or other remote electronic means, serve separate notice on deponent in addition to the subpoena (see §§5.30, 5.57), or so state on the face of this Judicial Council subpoena form. On taking deposition by telephone or other electronic means, see §5.30.

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Source: Civil Litigation/California Civil Discovery Practice/5 Deposition Procedures/§5.219 D. Form: Ex Parte Application for Order Shortening Time for Serving Notice of Deposition

§5.219 D. Form: Ex Parte Application for Order Shortening Time for Serving Notice of Deposition

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number, e-mail address*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR SERVING NOTICE OF DEPOSITION; SUPPORTING DECLARATION OF** _ _[*NAME*]_ _; _ _[*NAME'S*]_ _ **DECLARATION OF NOTICE OF EX PARTE APPEARANCE; PROPOSED ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _
	Action filed: _ _[*date*]_ _
	Trial date: _ _[*if set*]_ _

1. The _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, applies for an order shortening the time for serving notice of the deposition of** _ _[*name of deponent*]_ _ **on oral examination on** _ _[*date*]_ _**, commencing at** _ _[*time*]_ _**, at** _ _[*address*]_ _**, to at least** _ _[*days/hours*]_ _ **before the deposition will take place.**

2. As required by Cal Rules of Ct 3.1202(c), the attached declaration of _ _[*name*]_ _ **in support of this ex parte application sets forth the facts establishing good cause under Code of Civil Procedure §2025.210(b) for serving notice of deposition on defendant earlier than 20 days after the complaint was served. As set forth fully in the attached declaration,** _ _[*e.g., deponent is leaving the jurisdiction of the court before normal service of the deposition notice can be completed/deponent's testimony is needed at an imminent pretrial hearing*]_ _**.** _ _[*Attach supporting declaration setting out the facts showing good cause for granting plaintiff's ex parte application for order shortening the time for serving notice of deposition.*]_ _

[*Add, as required by Cal Rules of Ct 3.1202(b), if previous ex parte application of same character or for same relief has been made and court refused in whole or in part*]

3. Although made on a different state of facts, the _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, presented an ex parte application in this action on** _ _[*date*]_ _**, which the court** _ _[*e.g., refused in part*]_ _**, as fully described in the attached declaration of** _ _[*name*]_ _**in support of this application.**

[*Option 1: Other parties informed by 10:00 a.m. on court day before ex parte appearance*]

4. As required by Cal Rules of Ct 3.1204, the attached declaration of notice of _ _[*name*]_ _ **shows that**

notice of the date and time and other specifics of this application was given on _ _[*date*]_ _**, at** _ _[*time*]_ _**, to** _ _[*e.g., opposing attorney's name*]_ _**, who** _ _[*is/is not*]_ _ **expected to appear at the presentation of this application.** _ _[*Attach declaration of notice setting out the notice given, including date, time, manner, names of parties informed, the relief sought, any response, and whether you expect opposition to the application for this ex parte order.*]_ _

[*Option 2: Other parties informed after 10:00 a.m. on court day before ex parte appearance*]

4. Because exceptional circumstances justify a shorter time for notice than required by Cal Rules of Ct 3.1203(a), the attached declaration of notice of _ _[*name*]_ _ **shows that notice of the date and time and other specifics of this application was given on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, to** _ _[*e.g., opposing attorney's name*]_ _**, who** _ _[*is/is not*]_ _ **expected to appear at the presentation of this application.** _ _[*Attach declaration of notice showing the exceptional circumstances that exist for not informing parties by 10:00 a.m. on the court day before the ex parte appearance as well as the items listed in the declaration of notice described in Option 1.*]_ _

[*Option 3: Good faith attempt to inform other parties*]

4. Good faith attempts have been made to inform _ _[*e.g., opposing attorney's name*]_ _ **of this application, but have not succeeded, as shown by the facts described in the attached declaration of notice of** _ _[*name*]_ _**.** _ _[*Attach declaration of notice describing efforts made to inform other parties or their counsel, and why they could not be notified.*]_ _

[*Option 4: No attempt to inform other parties*]

4. For the reasons fully described in the attached declaration of _ _[*name*]_ _**showing why notice should not be required,** _ _[*e.g., opposing attorney's name*]_ _ **has not been informed of this ex parte application.** _ _[*Attach declaration stating the reasons why giving other parties or their attorneys notice of the ex parte appearance should not be required.*]_ _

[*Continue*]

5. The attached _ _[*declaration of notice/declaration showing why notice should not be required*]_ _ **states the name, address, and telephone number of all attorneys known to the applicant** _ _[*name*]_ _ **or known to the applicant's attorney to represent parties in this action, and, if no such attorney is known, includes the name, address, and telephone number of such party, if known, as required by Cal Rules of Ct 3.1202(a).**

This application is based on the attached declaration of_ _[*name*]_ _ **in support of this ex parte application,** _ _[*name's*]_ _ _ _[*declaration of notice/declaration showing why notice should not be required*]_ _**, the supporting memorandum, and the proposed order.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney or unrepresented party who received notice of the deposition); office copies.

Comment: Attach to ex parte application: (1) declaration in support of the application making a factual showing of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte; (2) declaration of notice of ex parte appearance or declaration why notice should not be required; (3) supporting memorandum; and (4) proposed order. Cal Rules of Ct 3.1201. On ex parte application for shortening the time for service of the deposition notice, see §§15.11-15.29.

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§5.220 E. Form: Other Party's Notice of Intention to Audio or Video Record Deposition

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF INTENTION**
vs	)	**TO** _ _[*AUDIO/VIDEO*]_ _
	)	**RECORD DEPOSITION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**(CCP §2025.330(c))**
_____	)	

PLEASE TAKE NOTICE that the deposition of _ _[*name of deponent*]_ _ **noticed by** _ _[*name of noticing party*]_ _ **and scheduled for** _ _[*date*]_ _**, at** _ _[*time*]_ _**, at** _ _[*address*]_ _**, will be recorded simultaneously by** _ _[*audio/video*]_ _ **technology by** _ _[*name of party making simultaneous* _ _[*audio/video*]_ _ *recording of deposition*]_ _**.**

[*Add if deponent is a treating or consulting physician or other expert if appropriate*]

Notice is further given that _ _[*name of party giving notice*]_ _ **reserves the right under Code of Civil Procedure §2025.620(d) to use the video recording of the deposition at trial.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (retain with proof of service for filing with court if future motion is made); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: Notice must be served on all parties and any nonparty deponent at least 3 days before the deposition. If served only 3 calendar days before the deposition, personal service is required. CCP §2025.330(c). See §5.75.

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§5.221 F. Form: Other Party's Notice of Intention to Appear at Deposition by Telephone, Video Conference, or Other Electronic Means

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF INTENTION TO**
vs	)	**APPEAR AT AND**
	)	**PARTICIPATE IN ORAL**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**DEPOSITION BY**
	)	_ _[TELEPHONE*/VIDEO CONFERENCE*]_ _ **(CCP**
_____	)	**§2025.330(c))**

PLEASE TAKE NOTICE that _ _[*name of party*]_ _ **will appear and participate in the oral deposition of** _ _[*name of deponent*]_ _ **noticed by** _ _[*name of noticing party*]_ _ **and scheduled for** _ _[*date*]_ _**, at** _ _[*time*]_ _**, at** _ _[*address*]_ _**, by** _ _[*specify, e.g., telephone, video conference, or describe other type of remote electronic means*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (retain with proof of service for filing with court if future motion is made); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: Written notice must be served by personal delivery or facsimile at least 3 days before the deposition. The party using some type of remote electronic means to appear at and participate in an oral deposition must make all arrangements and pay all expenses incurred for such appearance. CCP §2025.330(c). See §5.30.

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§5.222 G. Form: Stipulation for Taking Deposition

▶ To download **Word** version, right click and choose *Save Target As*

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**STIPULATION FOR TAKING**
vs	)	**DEPOSITION (CCP §2016.030)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

Under Code of Civil Procedure §2016.030, the parties stipulate through their counsel that _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, will take the deposition on oral examination of** _ _[*name of deponent*]_ _ **on** _ _[*date(s) of deposition*]_ _ **at** _ _[*time of deposition*]_ _**, at** _ _[*address*]_ _, _ _[*under the following conditions: e.g., that the employee designated as the most qualified to testify on the party's behalf regarding those matters described with reasonable particularity below may appear by telephone*]_ _ **and that further notice of the taking of the deposition and service is waived.**

Date: _ _ _ _ _ _	**Date:** _ _ _ _ _ _
__[*Signature*]__	__[*Signature*]__
_ _[*Typed name*]_ _	_ _[*Typed name*]_ _
Attorney for plaintiff	**Attorney for defendant**

Copies: Original (retain with proof of service for filing with court if future motion is made); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: Counsel should be certain that all matters agreed to are identified in the stipulation (*e.g.,* production of documents, location of deposition officer, intent to video deposition). See §5.50.

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H. Production of Business Records

§5.223 1. Form: Deposition Subpoena for Production of Business Records (Judicial Council Form SUBP-010)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS	CASE NUMBER:

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of deponent, if known)*:

1. **YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:**

To *(name of deposition officer)*:
On *(date)*: At *(time)*:
Location *(address)*:

Do not release the requested records to the deposition officer prior to the date and time stated above.

a. ☐ by delivering a true, legible, and durable **copy** of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.

b. ☐ by delivering a true, legible, and durable **copy** of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).

c. ☐ by making the **original** business records described in item 3 available for inspection at your business address by the attorney's representative and permitting **copying** at your business address under reasonable conditions during normal business hours.

2. *The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.*

3. **The records to be produced are described as follows:**

☐ Continued on Attachment 3.

4. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, *AND* CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PERSON ISSUING SUBPOENA)

(TITLE)

(Proof of service on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-010 [Rev. July 1, 2010]

DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

Code of Civil Procedure, §§ 2020.410–2020.440;
Government Code, § 68097.1
CEB
www.courtinfo.ca.gov

Print

SUBP-010

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

1. I served this *Deposition Subpoena for Production of Business Records* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:
   b. Address where served:
   c. Date of delivery:
   d. Time of delivery:
   e. (1) ☐ Witness fees were paid.
      Amount: . . . . . $ _____
      (2) ☐ Copying fees were paid.
      Amount: . . . . . $ _____
   f. Fee for service: . . . . . $ _____
2. I received this subpoena for service on *(date)*:
3. Person serving:
   a. ☐ Not a registered California process server.
   b. ☐ California sheriff or marshal.
   c. ☐ Registered California process server.
   d. ☐ Employee or independent contractor of a registered California process server.
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b).
   f. ☐ Registered professional photocopier.
   g. ☐ Exempt from registration under Business and Professions Code section 22451.
   h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

Copies: Original (retain with proof of service for filing with court if future motion is made); copies for service (one for

each attorney of record and unrepresented party); office copies.

Comment: When the witness produces business records as directed by this form of deposition subpoena, the records must be accompanied by an affidavit or declaration. CCP §2020.430(a)(2). See forms of declaration in §§5.224-5.226. See discussion in §§5.95-5.100.

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Source: Civil Litigation/California Civil Discovery Practice/5 Deposition Procedures/§5.224 2. Form: Declaration Accompanying Production of Business Records (Custodian or Other Qualified Witness)

§5.224 2. Form: Declaration Accompanying Production of Business Records (Custodian or Other Qualified Witness)

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	
	)	**DECLARATION OF**
vs	)	_ _[*CUSTODIAN OF*
	)	*RECORDS/OTHER QUALIFIED*
_ _[*Name(s)*]_ _,	)	*WITNESS*]_ _
Defendant(s)	)	**ACCOMPANYING**
	)	**PRODUCTION OF BUSINESS**
_____	)	**RECORDS**

_ _[*Name*]_ _ **declares:**

[*Option 1: Duly authorized custodian of records*]

1. I am the duly authorized custodian of records for _ _[*name of business*]_ _.

[*Option 2: Duly authorized to certify business records*]

1. I am _ _[*state title*]_ _ and am duly authorized to certify the business records of _ _[*state business*]_ _.

[*Continue*]

[*Add if witness has none of the records*]

2. _ _[*Identify business*]_ _ has none of the records described in the subpoena served on _ _[*date*]_ _.

[*Add if records are to be produced*]

[3.] The documents hereby produced were prepared by the personnel of this business in the ordinary course of business _ _[*at or near _ _[specify relevant act, condition or event*]_ _]_ _.

[*Continue*]

[4.] The documents hereby produced are _ _[*identify records*]_ _.

[5.] The records were prepared by _ _[*describe manner in which records were prepared*]_ _.

[*Option 1: True copies of records*]

[6.] These documents are true copies of all the records described in the deposition subpoena served on me on _ _[*date*]_ _.

[*Option 2: Original records delivered for copying*]

[6.] The original records described in the deposition subpoena were delivered to _ _[*identify deposition officer, attorney, or attorney's representative*]_ _ for copying at _ _[*witness's business address*]_ _ on _ _[*date*]_ _.

[*Continue*]

[*Add if appropriate*]

[7.] _ _[*Identify business*]_ _ **does not have the following documents requested in the subpoena served on** _ _[*date*]_ _**:** _ _[*Identify documents or categories of documents*]_ _**.**

[*Continue*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I have personal knowledge of the facts set forth above.

Executed this _ _ _ _ _ _ **day of** _ _ _ _ _ _ **at** _ _[*city and state*]_ _**.**

__[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (retain with copy of records made); copies (to accompany any copy of records delivered as directed by subpoena); office copies.

Comment: Counsel may draft a form of declaration, such as this one, for the custodian of records to complete when producing the requested records. CCP §2020.430(a)(2). Evidence Code §1561(a) requires that the affidavit or declaration contain all the above information "in substance." If the original records were delivered to the deposition officer or attorney's representative at the custodian's place of business for copying, the appropriate declaration in §5.225 (declaration of deposition officer) or §5.226 (declaration of attorney or attorney's representative) should also be used. See discussion in §§5.95-5.100.

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§5.225 3. Form: Declaration Accompanying Production of Business Records (Deposition Officer)

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	
	)	**DECLARATION OF**
vs	)	**DEPOSITION OFFICER**
	)	**ACCOMPANYING**
_ _[*Name(s)*]_ _,	)	**PRODUCTION OF BUSINESS**
Defendant(s)	)	**RECORDS**
_____	)	

_ _[*Name*]_ _ **declares:**

1. I am the officer designated to take the deposition of _ _[*custodian or other person to whom subpoena directed*]_ _ **by deposition subpoena served on** _ _[*date*]_ _**.**

2. On _ _[*date*]_ _**,** _ _[*name of custodian or other person*]_ _ **delivered to me, at** _ _[*address*]_ _**, records for copying. The attached documents are true copies of all records delivered to me.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I have personal knowledge of the facts set forth above.

Executed this _ _ _ _ _ _ **day of** _ _ _ _ _ _ **at** _ _[*city and state*]_ _**.**

__[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (retain with copy of records made); copies (to accompany any copy of records delivered as directed by subpoena); office copies.

Comment: This declaration is used in conjunction with the custodian's declaration (see §5.224) when the custodian delivers the records at the custodian's business address to the deposition officer for copying. CCP §2020.430(a). See discussion in §§5.98-5.99.

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§5.226 4. Form: Declaration Accompanying Production of Business Records (Attorney's Representative)

▶ To download **Word** version, right click and choose *Save Target As*

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF**
vs	)	_ _[*ATTORNEY/ATTORNEY'S REPRESENTATIVE*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**ACCOMPANYING PRODUCTION OF BUSINESS RECORDS**
_____	)	**RECORDS**

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*attorney/attorney's representative*]_ _ **designated in the deposition subpoena for the production of business records of** _ _[*name of business or other entity*]_ _**, served on** _ _[*date*]_ _**.**

2. On _ _[*date*]_ _**,** _ _[*name of custodian or other person*]_ _ **delivered to me, at** _ _[*address*]_ _**, records for copying at that address. The attached documents are true copies of all records delivered to me.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I have personal knowledge of the facts set forth above.

Executed this _ _ _ _ _ _ day of _ _ _ _ _ _ at _ _[*city and state*]_ _**.**

__[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (retain with copy of records made); copies (to accompany any copy of records delivered as directed by subpoena); office copies.

Comment: In lieu of the declaration of the custodian or other qualified witness (see §5.224), this alternative declaration under Evid C §1561(c) is used when the deposition subpoena directed delivery of the records to the attorney or attorney's representative for copying at the custodian's business address. See discussion in §5.100.

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Source: Civil Litigation/California Civil Discovery Practice/5 Deposition Procedures/§5.227 I. Notice to Consumer or Employee and Objection (Judicial Council Form SUBP-025)

§5.227 I. Notice to Consumer or Employee and Objection (Judicial Council Form SUBP-025)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/ PETITIONER: DEFENDANT/ RESPONDENT:	CASE NUMBER:
NOTICE TO CONSUMER OR EMPLOYEE AND OBJECTION (Code Civ. Proc., §§ 1985.3,1985.6)	

NOTICE TO CONSUMER OR EMPLOYEE

TO *(name)*:

1. PLEASE TAKE NOTICE THAT **REQUESTING PARTY *(name)*:**
   SEEKS YOUR RECORDS FOR EXAMINATION by the parties to this action on *(specify date)*:
   The records are described in the subpoena directed to **witness** *(specify name and address of person or entity from whom records are sought)*:
   A copy of the subpoena is attached.
2. IF YOU OBJECT to the production of these records, YOU MUST DO ONE OF THE FOLLOWING BEFORE THE DATE SPECIFIED IN ITEM a. OR b. BELOW:
   a. If you are a party to the above-entitled action, you must file a motion pursuant to Code of Civil Procedure section 1987.1 to quash or modify the subpoena and give notice of that motion to the **witness** and the **deposition officer** named in the subpoena at least five days before the date set for production of the records.
   b. If you are not a party to this action, you must serve on the **requesting party** and on the **witness,** before the date set for production of the records, a written objection that states the specific grounds on which production of such records should be prohibited. You may use the form below to object and state the grounds for your objection. You must complete the Proof of Service on the reverse side indicating whether you personally served or mailed the objection. The objection should **not** be filed with the court. **WARNING:** IF YOUR OBJECTION IS NOT RECEIVED BEFORE THE DATE SPECIFIED IN ITEM 1, YOUR RECORDS MAY BE PRODUCED AND MAY BE AVAILABLE TO ALL PARTIES.
3. YOU OR YOUR ATTORNEY MAY CONTACT THE UNDERSIGNED to determine whether an agreement can be reached in writing to cancel or limit the scope of the subpoena. If no such agreement is reached, and if you are not otherwise represented by an attorney in this action, YOU SHOULD CONSULT AN ATTORNEY TO ADVISE YOU OF YOUR RIGHTS OF PRIVACY.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF ☐ REQUESTING PARTY ☐ ATTORNEY)

OBJECTION BY NON-PARTY TO PRODUCTION OF RECORDS

1. ☐ I object to the production of all of my records specified in the subpoena.
2. ☐ I object only to the production of the following specified records:

3. The specific grounds for my objection are as follows:

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE)

(Proof of service on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-025 [Rev. January 1, 2008]

CEB
Code of Civil Procedure, §§ 1985.3. 1985.6, 2020.010–2020.510
www.courtinfo.ca.gov

Print

SUBP-025

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

PROOF OF SERVICE OF NOTICE TO CONSUMER OR EMPLOYEE AND OBJECTION
(Code Civ. Proc., §§ 1985.3,1985.6)

☐ **Personal Service** ☐ **Mail**

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
2. I served a copy of the *Notice to Consumer or Employee and Objection* as follows *(check either a or b)*:
   a. ☐ **Personal service.** I personally delivered the *Notice to Consumer or Employee and Objection* as follows:
      (1) Name of person served:
      (2) Address where served:
      (3) Date served:
      (4) Time served:

   b. ☐ **Mail**. I deposited the *Notice to Consumer or Employee and Objection* in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:
      (1) Name of person served:
      (2) Address:
      (3) Date of mailing:
      (4) Place of mailing *(city and state)*:

      (5) I am a resident of or employed in the county where the *Notice to Consumer or Employee and Objection* was mailed.
   c. My residence or business address is *(specify)*:
   d. My phone number is *(specify)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME OF PERSON WHO SERVED) ▶ (SIGNATURE OF PERSON WHO SERVED)

PROOF OF SERVICE OF OBJECTION TO PRODUCTION OF RECORDS
(Code Civ. Proc., §§ 1985.3,1985.6)

☐ **Personal Service** ☐ **Mail**

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
2. I served a copy of the *Objection to Production of Records* as follows *(complete either a or b)*:
   a. ON THE REQUESTING PARTY
      (1) ☐ **Personal service.** I personally delivered the *Objection to Production of Records* as follows:
         (i) Name of person served:
         (ii) Address where served:
         (iii) Date served:
         (iv) Time served:

      (2) ☐ **Mail.** I deposited the *Objection to Production of Records in* the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:
         (i) Name of person served:
         (ii) Address:
         (iii) Date of mailing:
         (iv) Place of mailing *(city and state)*:

         (v) I am a resident of or employed in the county where the *Objection to Production of Records* was mailed.
   b. ON THE WITNESS
      (1) ☐ **Personal service.** I personally delivered the *Objection to Production of Records* as follows:
         (i) Name of person served:
         (ii) Address where served:
         (iii) Date served:
         (iv) Time served:

      (2) ☐ **Mail**. I deposited the *Objection to Production of Records* in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:
         (i) Name of person served:
         (ii) Address:
         (iii) Date of mailing:
         (iv) Place of mailing *(city and state)*:

         (v) I am a resident of or employed in the county where the *Objection to Production of Records* was mailed.
3. My residence or business address is *(specify)*:
4. My phone number is *(specify)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME OF PERSON WHO SERVED) ▶ (SIGNATURE OF PERSON WHO SERVED)

Copies: Original (retain with proof of service for filing with court if future motion is made); copies for service (one for

consumer or employee and for each attorney of record and unrepresented party); office copies.

Comment: A copy of this notice, along with proof of service on the consumer or employee completed on its back page, must be served on the witness who is to produce the personal or employment records. CCP §§1985.3(b), 1985.6(b). See §5.118.

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J. Motion to Quash

§5.228 1. Form: Notice of Motion and Motion to Quash Deposition Notice and for Sanctions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION FOR ORDER QUASHING NOTICE OF DEPOSITION AND STAYING TAKING OF DEPOSITION AND FOR SANCTIONS (CCP §2025.410)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, moves the Court at the above date and time for an order quashing the notice of deposition and staying the taking of the deposition of _ _[*name of deponent*]_ _, now scheduled for _ _[*date*]_ _, and for a monetary sanction in the amount of $_ _[*amount*]_ _ under Code of Civil Procedure §§2023.010-2023.040 against _ _[*identify person, party, and/or attorney*]_ _. This motion is made under Code of Civil Procedure §2025.410 on the ground that the notice of deposition served on _ _[*objecting party*]_ _, on _ _[*date*]_ _, was defective in that _ _[*specify error or irregularity*]_ _.

[*If required by local rules*]

Notice is further given that the court will issue a tentative ruling by _ _[*time*]_ _ the court day before the hearing. To obtain the tentative ruling, call the court at _ _[*phone number*]_ _or download the ruling from the court's website at _ _[*web address*]_ _. If you wish to appear and present oral argument in response to the tentative ruling, you must notify the court and all other parties/counsel of your request not later than _ _[*time*]_ _ the court day before the hearing. If no such request is received, the tentative ruling will become the order of the court.

This motion is based on this notice, the attached supporting memorandum, the attached declaration of _ _[*name*]_ _, the attached notice of deposition, and all pleadings, records, and files in this action.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney or unrepresented party who received notice of the deposition); office copies.

Comment: This motion is made in addition to serving written objection specifying an error or irregularity in the deposition notice. CCP §2025.410. A copy of the defective deposition notice and the objection should be attached to the moving papers. See §5.137.

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Source: Civil Litigation/California Civil Discovery Practice/5 Deposition Procedures/§5.229 2. Form: Declaration Supporting Motion to Quash Deposition Notice and for Sanctions

§5.229 2. Form: Declaration Supporting Motion to Quash Deposition Notice and for Sanctions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	**MOTION TO QUASH NOTICE**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**OF DEPOSITION AND TO**
	)	**STAY TAKING OF**
	)	**DEPOSITION AND FOR**
	)	**SANCTIONS (CCP §2025.410)**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the attorney for _ _[*name of objecting party*]_ _**.**

2. On _ _[*date*]_ _**, my client was served, through me, with a notice for the deposition of** _ _[*name of deponent*]_ _**. A copy of this notice is attached to this motion.**

3. The attached notice is defective in that it fails to comply with _ _[*state portion of Code of Civil Procedure §§2025.210-2025.270 violated*]_ _**, as more fully set forth in the attached objection to deposition notice, which I served on** _ _[*date*]_ _**, on all parties who received notice of the deposition.**

4. On _ _[*date*]_ _**, I attempted to resolve this problem informally by** _ _[*describe attempt*]_ _**.**

5. I request that a monetary sanction be imposed against _ _[*identify person, party, and/or attorney*]_ _ **in the sum of $**_ _[*amount*]_ _**, incurred as a result of the reasonable expenses and attorney fees itemized as follows:** _ _[*Set forth in appropriate detail*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I have personal knowledge of the facts set forth above.

Executed this _ _ _ _ _ _ day of_ _ _ _ _ _ **at** _ _[*city and state*]_ _**.**

__[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney or unrepresented party who received notice of the deposition); office copies.

Comment: At no. 4, the declaration must state facts showing that counsel made a reasonable and good faith attempt at informally resolving the objections. CCP §2025.410(c). See §5.137.

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K. Deposition to Perpetuate Testimony

§5.230 1. Form: Notice of Motion for Order Authorizing Deposition to Perpetuate Testimony

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for Petitioner, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION FOR**
vs	)	**ORDER AUTHORIZING**
	)	**DEPOSITION** _ _[*AND*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*PRODUCTION OF*
	)	*DOCUMENTS*]_ _ **TO**
	)	**PERPETUATE TESTIMONY**
	)	**(CCP §§2035.010-2035.060)**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[N/A]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that petitioner, _ _[*name*]_ _, moves the Court at the above date and time for an order under Code of Civil Procedure §§2035.010-2035.060 authorizing petitioner to take the deposition of _ _[*name of deponent*]_ _ on oral examination

[*Add if appropriate*]

and authorizing the production of documents and things for inspection and copying at the time of the deposition.

[*Continue*]

Petitioner applies for this order on the ground that perpetuating the testimony of _ _[*name of deponent*]_ _ _ _[*and preserving the evidence designated*]_ _ will prevent a failure or delay of justice as more fully set forth in the attached petition.

[*If required by local rules*]

Notice is further given that the court will issue a tentative ruling by _ _[*time*]_ _ the court day before the hearing. To obtain the tentative ruling, call the court at _ _[*phone number*]_ _or download the ruling from the court's website at _ _[*web address*]_ _. If you wish to appear and present oral argument in response to the tentative ruling, you must notify the court and all other parties/counsel of your request not later than _ _[*time*]_ _ the court day before the hearing. If no such request is received, the tentative ruling will become the order of the court.

This application is based on this notice, the petition for an order permitting discovery to perpetuate testimony and preserve evidence _ _[, *and the attached supporting memorandum*]_ _ _ _[*and declarations*]_ _ **supporting this petition.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each expected adverse party); office copies.

Comment: For discussion of procedures, see §§5.147-5.155.

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§5.231 2. Form: Petition for Order Authorizing Deposition to Perpetuate Testimony

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for Petitioner, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**VERIFIED PETITION FOR**
vs	)	**ORDER AUTHORIZING**
	)	**DEPOSITION TO**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**PERPETUATE TESTIMONY**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[N/A]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **alleges:**

1. Petitioner, _ _[*name*]_ _**, expects to be a** _ _[*e.g., plaintiff/defendant*]_ _ **in an action in the Superior Court of the State of California, County of** _ _[*name of county*]_ _**. The nature of that action is as follows:** _ _[*Briefly describe nature and subject matter of anticipated action, petitioner's involvement, and facts showing that action is cognizable in a California court*]_ _**.**

2. Petitioner expects that _ _[*name or description of all anticipated adverse parties and addresses*]_ _ **will be** _ _[*an adverse party/adverse parties*]_ _**.**

3. Petitioner is presently unable to _ _[*bring that action/cause that action to be brought*]_ _ **because** _ _[*explain reasons*]_ _**.**

4. Petitioner desires to perpetuate the testimony of _ _[*name(s) and address(es) of prospective deponent(s)*]_ _**.**

5. The substance of the deposition testimony that petitioner expects to elicit is as follows: _ _[*Set forth substance of testimony anticipated from each deponent*]_ _**.**

[*Add if deponent will produce documents or other materials*]

6. Petitioner desires to preserve evidence contained in the following documents or things: _ _[*Describe documents or things or refer to attached exhibit containing such a description.*]_ _**. The substance of the information that petitioner expects to elicit from this evidence is as follows:** _ _[*Set forth substance of information anticipated from materials to be produced*]_ _**.**

[*Continue*]

[7.] Petitioner expects to establish by the proposed testimony _ _[*and materials to be produced*]_ _ **that** _ _[*set*

forth facts to be established]_ _.

[8.] Petitioner desires to perpetuate and preserve such testimony and evidence because _ _[*set forth why this is necessary and how it will prevent a failure or delay of justice*]_ _.

WHEREFORE, petitioner requests the Court for an order authorizing petitioner to take the depositions of _ _[*name(s) of deponent(s)*]_ _ **by** _ _[*oral examination/written questions*]_ _ **for the purpose of perpetuating testimony and preserving evidence.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

VERIFICATION

I declare under penalty of perjury under the laws of the State of California that the matters stated in the foregoing document are true and correct, and that I have personal knowledge of the facts set forth herein.

Date: _ _ _ _ _ _ __[*Signature of petitioner*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each expected adverse party); office copies.

Comment: CCP §2035.030(b) requires that the verified petition be titled in the name of the one who desires the perpetuation of testimony or the preservation of evidence. Counsel should attach a supporting memorandum and appropriate declarations to the petition. See §5.150.

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§5.232 3. Form: Order Authorizing Deposition to Perpetuate Testimony

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**ORDER AUTHORIZING**
vs	)	**DEPOSITION TO**
	)	**PERPETUATE TESTIMONY**
_ _[*Name(s)*]_ _,	)	
Defendant(s)	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The petition of _ _[*name of petitioner*]_ _ **for an order authorizing the taking of the deposition of** _ _[*name of prospective deponent*]_ _ _ _[*and permitting the production of documents and other materials for inspection and copying at the deposition*]_ _ **for the purpose of perpetuating testimony and preserving evidence was heard on** _ _[*date*]_ _. _ _[*Name*]_ _ **appeared as attorney for petitioner, and** _ _[*name*]_ _ **appeared as attorney for the expected adverse party.**

Satisfactory proof having been made that the perpetuation of testimony and preservation of evidence may prevent a failure or delay of justice, and good cause appearing,

IT IS ORDERED that:

_ _[*Name of petitioner*]_ _ **be granted leave to take the deposition of** _ _[*name of deponent*]_ _ **by** _ _[*oral examination/written questions*]_ _ _ _[*and to command the production of the following documents and things at the deposition:* _ _[*Describe*]_ _]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original and copy (present to judge for signature and file original with court clerk; retain conformed copy); copies for service (one for each attorney of record and unrepresented expected adverse party); office copies.

Comment: Counsel for the petitioner should submit a proposed order to the court when the petition is filed. On court's order when granting a petition to perpetuate testimony, see CCP §2035.050(a)-(b). See §5.154. The order and a subpoena should be served on the deponent and each expected adverse party. See CCP §§2020.220, 2035.030.

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6

Taking and Defending Oral Depositions

Mark A. Neubauer

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§6.1 I. SCOPE OF CHAPTER

This chapter covers taking and defending oral depositions in California from both examining and defending attorneys' points of view. See CCP §§2025.010-2025.620.

On the procedures for scheduling depositions (*e.g.,* contents of deposition notice), see chap 5. On the procedures for subpoenaing the production of business records under CCP §§2020.010-2020.510, see §§5.85-5.107.

On discovery in proceedings other than civil actions (*e.g.,* in judicial arbitration proceedings (Cal Rules of Ct 3.822)), see §§1.13-1.33 and 2.28.

On limitations on depositions in limited civil cases, see §§14.16-14.18.

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II. BEFORE TAKING OR DEFENDING ORAL DEPOSITION

A. Before Taking Deposition

§6.2 1. Setting General Strategy

Counsel should focus on the goals of the deposition. What are the reasons for deposing this witness? They might be, *e.g.,* to preserve testimony, to obtain information for a summary judgment motion, to obtain admissions from the witness, or to impress the witness with what he or she will face if the matter goes to trial. On uses of depositions, see §§6.136-6.139. The goals of each deposition differ.

Counsel should ask, "What do I want from this witness?" "Do I need any specific facts?" "What do I want this witness to say and not to say?" Each witness is different. If the witness is infirm and may be unavailable for trial, the deposition may be counsel's sole opportunity to question him or her. If the witness is the plaintiff and will be present at trial, in rare circumstances counsel might consider holding back some questioning to preserve an element of surprise for trial.

Counsel should consider the methods for best achieving the goals of the deposition and try to anticipate the hurdles that may stand in the way. For example, if the subject matter of the deposition is likely to give rise to claims of privilege, counsel may need to work to obtain the desired information without intruding on the privilege. It is useful for counsel to develop an ongoing strategy for the examination and maintain flexibility in enlarging or limiting the anticipated scope of questioning, both during preparation and at the deposition itself.

CAUTION: Effective discovery requires a thorough understanding of the substantive law governing the case. Counsel who did not undertake adequate research before noticing the deposition must do so before the examination begins. In addition to understanding the elements of each cause of action or defense and the parties' respective burdens of proof, counsel should research the appropriate law and anticipate probable objections and instructions to a party not to answer. This preparation will be particularly helpful if the deposition is likely to give rise to claims of privilege. On privileges, see chap 3.

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§6.3 2. Assembling Written Record and Exhibits

Documents tell the story of the case. Examining counsel should review the file in detail, including any documents or records that concern the deponent. If the deponent is a party, responses to interrogatories and requests for production of documents should be reviewed. Counsel should become thoroughly familiar with pertinent medical records if the deponent is a treating physician, a medical expert, or a plaintiff claiming personal injury.

PRACTICE TIP: Pay particular attention to prior testimony of the witness in the form of recorded statements, depositions in the same or related cases, and trial transcripts. Such documents may provide fertile ground for impeachment in the event the deponent's testimony changes significantly from that given previously.

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§6.4 3. Organizing Key Documents to Use as Deposition Exhibits

Examining counsel must master the documents. To learn the case, counsel should know the documents backwards and forwards. Although flexibility during the deposition is important, the examiner must be able to return to key exhibits and to recognize when a witness's response, *e.g.,* to Exhibit 1, requires that certain questions be asked about Exhibit 100.

Documents that are stored electronically should be printed out and reviewed, along with the correspondence, the pleadings, and other documents. Although documents may be electronically stored, they must be marked as exhibits when used in a deposition which usually requires hard copies. On discovery of electronically stored evidence, see chap 4. Counsel should note each document that may be useful when examining the deponent and copy and segregate each document to be used as a deposition exhibit. Counsel should make at least two copies of each exhibit, one to be marked by the court reporter and attached to the deposition transcript, and one for the examiner's use in asking questions. Although not required, preparing additional copies for those attending the deposition reflects a cooperative attitude, allows the deposition to proceed more quickly, and shows that counsel has prepared for the deposition.

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§6.5 4. Preparing Case or Issue Chronology

If counsel has not already done so, he or she should prepare a case chronology before the deposition. On the importance of case chronology, especially in cases involving claims or defenses that depend on proof of a party's state of mind at a particular time, see §2.6. It may be useful to include in the chronology cross-references to applicable documents. Counsel should draft a separate chronology for the deposition if the issues require it, *e.g.,* if plaintiff's counsel fears or defending counsel hopes to establish a statute of limitations defense, it may be helpful before the deposition to draft a separate chronology dealing with this single issue and including cross-references to applicable documents.

PRACTICE TIP: Counsel will derive the maximum benefit from a case chronology if each entry includes a reference to the source of the information. Example: "Plaintiff's first complaint of headaches following the accident (Dr. Smith's records, p. 5)."

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§6.6 5. Consulting With Client

Should client attend deposition? Counsel should consider whether the client should attend the deposition. On who may attend a deposition, see §6.18. The presence of a party sometimes makes a witness uncomfortable and affects the testimony he or she is willing to give. Sometimes, the client's presence can surprise an opposing party who is being deposed. Clients can often help counsel by supplying information and insight as the deposition progresses. On the other hand, the presence of a client who is very emotional and finds it difficult to exercise self-control may be detrimental.

PRACTICE TIP: If the client is a business entity and a particular decision is at issue, the person who made the contested decision is probably the "client" whose presence will be most helpful.

Ask client about witness. Counsel's own client may be an excellent source of information in preparing for the depositions of other witnesses, especially if the client knows the individual to be deposed. When the client is an organization, counsel may have access to organizational information that may help in deposition preparation.

CAUTION: Although the client may identify witnesses or gather documents, avoid using the client as an "investigator." A client's contact with potential witnesses could be misconstrued as attempting to influence testimony or could result in inadvertent waiver of the attorney-client privilege. Counsel should instruct the client to communicate with no one about the lawsuit except counsel. Counsel can communicate with any witnesses identified by the client, preferably through an investigator. On deciding whether to depose nonparty witnesses, see §5.38-5.39. See also §§2.34 (communicating with party represented by counsel), §§2.35-2.36 (obtaining informal witness statements), 3.165-3.190 (waiver of privileges). Outside of a deposition, defense counsel should avoid communicating with a plaintiff's treating physician. Any substantive communication regarding the plaintiff's medical condition or treatment without the plaintiff's consent would violate the doctor-patient privilege. On privileges in general, see chap 3.

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§6.7 6. Considering Consultation With Expert

Examining counsel may want to consult with an expert who will not testify and will not be subject to the disclosure procedures of CCP §§2034.010-2034.730. On the distinction between a consulting expert and a testifying expert subject to disclosure under CCP §§2034.010-2034.730, see §11.5.

An expert who has special skill in or knowledge about the subject matter of the examination and familiarity with the technical aspects of an issue may help the examiner frame appropriate questions and appreciate inconsistencies or potential areas of impeachment. An examining attorney who is comfortable with the subject matter may also seem more credible and authoritative, resulting in the deponent's giving more thorough and honest testimony. If the deponent is a party in a medical malpractice case or a plaintiff in a personal injury case, and the medical issues are not simple and straightforward, consulting with an expert before the deposition (although apparently increasing the deposition's cost) actually enables counsel to take a focused deposition and reduces the likelihood of wasting time in a fishing expedition.

CAUTION: Counsel should recognize, however, that if the expert testifies, it is likely that some of the expert's prior "consultation" with counsel will be disclosed, depending on the scope of the expert's proposed testimony. See §11.5. Cautious counsel will assume that anything said to an expert becomes fair game if the expert testifies at trial.

On preparing to depose a disclosed expert, see §6.9.

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§6.8 7. Preparing Deposition Outline and Anticipating Responses

To avoid overlooking an important subject during the deposition, counsel should prepare an outline or list of the points to address in the deposition. On using an outline during the deposition, see §6.24.

Counsel should anticipate the witness's possible responses and break them down into useful parts. For example, if the point is to obtain information about a particular conversation, the question might be, "Did you talk with Mary?" Counsel should plan how to break down the expected response with follow-up questions such as, *e.g.:*

- When did you talk with Mary?
- Did you talk in person? By telephone?
- Did you take any notes?
- Did you talk with anyone else about the conversation? With whom? When?

The rhythm of the examination is question, answer, and follow-up. It is important, however, to retain the flexibility to leave the outline and return to it when necessary. For more on breaking down responses, see §6.25.

CAUTION: Although most attorneys have an outline of the questions they wish to address, attorneys vary considerably in the extent to which they "map out" the deposition in advance. An overly detailed deposition outline may tend to wed the examining attorney to its structure. Many witnesses, particularly parties, have their own agendas, and they may blurt out important information unexpectedly. The deposition examiner must be able to depart from the outline when this occurs or risk losing the moment. For the same reason, prewritten deposition questions should be used sparingly, if at all, although if a particular subject is crucial, *e.g.*, to a possible statute of limitations defense, counsel might write out a key question, *e.g.*, "When did you first suspect that there was a problem with the medical treatment that you received?"

Counsel should evaluate whether the deposition will pose particular difficulty, *e.g.,* whether it is likely that deponent's counsel will instruct the witness not to answer a particular question. See §6.39. If so, consider arranging with the court clerk a tentative hearing date for a motion to compel, alerting a judge to the upcoming deposition, or asking other counsel to agree to a discovery referee who can be on call to resolve deposition problems. On how to handle the deponent's failure to answer or produce, see §§6.75-6.85.

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§6.9 8. Making Special Preparation When Deponent Is Opposing Party's Expert

The deposition of an opponent's disclosed expert may entail more preparation than is required for the deposition of a lay witness. To prepare for the expert's deposition, counsel should, *e.g.*:

- Review the scope of testimony described in the expert witness disclosure and focus preparation on that area of the case;
- Determine whether the expert seems qualified to testify in the designated area;
- Obtain and review any pertinent articles written by the expert and other deposition testimony that the expert has given;
- Run a jury verdict search to find other cases in which the expert has testified at trial, then contact the attorneys involved in other cases to obtain their insights about the expert, and if possible, the transcripts of the expert's prior depositions; for links to sources of jury verdicts, see the Los Angeles County Law Library website at http://lalaw.lib.ca.us/jury.htm;
- Consult with a "consulting expert" to obtain recommendations about helpful areas of inquiry; on the difference between a consulting and a testifying expert, see §§6.7, 11.5.

Opposing experts often know each other and can offer information about the potential deponent's views that is not readily available elsewhere.

If opposing counsel has attached the expert's curriculum vitae (CV) to the expert witness disclosure, review the CV to determine whether the expert is qualified to testify in the area designated. A CV usually lists all of the expert's publications. Many attorneys also run an Internet search for the expert, using Google or a similar search engine, to obtain information about the expert.

PRACTICE TIP: That the expert seems unqualified does not mean counsel should not take the deposition. Examining counsel can use the opportunity to question the expert about education, credentials, and experience, and to find out what the expert knows. Using the expert's deposition as supporting evidence, at trial counsel may launch an attack on the expert's qualifications to testify on a particular subject by submitting an in limine motion to the trial judge or engaging in voir dire of the individual.

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B. Before Defending Oral Deposition

§6.10 1. Setting General Strategy

The steps to take before defending a deposition are not markedly different from the preparation undertaken by the noticing attorney. See §§6.2-6.9. For example, defending counsel must set the goals of the deposition from defending counsel's perspective, *e.g.,* to avoid disclosure of privileged information, to prepare the witness for testifying at trial, to ensure that the witness's credibility is not impeached by anything said during the deposition. Defending counsel must also consider the examining attorney's goal in taking the deposition and identify and evaluate the concerns counsel has about the deposition. On uses of depositions, see §§6.136-6.140.

Defending counsel should review the case file and available documents. Counsel should become wholly familiar with the testimony of every individual deposed or interrogated to date whose testimony may adversely affect the client's case and with the documents. Counsel must know the substantive law with respect to the elements of each cause of action, burdens of proof, and potential defenses. See Caution in §6.2. Counsel must anticipate possible lines of questioning and prepare to handle likely privilege or other issues that may arise.

PRACTICE TIP: Storing deposition transcripts electronically (*e.g.*, on a computer disk) makes them easier to search for particular witnesses or subject matters.

Unlike examining counsel, defending counsel must also devote substantial time to preparing the client-deponent. On advising a deponent, including preparing a client for deposition, see §§6.11-6.17.

NOTE: Counsel might also meet with friendly nonparty witnesses before their depositions, understanding of course, that there is no attorney-client privilege as to such communications. On the risks inherent in attorney communications with nonclients outside the deposition arena, see §2.34.

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2. Advising Client-Deponent

§6.11 a. Explaining Deposition Process

Counsel defending the deposition should assume the deponent knows nothing about the deposition process and is approaching the event with at least some anxiety. The likelihood of minimizing the deponent's discomfort depends on the extent to which the defending attorney provides understanding, information, and thorough preparation.

Counsel should explain to the deponent what a deposition is and the pressure that the deponent may feel. For example, witnesses often want to have an answer for every question and, even though they do not remember, may reach back to what they believe must have occurred to fill in the gaps in their memory. Counsel should stress that the deponent must tell the truth and answer with what he or she remembers, not with what he or she honestly believes occurred.

EXAMPLE: Counsel might explain to the client: "If I ask you what you had for breakfast this morning, you can tell me. But do you remember what you had for breakfast on a date 6 months ago? Perhaps you usually eat cornflakes for breakfast and believe you probably ate them on that day, too. But if during the deposition you answer 'cornflakes' when you do not remember, the examining attorney might produce a credit card receipt for that date with your name on it, showing that you had steak and eggs at the local Denny's. You will look like a liar because you tried to be helpful when really you did not remember."

Counsel should explain to the deponent that opposing counsel may attempt to refresh the deponent's recollection by showing the deponent a document or otherwise triggering the deponent's memory. In addition to answering any questions the deponent may pose, counsel should explain the following:

- The deponent's testimony will be given under oath, which means under penalty of perjury, just as if the witness were present in court.
- The examining attorney, other parties' counsel, a court reporter, and possibly the opposing party will attend the deposition.
- The purpose of the deposition is to allow the adversary to learn the nature and extent of the deponent's knowledge about the subject matter of the action.
- The noticing party's attorney will ask most of the questions, after which other attorneys may also ask questions.
- A court reporter will be present to record everything that is said during the deposition.

Also, counsel should explain the defending attorney's role at a deposition, *e.g.,* that defending counsel is unlikely to ask any questions but will be present throughout the process to hear the testimony, to object to improper questions, to give instructions not to answer a question and, generally, to offer protection from any improper treatment.

NOTE: Counsel may want to give the deponent other instructions, *e.g.,* if counsel suggests that it is time to take a break, the deponent should agree because counsel wants to speak with the client. Counsel should also instruct the deponent to ask for a break if he or she is tired or wants to speak to counsel.

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§6.12 b. Giving General Rules for Testifying

During the preparation session, *and as often thereafter as necessary,* defending counsel should advise the deponent of general rules for testifying, including the following:

- Tell the truth.
- If you do not understand the question, say so.
- Give a complete answer to the question asked, but do not volunteer information beyond the scope of the question.

  EXAMPLE: Counsel might explain to the client-deponent that there is a difference between normal conversation and the deposition. For example, the examiner may ask: "Do you know the time?" In normal conversation, the answer is "Yes, it's 10:30." In a deposition, however, the answer is either yes or no; the examining attorney may then ask "What time is it?" if he or she chooses.

- Do not rephrase or attempt to clarify ambiguous questions for the examining attorney.
- *Do not guess.* If you do not know or cannot remember, the only *truthful* answer is "I don't know" or "I can't remember."
- Avoid the temptation to reconstruct what *probably* happened (see §6.11).
- Do not argue.
- If the answer is complete, stop talking. Just answer the question.
- When the examining attorney's silence suggests some further response is in order, remain silent anyway.
- Before answering, pause to give defending counsel an opportunity to object.
- Listen carefully to objections, because they warn you there is a problem with the question and may reveal the nature of that problem.
- Follow your attorney's instruction not to answer.
- Avoid disparaging remarks about any class of individuals *or the opposing party*.
- Do not hesitate to ask the examining attorney to repeat the question.
- Do not believe for one minute that the examining attorney is on your side, however friendly he or she may seem.
- Do not hesitate to request a recess to speak with counsel.
- If you are being videotaped, be careful of your gestures and expressions.
- If the examining attorney shows you a document, read it. Do not guess or assume that you know what it says.
- Do not take notes during the deposition; such notes may be discoverable.

NOTE: The attorney-client privilege is likely to protect notes the deponent made for the purpose of communicating with counsel. On attorney-client privilege, see chap 3.

On alerting the client-deponent to protected areas of inquiry and to the potential weaknesses of the case, see §6.13.

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§6.13 c. Educating Client on Case Weaknesses

Counsel should not deny the obvious. In addition to ensuring that a client understands the deposition process and the rules for giving testimony (see §§6.11-6.12), counsel should reiterate the potential weaknesses in the case. Most clients are aware of such weaknesses by the time they are deposed, and counsel should prepare them for questioning in those areas. Although it is not defending counsel's job to supply the witness with answers, it is counsel's responsibility to make sure that the client understands the subtle nuances inherent in key questions and answers. For example, a plaintiff in a medical malpractice case facing a statute of limitations defense must be prepared for the question, "When did you first suspect you had a claim?" To respond appropriately, the client must understand that the statute of limitations begins to run when the medical malpractice plaintiff discovers or should have discovered the injury *and its negligent cause*.

CAUTION: Some attorneys use commercial video recordings to educate the client with respect to the deposition process. These presentations are not a substitute for preparation tailored to a specific case, although they may, *e.g.,* add a level of comfort if the deposition is to be videotaped.

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§6.14 d. Alerting Client to Protected Areas of Inquiry

Counsel should devote particular attention to objectionable areas of inquiry and the substantive law on those areas when preparing the client for a deposition. Counsel should explain the manner in which these considerations may affect the client's responses, as follows:

- The examining attorney cannot invade the attorney-client privilege. This means that all conversations between counsel and client are protected, including those that occur in the course of deposition preparation.
- There is a privilege not to disclose confidential marital communications or to testify against one's spouse. See §§3.69-3.83. The client does not need to say "The other day I told my wife…."
- It is counsel's responsibility to recognize when the examining attorney is seeking protected information or asking other improper questions.
- The client should listen to each question carefully and pause before answering to give counsel an adequate opportunity to interject objections.
- Counsel may make objections for the purpose of preserving them on the record, after which the client may respond unless instructed not to do so.
- Everything the client says is on the record, even a question to counsel such as, *e.g.,* "Do I have to answer that?"
- Leading questions from the examiner require the client to think, how do I answer truthfully without prejudicing my case?

CAUTION: Warn the client not to bring anything to the deposition except that which he or she has been requested to bring. The client should not bring the case files or other case information; documents that are brought into the deposition sometimes become the object of deposition questions.

For discussion of the attorney-client and other privileges, the work product rule, and other protections, see chap 3.

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§6.15 e. When Counsel's Client Is Hostile

Plaintiffs and defendants are frequently very emotional about the circumstances giving rise to the litigation, the actual process of litigation, and the uncertainty surrounding its resolution. Their feelings often result in a display of hostility not only toward the opposing party but also toward opposing counsel. The client may be particularly resentful of the deposition procedure and may view it as a challenge to personal veracity. It is important for counsel to help such a client acknowledge these emotions and deal with them appropriately.

The more hostile the client, the more extensive deposition preparation should be. Practice sessions with counsel that give the client time to anticipate questions and answers may mitigate, if not eliminate, attitude problems. Counsel should remind a client who seems unable to confine answers to the scope of the questions that volunteering information usually helps the adversary. Similarly, deponents who tend to be argumentative in their responses, displaying loss of control, ill temper, or hostility, undoubtedly please the examining attorney.

JUDGE'S PERSPECTIVE: The view from the bench makes it all too clear how a hostile client or witness almost always detracts attention from the issues in the case, usually focuses on unimportant collateral matters, and ultimately damages his or her own credibility. On the other hand, if motions are made, *e.g.*, to compel discovery, the court may look favorably on a witness who is complying reasonably with the deposition process.

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§6.16 f. Using Documents in Course of Preparing Client

Documents that the client reviews to refresh recollection before the deposition may be discoverable. See *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1372, 282 CR 783; *Kadelbach v Amaral* (1973) 31 CA3d 814, 822, 107 CR 720; *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 410, 72 CR 74. See also Evid C §771. It is unclear whether discovery can be avoided if the document is otherwise privileged. See *Sullivan v Superior Court* (1972) 29 CA3d 64, 69, 105 CR 241. Similarly, it is not settled whether discovery can be avoided if the deponent's counsel asserts the work product protection for counsel's strategy in selecting documents for predeposition review. See *Sporck v Peil* (3d Cir 1985) 759 F2d 312. Most experienced counsel avoid showing documents to the client during preparation sessions unless it makes no difference whether the opponent discovers them, *e.g.,* when the documents have already been produced to the other side or have been requested and will be produced at the deposition. The deponent should be completely familiar with documents to be produced at the deposition. On attorney work product protection, see §§3.52-3.68.

PRACTICE TIP: An effective alternative to showing the client documents during preparation is to describe the items in the document and discuss which of its provisions are pertinent. This method does not risk discovery because attorney-client *communications* during deposition preparation are absolutely protected. See *Sullivan v Superior Court, supra*.

JUDGE'S PERSPECTIVE: Counsel should prepare a client for a deposition as if it were the trial. Counsel should carefully refresh the client's memory. Witnesses whose memories have not been refreshed often make incorrect statements about their observations. The effect of inaccurate and damaging deposition testimony is indelible and will last throughout the trial. On the other hand, deponents who lack knowledge of a potential subject of the deposition should not necessarily be educated about it for the purpose of the deposition. At a deposition, the deponent testifies only as to his or her personal knowledge and is not required to investigate facts in anticipation of the deposition.

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§6.17 g. Staging Video Rehearsals

If economic factors permit, and the client's deposition is expected to be unusually problematic or complicated, counsel defending the deposition may consider a video recorded practice session in which counsel plays the role of the examining attorney. Counsel can then review and discuss the video with the client, making comments or recommendations where appropriate.

PRACTICE TIP: In some cases, *e.g.,* when the client is a particularly bad witness or the exposure to liability is great, counsel might consider retaining a jury consultant to help with witness preparation. Such consultants are expensive, but may be justified in certain circumstances.

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§6.18 C. Who May Attend Deposition

Parties and their counsel have the right to attend a deposition and other persons may attend unless the court orders otherwise. See CCP §2025.420(b)(12) (any party, deponent, or other affected person or organization may move for protective order to exclude designated persons—other than the parties to the action and their officers and counsel—from the deposition). See also CCP §2025.240(a) (noticing party must give every other party who has appeared in the action notice of the deposition).

Technically, counsel does not have a right to refuse to proceed with a deposition when surprised by the presence of unexpected and unwelcome persons without a court order. However, counsel can suspend the deposition for the purpose of applying for a court order to exclude these persons. See, *e.g., Times Newspapers Ltd. v McDonnell Douglas Corp*. (CD Cal 1974) 387 F Supp 189, 196 (court held only "principals," not press who intended to publish newspaper stories, could attend depositions that would involve testimony inadmissible in a public trial concerning airplane products liability). This principle has survived federal constitutional challenge. *Seattle Times Co. v Rhinehart* (1984) 467 US 20, 32, 81 L Ed 2d 17, 27, 104 S Ct 2199. But the balance between state law guarantees of privacy and free press remains in flux. See *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 86 CR2d 778 (discussing press access at trial).

PRACTICE TIP: Counsel who elects to have a nonparty attend the deposition runs the risk that everyone will appear at the deposition, only to have it suspended while opposing counsel seeks a protective order to exclude the nonparty. See CCP §2025.420(b)(12). To avoid last-minute squabbles as the deposition is about to begin, consider notifying opposing counsel of any nonparty planning to attend so that any motion for a protective order can be made before the deposition.

As a practical matter, the only persons present at most depositions are the examiner, the deponent, deponent's counsel, other parties' counsel, the court reporter, a videographer, and an interpreter, if necessary. In some cases, a party may wish to attend, *e.g.,* to encourage a deponent with whom the party has had critical conversations to testify truthfully. A party has a right to attend. See CCP §§2025.240, 2025.420(b)(12). In other cases, the examiner may wish a nonparty, such as an expert witness or consultant, to assist on follow-up questions or suggest additional areas of inquiry, particularly if the testimony will touch on very technical points.

NOTE: Many attorneys would move to exclude expert witnesses or consultants from the deposition. Some might make a motion for an order excluding even parties from a deposition when there are a great number of them, *e.g.,* 30-40 plaintiffs in an employment litigation case.

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D. Demeanor and Appearance at Deposition

§6.19 1. Examiner

The examiner usually controls the proceedings. In addition to hiring the reporter and preparing the deposition notice (see §§5.52-5.84), the examiner customarily asks most, if not all, of the questions. To press the advantage, setting the pace and tone of the deposition, the examiner should be well prepared, appear confident, and act professionally.

There is no more certain way of undermining the inherent advantages of being the examiner than to appear unprepared, disorganized, and hesitant. An excessive casualness in dress may also erode the solemnity of the proceedings, making the deposition less productive than it might otherwise be. When the examiner—for whom the deposition should be a routine event—appears unprepared and uncertain, the witness—for whom a deposition may be a once-in-a-lifetime experience—may suddenly feel fortified. Defending counsel may also compete for control, objecting more strenuously to an examiner who appears less prepared and therefore less competent.

On preparing for oral depositions generally, see §§6.2-6.17.

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§6.20 2. Deponent

In the position diametrically opposed to the examiner, a party deponent often correctly believes that a lot can be won or lost at the deposition, but frequently has little practical understanding of how to achieve good results. Preparation with deponent's own counsel should acquaint the deponent with the procedural aspects of testifying at a deposition and aid the deponent's deposition.

A deponent whose credibility and appearance suggest that a positive impression will be made at trial adds immeasurably to the settlement value of a case. A deponent should keep obvious but essential pointers such as the following in mind during the examination:

- Wait before answering questions to allow defending counsel to interpose any objections.
- Answer questions without volunteering unnecessary information.
- Avoid arguing with the examiner about the correctness of any particular position.
- Strive for a convincing presentation of honesty and determination.
- Be careful to avoid pauses if the deposition is being videotaped.
- Be aware that videotaping captures every change of expression, every moment of chagrin.

For a detailed discussion of preparing a client before a deposition, see §§6.11-6.17.

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§6.21 3. Defending Counsel

Although defending counsel's role at a deposition is not as active as that of the examiner and the deponent, the overall impression defending counsel makes can affect the examiner's evaluation of the case and the advisability of settlement. Defending counsel should be able to perform certain tasks during the deposition professionally and crisply if circumstances require it, including:

- Instructing the client not to answer (see §§6.39, 6.102-6.105);
- Objecting to the examiner's questions (see §§6.94-6.101);
- Suspending the deposition to seek a protective order (see §§6.106-6.108);
- Examining the deponent, whether a nonparty witness or the client (see §6.109).

Even though it is difficult to sit through a deposition for long periods listening to someone else ask questions, protecting the deponent and the record requires that defending counsel neither rest nor relax. Counsel will need to interpose any objections immediately, before the deponent begins to answer the question. Defending counsel's attentiveness may also reassure a deponent who feels anxious or intimidated by the deposition process, making the deponent less likely to panic and make mistakes.

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§6.22 4. Video and Audio Recorded Depositions

Similar to trial. A recorded deposition, particularly a video recording, is more like trial examination than a stenographically recorded deposition. On whether to video record the deposition, see §§5.75-5.84. When a deposition is recorded, defending counsel should consider the impression that will be made on the jury if the recording is used at trial. Vitriolic colloquy among counsel at a recorded deposition can have a negative impact on a jury, and counsel cannot be sure which portions will be edited if the recording is shown at trial. All rulings on objections to the use of a recorded deposition, or portions of it, are made exclusively by the trial judge. CCP §2025.340(m).

NOTE: During a videotaped deposition, the videographer continues recording unless the parties agree to go off the record or agree that the recording will stop during breaks. Counsel who asks for a break to speak with his or her client during a videotaped deposition should ask to have the video turned off during the break to avoid a long gap in the proceedings which may produce a negative impression if the video is used at trial. For this same reason, opposing counsel may insist that the video remain on.

Video deposition of examiner's own witness. The biggest problem in defending a video deposition arises when the party noticing the deposition is seeking to preserve the testimony of its own witness. In this instance, the deponent is often carefully prepared, as if for trial, and the deposition can be like a rehearsed script, with defending counsel expected to cross-examine the deponent without benefit of prior discovery. Unless the deponent is a physician or an expert whose deposition was reserved for use at trial in the deposition notice (CCP §§2025.220(a)(5)-(6), 2025.620(d)); see §5.75), defending counsel may not have an opportunity to be fully prepared. See CCP §2025.420(b)(3) (party may seek protective order to postpone video deposition of treating or consulting physician or expert witness until moving party has had adequate opportunity to prepare for cross-examination by discovery deposition or other means).

Counsel who must defend a video deposition of the examiner's own witness should consider seeking a court order under CCP §2025.420 to depose the witness himself or herself. In the alternative, counsel should prepare to cross-examine the witness during the video deposition (after the witness has been examined by his or her own attorney) so that if the witness is subsequently unavailable at trial, counsel's client is protected. See CCP §2025.620(c). See CCP §2025.610 (only one deposition per deponent except by court order). See also CCP §2025.420(b)(3).

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III. TAKING DEPOSITION

§6.23 A. Examination Techniques

Although every lawyer develops an individual deposition style, there are certain basic tools which are summarized in the following list:

- **Outline areas of inquiry.** For particularly important questions, counsel should write out the questions in advance. Understanding the objectives of the particular deposition and the material to be covered—and predicting how the deponent's testimony might be used in motions, settlement discussions, and trial—helps focus the examination. See §6.24.
- **Make certain virtually compulsory inquiries.** Some areas should be covered as the deposition begins. For example, counsel should almost always ask if the deponent has taken medication, feels ill or fatigued, or has any other problem, including recent alcohol or prescription or other drug use, that would affect the ability to recollect or to testify accurately. Ask whether the deponent speaks English or has any difficulty understanding it. These questions protect the record so that the deponent cannot later blame medication, a physical impairment, or poor English comprehension in an effort to explain away unfavorable testimony. See §§6.48-6.51.
- **Learn about deponent.** A wealth of information exists in publicly accessible sources and databases; some of this information may pertain to the deponent. Old-fashioned techniques also work well, *e.g.,* talking with the client and others who know the deponent and can share background information before the deposition. See §6.6. Asking the witness background questions at the deposition can also be very fruitful. See §6.56.
- **Consider tone of examination.** Based on a knowledge of the deponent and the goals of the deposition, counsel should think about the tone or style that might make the deposition most productive. For example, firmness may be appropriate with a witness who is likely to be hostile or recalcitrant. An accommodating manner may work well with a witness who will open up to that approach or with a friendly witness. It is important to be flexible, changing the tone of the examination during the deposition itself if needed. See §6.54.

NOTE: It is much easier to question a cooperative witness. If certain subjects are likely to upset the witness or create a hostile atmosphere, counsel should consider saving those subjects for last. Once a cooperative environment is gone, it unlikely to be recreated during the deposition.

- **Consider strategic order of examination.** It is often a good idea to begin the examination with general questions. If possible, counsel should ask questions that allow the deponent to "tell the story of what happened next." This approach may demonstrate inconsistencies in the deponent's testimony when the examiner later returns to specific areas, *e.g.,* when asking the deponent about particular exhibits. See §§6.52-6.53.
- **Ask about document review and preparation.** At some point during the deposition, counsel should ask whether the deponent reviewed any documents or discussed the case with anyone before the deposition. The response may lead to fruitful areas of discovery, especially if a nonparty deponent has reviewed the matter extensively with defending counsel, because no privilege protects such conversations from discovery. On privileges and other protections, see chap 3.
- **Never needlessly embarrass deponent.** Not only is such conduct unethical (ABA Model Rules of Prof Cond 4.4), it is unproductive and sanctionable. See CCP §2023.010(c) (misuse of discovery includes employing discovery method in manner "that causes unwarranted annoyance, embarrassment, or oppression"). When potentially embarrassing questions are relevant to the issues in the case, however, the examiner has an obligation to pursue them. On sanctions for misuse of discovery, see §§15.87-15.91.
- **Ensure that questions are answered.** If the deponent does not recall information with precision, the examiner is entitled to the deponent's best recollection. The record should show the examiner's insistence on an answer in order to compel discovery and seek sanctions under CCP §2025.480. See §6.76.
- **Never argue.** It is not a good idea to argue with opposing counsel or the witness. Doing so wastes time,

lengthens the transcript (increasing the expense of the deposition), may appear unprofessional or qualify as sanctionable conduct on the record, and could unnecessarily educate the opponent on the theory of the case, important issues, and the client's general strategy. See §6.19.

JUDGE'S PERSPECTIVE: Unnecessary argument by an attorney at the deposition can be irritating to a judge who has to read the transcript in connection with a motion or for some other purpose.

- **Keep the big picture in mind.** Statistically, a case is much more likely to settle than to go to trial. Establishing and maintaining a respectful relationship with the deponent and opposing counsel, and avoiding both needless rancor and inappropriate friendliness, will increase the probability of good faith negotiations, advance case objectives, and ultimately benefit the client's interests.
- **Do not feel compelled to ask every possible question.** At the deposition, examining counsel usually questions the witness thoroughly to learn how the witness will respond at trial and to prepare for effective impeachment if the witness tries to change his or her position at trial. Sometimes, however it may be better not to ask a key question, *e.g.,* there may be an important document that counsel prefers to save for impeachment at trial and deposition examination might prepare the witness to diffuse that later impeachment effort. Counsel must balance the desire to surprise the witness at trial against the risk that counsel will be surprised by not knowing the witness's testimony before trial.

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§6.24 1. Using Deposition Outline

A deposition outline is a tool, not a script. An examiner who has drafted an outline of the deposition must still be prepared for the likelihood, even the certainty, that the deposition will deviate from the plan. The examiner must thus observe two contradictory dictates:

- **Stick to the plan until the facts are established.** The examiner must probe the facts on which crucial claims and defenses are based. Evasive answers, overly general responses, or obstructionist conduct does not deter a skilled examiner from asking further questions to learn these facts. A common failing of most beginning attorneys is to blandly accept each witness's answer and go on to the next step in the outline. The skilled examiner does not allow the witness to escape so easily, but breaks down each answer into follow-up questions. On breaking down answers, see §§6.8, 6.25.
- **Keep an open mind and remain flexible.** It is crucial for the examiner to listen to the deponent's responses. During the deposition, facts not accounted for in the outline may emerge and need development. The examiner should pursue newly discovered facts without attempting to shape them unnaturally to a particular legal theory. By listening attentively and reflecting on the answers, the examiner can often think of ways to modify a legal theory to fit the facts as discovered. After completing follow-up questions on a certain subject, return to the deposition outline and continue questioning as planned.

JUDGE'S PERSPECTIVE: If a question elicits a damaging admission from a witness and the witness has been "boxed in" sufficiently that he or she cannot dilute the admission at trial, the examiner should resist the urge to "nail it down" and simply move on to the next subject in the outline. Given another chance, the witness may appreciate the significance of the admission and make corrections. Trial judges frequently see the situation in which an attorney was able to extract an admission from a deponent but, by further questioning on the subject at the deposition, diluted its impeachment value at trial.

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§6.25 2. Asking Specific Questions

A deponent may give an answer, such as: "I was told that the car had been fixed before I drove it." This is the time to follow up with specific questions, including: "Who told you? When were you told? How were you told (*e.g.,* in person, by telephone, by letter)? Are there any documents that reflect that conversation (*e.g.,* a repair order, memorandum, e-mail message)? Who else was present when these statements were made?" Ask what the witness said in response, and whether there is any document that might refresh the witness's recollection. In addition to eliciting additional facts, the follow-up questions may either establish the truth of the witness's testimony or serve as impeachment evidence. The follow-up questions are basically who, what, where, why, when, and how, and end with "Is there anything else?" On deposition procedures, see chap 5.

PRACTICE TIP: In some circumstances, it may be appropriate to abandon avenues of discovery during a deposition because of concern about their impact on pretrial motions, settlement discussions, or trial. Because a party need not pursue every advantageous theory, the examiner should consider how to avoid educating an opponent needlessly with questions in a sensitive area. Although it is never wise to rely too heavily on the unpreparedness or ignorance of an opponent, it may become evident during the course of a deposition that specific questions may only raise awareness of issues that might not otherwise occur to the opponent.

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B. Ensuring Accurate Record

§6.26 1. Controlling Record

The examiner representing the party noticing the deposition is in charge of the deposition and has the responsibility to ensure that the record is accurate and usable. On using deposition at trial, see §6.136.

It is the examiner's responsibility to insist that people talk one at a time and to let the court reporter know that if any simultaneous comments do occur, the deponent's statements should be recorded before others'. On helping the court reporter make an accurate record, see §6.30.

Going off the record. The examiner may wish to make a statement at the beginning of the deposition that the reporter will record everything said during the proceeding unless the examiner instructs the reporter otherwise. A deposition is a court proceeding and cannot be treated as if it were an informal conversation. During the course of a deposition, an increased familiarity may develop among those present to the point that defending counsel or even the deponent may casually declare, "Off the record." It is essential for the examiner to make sure that the reporter understands that nothing is off the record unless the examiner has agreed it can be.

It is particularly hazardous to go on and off the record frequently. A deponent may become confused and obscure the record later, claiming the reporter included inaccurate or improper material, or delivered an incomplete transcript of the proceeding. If matters are stated off the record, they will not be preserved for later use. When the examiner permits discussions off the record, the conclusions reached should be summarized after going back on the record.

JUDGE'S PERSPECTIVE: Profanity is never appropriate. Engaging in verbal abuse is both unwise and unethical. See *Tylo v Superior Court* (1997) 55 CA4th 1379, 1386 n3, 64 CR2d 731; *Paramount Communications, Inc. v QVC Network, Inc.* (Del 1994) 637 A2d 34, 53. This kind of behavior has a very negative influence on judges and greatly undermines counsel's credibility when making or opposing discovery or other pretrial motions. Judges are usually inclined to take stern action if confronted with profanity or verbal abuse at a deposition.

Rereading question. If there is a long "speaking objection," *i.e.,* one in which counsel states the legal basis for objecting to a question and offers argument on why the objection is appropriate, ask to have the question reread. On speaking objections, see §6.100.

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§6.27 2. Understanding What Record Does Not Show

Unless the deposition is video or audio recorded, the record will not reflect nonverbal responses. It will not distinguish between a shout and a whisper or clarify estimates by the witness based on objects in the examination room (*e.g.,* "about the size of this table," "the same distance as from here to the wall"). It will probably not reflect whether defending counsel and the witness inappropriately confer or review documents during the course of a deposition.

If conduct occurs that is material to the deposition, the examiner should describe the conduct on the record. A declaration on a motion to appoint a referee at a deposition, stating that defending counsel shouted or constantly coached the witness is a poor substitute for a statement to that effect on the record that is not contradicted contemporaneously. An estimate put into measurable units in the examiner's next question ("Do you agree that the distance you describe as from here to the wall is roughly 20 feet?"), followed by a request to counsel that they put any disagreement with the measurement on the record at that time, will assist in keeping the record accurate.

On requesting a reenactment during the deposition, see §6.66.

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§6.28 3. Conducting Deposition Using Instant Video Display ("Realtime")

When a deposition is taken using instant video display (often referred to as conducting the deposition in "realtime"), the court reporter's strokes on the stenographic machine are transmitted to the reporter's computer which translates the strokes into English. The English text of the deposition can be instantaneously displayed on laptop screens, computer monitors, or large projection screens and transcripts can be printed as the deposition is taking place. See §5.74.

The use of instant video display can make it easier to keep track of the progress of an examination, *e.g.,* after a long speaking objection it is possible to locate the question that triggered the objection. If the deposition testimony has been transmitted to and displayed on computers in another location, it is possible for a consulting expert in that location to read the deposition transcript as it is being transcribed and send messages to the examiner via computer during the deposition.

NOTE: If the deposition is to be conducted in realtime, this should be stated in the deposition subpoena or notice. See CCP §§2020.310(d), 2025.220(a)(5). See §5.74.

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§6.29 4. Preserving Objections

Errors or irregularities that might be cured if promptly presented are waived unless a specific objection to them is made in a timely fashion during the deposition. See CCP §2025.460(b). For a complete list of trial objections that may also be useful during depositions, see the laminated Checklist of Objections (Cal CEB 2006) included with this book.

Objections to form of questions or answers. This rule applies to objections to the examiner's questions as well as to the deponent's answers. See CCP §2025.460(b) (errors include those relating to the form of any question *or answer*). On the dangers of reserving objections until trial, see §6.40.

Although defending counsel will usually object to the form of the question, thus preserving that objection, the examiner should use particular care at depositions in which the witness may not be available at trial. For example, the witness may live beyond the scope of the jurisdictional subpoena power of the court, or may be facing a terminal illness. If the witness's response is objectionable (*e.g.,* it is nonresponsive or goes beyond the scope of the question), even the examiner should interpose an objection and move to strike the answer as nonresponsive. Otherwise, a court may allow the witness's objectionable testimony to be received into evidence at trial. The examiner's objecting to an answer, even to the examiner's own question, puts opposing counsel on notice that the error must be cured during the deposition. Silence—even by the examining counsel—to an improper answer may be equivalent to a waiver. See CCP §2025.460(b).

PRACTICE TIP: Sometimes counsel will move to strike as nonresponsive the answer of counsel's own witness. The move to strike preserves the objection, prevents the examiner from claiming that he or she relied on the lack of objection to the form of the question or answer, and is a hint to the witness that he or she is giving more information than necessary to respond to the question.

If a question is improper, counsel should rephrase it. An improper question is useless because the answer to it may be inadmissible at trial or on summary judgment.

Inappropriate or abusive conduct. Errors or irregularities that can be cured if promptly objected to include inappropriate or abusive conduct of anyone present at the deposition or inappropriate or abusive questions by any of the lawyers. Although seldom concerned with objections, the examiner should nonetheless be prepared to object to errors or irregularities of any kind that occur during the examination.

For more detailed discussion of objections that should be made during depositions from defending counsel's viewpoint, see §6.94.

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§6.30 5. Assisting Court Reporter

Before the deposition, the examiner should give the court reporter a copy of the case caption so the transcript will include the correct case name and court number. It is often useful for the examiner to appear early to organize documents for convenient reference and to premark them as exhibits during examination. See §6.42. If the deponent is an expert, it may be helpful to provide the reporter with a written glossary of unusual terms to be used during the proceeding. On discovery of expert witnesses, see chap 11.

After the deponent and other counsel appear, the examiner should assist the court reporter by identifying everyone who is present at the deposition, including the party each counsel represents. During unusually long or technical depositions, the examiner from time to time should ask if the court reporter would like to take a short break. Certain courtesies (*e.g.,* spelling technical words or proper names into the record during the examination, controlling the examination so that two people are not talking at once) help the court reporter make the record of the deposition complete and accurate.

PRACTICE TIP: Counsel should be sure that a relatively inexperienced court reporter understands that interrupting the examination to ask for an answer to be repeated is preferable to guessing at what was said. A competent court reporter also understands, however, that frequent interruptions interfere with the pace of examination and should be avoided unless essential to preserve an accurate record. If people speak simultaneously, the examiner should ensure that the court reporter records the deponent's statements before others'. If the examiner is uncertain whether the deponent's answer was recorded correctly, the examiner should ask the court reporter to read back the last question and answer. If the answer is incorrect, then the examiner can ask the deponent to repeat the correct answer. Checking with the reporter at a break about any transcription problems is another good way to avoid an ambiguous record. For more ideas on the examiner's control of the record to ensure accuracy, see §6.26.

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§6.31 C. Using Interpreter

Counsel should find out before the deposition whether the witness will need an interpreter. Whether the deposition's purpose is to discover facts or to preserve testimony for pretrial motions or trial, the examiner should ensure that the deponent understands the questions and delivers responsive answers. Otherwise, even the most damaging admission can be explained away in court by the very simple and credible statement, "I didn't understand."

It is good practice for an examiner to apply the same rule to depositions that guides the use of interpreters at trial. At trial, an interpreter's services are mandatory if the witness is incapable of understanding English or of expressing himself or herself "so as to be understood directly by counsel, court, and jury." Evid C §752(a). Whether the foundational requisite has been met at trial is a matter for the court's discretion. See *People v Brown* (1980) 110 CA3d 24, 35, 167 CR 557; *People v Holtzclaw* (1926) 76 CA 168, 177, 243 P 894. See California Trial Practice: Civil Procedure During Trial §§11.28, 11.31, 11.34-11.36 (3d ed Cal CEB 1995).

NOTE: The same rule also applies to trial witnesses with hearing impairments great enough to prevent an understanding of "language spoken in a normal tone." Evid C §754.

Using an interpreter means, in effect, that two depositions are being taken simultaneously: the interpreter's and the deponent's. See Evid C §750 (person serving as interpreter is subject to all rules of law relating to witnesses).

JUDGE'S PERSPECTIVE: As a practical matter, the reporter does not report the exchanges between the interpreter and the deponent that are in the other language. Only the questions from the examiner and the English answers from the interpreter are reported. However, any portions of the deponent's answers that are in English are reported. Counsel for the deponent should caution the deponent to wait until the interpreter translates the question in the foreign language and to answer only in the foreign language.

The examiner should be certain that both the interpreter and the deponent are sworn. See Evid C §751. Logically, the interpreter should be sworn first. Then the interpreter should translate the oath that the deponent takes as well as the deponent's response. At that point, the deposition can begin.

PRACTICE TIP: Before deposing a witness who does not speak English, the examiner should confer with the interpreter or someone else who speaks the particular language to determine how to ask questions that translate intelligibly. Because translation is both an art and a science, questions and answers can be rendered in subtly different ways. The examiner should communicate to the interpreter that even small verbal differences can have significant legal consequences and should request that the interpreter ask for clarification when in doubt.

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§6.32 1. Sample Oath

An oath taken by the interpreter should be similar to the following (see Evid C §751(a)):

> Q. Do you swear that you will make a true interpretation to the deponent from English to _ _ _ _ _ _ of all questions asked and that you will make a true interpretation from _ _ _ _ _ to English of the deponent's answers, to the best of your skill and judgment?
>
> A. I do.

If an oath is not given to the interpreter, and other counsel do not object, the defect is waived. CCP §2025.460(b). See *People v Reyes* (1976) 62 CA3d 53, 70, 132 CR 848 (discussing whether objections to qualifications of interpreter were waived at trial).

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§6.33 2. Transcript Translation

It may be necessary for the transcript itself to be translated for reading and signing by the deponent. See CCP §2025.520; discussion in §6.127. In this event, the examiner should be sure that the deposition officer, when indicating any action taken by the deponent, notes on the original that a translation of the transcript was made available to the deponent. See CCP §2025.520.

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§6.34 D. Going on Record

The examiner should specify the point at which the court reporter will begin to record all matters. The examiner may then summarize for the record the notice, subpoena, or stipulation that gave rise to the deposition. The examiner can also request the court reporter to attach a copy of this document to the transcript.

The examiner often handles the question of what stipulations, if any, will be in effect during the deposition. See §§6.35-6.44. Finally, the examiner should ask the court reporter to swear in the deponent. See §6.45.

The examination then proceeds, beginning with admonitions to the deponent and preliminary background questions, followed by substantive questioning. See §§6.46-6.65.

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§6.35 E. Handling Stipulations

Before examining the deponent, some attorneys agree to certain stipulations while others enter into stipulations only at the end of the deposition. See §6.38. Examples of stipulations that counsel may consider adopting at a deposition are discussed in §§6.36-6.44.

If arguments develop over which stipulations to adopt, the examiner can take the discussion off the record and then return to the record with a statement of the stipulations that counsel agree will govern the deposition. Some counsel agree on written stipulations before the deposition and present them to the court reporter as the deposition commences.

CAUTION: When a deponent is not represented by counsel, the examiner should carefully explain the nature and effects of any stipulations the examiner and other counsel wish to adopt. This is best done on the record.

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§6.36 1. Numbering All Exhibits Consecutively

If the deposition is the first of the case, the examiner may suggest at the beginning, or when introducing the first exhibit, that counsel agree to number the exhibits consecutively for the entire case, rather than beginning numbering anew with each deposition. Consecutive numbering avoids, *e.g.,* "Jones Depo, Exhibit 4," "Smith Depo, Exhibit 4," and "Roberts Depo, Exhibit 4"—there will be only one Exhibit 4.

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§6.37 2. Avoiding "Usual" Stipulations

Sometimes counsel ask for an agreement that the "usual" stipulations be in effect during the deposition. To do so is never advisable, because what may be customary to one counsel may not be to another, particularly if they practice law in different locations or legal specialties.

JUDGE'S PERSPECTIVE: An agreement to the "usual" stipulations is not meaningful to a judge who is called on later to resolve a dispute involving a stipulation.

Some court reporters are also accustomed to including the "usual" stipulations at the beginning of the transcript and do so even when counsel have not mentioned the subject. The careful examiner should instruct the court reporter in appropriate cases that no stipulations have been entered into, even making such a statement on the record, if the examiner believes other counsel may not be clear about the subject. When counsel receives the transcript, he or she should carefully review it to make certain that the reporter did not include the "usual" stipulations as a matter of course.

PRACTICE TIP: An attorney responding to an offer of the "usual" stipulations can simply ask that they be stated individually on the record, with an opportunity to consent to or suggest a modification of each stipulation. Less experienced counsel should not be intimidated into agreeing to the "usual" stipulations to avoid looking like a novice.

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§6.38 3. Stipulations at End of Deposition

Certain stipulations entered into at the end of the deposition can be very useful. These include:

- The deponent can sign and review the transcript other than at the reporter's office;
- The deponent may sign the deposition under penalty of perjury without notarial acknowledgment;
- The original of the transcript will be sent to deponent's counsel, rather than to the attorney for the noticing party (see CCP §2025.550(a));
- The deponent will review and sign the deposition within 30 days after it is received by counsel; and
- The deponent will advise counsel within a particular number of days of any changes to the transcript.

Counsel should consider using the following language:

EXAMINER: Do you stipulate that after the transcript has been transcribed, the reporter will send the original to deponent's counsel at counsel's office address and that deponent will have 30 days after the transcript has been received by deponent's counsel within which to read and review the transcript and make any corrections, additions, or deletions and list these changes on the errata page provided by the reporter?

DEFENDING COUNSEL: Yes.

EXAMINER: Do you stipulate that on completing the review and listing the changes, if any, the deponent will sign the transcript under penalty of perjury where indicated at the end of the transcript, without need for affirmation by a notary? And that within ten days after the deponent signs the transcript, deponent's counsel will advise all other counsel in writing of any changes that deponent made when reviewing the transcript?

DEFENDING COUNSEL: Yes.

EXAMINER: Do you stipulate that deponent's counsel will maintain custody of the original executed transcript and on reasonable request will produce it and lodge it with the court at the time of trial or for any motion for which it may be required?

DEFENDING COUNSEL: Yes.

EXAMINER: Do you stipulate that if the witness does not sign the transcript within the time frame, if the witness does not provide notice of any changes to the answers within the time frame, or if the original executed transcript becomes lost or otherwise unavailable, the parties agree that a certified copy of the transcript may be used for all purposes, as if it were a duly executed and corrected original transcript?

DEFENDING COUNSEL: Yes.

JUDGE'S PERSPECTIVE: Counsel should also consider not entering into any stipulations and simply proceeding as required under the Code of Civil Procedure.

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§6.39 4. Stipulation on Instructing Deponent Not to Answer

During the course of a deposition, defending counsel may instruct the deponent (if the deponent is defending counsel's client) not to answer a question. On the legal basis for such an instruction, see §6.102. Absent a stipulation, the examiner must insist that the deponent either answer or refuse to answer the question because:

- Until there is a specific refusal on the record, the witness has technically not refused to answer the question. Defending counsel has merely interposed an instruction, and the deponent remains free to disobey the instruction and to answer the question. Most deponents will not do so, but the option remains.
- Unless the deponent's clear refusal to answer is on the record, the examiner has not satisfied the prerequisite for a subsequent motion under CCP §2025.480 to compel an answer to the question. See §§6.112-6.125.

As a practical matter, the time associated with extracting a specific refusal to answer is often very costly. To avoid the need for a formal refusal on the record each time defending counsel instructs the deponent not to answer, counsel may stipulate, at the commencement of the deposition or when the first instruction is interposed, that an instruction not to answer by defending counsel constitutes a refusal to answer by the deponent for purposes of a motion to compel.

The following exchange exemplifies counsel agreeing to this stipulation:

> EXAMINER: Do you stipulate that your instruction to the deponent not to answer shall constitute a refusal to answer for purposes of a motion to compel under CCP §2025.480?
>
> DEFENDING COUNSEL: Yes.

CAUTION: This stipulation should not be used if the examiner believes there is a chance the witness will disobey defending counsel's instruction, and that the expenses associated with a motion to compel can thus be avoided. Counsel should never enter into this stipulation at the deposition of a nonparty. Only the deponent's own attorney can instruct a deponent not to answer.

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§6.40 5. Be Wary of Reserving Objections Until Trial

A deposition stipulation regarding objections usually attempts to address the uncertainties caused by the language of CCP §2025.460(b) that errors and irregularities "that might be cured" if objections are timely made during the deposition are waived. See §6.94. It is often difficult during a deposition to judge whether a matter is an error, and if so, whether the error might be cured if counsel makes a specific objection. Other objections that become obvious later may not occur to counsel during the deposition. Some examiners also prefer not to object to the form of the *answers* during the deposition because they believe such objections interfere both with the pace of the examination and any rapport they have been able to establish with the deponent. Thus, some counsel stipulate that all objections under CCP §2025.460(b), except as to the form of the question, are reserved until trial.

NOTE: Objections to the deponent's competency or to the "relevancy, materiality, or admissibility at trial" of the testimony or exhibits are not waived by failure to make them at the deposition, but are preserved as a matter of law. CCP §2025.460(c). Objections on the grounds of privilege or work product protection are waived unless they are timely made during the deposition. CCP §2025.460(a); Evid C §912(a). For a list of trial objections, see the laminated Checklist of Objections (Cal CEB 2006) included with this book.

Counsel should be wary of reserving objections until trial. A broad stipulation is generally not good practice from the examiner's viewpoint, because there are many objections that might be waived if not made at the deposition or that could be cured if made. Stipulations to reserve objections can also lead to inadmissible testimony. For example, if the examiner asks an improper compound question, after an objection he or she can immediately rephrase it into separate questions. After the deposition is over, this mistake cannot be cured.

The stipulation is also troublesome from the point of view of counsel who is defending the deposition. If defending counsel relies on the stipulation and fails to make an objection as to privilege or work product, for example, the testimony might come in at trial despite an objection if the judge reasons that, as a practical matter, the testimony was given, it is on the record, and everyone knows it. It is far better to make the objection, then agree to waive it for a particular line of inquiry at the deposition, subject to the right to raise the objection at trial. Sometimes it is necessary for defending counsel to object to a deponent's answer to protect the record, *e.g.,* when protecting privileges of nonparty witnesses whom defending counsel cannot instruct (see §6.105) or when a witness is being deposed to preserve testimony for trial and counsel should not surrender the right to make the objection. See §6.101.

CAUTION: If the deposition is being conducted for discovery purposes only (*i.e.*, not to preserve testimony or impeach the witness), some counsel agree to reserve *all* objections under CCP §2025.460(b), even as to the form of the question. Such a stipulation is unwise. First, what is anticipated to be a discovery deposition may become a deposition to preserve evidence if the witness becomes unavailable for trial; counsel cannot know this in advance. Second, unless objections to the form of the question are made and the questions are corrected, the result may be inadmissible testimony.

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§6.41 6. Avoiding Multiple Objections

In multiple-party litigation, there are often many attorneys present at the deposition. To avoid the delay of multiple objections to the same question, the examiner should suggest a stipulation that an objection by any counsel shall reserve that objection for all parties. This stipulation works particularly well when one counsel can serve as "lead counsel," other counsel intervening only when they do not agree with, or wish to amplify, the objection.

The following is an example of this stipulation, to which each defending counsel should assent separately on the record:

> EXAMINER: Do you stipulate that an objection by one party is deemed an objection by all parties for the purpose of reserving objections until the time of trial?
>
> DEFENDING COUNSEL: Yes.

JUDGE'S PERSPECTIVE: Be aware that unless such a stipulation is reached, any party must specifically and separately object and state the grounds on which the objection is based to avoid waiver of the objection. See *Estate of Silverstein* (1984) 159 CA3d 221, 225, 205 CR 294.

Counsel who believes an objection to be improper, particularly when the objection leads to deponent's refusal to answer and a subsequent motion to compel, may avoid sanctions by indicating clearly on the record that the party counsel represents is not joining in that particular objection. The likelihood of sanctions against a counsel who is deemed to have joined in an objection, but does not explicitly join, however, is remote.

NOTE: Unlike a broad form stipulation that preserves all, or even most objections to trial, this type of stipulation is generally very helpful to an examiner because it allows the deposition to go forward more efficiently.

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§6.42 7. Marking Exhibits

Before questioning the deponent about a particular document, the examiner usually identifies the document for the record. For example:

> EXAMINER: I am handing to the reporter (a three-page letter dated November 1, 2005, addressed to John Jones from Gary Gray), and ask that he mark it as Exhibit B for identification.

PRACTICE TIP: As defending counsel, do not let the witness be examined about a document unless it is first marked as an exhibit. To do so is to create a potentially ambiguous record as to the correct exhibit. It is better practice to follow in deposition the same procedures counsel would follow at trial.

The parties may stipulate to allow exhibits to be premarked by the examiner before examination begins in the order in which they will be used during the deposition, or to have the reporter premark certain documents before beginning the deposition. With large numbers of documents, it is usually efficient to premark the exhibits by Bates-stamping the documents (*i.e.,* by attaching labels to each document with consecutive numbers).

Once marked, the examiner should carefully identify the document before questioning the deponent about it. An appropriate introduction would be as follows:

> EXAMINER: I have handed the witness (the three-page letter dated November 1, 2005, addressed to John Jones from Gary Gray), which the reporter has marked as Bates no. 11012 for identification. Do you have that letter in front of you?
>
> DEPONENT: Yes.

Alternatively, the examiner may ask questions of the deponent to identify and to authenticate the document. For example:

> EXAMINER: I am handing you a three-page document that the reporter has marked as Bates no. 11012 for identification. Do you recognize this document?
>
> WITNESS. Yes.
>
> EXAMINER: Can you describe this document for the record?

All documents (including hard copies of electronically stored documents) that have been marked for identification are customarily attached as exhibits to the transcript, making it much easier to use both documents and deposition testimony at trial. However, there are some instances in which exhibits are not attached. See §6.44.

PRACTICE TIP: It is a good idea to make copies of each exhibit for each opposing counsel. Not only does this speed up the pace of the deposition, it could impede defending counsel from coaching the witness while reviewing the document with the witness.

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§6.43 8. Attaching Copies of Exhibits and Treating Attached Copies as Admissible Secondary Evidence

If a deponent prefers to retain original documents produced at the deposition, counsel may stipulate that copies attached to the transcript as exhibits be treated as admissible secondary evidence to prove the content of the original writings. See Evid C §§1520-1521 (content of a writing may be proved by an original or by otherwise admissible secondary evidence). The court reporter may take custody of the originals for copying, then return the originals to the deponent.

NOTE: When a party seeks discovery of computer information, there is a rebuttable presumption that a printed representation of computer information or a computer program, or of images stored on a video or digital medium, is an accurate representation of what it purports to represent. Evid C §§1552-1553. On electronic discovery, see chap 4. On electronic documents and inspection demands, see chap 8.

Counsel should be aware that the costs of having the court reporter copy voluminous exhibits can be substantial. It is good practice to specify in the stipulation itself the agreed arrangement for the costs of copying.

A sample stipulation is as follows:

> EXAMINER: Do you stipulate that the original documents marked for identification be copied by the court reporter *(e.g., at the deponent's expense/the costs of copying to be divided equally between the parties)*, the court reporter return the originals to the deponent, and do you further stipulate that the copies attached as exhibits to the deposition transcript may be offered as admissible secondary evidence to prove the content of the originals?
>
> DEFENDING COUNSEL: Yes.

NOTE: Counsel may agree to the first portions of the stipulation concerning the court reporter's attaching copies to the transcript and who pays for this expense, without the need to agree to the final portion. Arguably, copies made by the court reporter would be admissible secondary evidence at trial, unless there was other evidence of their unreliability and justice required their exclusion. See Evid C §1521.

Voluminous documents. If exhibits are voluminous and there is sufficient trust between counsel, counsel can agree that one of them will keep custody of the documents. Such a stipulation is risky, however, because it creates the possibility that the record will be unclear. The parties can save money by not attaching the exhibits to the transcript or by having a third party hold the documents, but whenever the documents are not attached to the transcript, the possibility exists that the witness will disavow knowledge of the documents, saying that they were not there when he or she signed the transcript.

JUDGE'S PERSPECTIVE: In cases involving voluminous documents, counsel should consider requesting an order for production, storage, and access to the electronic documents in electronic form. See CCP §2017.730(d). On electronically stored documents, see §§8.19-8.27. On electronic discovery in general, see chap 4.

PRACTICE TIP: Attorneys sometimes mark voluminous documents as exhibits and bind them in a separate volume to prevent the transcript from becoming unwieldy and to ensure a proper foundation for the exhibits.

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§6.44 9. Excluding Exhibits

The best practice is to attach the originals or copies of any documents used during the examination to the transcript so that later there will be no question about identifying them. On the dangers of not doing so, see §6.43. However, there are instances in which the costs of doing so are prohibitive or in which attachment is impractical, *e.g.,* voluminous or oversized documents. Counsel not intending to attach such documents should enter into an appropriate stipulation, such as the following:

> EXAMINER: During the course of pretrial discovery, the parties have agreed to mark as exhibits, documents numbered 1-5000. Do you stipulate that these exhibits need not be re-marked at this deposition and that this deposition shall be read as if said exhibits were attached?
>
> DEFENDING COUNSEL: Yes.

PRACTICE TIP: When documents referred to during examination cannot be identified by number, it is important to be as specific as possible in identifying them. Descriptions (*e.g.,* type of document, number of pages, names, dates, any titles on documents, and other pertinent details) should be read into the record in the manner set forth in §6.42, whether or not the documents or copies are attached to the transcript.

JUDGE'S PERSPECTIVE: Defending counsel should not permit the examiner to ask questions of the deponent about electronic documents that have not been produced as paper copies. If the examiner refuses, counsel should make a proper objection and consider suspending the deposition and obtaining a protective order.

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§6.45 F. Swearing In Deponent

The examiner should ask the deposition officer to swear in the witness, placing the deponent under oath as required by CCP §2025.330(a). If the deponent refuses to take the oath, the examiner should be sure that the record shows this unequivocally and that the deponent has been made aware of the consequences. A motion to compel the deponent to be sworn can then be made. See CCP §§2025.440(b) (motion for order compelling testimony on failure of party deponent to proceed with deposition); 2020.240 (nonparty deponent may be held in contempt of court for refusing to obey a lawfully issued subpoena); 2025.450 (motion for order compelling deponent's attendance and testimony).

Defending counsel or the deponent must promptly present any objections to the oath or affirmation administered, so that there is an opportunity to cure any defects. Otherwise, they are waived. See CCP §2025.460(b).

On rare occasions, an examiner may encounter a person who refuses to adopt the form of the oath set forth in CCP §2094(a)(1) because of its reference to "God." The examiner who sees the deponent is having a problem with taking the oath should suggest that the court reporter ask the witness, instead of swearing, to solemnly affirm (or declare) to tell the truth, the whole truth, and nothing but the truth. See CCP §2094(a)(2).

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G. Admonishing Deponent

§6.46 1. Purpose of Admonitions

The examiner should see to it that a deponent is fully informed. Otherwise, the witness can try to avoid the consequences of having made damaging statements at the deposition by later claiming a misunderstanding about the nature of the deposition process (*e.g.,* "I felt intimidated into giving some answer to the question, even though I did not understand it").

When admonitions are part of the record before the examination begins, the deposition testimony becomes useful as an admissible prior inconsistent statement if the deponent later contradicts statements made at the deposition. See Evid C §1235.

JUDGE'S PERSPECTIVE: When faced with damaging deposition testimony, a witness at trial commonly pleads nervousness or lack of understanding due to the pressure of the situation. Careful admonitions at the beginning of the deposition transcript help neutralize such disclaimers. The examining attorney need only bring to the attention of the jury that the witness was admonished at the deposition not to answer a question that was not clearly understood.

For sample admonitions given during a deposition, see §6.141.

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§6.47 2. Specific Comments

The examiner should be sure the record shows the deponent's understanding of the deposition procedure. After the court reporter has administered the oath to the deponent, and the examiner is ready to proceed, the examiner usually admonishes the deponent by making short statements on the record and eliciting the deponent's understanding of each admonition given.

No specific form need be followed, but certain key points should always be covered:

- Ask whether the witness has ever been deposed before (see §6.50);
- Even though the deposition is being taken in a relatively informal setting, the witness is under oath, has sworn to tell the truth, and the effect of that oath is the same as if the witness was testifying in court;
- The witness should answer audibly, and only after the examiner has finished speaking, so the court reporter can take down each person's words, with only one person speaking at a time;
- The witness should advise the examining attorney if any question is unclear in any way, whereupon the examining attorney will reword the question;
- The witness should not guess when providing responses but, if appropriate, should provide estimates based on his or her best recollection;
- If a question calls for a yes or no answer, the witness should answer "yes" or "no" rather than with a nod or a shake of the head;
- The witness is entitled to request a break at any point in the deposition to confer with counsel, to use the restroom, or for any other reason;
- Other attorneys may make objections to questions or answers; they are objections for the judge to consider later; now you are required to answer unless, as a party, your counsel requires you not to answer;
- The court reporter is recording all the questions, answers, and objections and will reduce that information to booklet form after the deposition is concluded, whereupon the witness will be given the opportunity to read the transcript and correct any inaccuracies;
- If the witness makes changes in the testimony given that are inconsistent with the answers given during the deposition, the examining attorney will be entitled to comment on those discrepancies at the time of trial to question the witness's veracity.

For sample admonitions given during a deposition, see §6.141.

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H. Important Preliminary Questions

§6.48 1. Deponent's Medications and Illnesses

The examiner should ask questions about what medications, if any, the deponent has taken that day, the pharmaceutical identity of each of them, or if not known, the name of the prescribing physician. Defending counsel's assistance can often be enlisted to furnish the names of any medications and their dosages by letter after the deposition. Similarly, the examiner should ask if the deponent is suffering from any illness that would affect the deponent's ability to recall events. The examiner should make clear that it is necessary to ask such seemingly personal health questions to establish on the record that any medical problems or medications will not prohibit the deponent from testifying accurately.

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§6.49 2. Deponent's Familiarity With English Language

The examiner should ask whether the deponent speaks English or has any difficulty understanding it.

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§6.50 3. Previous Depositions

The examiner should always ask the deponent whether he or she has been deposed before, and, if so, the dates, name, and county of any former lawsuit, the role of the deponent in the lawsuit (*e.g.,* plaintiff, defendant, nonparty), the type of case or its subject matter, and its conclusion (*e.g.,* trial, settlement).

Asking the deponent about prior experiences in testifying can be useful for at least two reasons:

- Demonstrating the deponent's familiarity with the requirements of testifying will limit the deponent's ability to vary the testimony given at a subsequent hearing or trial by feigning ignorance of the deposition process; and
- Determining that the deponent has been involved in related litigation or proceedings may lead to impeachment evidence by revealing prior inconsistent statements in transcripts from past depositions, administrative hearings, or trial.

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§6.51 4. When Witness Is Organization Representative

If, under CCP §2025.230, the deponent named in the notice or subpoena is not a natural person but a corporation, partnership, union, or other entity, the examiner should ask additional questions before the examination begins of the representative appearing on behalf of that organization. For example:

> EXAMINER: Are you designated by _ _ _ _ _ _ Corporation, under CCP §2025.230, on all matters set forth in the notice of deposition, which the reporter has marked as Exhibit A?
>
> WITNESS: Yes.

If the deponent's answer is no, the examiner should find out precisely which individuals the organization has designated on each matter set forth in the deposition notice. The examiner may wish to go off the record, conferring with the organization's counsel on this subject, if he or she is present. Arrangements to depose additional representatives on other matters designated in the notice or subpoena can frequently be made by stipulation. On initiating depositions under CCP §2025.230, see §§5.8, 5.62.

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I. Substantive Questioning of Deponents

§6.52 1. General Approach for All Witnesses

After the appropriate admonitions have been given and preliminary questions asked (see §§6.46-6.51), the focus of the deposition of a percipient witness, including a party, turns to the substantive aspects of the case. Although it is impossible to define a method of questioning that can be adapted to every deposition, a number of guidelines may prove helpful.

NOTE: The examiner should ask whether the witness reviewed any documents before the deposition, talked with anyone other than counsel about the deposition, or did anything to prepare for it. The answers to these questions can sometimes be surprising and useful. If the witness answers affirmatively that he or she used a document to refresh his or her memory, that document must be produced immediately. Evid C §771(a).

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§6.53 a. Chronological Versus Other Order

The simplest approach to substantive questioning is to proceed in chronological order, *i.e.*, to ask questions in the same order as pertinent events occurred. This method is also easiest for the witness, who benefits from anticipating the question and planning the answer accordingly. However, moving from topic to topic with no *apparent* organization affords the witness less time to analyze and is more likely to encourage spontaneous responses. Whichever choice seems appropriate, the deposition format should reflect the option of the examining attorney, not the deponent. The examiner should be alert to the witness who throws out enticing bits of information that are nevertheless unresponsive to the question and appear designed to focus attention elsewhere and take control of the deposition away from counsel.

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§6.54 b. Confrontational Versus Friendly Style

Counsel's style of questioning during the deposition is a matter of strategy. Some attorneys are noted for their confrontational deposition style, while others prefer a friendly, gentle approach designed to put the witness at ease. Maximum effectiveness is achieved through flexibility, employing whatever methods work best in any given case with a particular deponent. On examination techniques, see §6.23.

NOTE: Counsel's style can depend on whether the goal of the deposition is, *e.g.,* to find out information or to elicit inconsistencies. Sometimes, starting with general questions and then going to specific questions reveals inconsistencies. Treating the witness in a friendly fashion and establishing a cooperative atmosphere can make it easier to obtain information from the witness.

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§6.55 c. Eliciting Positive and Negative Information

There is a point in many depositions at which the examiner must decide whether to elicit potentially harmful testimony or leave the question unasked. For example, "Are you sure the light was red when my client approached the intersection?" New attorneys often shy away from these questions in the mistaken belief that their responsibility is to obtain only testimony that makes the client look good. It is helpful to remember that the primary purpose of depositions is to discover all facts available, positive or negative. The admonition that *trial* counsel should never ask a question unless he or she knows the answer rests in part on the assumption that if the question is important enough to ask at trial, the answer should have been ascertained *before* trial. Unless there is a strategic reason not to do so, *e.g.,* a pending summary judgment motion, questions calling for negative information should be asked. See Practice Tip in §6.25.

PRACTICE TIP: If the goal of the deposition is not to discover information, but to preserve testimony, there may be questions counsel should not ask.

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Source: Civil Litigation/California Civil Discovery Practice/6 Taking and Defending Oral Depositions/§6.56 d. Obtaining Basic Information

§6.56 d. Obtaining Basic Information

At a minimum, the examiner should come away from most depositions with the following information:

- The deponent's personal knowledge, or lack thereof, as to the events giving rise to the litigation;
- The names and locations of all individuals who may possess information concerning the subject matter of the case;
- The deponent's knowledge, if any, about the location of documents pertinent to the case;
- The timing and substance of all communications between the deponent and the parties about the subject matter of the case;
- The substance of all communications between the deponent and opposing counsel unless the deponent is a party.

The examiner should remember to break down every response into useful details. On breaking down responses, see §§6.8, 6.25.

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§6.57 e. Considering Asking "Why?"

Inexperienced attorneys sometimes assume they have understood the thought processes of the deponent and the state of mind that accompanied acts or omissions bearing on the case. "Why?" can be an important question to ask and can elicit surprising answers. On the other hand, if counsel's goal is a summary judgment motion, more information may not be desired. As at trial, it can sometimes be true that "why?" is a question to avoid.

CAUTION: There may be times when tactical considerations make a thorough deposition of an adverse party inappropriate. For example, counsel contemplating a statute of limitations defense may prefer not to educate the opponent in advance, particularly if evidence of the defense has already been obtained and a summary judgment motion or bifurcated trial on the issue is planned.

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§6.58 2. Parties

Merely because the deponent is represented by counsel, the examiner should not assume that the ground rules governing depositions have been explained. The deposition of an adverse party should also begin with the introductory matters addressed in §§6.46-6.51. Besides the guidelines for questioning all witnesses addressed in §6.52, the examiner should ask for additional information from a party deponent.

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§6.59 a. Personal Background Information

Most examiners then elicit foundational information, including the witness's full name and any names used in the past, education, employment history, and professional licenses.

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§6.60 b. Documents Reviewed in Preparation

It is a good idea to ask the witness at the outset to identify all documents he or she reviewed in preparation for the deposition. On the risk of using documents in the course of deposition preparation and the examiner's right to review any documents so used, see §6.16. The goal of identifying relevant documents early is twofold:

- To learn about the existence of documents previously unknown to the examiner; and
- To discover opposing counsel's theory of the case by highlighting the significance of specific documents.

In addition, if a witness testifies that he or she reviewed documents which refreshed his or her recollection, the documents must be produced for examination subject to the exception contained in Evid C §771(c).

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§6.61 c. Facts Underlying Causes of Action or Defenses

The extent of substantive questioning necessarily depends on the nature of the case, counsel's overall strategy, and areas of inquiry suggested by other discovery or investigation conducted before the deposition. In general, however, the examiner should ascertain the facts and evidence underlying each cause of action or defense, the party's version of the sequence in which key events occurred, the names of all witnesses to the events giving rise to the cause of action or defense, and the identity of every individual with whom the party has discussed the case.

CAUTION: In deposing the adverse party about substantive aspects of the case, counsel should bear in mind that it is improper to ask a party at a deposition to state all facts on which a legal contention is based, even though that question may be propounded in the form of an interrogatory. See *Rifkind v Superior Court* (1994) 22 CA4th 1255, 1263, 27 CR2d 822.

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§6.62 d. Damages

The extent to which the issue of damages is addressed in deposition questioning depends in large part on whether a controversy exists about this aspect of the case. A plaintiff who walked away from a mild collision and is now claiming permanent disability may be questioned in detail about the onset and duration of each symptom, the type and dates of treatment, and the like. At the opposite end of the spectrum is the plaintiff who underwent surgery for a ruptured spleen following an automobile accident, has provided copies of medical bills in the course of discovery, and claims no residual injury.

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§6.63 e. Follow-Up Questions

Throughout the deposition, counsel should ask follow-up questions in response to the party's testimony. There are two categories of follow-up questions. The first type pursues other areas of inquiry elicited by the answer to the preceding question. The second type can be described as "closing the door" questions, such as, "Have you now told me the names of every person you believe witnessed the accident?" Other examples of questions designed to foreclose future testimony and commit the party to a particular version of the facts include "Are you aware of anything that could refresh your memory?" and "Do other documents exist?" On asking specific questions, see §6.25.

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§6.64 3. Treating Physicians

There are a number of reasons for deposing the adversary's treating physician, and the goal to be achieved in a given instance defines the scope of questioning. For example:

- **Illegible notes.** The examiner can ask a physician whose chart notes are illegible to read them into the record. The examiner can then decide what follow-up questions are appropriate.
- **Foundational questions.** If the physician's deposition was noticed because the medical chart appears to be inconsistent with the plaintiff's contentions about the nature or duration of injury, the examiner should first ask some foundational questions. The examiner can ask the physician to describe the customary practice with respect to charting information. The likely response is that significant information related by the patient or observed by the physician is noted in the chart. It is also helpful to ask the physician if he or she has any recollection of a particular office visit independent of the information contained in the chart. The answer is often no.
- **Substantive questions.** With these foundational matters established, the examiner is in a position to ask questions such as "Is it reasonable to assume that if this patient had complained of blinding headaches on April 4, you would have recorded that fact in the chart?"

JUDGE'S PERSPECTIVE: Counsel might consider taking the deposition by video after giving proper notice that the right is reserved for the use of video at trial. See CCP §2025.220(a)(5)-(6). A video deposition may save the cost of paying each and every treating physician at trial, while still presenting relevant testimony. Counsel must take care when deposing the physician that the testimony is sufficient for evidentiary purposes, *e.g.*, by laying a proper foundation for the testimony. See CCP §2025.260.

On payment of expert witness fees to treating physicians deposed as percipient witnesses, see §11.41.

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§6.65 4. Expert Witnesses

Questioning of adverse expert witnesses depends in part on the nature of the expert's particular specialty. However, a number of general guidelines apply to the questioning of most expert witnesses:

- **Accuracy of expert disclosure information.** The examiner should confirm the scope of the expert's retention as stated in the expert witness disclosure and clarify any departure from it.
- **Production and review of expert's file.** The examiner should ask the expert to produce every document read, referred to, or relied on in forming opinions about the case. The expert's file should be reviewed, including documents reflecting communications with the retaining counsel. The examiner should ask the expert witness to explain any unclear notes or memos contained in the file. The expert's file may, but need not be, marked as an exhibit to the deposition.
- **Communications with retaining counsel.** The examiner should ask the expert to relate the content of all communications with opposing counsel and the opposing party pertaining to the case. It is usually prudent to ask the witness if he or she recommended any testing, research, or investigations that opposing counsel refused to approve.
- **Additional trial preparation.** The examiner should determine whether the expert contemplates doing any additional work before trial, and if so, the nature and extent of such work.
- **Statement of and basis for expert opinions.** The examiner should ask the expert to state each opinion he or she was retained to provide, the factual basis of that opinion, and its scientific basis, if applicable.

For detailed discussion on exchange of expert information under CCP §§2034.010-2034.730, see chap 11.

PRACTICE TIP: After obtaining the expert's opinions for the record, the examiner must then make a judgment call whether to proceed beyond this point of inquiry. Most attorneys ask all questions and examine the witness thoroughly to avoid any surprise at trial. Sometimes, if it appears likely that the case will proceed to trial, the examiner may wish to adjourn the deposition as soon as each opinion and its basis have been obtained. This approach avoids alerting the expert or opposing counsel to anticipated areas of impeachment. If the case is likely to settle, and the expert's opinions appear to be based on facts contrary to the evidence, the examiner may attempt to neutralize the witness by asking hypothetical questions based on counsel's understanding of the facts. For example, "Would your opinion be different if the plaintiff's first complaint of headaches occurred 6 months after the accident, not 24 hours after the accident?"

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§6.66 J. Requesting Deponent's Reenactment

The examiner may compel a deponent to give a nonverbal response at a video deposition. A potential reason to take a video deposition is to have a record of a physical reenactment of an incident relevant to the case. A party may be compelled to "answer" in a nonverbal manner under CCP §2025.480 and to participate in a reenactment at a deposition. The California Supreme Court has held that deponent's failure to comply can be a ground for sanctions, including evidence preclusion at trial. *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 1122, 68 CR2d 883. On video recording a deposition, see §§5.53-5.84.

NOTE: The examiner can ask the witness to draw with pencil and paper what happened (*e.g.,* show where the car was when it was struck). If the examiner knows in advance that reenactment will be useful, it is wise to notice and take a videotaped deposition.

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Source: Civil Litigation/California Civil Discovery Practice/6 Taking and Defending Oral Depositions/§6.67 K. Reexamining Deponent

§6.67 K. Reexamining Deponent

Defending counsel sometimes conducts an examination of the deponent after the examiner has completed questioning. See §6.109. The examiner must then decide whether to reexamine the deponent. This depends on defending counsel's purpose in asking questions of the deponent during the deposition.

Defending counsel's questions may serve a number of different purposes:

- Rehabilitating the deponent;
- Asking the deponent to offer explanations for damaging testimony given during the deposition; or
- Using the deponent's deposition at trial.

The examiner who concludes that defending counsel's purpose for examining the deponent is the use of the deposition at trial should seriously consider reexamining the deponent so that key questions and answers are in admissible form.

CAUTION: After the deposition has been completed, a subsequent deposition of the same person cannot be opened except for a showing of good cause (unless the first deposition was taken in the person's capacity as an organization representative). CCP §2025.610. See §5.15. Therefore, the examiner should make sure that no further information is needed from the deponent before concluding the deposition.

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IV. HANDLING PROBLEMS DURING DEPOSITION

A. Deponent's Failure to Appear

§6.68 1. Party Deponent

If a party deponent fails to appear without having served a valid objection to the deposition notice under CCP §2025.410 (see §§5.135-5.138) the party is subject to monetary sanctions under CCP §§2023.010-2023.040, to be paid to the noticing party and to any other party moving for sanctions who appeared at the deposition expecting the deponent to testify. CCP §2025.450. See §§6.70-6.74.

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§6.69 2. Nonparty Deponent

A nonparty deponent who fails to obey a deposition subpoena may be punished for contempt under CCP §2023.030(e) and is subject to a forfeiture of $500 and the payment of damages set forth in CCP §1992. CCP §§2020.240, 2025.440(b). See also CCP §1987.1 (motion to quash subpoena); discussion in §§5.137-5.138.

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3. Examiner's Procedures

§6.70 a. Confirming Proper Service of Notice or Subpoena

What should an examiner do if the deponent fails to appear at the deposition? After waiting a short period of time, *e.g.*, 10 or 15 minutes, the examiner should telephone the deponent or deponent's counsel to ask what happened. Then, the examiner should confirm that the deponent was properly notified of the deposition proceeding. A party or an officer, director, employee, or managing agent of a party can be compelled to attend the deposition by properly mailed notice to counsel of record. See §5.52. A nonparty deponent must have been served with a deposition subpoena. See §5.55. On examiner's failure to serve the deposition subpoena on deponent, see §6.93.

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§6.71 b. Making Evidentiary Record

If it is clear that the notice or the deposition subpoena was properly served, the examiner should then establish an evidentiary record of the deponent's failure to appear. For example, if the court reporter has arrived and the designated time for the deposition has lapsed, the examiner should go on the record and establish the time, the date, and the fact that the deponent is not present. Counsel should make the deposition notice or subpoena, and the proof of service, part of the record. Counsel should state, *e.g.,* that he or she tried to call the deponent, but no one responded; the deponent's whereabouts are unknown; and the deposition is being adjourned. The transcript will then support any declaration subsequently made on a motion to compel the deponent's attendance. See CCP §2020.220(c).

An example of what not to do in relation to the evidentiary record and the institution of contempt proceedings against a nonparty deponent can be found in *In re Morelli* (1970) 11 CA3d 819, 828, 91 CR 72, disapproved on other grounds in *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 100 CR2d 320 (neither court reporter nor attorney provided proper affidavit or declaration under penalty of perjury, or sworn statement on the record, of deponent's nonappearance at deposition).

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Source: Civil Litigation/California Civil Discovery Practice/6 Taking and Defending Oral Depositions/§6.72 c. Contacting Deponent Informally

§6.72 c. Contacting Deponent Informally

In addition to contacting the deponent on the day and at the time of the deposition, the examiner must contact the deponent to inquire about the nonappearance before moving to compel the deponent to attend and testify, or produce documents, at the deposition. CCP §2025.450(b)(2).

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§6.73 d. Making Motion to Compel Party Compliance With Notice and for Sanctions

If the matter cannot be resolved informally, the examiner should move for an order compelling the party deponent's (or the party-affiliated deponent's) attendance. The moving papers must include a declaration stating that the declarant contacted the deponent to inquire about the nonappearance. CCP §2025.450(b)(2). See §6.72. On motions to compel, see §§6.112-6.125.

NOTE: A motion to compel cannot be brought against a nonparty deponent; a contempt order is the remedy in the case of a nonparty deponent who does not appear. See §6.69.

Failing to submit to an authorized method of discovery is a misuse of the discovery process. CCP §2023.010(d). The discovery statute mandates a monetary sanction under CCP §§2023.010-2023.040 for failure to appear at the deposition unless certain circumstances make the imposition of the sanction unjust. CCP §2025.450(c). On sanctions in general, see §§15.85-15.116.

NOTE: According to the Reporter's Notes, in drafting the Civil Discovery Act of 1986 the State Bar-Judicial Council Joint Commission on Discovery recommended that only a monetary sanction be available in the first instance for a failure of a party to appear for a deposition, even if the court finds that the failure was "willful." However, if the court orders that party to appear, and this order is not obeyed, it becomes appropriate to deal with the disobedience by a more severe sanction (*e.g.,* issue, evidence, or terminating sanctions). See CCP §2025.450(d); §§15.92-15.103.

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§6.74 4. Other Parties' Procedures

In addition to the examiner representing the noticing party, any other party who appeared in person or by attorney at the proper time at the deposition site, in the expectation that the deponent's testimony would be taken, can move the court to impose a monetary sanction under CCP §§2023.010-2023.040. CCP §2025.450(c)(2).

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§6.75 B. Deponent's Failure to Answer or Produce

If the deponent, whether a party or a nonparty, fails to answer a question or produce any document or tangible thing under the deponent's control that is specified in the deposition notice or subpoena, the examiner has two choices (CCP §2025.460(d)):

- To adjourn the deposition; or
- To complete the deposition on other matters.

When the examiner elects to complete the deposition, the right to move for an order to compel that answer or production is not waived. CCP §2025.460(d). For this reason, the second choice listed above is usually the wiser course. However, if the question the deponent refuses to answer is the key to the entire examination, or the number and scope of the questions to which the deponent refuses to respond are substantial and broad, the examiner may have little choice but to adjourn the deposition.

The examiner may make clear his or her intention to seek a court order by giving oral notice of a motion to compel at the time of deponent's failure to answer or produce. As a practical matter, however, written notice will also be required. See §6.78. On serving the notice, see §6.118. On adjourning the deposition, see §6.77.

NOTE: Code of Civil Procedure §2025.460(d) requires only that the deponent *fails to answer.* It does not use the word, "refuses." Therefore, to make a motion to compel, the examiner need not show that the witness *willfully* obstructed discovery, but only that the witness did not answer the question.

PRACTICE TIP: Because counsel has an obligation to meet and confer with the opposing side before filing a motion for an order compelling the answer or production (see CCP §2025.480(b)), it is important to exhaust all other options before adjourning the deposition. Counsel's efforts to solve the problem at the deposition should be included in the declaration accompanying the motion.

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§6.76 1. Making a Record

When the deponent fails to answer a question, or to produce any document or tangible thing, the examiner should first establish the failure or refusal clearly on the record, and, if possible, the reasons for it. After each question or request to produce and the deponent's failure or refusal to do so, some examiners ask the court reporter to note the last question or request as well as the deponent's answer, all of which are then listed separately with a page reference to their location in the deposition transcript. Although this makes it easier to locate the question and response in the transcript, under Cal Rules of Ct 3.1020(c), the information must also appear in the separate statement that is filed with the motion to compel. On moving to compel, see §§15.30-15.58.

An inquiry into the reasons for the deponent's failure to answer or produce can provide a record when the court considers whether someone unsuccessfully making or opposing a motion to compel acted with substantial justification or whether other circumstances make the imposition of a monetary sanction unjust. See CCP §2025.480(f). When confronted with deponent's failure or refusal to answer or produce, the examiner should explore questions such as the following during the examination:

- Does the deponent merely misunderstand the question, or even the obligation to testify?
- Is the deponent unable to locate the documents, but willing to search further or suggest others who may have custody of any copies?
- Does the deponent need any additional documentation to answer?
- Is the deponent reluctant to answer because counsel objected to the question, or advised or instructed the deponent not to answer?
- Is defending counsel objecting simply for the record, with the intention of advising the deponent to answer the question?

The examiner who is unclear on this last point should ask if the deponent's counsel is objecting for the record and is also advising or instructing the deponent not to answer the question. On stipulation that instruction not to answer is equivalent to deponent's refusal to answer, see §6.39. On defending counsel's instruction to deponent not to answer, see §6.102.

If the deponent's refusal to answer a question is based on a privilege, the examiner should ask questions that show whether the elements of that privilege obtain. On specific privileges and discussion of privilege generally, see chap 3.

NOTE: When the deponent bases a refusal to answer on the grounds that certain documents are needed to refresh recollection, the witness can be required to review those documents. See *Filipoff v Superior Court* (1961) 56 C2d 443, 449, 15 CR 139.

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§6.77 2. Adjourning Deposition

After deponent's failure to answer or produce, the examiner has the option of adjourning the deposition to seek a court order under CCP §2025.480(a) or of completing the examination on other matters. CCP §2025.460(d). The proper procedure for adjourning the deposition is simply to state on the record that the deposition is adjourned for the time necessary to move the court for an order under CCP §2025.480(a) compelling the answer or production.

CAUTION: Adjourning the deposition without completing it can be extremely dangerous because the "one-deposition" rule (CCP §2025.610) allows only one deposition of a natural person. See §5.15. If the court denies the motion to compel, the deposition could be over, leaving the examiner unable to pursue other questions.

Try to complete deposition on other matters. In attempting to complete the deposition on other matters, the examiner may also be able to approach the problematic subject in a different manner and obtain the needed information at a later point in the deposition. Further examination can show that the deponent's answers to certain questions or the production of various items are no longer important in view of the overall discovery obtained.

Even when the deponent continues to be unable or unwilling to answer or produce, the better practice is to try to complete the deposition on as many matters as possible. If the deponent fails to answer additional questions or produce another document or tangible thing, it is economical to file one motion to compel and obtain the court's ruling on all questions to be answered when the deposition resumes.

When to adjourn. In rare situations, the unanswered question or the unproduced item is so important that it is unproductive to continue the deposition. Also, when defending counsel's or the deponent's conduct make it impossible to continue with the examination, the examiner should adjourn the deposition. In such instances, the examiner should seek a protective order under CCP §2025.420. See §§6.111, 6.142-6.144.

PRACTICE TIP: Before adjourning a deposition, it is good practice to state on the record the exact areas of inquiry that have not been completed. This may assist the court in determining the permissible areas of inquiry when the deposition resumes if defending counsel asks the court to limit the examination.

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§6.78 3. Oral Notice of Motion to Compel

After the deponent fails to answer or produce, the examiner may give oral notice of a motion to compel or the examiner may serve notice of the motion in writing after the examination is over. Because as a practical matter written notice must be given in any case, oral notice is not often used. It can, however, impress on the deponent the seriousness of the failure to answer and thus may sometimes be very useful. See §6.82

For further discussion on procedures for serving and filing motion to compel and required supporting documents, see §§6.112-6.125. For considerations the examiner should keep in mind during the deposition, see §§6.23-6.67.

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§6.79 a. Procedures

The examiner who chooses to give the deponent and the parties notice of this motion orally at the deposition should request the court reporter to direct the deponent to attend a session of the court at the time specified in the notice. CCP §2025.480(c).

JUDGE'S PERSPECTIVE: Before the oral notice is given, the examiner should contact the court to try to reserve the next available hearing date. The examiner who foresees difficulties should try to arrange a tentative date before appearing at the deposition. The examiner might also check with the court clerk and arrange, if possible, to have a judge on call for relief during the deposition. Or, the parties might agree in advance to a discovery referee who can attend the deposition or be on call to resolve disputes.

A nonparty deponent is required to attend a court session to consider any issue arising from a refusal to answer or produce specified items (or refusal to permit any inspection, testing, or sampling specified in the deposition subpoena) as long as the deponent was a resident of California at the time of personal service of the deposition subpoena. CCP §§2020.220(c), 2020.240.

JUDGE'S PERSPECTIVE: Counsel should not be lulled by the 60-day requirement of CCP §2025.480(b) (see §6.112). Schedule difficult depositions soon enough to calendar a motion to compel before the cutoff date. On timing considerations in discovery, see §§2.20-2.28.

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§6.80 b. Papers to Be Filed in Court

The examiner should keep in mind that the transcript must be available before the hearing on the motion. Not less than 5 days before the hearing on the motion, the examiner must lodge a certified copy of any parts of the stenographic transcript that are relevant to the motion. CCP §2025.480(d).

The motion itself and accompanying papers, which must include a separate statement listing each question to which a further response or answer is requested, the response given, and the factual and legal reasons for compelling it (see Cal Rules of Ct 3.1020), must be served and filed at least 16 court days before the hearing date. CCP §1005(b). The 16-day period is extended in the normal manner if service is by mail. CCP §§1005(b), 1013. On motion practice, see chap 15. On timing under CCP §§1005(b) and 1013, see §2.22.

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§6.81 c. Service on Nonparty Deponent

All moving papers supporting a motion to compel must be personally served on a nonparty deponent unless the nonparty deponent agrees to accept service by mail at an address specified in the deposition record. Cal Rules of Ct 3.1025.

Thus, the examiner should ask a nonparty deponent on the record if service of the written court papers can be made by mail instead of personally. If the deponent agrees, ask deponent to state his or her address for the record.

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§6.82 d. Effect of Oral Notice

Giving oral notice of the motion to compel can be a powerful tool for convincing the deponent to answer or produce at the deposition. The deponent may become concerned over the sudden prospect of appearing in court and the risk of having to pay a monetary sanction. Defending counsel may also be concerned about the court's ruling on any objection or instruction not to answer or produce and about the monetary sanction that the court might impose on defending counsel who unsuccessfully opposes the motion. See CCP §2025.480. Because of these concerns, the examiner should give the deponent and defending counsel an opportunity to withdraw or limit any objection.

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§6.83 C. Improper Coaching

Improper coaching of the deponent generally occurs in one of two situations:

- Defending counsel interjects commentary after the examiner's questions, or objects to questions in a manner suggesting a particular response to the deponent.
- The deponent repeatedly confers privately with defending counsel before answering a question.

If either situation persists, the examiner should warn the deponent and defending counsel that their conduct will make it necessary to adjourn the deposition to enable the examiner to move for a protective order. See CCP §2025.420. On "speaking objections," a tactic often used to alert the deponent to a dangerous question, see §6.100.

NOTE: Unlike the provisions of CCP §2025.480(c), which permit oral notice of a motion to compel the deponent to answer or produce, CCP §2025.420 requires written notice of a motion for a protective order sought during the deposition.

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§6.84 a. Making a Record

Before the deposition is adjourned, the examiner should be certain that the evidentiary record will support the motion for a protective order. For example, if private conferences between the deponent and defending counsel become so frequent that they interfere with the examiner's ability to obtain testimony, the examiner should state on the record the time that each conference begins and ends.

PRACTICE TIP: Anticipating such problems as unreasonably frequent interruptions for conferences between defending counsel and the deponent can often prevent them. The examiner can do something as simple as announcing, as the deposition begins, that two short recesses will be taken, *e.g.,* at 10:00 a.m. and 11:00 a.m., to avoid recesses for private conferences at the whim of the deponent or defending counsel. When the examiner expects a particular defending counsel to make objections that suggest particular answers to the deponent, the examiner should consider recording the deposition on video, if the case warrants it, to discourage such behavior. On recording depositions, see §§5.75-5.84.

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§6.85 b. When Deponent Is Nonparty

Coaching the witness generally occurs when the defending counsel is representing a party deponent. However, a situation similar to both "coaching" and "instructing the witness" (see §6.102) can also occur when the deponent is a nonparty appearing without counsel at the deposition.

EXAMPLE: Counsel in *Sabado v Moraga* (1987) 189 CA3d 1, 234 CR 249, gave advice about the marital privilege to an unrepresented witness and as a result, the deponent refused to testify. The appellate court reversed an award of sanctions under CCP §128.5 based on counsel's advice, but stated that sanctions might be justified "if an attorney offers meritless legal advice to a witness which results in a delay of the proceedings." 189 CA3d at 9. Although the defending counsel in *Sabado* had no duty to notify the examiner before the deposition of his intention to advise the witness concerning the marital privilege, the court observed that professional courtesy might have dictated otherwise. 189 CA3d at 11.

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§6.86 D. Objections of Counsel

If an objection is made during the deposition, the examiner must decide if the objection has merit. When the ground of the objection is to the form of the question, the examiner should consider rephrasing it. Depending on any stipulations about objections (see §§6.39-6.41), the examiner may also decide to respond to other curable objections (*e.g.,* objections based on lack of foundation, hearsay, or the secondary evidence rule). For discussion of objections from defending counsel's viewpoint, see §§6.94-6.101.

If defending counsel's objections amount to unwarranted annoyance and interfere unduly with the examiner's ability to question the deponent (see CCP §2023.010(e)), the examiner should make sure the record clearly shows defending counsel's misconduct and then adjourn the deposition to seek a protective order. CCP §2025.420. On objections used improperly to coach deponent, see §6.83. On objections generally, see California Trial Objections (Cal CEB Annual). For a list of objections, see Checklist of Objections (Cal CEB 2006), the laminated card included with this book. On protective orders, see §§6.111 and 6.142-6.144. See also chap 15.

JUDGE'S PERSPECTIVE: If the examiner decides not to modify the question after an objection, he or she should repeat the question or ask the court reporter to read it back before the deponent answers. Otherwise, the intervening objection and any comment between counsel may cause uncertainty in the deposition transcript about the deponent's response. Efforts to impeach a witness at trial with the witness's deposition testimony are often frustrated because the attorney, after searching through pages of colloquy preceding the answer, cannot find a clear question to frame and make that answer meaningful. It is very difficult to read impeaching deposition testimony into a trial record when the question and the answer are separated by argument or other discussion.

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E. Dealing With Difficult Personalities

§6.87 1. Witnesses

It is inevitable that the examiner will encounter deponents who are difficult to question. Apart from maintaining a professional manner, one or more of the following strategies may prove effective.

The confused witness. This kind of witness typically responds to probing questions by asking questions. The examiner should attempt to rephrase the questions for the record and continue to seek answers. If the examiner is confident the questions are clear, and the witness continues to provide evasive responses, it may be necessary to adjourn the deposition and file a motion to compel answers to deposition questions under CCP §2025.480. See §6.77.

The conveniently forgetful witness. This witness "cannot presently recall" much of anything unless the information asked for is innocuous. The admonitions given to a deponent at the outset about medication or other reason for memory impairment is partially in anticipation of this type of response. Although a witness cannot be expected to remember the precise details of remote or even recent events, if the responses seem deliberately evasive, the examiner might tell the witness to take all the time needed to think about the questions, note for the record the time that elapses, and ask the question again. If this process is repeated for each critical question, a record of nonrecollection is established and can be used in summary judgment proceeding or trial, with the witness hard pressed to explain a sudden resurgence of memory.

The examiner might also ask the witness whether there is anything that would refresh the witness's recollection.

The literal witness. This type of witness wants to answer the question no and valiantly strives to do so. For example, the examiner asks, "Did your supervisor ever express any dissatisfaction with your job performance?" and the witness answers, "Not specifically in those words, no." In such cases the examiner may try to rephrase the question: "Do you have any general recollection of your supervisor expressing dissatisfaction with your job performance, regardless of whether those words were used?" Although it is tedious to take a deposition in this manner, failing to do so merely provides a record of meaningless responses that have committed the deponent to nothing.

The rambling witness. This witness provides long, narrative, and often uninformative answers to relatively simple questions. The rambling response is not necessarily intended to be evasive. It may reflect the deponent's anxiety or nervousness. Often defending counsel takes the lead in addressing the problem by telling the client, "Just answer the question." If the problem persists, the examiner can move to strike the answer as nonresponsive, and ask the court reporter to read back the question as many times as necessary.

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§6.88 2. Opposing Counsel

The abusive, demeaning opposing counsel can be particularly intimidating to new attorneys. It is important to maintain as professional a demeanor as possible and remember that absent unusual circumstances, opposing counsel is owed no explanation about why (1) a particular question is being asked, (2) a particular subject area is deemed relevant, (3) the deposition is taking so long, or (4) the examining attorney seems so unprepared.

The examining attorney should also bear in mind that no participant in a deposition is compelled to suffer harassment or abuse. If necessary, the examining attorney should advise opposing counsel that unless the abusive tactics cease, the deposition will be adjourned for the purpose of obtaining a protective order. See §6.77.

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F. Additional Avenues of Recourse

§6.89 1. Requesting Referee

When serious disputes arise among counsel during examination, it may become necessary to obtain a referee to supervise the deposition. A court has the power to appoint a referee if necessary, and the referee may be empowered to hear and determine whatever objections or motions are made during the course of the deposition, and to report to the court findings and recommendations as to any discovery dispute. See CCP §639. The referee may be present throughout the deposition or may be available by telephone to provide prompt rulings if problems arise during the examination. On planning for a discovery referee, see §§2.68-2.72.

PRACTICE TIP: Although expensive, seeking a referee may avoid numerous fights and, ironically, curtail deposition costs by forcing the parties to focus on what is really in dispute and obtain prompt adjudication of those disputes.

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§6.90 2. Arranging for Telephonic Court Ruling

The examiner who anticipates either excessive improper coaching (see §§6.83, 6.100) or objections designed to disrupt or interfere with the deposition (see §6.86) should consider arranging for a telephonic hearing with the court during the course of the deposition. Some courts will allow counsel to call them during a deposition to seek guidance on particularly troublesome issues, or to discourage disruption or improper coaching.

The examiner should check with the particular court in which the matter is pending, particularly if the case has been assigned to an individually calendaring court rather than a master calendar court. If the court will allow such telephonic hearings, the examiner should arrange a telephone conference call during the course of the deposition with the court reporter, opposing counsel, and the court.

After allowing the court reporter to read the pertinent record, the examiner should ask the court for a ruling. Such preparation on the part of the examiner and even the possibility of a court hearing on the matter may deter abuses by defending counsel.

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V. DEFENDING DEPOSITION

§6.91 A. General Strategies

Whether the deponent is a party or a nonparty, it is likely that a deposition was scheduled because the deponent cannot be interviewed informally. Rarely, the examiner seeks to preserve favorable testimony of a witness who will be unavailable at trial (see Evid C §1291), or testimony that the examiner fears may change if not preserved. On perpetuating testimony before an action is filed and preserving testimony pending appeal, see §§5.147-5.155.

Usually, however, defending counsel can assume that the deposition is designed to uncover evidence from witnesses adverse to the examiner's client. Methods for preparing to defend a deposition and for preparing the deponent for the examination are discussed at §§6.10-6.17, 6.21. The following is a brief list of points that counsel should keep in mind during the examination itself:

- **Avoid volunteering information.** Counsel should not volunteer information and should discourage the deponent from volunteering information not directly called for by the pending question.
- **Stay alert.** The pace of a deposition is often swift. Objections not timely raised may be waived. CCP §2025.460(b); Evid C §1291(b)(1). On waiver of privileges if not promptly asserted, see CCP §2025.460(a). For discussion, see §§3.165-3.190.
- **Protect the witness.** Defending counsel should protect the deponent from improper questioning and abusive tactics. On suspending the deposition to seek a protective order, see §6.106.
- **Be cautious about entering into stipulations about facts or documents during the examination.** To accept such a stipulation immediately puts defending counsel at risk of unintentionally making an agreement harmful to the client's interests. Instead, defending counsel can state on the record that the stipulation will be taken under advisement and can make a decision after reflecting on its implications to the case.
- **Consider whether the deponent should be examined.** On occasion, there are good reasons for defending counsel to question the deponent after the examiner's questioning is completed. See §6.109.

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B. Handling Examiner's Failure

§6.92 1. Failure to Appear at Deposition

The court must impose a monetary sanction under CCP §2023.030(a) against a party, an attorney, or both, who notices and then fails to attend or proceed with a deposition unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the sanction unjust. CCP §2025.430. The sanction is imposed in favor of any party who attends the deposition in person or by his or her attorney. CCP §2025.430. See, *e.g., Rosen v Superior Court* (1966) 244 CA2d 586, 592, 53 CR 347 (examiner who ignored his own notice assessed costs when opposing attorney traveled to New York City for scheduled deposition).

A noticing party can always cancel its own deposition in advance for good cause (*e.g.,* attorney's illness or scheduling conflicts). Counsel should promptly notify all parties served with the deposition notice, including the deponent, of the cancellation. Notice can be by telephone, followed by confirmation in writing. Defending counsel who has not received such notification and who appears at a deposition in which the examiner is not present should move for sanctions under CCP §2025.430, or costs of travel and attorney fees.

NOTE: Although the examiner who notices a deposition must attend the deposition, an attorney for a party has a right to attend but is under no compulsion to do so. The deposition may proceed in the absence of a party's representative, and counsel's failure to attend the deposition does not preclude use of that deposition in evidence. CCP §2025.620 (deposition may be used against any party who was present or represented, or had due notice of the deposition and did not serve a valid objection under CCP §2025.410). See, *e.g., Lathrop v Kellogg* (1958) 158 CA2d 220, 223, 322 P2d 572.

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§6.93 2. Failure to Serve Deponent With Subpoena

If a nonparty deponent does not appear for a deposition because the examiner failed to serve a required deposition subpoena, the court must impose a monetary sanction under CCP §2023.030(a) against the examiner, the noticing party, or both, in favor of any other party who in person or by his or her attorney attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken. CCP §2025.440(a). The court need not impose the sanction if it finds that the one subject to it acted with substantial justification or other circumstances make the sanction unjust. CCP §2025.440(a).

A nonparty deponent who has been subpoenaed properly and nonetheless fails to appear or refuses to testify at the deposition is subject to the sanctions described in CCP §2020.240. CCP §2025.440(b).

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§6.94 C. Objections

Objections during the taking of an oral deposition are governed by CCP §2025.460, as follows:

- Objections on the grounds of privilege or work product protection are waived unless they are timely made during the deposition. CCP §2025.460(a); Evid C §912(a) (privilege waived by failure to claim it when holder has legal standing and opportunity to claim it). See §6.97. On instructing client not to answer, see §6.102; on suspending deposition, see §6.106. On privileges and work product, see chap 3.
- Certain errors and irregularities that might be cured if promptly presented are waived unless a specific objection to them is timely made during the deposition (*e.g.,* those relating to the manner of taking the deposition, to the oath or affirmation administered, to the conduct of a party, attorney, deponent, or deposition officer, and to the form of any question or answer). CCP §2025.460(b). See §6.40.
- Objections to the competency of the deponent or to the relevancy, materiality, or admissibility at trial of the testimony are not waived by failure to make them before or during the deposition. CCP §2025.460(c).

Absent a stipulation reserving objections, defending counsel must raise all objections to errors or irregularities that might be cured if brought promptly to the examiner's attention. CCP §2025.460(b). These objections include, but are not limited to (CCP §2025.460(b)):

- The manner of recording the deposition (see §6.95);
- The identity of the deposition officer (see §6.96);
- The form of any question (see §6.98); and
- The form of an answer (see §6.101).

PRACTICE TIP: Because it is often difficult during the deposition to grasp all the implications of a question, as well as to assess whether the trial judge might later rule that the matter could have been cured had an objection been timely made during the deposition, defending counsel should err on the side of making an objection rather than risking a waiver by saying nothing. To preserve an objection, defending counsel must object and identify the ground for objection on the record. See Evid C §353. Otherwise, the objection may be waived when the deposition is subsequently offered into evidence. See, *e.g., Chavez v Zapata Ocean Resources, Inc.* (1984) 155 CA3d 115, 124, 201 CR 887.

Because relevancy is not a proper objection (*Stewart v Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1014, 105 CR2d 115),

> the deponent's counsel should not even raise an objection to a question counsel believes will elicit irrelevant testimony at the deposition. Relevance objections should be held in abeyance until an attempt is made to use the testimony at trial.

For a list of trial objections, see Checklist of Objections (Cal CEB 2006), the laminated card included with this book.

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§6.95 1. Objections to Manner of Recording

Counsel arriving at the deposition and finding something amiss in the manner of its recording (*e.g.,* testimony to be video recorded without notice or prior agreement) should promptly object on the record in a brief preliminary statement before the examination begins. See CCP §2025.330(b) (testimony as well as any stated objections must be taken stenographically). The deposition then proceeds subject to the objection, unless counsel or the deponent demands that the deposition be suspended to permit a motion for a protective order to be made under CCP §2025.470.

CAUTION: If counsel decides the error or irregularity in the manner of recording warrants suspending the deposition to seek a protective order, the grounds for the motion for protective order are that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or a party. Counsel must also state facts in a supporting declaration that show a reasonable and good faith attempt at informal resolution of the issues in dispute. CCP §2025.420. See §6.106.

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§6.96 2. Objection to Deposition Officer

Counsel should object to the qualifications of the deposition officer before the deposition begins, or as soon as the objection becomes known or could be discovered with reasonable diligence. Otherwise, the objection is waived. CCP §2025.320(e). The deposition officer's financial interest in the action or status as a relative or employee of an attorney or a party are grounds for the objection. See CCP §2025.320(a).

In most instances, a deposition notice does not identify the reporter by name. See form in §5.216. Defending counsel may not be able to formulate an objection to the deposition officer until the time of the examination, or after the examination has been completed. If grounds for objection to the deposition officer are discovered at the deposition, counsel should put the objection on the record. See CCP §§2025.320(e), 2025.460(b). The testimony is then taken subject to the objection, and the court can later rule on the merits of the objection. CCP §2025.460(b).

When counsel believes that the ground for objection is so serious that the deposition should not go forward (*e.g.,* officer biased because of financial interest in the case), defending counsel should demand that the deposition be suspended to permit counsel to seek a protective order. CCP §2025.460(b). See §6.106.

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§6.97 3. Objections to Questions Seeking Privileged Information

Defending counsel must always be alert to questions calling for information that is privileged or otherwise protected, and should make a specific, timely objection to avoid any disclosure that constitutes a waiver. CCP §2025.460(a).

Failure to object to the discoverability of privileged material at a deposition generally constitutes a waiver of the privilege. CCP §2025.460(a); *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1373 n4, 282 CR 783. See also *Boler v Superior Court* (1987) 201 CA3d 467, 472 n1, 247 CR 185.

EXAMPLE: Defending counsel can assert that the question seeks information protected by a privilege, such as attorney-client, spousal, doctor-patient, clergyperson-penitent, voter, self-incrimination, trade secret, taxpayer, or insured-insurer, or that other restrictions apply, such as attorney work product or personal privacy. For discussion or privileges and other protections, see chap 3.

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§6.98 4. Objections to Form of Question

If a stipulation to which attorneys frequently agree is in effect, *i.e.,* reserving all objections except to the form of the question (see §6.40), defending counsel has the limited task of identifying and objecting to defects in the *form* of the questions. On statutory rules for objections, see §6.94.

Objections to the form of the question include:

- Vague;
- Unintelligible;
- Ambiguous;
- Compound;
- Calls for speculation;
- Argumentative;
- Asked and answered;
- Calls for privileged information;
- Not reasonably calculated to lead to discovery of admissible evidence;
- Harassing and oppressive;
- Incomplete hypothetical;
- Calls for hearsay; and
- Leading (if not an adverse witness).

NOTE: The objection that the question is leading is appropriate when the party is deposing a friendly witness for the purpose of preserving testimony.

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§6.99 a. Procedure

State the grounds for the objection. It is not enough merely to state, "I object." To preserve the objection, defending counsel must state the particular defect in the form of the question. Counsel objecting to the form of the question should state the defect clearly so the examiner has an opportunity to rephrase the question properly. See Evid C §353(a).

The objection need be no more than a simple statement, for example:

- "Objection. Compound question."
- "Objection. Question is argumentative."
- "Objection. Question is ambiguous."

On objections to the form of question, see generally California Trial Objections (Cal CEB Annual).

PRACTICE TIP: Counsel defending the deposition need not object to every impermissible question. Just as at trial, counsel may determine that certain questions or answers are not sufficiently harmful to warrant an objection.

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§6.100 b. What to Avoid

"Speaking objections" are those in which counsel states the legal basis for objecting to a question and then proceeds to offer argument on why the objection is appropriate. This tactic, which is usually used to alert the deponent to a dangerous question, may in effect be a form of coaching the witness. See §6.83. If defending counsel indulges in lengthy objections that suggest the type of response the deponent should make, the objections may constitute the type of vexatious conduct justifying the suspension of the deposition to permit the examiner to seek a protective order under CCP §2025.470.

As an alternative to an objection, counsel may ask the examiner to clarify an ambiguous question. If overdone, this type of participation by defending counsel may also be construed by the examiner to be the sort of annoying conduct against which an order under CCP §2025.420 offers protection. See §6.86.

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§6.101 5. Objections to Answer and Motions to Strike

On rare occasions, it may be appropriate for counsel defending the deposition to object to a deponent's answer and move to strike it in order to protect the record, *e.g.,* when protecting privileges of nonparty witnesses whom defending counsel cannot instruct (see §6.105) or when a witness is being deposed to preserve testimony for trial (see §§5.147-5.155).

Procedurally, counsel defending the deposition should object promptly, putting the examiner on notice of the requirement to cure the problem, and move to strike the answer. See CCP §2025.460(b); for discussion, see §6.94. Otherwise, the trial court may deem counsel's failure to object to have precluded the examiner from curing the deficiency, overruling a trial objection on the admissibility of the deposition transcript to avoid undue prejudice to the examiner. A safer practice is to raise the objection at the deposition. If the examiner fails to cure the problem, the court may be more inclined to enforce the objection at trial.

NOTE: Remember that CCP §2025.460(b) requires that objections must be made to the form of any question *or answer* or they are waived. See §§6.40, 6.94.

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§6.102 D. Instructing Client Not to Answer

An objection to a question preserves the grounds for the objection, and, if ruled meritorious by the trial court, the answers given will be precluded from the evidence. However, the deponent must still answer the question subject to the objection. CCP §2025.460(b). Under CCP §2025.460(b), instead of allowing the deponent to answer, counsel may suspend the deposition to seek a protective order. See §6.106.

In addition to an objection, and in lieu of immediately suspending the deposition, certain circumstances may call for counsel simply to instruct the deponent not to answer without a demand that the deposition be immediately suspended. This places the burden on the examiner to move to compel the answer, either immediately on adjourning the deposition or after completing the examination on other matters. CCP §2025.460(d).

California case law implicitly recognizes that counsel may instruct the deponent not to answer without demanding that the deposition be suspended to seek a protective order. See, *e.g., Stewart v Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1015, 105 CR2d 115 (irrelevance alone insufficient ground to justify instructing witness not to answer deposition question); *Flynn v Superior Court* (1997) 57 CA4th 990, 994, 67 CR2d 491 (private investigator refused on advice of counsel to supply name of her employer); *Tylo v Superior Court* (1997) 55 CA4th 1379, 1384, 64 CR2d 731 (on advice of counsel, plaintiff refused to answer certain questions about her marriage). See also *Pacific Tel. & Tel. Co. v Superior Court* (1970) 2 C3d 161, 171, 84 CR 718; *Nowell v Superior Court* (1963) 223 CA2d 652, 657, 36 CR 21. The statutory procedure available to the examiner for compelling a deponent to answer implies that a deponent's refusal to answer may be justified because the sanctions of CCP §2025.480(f) will not be imposed if the court finds that the party, person, or attorney acted with substantial justification, *e.g.,* there were legitimate grounds supporting counsel's instruction not to answer. See CCP §2025.480(f).

JUDGE'S PERSPECTIVE: In *Stewart v Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1015, 105 CR2d 115, the court concluded that the discovery provisions "clearly contemplate that deponents not be prevented by counsel from answering a question unless it pertains to privileged matters or deposing counsel's conduct has reached a stage when suspension is warranted." The discovery provisions provide that objections on the ground of privilege or protected work product are waived unless "a specific objection to [the] disclosure is timely made during the deposition" (CCP §2025.460(a)), but objections to the deponent's competency or to the relevancy, materiality, or admissibility at trial of the deposition testimony are *not* waived by failure to object at the deposition. CCP §2025.460(c). Thus, "witnesses are expected to endure an occasional irrelevant question without disrupting the deposition process." 87 CA4th at 1014. Deponent's counsel should not even raise an objection to a question counsel believes will elicit irrelevant testimony at the deposition, but should hold the objection in abeyance until an attempt is made to use the testimony at trial. The deposition may be suspended when it is "being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party" (CCP §2025.470); the examiner's insistence on inquiring into irrelevant areas could justify suspension under this standard, but only if it reaches the point when it could legitimately be said that counsel's intent was to harass, annoy, embarrass, or oppress. Objections to questions or answer containing irregularities that might be promptly presented are waived absent a specific objection (CCP §2025.460(a)). As to such objections, counsel is not to instruct the deponent not to answer, but is to suspend the deposition to seek a protective order or proceed with the deposition subject to the objection.

On factors affecting the discoverability of specific information, including privileges, work product, and other sources of confidential information, see chap 3.

CAUTION: Instructions not to answer are among an attorney's most important judgment calls. If counsel allows the deponent to answer certain improper questions, an important privilege may be waived. But counsel who is mistaken in instructing a client not to answer not only runs the risk that the deponent will be reexamined but also chances the imposition of sanctions if counsel's instruction and deponent's refusal are found to be without substantial justification. See CCP §§2023.010(d)-(e), 2025.480(f). On examiner's motion to compel answers, see

§§6.112-6.125.

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§6.103 1. Grounds

Grounds for instructing the deponent not to answer a question include privilege, work product protection, and improper examination (*i.e.*, question asked in bad faith or in manner to unreasonably annoy, embarrass, or oppress deponent or party). See language of CCP §2025.420(b).

An attorney can also properly instruct the deponent not to answer "legal contention" questions that ask the deponent to state all facts, list all witnesses, and identify all documents that support the deponent's allegations or defenses. *Rifkind v Superior Court* (1994) 22 CA4th 1255, 1263, 27 CR2d 822. On contention interrogatories, see §§7.39-7.43.

The asking of irrelevant questions is not a basis for instructing the witness not to answer unless "it reaches the point where it could legitimately be said that counsel's intent was to harass, annoy, embarrass, or oppress." *Stewart v Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1015, 105 CR2d 115.

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2. Procedures

§6.104 a. Client Deponent

Counsel who instructs a deponent not to answer should make a record at the deposition that sets forth the grounds of the instruction. If possible, invite the examiner to rephrase the question to eliminate the objection, or offer to allow the deponent to answer questions if the examiner limits the scope of the inquiry.

CAUTION: Defending counsel should be wary of allowing the deponent to testify *partially* about privileged material because this could constitute a waiver of the privilege. For example, allowing the deponent to testify about one communication between an attorney and a client could constitute a complete waiver. See *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 413, 72 CR 74; *Regents of Univ. of Cal. v Superior Court* (1962) 200 CA2d 787, 791, 19 CR 568.

Occasionally, a client deponent will reveal the attorney's work product in response to a question. Counsel should warn a client when preparing for the deposition not to share the products of their investigation, such as observations by private investigators. The risk of waiver occurs if the client volunteers that information or the source of the information during examination. If such a lapse occurs at the deposition, defending counsel should first warn the deponent against the disclosure and, if that warning fails, assert the objection and instruct the deponent not to answer.

PRACTICE TIP: If the deponent has inadvertently waived privileged material, move to strike the inadvertent waiver. If counsel objects to the motion to strike, ask for authority for that objection.

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§6.105 b. Counsel Cannot Instruct Nonclient

Counsel does not usually have the authority to instruct a nonclient deponent not to answer. On circumstances when counsel is in a position to instruct a nonclient, see Practice Tip below.

Nevertheless, counsel defending the deposition can apprise a nonclient unrepresented by counsel of the right to assert a privilege, and the deponent may decide to follow the advice. See, *e.g., Morris Stulsaft Found. v Superior Court* (1966) 245 CA2d 409, 418, 54 CR 12.

PRACTICE TIP: It is appropriate in a case in which a privilege is held jointly (see Evid C §912), such as the marital communication privilege (see Evid C §§980-987), and counsel represents the nontestifying spouse, to instruct a nonclient deponent not to answer. If the deponent refuses to follow counsel's instruction, counsel may then suspend the deposition to seek a protective order. See §6.106.

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§6.106 E. Suspending Deposition to Seek Protective Order

The deposition officer must not suspend the taking of testimony without the stipulation of all parties present, unless any party attending the deposition or the deponent demands that the deposition officer suspend the deposition to enable that party or deponent to move for a protective order on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that deponent or party. CCP §2025.470. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith effort at an informal resolution of each issue presented by the motion. CCP §2025.420(a). Sanctions must be imposed against anyone unsuccessfully making or opposing the motion, unless the one subject to the sanction acted with substantial justification or other circumstances make the sanction unjust. CCP §2025.420(d). For form of protective order, see §§7.155-7.158.

On a showing of good cause, the court may terminate the examination or limit the scope and manner of taking the deposition as provided in CCP §2025.420 (governing motion for protective order made before, during, or after deposition). If the court order terminates the examination, the deposition cannot be resumed, except on order of the court. On court's discretion to limit the scope of discovery, see CCP §§2017.020(a), 2019.030(a)-(b).

CAUTION: Before demanding that the deposition be suspended under CCP §2025.470, counsel should ensure that the record reflects any appropriate objections and the grounds for the protective order. See language of CCP §2025.470 (examination conducted "in bad faith" or in manner that "unreasonably annoys, embarrasses, or oppresses" deponent or party).

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§6.107 1. Nonparty as Deponent

In egregious circumstances (see Caution in §6.106) or to protect a privilege (see §6.97), defending counsel may recommend to a nonparty deponent to demand suspension of the deposition to seek a protective order. See CCP §2025.470 (party or nonparty deponent may demand that the deposition be suspended to enable party or deponent to seek protective order).

NOTE: At least one appellate court has strongly disapproved the unilateral termination of a deposition by a deponent when the grounds were not the examiner's "bad faith," but the deponent's personal convenience. See *Waicis v Superior Court* (1990) 226 CA3d 283, 286, 276 CR 45, in which the court of appeal upheld the trial court's order barring an expert witness's testimony at trial because the expert, after repeated failures to agree on a deposition date, unilaterally terminated his deposition after a few hours to attend a "personal meeting."

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§6.108 2. Organization Representative as Deponent

When counsel representing an organization is called to defend an officer, director, managing agent, or employee at a deposition, counsel should analyze whether any potential conflict of interest exists between the deponent and the organization. This is usually accomplished before the deposition by reviewing the potential deposition testimony with the deponent.

If a potential or actual conflict of interest develops at the deposition, counsel should at that time demand that the deposition officer suspend the deposition. CCP §2025.470. See §6.106. The deposition can then be resumed with different counsel representing the deponent. Such an action should be rare because it exposes the conflict issue to the opposition.

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§6.109 F. Examination of Deponent

Although CCP §2025.330(d) provides for examination and cross-examination of the deponent as permitted at trial, most practitioners defending a deposition consider it inadvisable and unnecessary to question the witness. Counsel usually avoid examining the deponent because asking questions of a client or favorable witness that would be asked at trial educates the examiner and rarely provides any real benefit to the case.

As with any general rule, however, there are exceptions, including the following:

- **To correct the record.** It may be better to correct an erroneous answer in the record rather than await the deponent's revision and signing of the transcript.
- **To pin down testimony**. Counsel may suspect that the deponent will not stick to favorable testimony at trial.
- **To preserve testimony**. The deponent may not be available at trial because of serious illness, death, or absence from the court's jurisdiction.
- **To voir dire the witness**. Counsel may need to establish foundational facts necessary to support the finding of an evidentiary privilege or for some other reason to establish the competence of the deponent's testimony.
- **To protect a party in a summary judgment motion**. Counsel should guard against the possibility of a court granting summary judgment on the basis that deposition testimony constitutes a judicial admission and cannot be disputed by subsequent affidavit refuting that testimony. See, *e.g., D'Amico v Board of Med. Examiners* (1974) 11 C3d 1, 21, 112 CR 786.
- **To rehabilitate the deponent**. In rare instances, a deponent may make such a damaging admission that it is fatal to the case, and counsel may wish to examine the deponent at the deposition in an attempt to rehabilitate the deponent's testimony.

PRACTICE TIP: Although the deponent will have an opportunity to review the transcript and make any changes (CCP §2025.520; see §6.127), the examiner will be able to comment on those changes at trial. By soliciting more favorable testimony at the deposition (and hopefully establishing contemporaneously some basis for the inconsistency), the deponent's rehabilitation may be more credible.

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VI. HANDLING DEPOSITION DISCOVERY DISPUTES

§6.110 A. Seeking Informal Resolution

Counsel who find themselves in a dispute relating to a deposition are obligated to attempt to resolve their differences before moving the court for relief. On the meet-and-confer obligation in general, see §§15.42-15.44. A declaration stating facts showing a good faith attempt at an informal resolution of each issue presented must accompany the following motions:

- For an order quashing a deposition notice or subpoena under CCP §2025.410 (see §§5.135-5.138, 5.228-5.231);
- For protective order to limit scope or restrict method of discovery under CCP §§2017.020(a), 2019.030(b) (see §§15.59-15.84);
- For protective orders before, during, and after depositions under CCP §2025.420(a) (see §§5.139-5.141);
- To compel attendance, testimony, and production under CCP §§2025.440-2025.450 (see §§6.68-6.74);
- For protective order after deposition suspended under CCP §2025.470 (see §§6.106-6.108, 6.143); and
- To compel answers or production under CCP §2025.480(b) (see §§6.112-6.125).

Counsel who are unable to resolve their differences risk sanctions because the court must impose sanctions against any person, including a party, an attorney, or both, who unsuccessfully makes or opposes the motion unless it finds that the one subject to the sanction acted with substantial justification or other circumstances make the imposition of the sanction unjust. See CCP §2023.030(a). On sanctions, see §§15.85-15.116.

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§6.111 B. Moving for Protective Order

Although the party employing a self-executing method of discovery such as a deposition does not have to show "good cause," a party seeking a protective order to resist the taking of the deposition, or limit the matters that may be inquired into, may be required to establish good cause. CCP §2025.420(b); *Dow Chem. Co. v Superior Court* (1969) 2 CA3d 1, 6, 82 CR 288. For discussion of good cause, see §§15.4-15.10. On protective orders, see §§15.59-15.84.

Although the deposition may be suspended unilaterally under CCP §2025.470 for the purpose of moving for a protective order (see §§6.106-6.108), it appears that discovery relief cannot be granted on an ex parte basis, but only by a noticed motion. See *St. Paul Fire & Marine Ins. Co. v Superior Court* (1984) 156 CA3d 82, 85, 202 CR 571. See also *Titmas v Superior Court* (2001) 87 CA4th 738, 743, 104 CR2d 803.

PRACTICE TIP: When prompt discovery relief is necessary, counsel should make an ex parte application for an order shortening time for notice of the hearing date of the motion. For procedures, see Cal Rules of Ct 3.1200-3.1207. On ex parte application for order shortening time, see §§15.11-15.29. Alternatively, counsel can notice the motion for protective order in the normal manner (see CCP §1005) and make an ex parte application for an order staying the deposition or other discovery until after the motion is heard. For procedure, see chap 15.

For procedures for making and opposing motions for orders to compel answers or production under CCP §2025.480, see §§6.112-6.125. On law and procedures for making and responding to protective orders, see §§15.59-15.84. For forms of motion and supporting declaration for protective order, see §§6.142-6.144.

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C. Moving to Compel Party or Nonparty Answers or Production

§6.112 1. When to Make Motion

A motion to compel deposition answers or production must be made within 60 days after the completion of the record of the deposition (*i.e.*, when the court reporter completes the transcript and certifies it). CCP §2025.480(b). The 60-day limit also applies to a motion to compel based on objections in response to a business records subpoena because the response to a business record subpoena is a "record of the deposition." *Unzipped Apparel, LLC v Bader* (2007) 156 CA4th 123, 133, 67 CR3d 111.

The motion is considered made and pending before the court on service and filing of the notice of motion. CCP §1005.

Counsel should consult the Code of Civil Procedure, the Rules of Court, the case management order, if any, and the local rules to determine when to make the motion and when it must be heard. On motion timing requirements, see §§2.23. Many courts require a hearing date to be reserved in advance, and thus counsel must not delay in deciding whether to move to compel. On when the prescribed period for notice may be extended depending on the manner of service, see §§2.22. See also CCP §1005(b).

JUDGE'S PERSPECTIVE: It is important not to be lulled by the 60-day requirement of CCP §2025.480(b) and to schedule difficult depositions soon enough to calendar a motion to compel before the discovery cutoff date.

Moreover, calendar constraints in some counties may make it impossible for a court to grant an order shortening time. This is particularly true in jurisdictions where law and motion matters are only heard on a particular day each week, greatly reducing the number of available dates. Counsel should be cautious about expecting orders shortening time to be granted, and allow sufficient time for regular notice of hearing.

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§6.113 2. Making Motion in Proper Court

Whether the deponent is a party or a nonparty, when the deposition is taken in California, the motion to compel is made in the court in which the action is pending rather than the county in which the deposition is taken. CCP §2016.020(b).

If the deposition is taken outside California, and the deponent is a nonparty, the process and procedures required and available under the laws of the state, territory, or insular possession where the deposition is taken must be used to compel the deponent to testify or produce. CCP §2026.010(c). On depositions taken in other states, see chap 12.

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§6.114 3. Preparing Moving Papers

The most important aspect of a motion to compel is the evidentiary record that is presented to the court, *i.e.,* the transcript itself lodged before the hearing (see §6.120), all declarations, the supporting memorandum, which may be brief, and the separate statement required by Cal Rules of Ct 3.1020 setting out each question or request for production, the response, and the legal and factual reasons for compelling a further response. On discovery motions, see chap 15.

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§6.115 a. Separate Statement Listing Questions or Demands

The motion to compel must be accompanied by a separate statement that sets forth the following (Cal Rules of Ct 3.1020(c)):

- The text of each deposition question or request for production to which further response is demanded;
- The text of each response or objection, and any further responses given by the deponent at the deposition;
- A statement of the factual and legal reasons for compelling further response;
- If necessary, the text of all instructions and other matters required to understand each request and the responses;
- If the response is dependent on a response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the text of the other request and the response to it; and
- If pleadings or other documents in the court file or other items of discovery are relevant to the motion, a summary of each document or item, by the party relying on them.

The court rule expressly states that material must not be incorporated by reference. Cal Rules of Ct 3.1020(c). For form, see §6.148.

NOTE: Under Cal Rules of Ct 3.1020, there is no explicit penalty for the moving party's failure to set forth (1) each deposition question or request for production to which a further response is requested, (2) the response given, and (3) the factual and legal reasons for compelling further response. However, a trial court can disregard the motion for failing to comply with the rule. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1270, 245 CR 682.

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§6.116 b. Declaration

Depending on the circumstances and complexity of the case, the examiner's declaration in support of a motion to compel should contain the information outlined in the following list:

- A brief statement of the case;
- The fact that the deposition of the deponent was taken by notice, through stipulation of the parties, or by personal service of a deposition subpoena;
- The fact that documents or items to be produced by deponent were properly specified in the notice, stipulation, or subpoena;
- Facts showing that the documents or items exist and are in deponent's possession, custody, or control;
- If oral notice of the motion was given at the deposition, the fact that the deposition officer directed the deponent to attend a session of the court at the stated time and place;
- Any objections or instructions by defending counsel to assist or advise deponent's failure to answer or produce;
- Facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion;
- The identity of every person, party, or attorney against whom a monetary sanction is sought; and
- Facts supporting the amount of the monetary sanction sought (including reasonable expenses and attorney fees incurred as a result of deponent's failure to answer or produce).

PRACTICE TIP: If possible, obtain a disk containing the deposition transcript from the court reporter and put the appropriate text from the deposition into the papers themselves so that the judge need not go to an exhibit or to the copy of the transcript that is lodged with the court.

For other declaration requirements, see §15.49.

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§6.117 4. Giving Notice of Motion

If the examiner gave oral notice at the deposition of the motion to compel under CCP §2025.480(c), the declaration accompanying the motion should recite the fact of oral notice given at the deposition and the court reporter's direction to the deponent to appear in court at the time and place indicated. See §6.79.

As a practical matter, even if oral notice of motion has been given, counsel must also give written notice. Written notice of a motion to compel is given in the same manner as any other motion. See CCP §1005 (served and filed at least 16 court days before hearing date, with additional time if service is by mail or other methods). See also CCP §1013; Cal Rules of Ct 3.1110. See §6.112. On timing, see §§2.20-2.28.

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§6.118 5. Serving Notice and Supporting Papers

A party deponent may be served by mailing the notice of motion and supporting papers to the party's attorney of record. Any written notice and all moving papers supporting a motion to compel a nonparty deponent must be personally served on that deponent unless the deponent agreed to accept service by mail at an address specified on the deposition record. Cal Rules of Ct 3.1025.

NOTE: A nonparty deponent is subject to the jurisdiction of the court by virtue of having been personally served with a deposition subpoena under CCP §2020.220(c). As long as the deponent was a resident of California at the time of the service, the subpoena requires attendance at a court session to consider any issue arising from the deponent's refusal to answer or produce specified items (or to permit inspecting, testing, or sampling of any items produced). CCP §2020.220(c). On serving deposition subpoena, see §5.68-5.69.

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§6.119 6. Filing Proof of Service

Proof of service of the moving papers must be filed no later than 5 calendar days before the hearing date. Cal Rules of Ct 3.1300(c). When service is by mail, the proof of service is normally attached to the papers served and filed. If the deponent is a nonparty who must be personally served with any written motion and the moving papers, proof of such personal service must be filed within the time allotted by Cal Rules of Ct 3.1300(c). See also Cal Rules of Ct 3.1025 (service of moving papers on a nonparty deponent).

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§6.120 7. Lodging Transcript

Not less than 5 days before the hearing date, the examiner must lodge with the court a certified copy of any parts of the stenographic transcript that are relevant to the motion. If the deposition is audio or video recorded, a certified copy of a transcript of any parts of the deposition that are relevant to the motion must likewise be lodged with the court. CCP §2025.480(d). Any material lodged with the court must be accompanied by an addressed envelope with sufficient postage for return mail. After determination of the matter, the clerk will mail back the material to the party lodging it. Cal Rules of Ct 3.1302(b).

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8. Filing Opposition and Reply Papers

§6.121 a. Drafting Opposing Papers

Review papers. Before drafting the opposing declaration, defending counsel should carefully review the moving party's declaration and supporting memorandum, as well as the separate statement filed by the examiner that lists each question or demand for production, the deponent's response that allegedly constitutes a failure to answer or produce (see §6.115), and the factual and legal reason the examiner has for compelling it. See Cal Rules of Ct 3.1020.

Challenge separate statement. Defending counsel should take issue with each argument advanced in the separate statement filed under Cal Rules of Ct 3.1020 and challenge any inaccuracies or errors in the examiner's declaration and supporting memorandum. When the examiner's questions were asked in bad faith or in a manner calculated to annoy, embarrass, or oppress deponent or a party, the declaration should establish the facts showing that this conduct occurred. See CCP §2025.470 (grounds for suspending deposition to seek protective order).

Lodge additional parts of record. If additional parts of the deposition transcript should be lodged with the court, defending counsel should make arrangements with the court reporter to obtain certified copies of those additional parts. CCP §2025.620(e) (any party at trial or other hearing in the action may introduce any parts of a deposition in response to the parts another party offered in evidence). Any relevant excerpts from the deposition transcript should also be set forth in counsel's declaration.

Include meet and confer. Defending counsel's declaration should contain facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion and should identify the person, party, or attorney against whom a monetary sanction is sought (including an itemization of the reasonable expenses and attorney fees incurred in opposing the motion to compel). See CCP §2025.480(b). See generally CCP §§2023.010-2023.040.

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§6.122 b. Filing Opposition at Least 9 Court Days Before Hearing Date

The party or the deponent opposing a motion to compel should serve and file a declaration in opposition to the motion at least 9 court days before the hearing date. CCP §1005(b).

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§6.123 c. Filing Any Reply Papers

Any reply papers must be filed at least 5 court days before the hearing. CCP §1005(b).

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§6.124 9. Burden of Proof

As a practical matter, the moving party makes a preliminary showing that the question or request for production was relevant. On scope of discovery, see chap 1. Thereafter, the burden of proof rests on a deponent who has refused or failed to answer a deposition question or to produce a document or other item, to show that the refusal or failure was justified or, if a privilege is asserted, to show its applicability. *San Diego Prof. Ass'n v Superior Court* (1962) 58 C2d 194, 199, 23 CR 384. On privilege, see chap 3.

If the court determines that the answer or production sought is subject to discovery, it must order that the answer be given or the production be made on the resumption of the deposition. CCP §2025.480(e).

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§6.125 10. Possibility of Sanctions

Defending counsel's instruction at the deposition not to answer or produce may result in a monetary sanction imposed against a deponent, an attorney advising that conduct, or both. CCP §2023.030(a). Under CCP §2023.010(h), making or opposing a motion to compel, unsuccessfully and without substantial justification, is defined explicitly as a misuse of the discovery process. Unless other circumstances make the imposition of the sanction unjust, the court must impose it. CCP §2025.480(f). On sanctions, see chap 15.

Additional sanctions (*e.g.,* issue, evidence, termination, contempt) as well as another monetary sanction may be imposed if a deponent who is a party or a party representative fails to obey an order compelling an answer or production. CCP §2025.480(g). The failure of either a party or a nonparty deponent to obey the court's order may be considered contempt of court and punished accordingly. CCP §2025.480(g). See also CCP §1992 (forfeiture of $500 and all damages resulting from failure to obey). On evidence preclusion sanctions, see §15.98.

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VII. POSTDEPOSITION MATTERS

A. Handling Deposition Transcript

§6.126 1. Official Stenographic Record

Unless the parties agree otherwise, the testimony of any deposition recorded stenographically must be transcribed. CCP §2025.510(a). See §5.73. The party noticing the deposition bears the cost of transcription unless the court orders that cost to be borne or shared by another party. CCP §2025.510(b). Any other party may obtain a copy of the transcript at its own expense. CCP §2025.510(c).

The court has the authority to require a deposition reporter to provide a copy of the deposition transcript to a nonnoticing party for a reasonable fee; this fee, if not agreed on by the parties, may be set by the court. *Serrano v Stefan Merli Plastering Co.* (2008) 162 CA4th 1014, 1035, 76 CR3d 559. This authority arises from CCP §2025.510(c) and the court's inherent power to control its ministerial officers and other persons connected with a judicial proceeding in furtherance of justice (CCP §128(a)(5)).

The attorney requesting the deposition, or the party, if appearing in pro per, must timely pay the deposition officer for the transcription or copy and for any other requested deposition products or services, unless responsibility for payment is otherwise provided by law or if, at the time the services are requested, the deposition officer is given written notice that the party or another identified person is responsible for payment. CCP §2025.510(h)(1)-(2).

PRACTICE TIP: An examiner who has no further use for a deposition should first seek agreement of other counsel not to have the record transcribed. If they refuse to agree, the examiner might consider making a motion requesting the court to order the attorney insisting on the transcription to bear the cost. The cost of such a motion, of course, should be weighed against the cost of transcribing the deposition.

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2. Correcting and Signing Original

§6.127 a. Procedures

Unless other provisions have been made by stipulation, after the deposition is transcribed, the deposition officer must send written notice to the deponent and all parties attending the deposition that the original transcript of the testimony is available for reading and signing. CCP §2025.520(a). If the deposition was not recorded stenographically, the deposition officer's notice must state that the audio or video recording is available for review. CCP §2025.530(a).

The deponent may sign the transcript either in person or by a signed letter to the deposition officer, approve or refuse to approve the deposition, or change the form or substance of the answer to any question in the transcript (CCP §2025.520(b)-(c)) or any answer recorded (CCP §2025.530(b)).

NOTE: The Discovery Commission believed that a deponent's right to correct the deposition should include the right to change even the substance of his or her testimony, and it expressly provided that language in the Discovery Act. This is in line with the federal courts' interpretation of the deponent's ability to "correct" the transcript. See *De Seversky v Republic Aviation Corp*. (ED NY 1941) 2 FRD 113, 114.

The deposition officer must indicate on the original transcript, or in a writing accompanying the recording of the deposition, any of the following responses that the deponent made after receiving the deposition officer's notice (CCP §§2025.520(e), 2025.530(c)):

- The deponent's signing of the transcript or the deponent's signature identifying the recording of the deposition as the deponent's;
- The deponent's express refusal to approve the transcript by not signing it or by not supplying a signature identifying the deposition as the deponent's; or
- The deponent's failure to contact the deposition officer within the allotted period.

CAUTION: Although the California courts have also recognized the deponent's statutory right to make corrections in the testimony taken at the deposition (see, *e.g., George v Double-D Foods, Inc.* (1984) 155 CA3d 36, 45, 201 CR 870), a deponent making an important change to the transcript may provide the good cause necessary for the examiner to take a subsequent deposition. See CCP §2025.610 (only one deposition of natural person permitted unless court orders or parties and deponent stipulate otherwise).

On counsel's stipulation to alter the statutory responsibilities of the court reporter, see §6.38.

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§6.128 b. Deadline to Read, Correct, and Sign Transcript

A deponent has 30 days to read, correct, and sign a transcript for each session of the deposition, unless the attending parties and the deponent agree on the record or in writing to a longer or shorter time period. CCP §2025.520(b). For a sample stipulation, see §6.38.

The 30-day period begins following notice by the deposition officer that the deposition transcript for a particular session is transcribed and available for review. The parties can also agree on the record to waive the reading, correcting, and signing of the transcript, or they can agree that the reading, correcting, and signing of the transcript will take place after the entire deposition has been concluded or at some other specific time. CCP §2025.520(a)-(b).

NOTE: If necessary (and if realtime is not being used), ask the court reporter for expedited copies, an electronic copy on a disk, or e-mail delivery of the transcript.

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§6.129 c. Effect of Unsigned Deposition

Even if the deponent refuses to sign or fails to respond, the deposition has the same force and effect as a signed deposition. CCP §2025.520(f). However, it is still desirable for the examiner to have the deponent's signature on the transcript or the writing accompanying the recording. The deponent who has signed the transcript cannot explain away inconsistencies quite as easily at trial, and any later motion to suppress a signed deposition may not as readily succeed.

It is also to defending counsel's advantage to use the simple procedure afforded by CCP §2025.520 to make any changes before the signing of the deposition. Even though such changes may be commented on, they are less damaging than attempts to change testimony at trial might be.

Even when the parties stipulate to procedures other than those provided by statute for handling the deposition transcript (*e.g.,* requiring that the deposition be signed before it can be used), the courts have nevertheless allowed an unsigned deposition transcript to be used at trial. See *Chavez v Zapata Ocean Resources, Inc*. (1984) 155 CA3d 115, 119, 201 CR 887 (parties stipulated that deposition would have to be signed, but deponent unavailable at sea; court held unsigned deposition admissible because signature not necessary to establish truthfulness of deponent's assertions).

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§6.130 d. If Motion to Suppress Deposition

On a motion to suppress the deposition (which can be made at any time, *e.g.,* during trial or on a motion for summary judgment), the court may rule that the refusal to sign requires rejection of the deposition in whole or in part. CCP §§2025.520(g), 2025.530(e).

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion, and the court must impose a monetary sanction on any party, person, or attorney who unsuccessfully makes or opposes a motion to suppress a deposition, unless the one subject to the sanction acted with substantial justification, or other circumstances make a sanction unjust. CCP §§2025.520(g)-(h), 2025.530(e)-(f). On sanctions, see chap 15.

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§6.131 3. Deposition Officer's Certification

The deposition officer must certify on the deposition transcript, or in the writing accompanying an audio or video recording of the deposition, that the deponent was duly sworn and that the transcript or recording is a true record of the testimony given. CCP §2025.540(a).

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§6.132 4. Retaining Notes If Not Transcribed

The deposition reporter must retain notes of the deposition for at least 8 years after the date of the deposition, when no transcript is produced, and at least 1 year after the date on which the transcript is produced. Notes may be either on paper or on electronic media, as long as the method allows for the satisfactory production of a transcript during the specified periods. CCP §2025.510(e).

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§6.133 B. Access to Deposition Transcript or Recording

If the deposition is both stenographically and audio or video recorded, the stenographic transcript is the official record of that testimony for the purpose of trial or any subsequent hearing or appeal. CCP §2025.510(g).

Any party who audio or video recorded the deposition must promptly provide to any other party, including a party who did not attend the deposition, both an opportunity to hear or view the recording and to obtain a copy of the recording on receipt of payment of the reasonable cost of making that copy. CCP §2025.510(f). For discussion of procedures for recording a deposition, see §§5.72-5.84.

Unless the court orders to the contrary, a copy of the transcript or video or other recording of the deposition, made by or at the direction of any party, if still in the deposition officer's possession, must be made available to anyone who requests a copy. CCP §2025.570(a). The person requesting the copy must pay the reasonable charge set by the deposition officer. CCP §2025.570(a).

If a copy is requested, the deposition officer must mail a notice to all parties attending the deposition and to the deponent at his or her last known address identifying the person who is requesting a copy of the deposition and the right to seek a protective order. The deposition officer must make the copy available to the person requesting it unless a protective order is served on the officer within 30 days after the notice is mailed. CCP §2025.570(b)-(c).

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C. Custody of Deposition Record

§6.134 1. Deposition Transcript

The original certified transcript must not be filed with the court. Instead, the deposition officer must securely seal the transcript in an envelope or package, marked with the deponent's name, and promptly transmit it to the attorney for the party who noticed the deposition. CCP §2025.550(a).

The attorney for the deposing party is responsible for storing the original transcript under conditions that will protect it against loss, destruction, or tampering until 6 months after final disposition of the action. However, on motion of any party, the court may order that the transcript be preserved for a longer period. CCP §2025.550(b).

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§6.135 2. Deposition Recording

The provisions for maintaining an audio or video record of deposition testimony mirror those for maintaining an original transcript. The recording must not be filed with the court but retained by the operator, who must store it under conditions that protect it against loss, destruction, or tampering, and preserve, as far as practicable, the quality and integrity of the recording and any images it contains. CCP §2025.560(a).

The attorney or operator who retains custody of the recording must retain custody of it until 6 months after final disposition of the action. CCP §2025.560(c).

On motion of any party, the court may order that an audio or video recording of the deposition testimony be preserved for a period longer than 6 months after final disposition of the action. CCP §2025.560(c).

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§6.136 D. Using Deposition Testimony at Trial and at Other Court Hearings

Deposition testimony that is admissible and offered for a proper purpose can be used against any party who was present or represented at the taking of the deposition or who had due notice of the deposition and did not serve a valid objection to the notice under CCP §2025.410. CCP §2025.620. To be admissible against a party, deposition testimony taken in the same case must come from a properly noticed deposition. See, *e.g., N.N.V. v American Ass'n of Blood Banks* (1999) 75 CA4th 1358, 1396, 89 CR2d 885. The former testimony exception to the hearsay rule (Evid C §§1290-1293) is inapplicable to deposition testimony against a party who did not receive proper notice of and did not attend the deposition. 75 CA4th at 1395 (defendant successfully excluded deposition testimony perpetuated from witness who had died before trial, because defendant had not been given proper notice of the deposition).

A party may offer all or any part of a deposition in evidence, and if the party introduces only part of the deposition, any party may introduce any other parts that are relevant to the parts introduced. CCP §2025.620(e).

NOTE: Substitution of parties in the same action, or a subsequent action within the United States involving the same subject matter and the same parties or their representatives, does not affect the right to use depositions previously taken. CCP §2025.620(f)-(g). However, testimony from another action involving the same subject matter that does *not* also involve the same parties may not be used at trial unless the requirements of Evid C §1292 are met. *Gatton v A.P. Green Servs., Inc.* (1998) 64 CA4th 688, 692, 75 CR2d 523, modified at 65 CA4th 1204A.

Deposition testimony taken in another case is inadmissible against a hearsay objection unless the prerequisites of Evid C §1292 are met, *i.e.*, the declarant is unavailable as a witness, the former testimony is offered in a civil action, and the party in the former action or proceeding had an opportunity to cross-examine the witness with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing. *Gatton v A.P. Green Servs., Inc, supra*. See also *Byars v SCME Mortgage Bankers, Inc.* (2003) 109 CA4th 1134, 1150, 135 CR2d 796.

Deposition testimony is admissible if the same testimony would be admissible under the rules of evidence if the deponent were present and testifying in court. CCP §2025.620. Some objections to the admissibility of deposition testimony are waived, however, if counsel fails to preserve the objection at the deposition. See §§6.94-6.101.

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§6.137 1. To Impeach

Any party may use the deposition testimony of any deponent to contradict or impeach the in-court testimony of the deponent, or for any other purpose permitted by the Evidence Code. CCP §2025.620(a).

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§6.138 2. For Any Purpose

When the deponent is an adverse party, or a person who was, when the deposition was taken, an officer, director, managing agent, employee, agent, or designee under CCP §2025.230 of an adverse party, the deposition may be used for any purpose. CCP §2025.620(b). See *Haluck v Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 1004, 60 CR3d 542 (elements of CCP §2025.620(b) not met when deponent was not an employee of a party when deposition was taken). This rule applies even though the deponent is available to testify, has testified, or will testify.

A deposition may also be used for any purpose if the deponent resides more than 150 miles from trial or hearing. CCP §2025.620(c)(1); *Monroy v City of Los Angeles* (2008) 164 CA4th 248, 264, 78 CR3d 738 (deposition testimony of deponent who resided 150 miles from courthouse admissible in lieu of live testimony under CCP §2025.620(c)(1)).

As long as the party offering the deposition has not committed any wrongdoing to prevent the deponent from testifying in court, a deposition may be used for any purpose if the deponent is (CCP §2025.620(c)(2)):

- Exempted or precluded on the ground of privilege from testifying about the matter to which the deponent's testimony is relevant;
- Disqualified from testifying;
- Dead or unable to attend or testify because of existing physical or mental illness or infirmity;
- Absent from the trial or other hearing and the court is unable to compel the deponent's testimony by its process; or
- Absent from the trial or hearing and the party offering the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process.

NOTE: The court may also order a deposition used for any purpose if it finds that exceptional circumstances exist that make it desirable to allow the use "in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court." CCP §2025.620(c)(3).

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§6.139 3. Video Deposition of Physician or Expert

Any party may use a video deposition of a treating or consulting physician or an expert deponent, even though the deponent is available to testify, if the deposition notice reserved the right to use the deposition at trial (CCP §2025.220(a)(6)), and the party has complied with CCP §2025.340(m). See CCP §2025.620(d).

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§6.140 E. Rough Drafts of Deposition Transcript

Because most deposition reporters use an electronic form of shorthand, they can create rough drafts shortly after any court hearing or other proceeding, at the request of a party or counsel. Any offer to provide rough draft transcripts before or at the deposition must be made by the reporter to all parties in attendance, who are obligated to pay the reasonable cost of that service, which may be no greater than the costs charged to any other party or attorney. CCP §2025.220(a)(5).

If the deposition is conducted using "Realtime," rough drafts of the transcripts will be immediately available. On realtime, see §6.28.

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VIII. FORMS

§6.141 A. Sample Admonitions

Introductory comments to the deponent, similar to those commonly appearing in deposition transcripts, are contained in the following sample:

EXAMINER: Now, Mr. W., I am an attorney representing ABC Corp. in this lawsuit. Have you ever been a witness in a deposition before?

WITNESS: No.

EXAMINER: Do you understand that, even though this deposition is taking place in an informal setting in a law office, the testimony you give today has the same force and effect as if it were given in a court of law?

WITNESS: Yes.

EXAMINER: Do you understand that the oath you have just taken requires you to testify truthfully under penalty of perjury?

WITNESS: Yes.

EXAMINER: Please answer each question audibly. If the answer is yes, do not nod your head, but say "yes." Similarly, do not answer by pointing or saying "about this much," or by making other statements that a transcript cannot fully capture. Is this clear?

WITNESS: Yes.

EXAMINER: The court reporter can record the words of only one speaker at a time. Do not begin to answer a question until after I have finished asking it. Do you understand this?

WITNESS: Yes.

EXAMINER: I will attempt to make my questions as clear as possible. But, if for any reason you do not understand a question, ask me to repeat it or rephrase it, and I will do so. If you go ahead and answer a question, everyone will assume, and the record will reflect, that you understood the question. Is this clear?

WITNESS: Yes, it is.

EXAMINER: Shortly, I will be asking you questions. You should answer each question truthfully, accurately, and completely. Do you understand?

WITNESS: Yes.

EXAMINER: I am entitled to your best estimate or your best recollection in response to my questions. For example, if you do not remember the exact words of a conversation, I am entitled to the gist of it or its substance. I do not want you to guess or speculate, however. Do you understand?

WITNESS: Yes.

EXAMINER: If, at any time during this deposition, you feel ill or for some other reason you are unable to continue to testify accurately, please tell me immediately and we will take a recess. Are you presently taking any medications, drugs, or any other substance that would affect your ability to testify accurately at this deposition?

WITNESS: No.

EXAMINER: Do you have any difficulty understanding or speaking English?

WITNESS: No.

EXAMINER: Is there any other reason at all why you cannot testify truthfully here today?

WITNESS: No.

EXAMINER: Everything we say here today will be taken down by the court reporter. After the deposition is over, the court reporter will transcribe what we have said into a booklet. If I ask you the same questions later, at the trial, that I have asked you today, and your answers are different then than they are today, I will be able to comment on the differences and one of the reasons will be to question your truthfulness. You can expect to be asked to explain the reason for the differences in your answers. Do you understand this?

WITNESS: Yes.

EXAMINER: Do you have any questions about anything I have just told you?

WITNESS: No.

EXAMINER: All right. Let's proceed with the deposition.

Comment: See §6.46. On resuming the deposition after a break period such as lunch, it can be useful to ask the witness questions such as, *e.g.,* "Did you have anything alcoholic to drink at lunch?" "Did you review any documents at lunch?" "Did you talk with anyone other than your attorney during the break or at lunch?"

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Source: Civil Litigation/California Civil Discovery Practice/6 Taking and Defending Oral Depositions/ B. Motion for Protective Order/§6.142 1. Form: Notice of Motion and Motion for Order That Deposition Be Terminated or Limited; Request for Sanctions

B. Motion for Protective Order

§6.142 1. Form: Notice of Motion and Motion for Order That Deposition Be Terminated or Limited; Request for Sanctions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION FOR ORDER** _ _[*STAYING/ TERMINATING/LIMITING SCOPE OF*]_ _ **DEPOSITION AND FOR SANCTIONS; SUPPORTING MEMORANDUM (CCP §2025.420)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
_____	)	

PLEASE TAKE NOTICE that _ _[*name and status*]_ _ **moves the Court for an order that the deposition of** _ _[*name*]_ _ **be** _ _[*stayed/terminated/limited in the following manner:* _ _[*e.g., scope of examination be restricted/examination be conducted only in the presence of a court commissioner*]_ _]_ _ **and for monetary sanctions against** _ _[*identify person, party, and/or attorney*]_ _ **for reasonable costs and expenses, including attorney fees, incurred in making this motion. This motion is made on the ground that there is good cause for the order sought in that** _ _[*briefly state ground, e.g., justice requires that the deponent be protected from unwarranted annoyance, embarrassment, and oppression under Code of Civil Procedure §2025(i)*]_ _.

This motion is based on all pleadings, papers, and records in this action, the attached supporting memorandum, the declaration of _ _[*name*]_ _ _ _[*, and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and

unrepresented party); office copies.

Comment: In addition to references to the Discovery Act (CCP §§2016.010-2036.050), the supporting memorandum should contain case and other statute citations, if appropriate, related to the specific facts that are the bases for the motion. For discussion on motion for protective order, see §§6.142-6.144.

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Source: Civil Litigation/California Civil Discovery Practice/6 Taking and Defending Oral Depositions/§6.143 2. Form: Memorandum Supporting Motion for Order That Deposition Be Terminated or Limited

§6.143 2. Form: Memorandum Supporting Motion for Order That Deposition Be Terminated or Limited

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**MEMORANDUM SUPPORTING**
vs	)	_ _[*NAME*]_ _**'S MOTION FOR**
	)	**ORDER THAT DEPOSITION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**BE TERMINATED OR LIMITED**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
_____	)	

FACTS: _ _[*Succinctly state facts underlying the motion.*]_ _

I. At any time before, during, or after the taking of the deposition, any party, deponent, or other affected natural person or organization may, on a showing of good cause, obtain an order that justice requires for protection against unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. Code of Civil Procedure §2025.420.

[*Add if protective order is being sought while deposition is suspended*]

II. On a showing that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party, the Court in which the action is pending may terminate the examination or may limit the scope and manner of the taking of the deposition as provided in Code of Civil Procedure §2025.420. Code of Civil Procedure §2025.470.

[*Continue*]

[III.] The Court must impose a monetary sanction under Code of Civil Procedure §2023.030(a) against any party, person, or attorney who unsuccessfully opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust. Code of Civil Procedure §2025.420(d).

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: A supporting memorandum must be filed with the motion. Cal Rules of Ct 3.1113.

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Source: Civil Litigation/California Civil Discovery Practice/6 Taking and Defending Oral Depositions/§6.144 3. Form: Declaration Supporting Motion for Protective Order

§6.144 3. Form: Declaration Supporting Motion for Protective Order

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**PROTECTIVE ORDER TO**
	)	_ _[*DESCRIBE ORDER*
	)	*SOUGHT, AS IN NOTICE OF*
	)	*MOTION*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*plaintiff/defendant/attorney for plaintiff/attorney for defendant*]_ _, _ _[*name*]_ _**, in this action. This action is for** _ _[*describe nature of action and give brief statement of case*]_ _**.**

2. _ _[*Continue in numbered paragraphs, with statements of specific facts setting forth the basis of, and showing good cause for, granting the motion.*]_ _

[3.] Before filing this motion, I made a reasonable and good faith attempt to resolve this dispute informally with opposing counsel as follows: _ _[*State facts showing that such an attempt was made to resolve each issue presented by the motion.*]_ _

[4.] The opposition of _ _[*name*]_ _ **to this motion is without substantial justification or other circumstances that would make the imposition of a sanction unjust.** _ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _**, requests the Court, if this motion is opposed unsuccessfully, to impose a monetary sanction against** _ _[*name of party or attorney*]_ _ **in the sum of $**_ _[*amount*]_ _ **incurred in making this motion, reasonable costs and expenses, and attorney fees:** _ _[*Itemize in appropriate detail.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: For further discussion of protective orders, see §§15.59-15.84.

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C. Motion for Order to Compel Answers or Production

§6.145 1. Sample Oral Notice of Motion

The procedures for giving notice of the motion orally at the deposition to compel an answer or production of a document are contained in the following example:

> EXAMINER: _ _[*Name of deponent*]_ _, under California Code of Civil Procedure §2025.480, you are hereby notified that on _ _[*date*]_ _, at _ _[*time*]_ _, or as soon thereafter as the matter can be heard, in _ _[*court where the action is pending*]_ _ _ _[*name of moving party*]_ _ will move the Court for an order compelling you to _ _[*answer the question/produce the document*]_ _ you have failed to _ _[*answer/produce*]_ _.
>
> You are advised that the Court must impose a monetary sanction under Code of Civil Procedure §2023.030(a) against any party, person, or attorney who unsuccessfully opposes a motion to compel, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.
>
> [*Add if appropriate*]
>
> You are further advised that the Court, in imposing a monetary sanction under Code of Civil Procedure §2023.030(a), may order that anyone engaging in a misuse of the discovery process, any attorney advising that conduct, or both, must pay the reasonable expenses, including attorney fees, incurred by anyone as a result of that conduct. A misuse of the discovery process under CCP §2023.010(h) includes making or opposing, unsuccessfully and without substantial justification, a motion to compel.
>
> [*Add if deponent is nonparty whose attendance was compelled by deposition subpoena*]
>
> You are advised that under Code of Civil Procedure §2020.220(c) your attendance at this Court session is required. You are also advised that a deponent who disobeys a subpoena by refusing to _ _[*answer any question/produce specified items*]_ _ at a deposition, or who fails to attend the Court session to consider that refusal, may be punished for contempt and is subject to the forfeiture and payment of damages of $500 as set forth in Code of Civil Procedure §1992.
>
> The deposition officer is now requested to instruct you to appear at the time and place that I just stated.
>
> DEPOSITION OFFICER: Under the instructions of counsel, you are so directed to appear.

Comment: On oral notice of this motion given at the deposition, see §6.79. Unless a nonparty deponent agrees to accept service by mail at an address specified in the deposition record, the motion to compel answers or production and all supporting papers must be personally served on the nonparty deponent. See Cal Rules of Ct 3.1025. See also §6.81.

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Source: Civil Litigation/California Civil Discovery Practice/6 Taking and Defending Oral Depositions/§6.146 2. Form: Notice of Motion and Motion to Compel Answers to Questions and Production of Documents at Deposition

§6.146 2. Form: Notice of Motion and Motion to Compel Answers to Questions and Production of Documents at Deposition

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION TO COMPEL ANSWERS TO QUESTIONS** _ _[*AND PRODUCE DOCUMENTS*]_ _ **AT DEPOSITION AND FOR SANCTIONS; SUPPORTING MEMORANDUM**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

[*Option 1: Notice not given at deposition*]

PLEASE TAKE NOTICE THAT

[*Option 2: Notice given orally at deposition*]

NOTICE WAS GIVEN at the time the deposition of _ _[*name of deponent*]_ _ was taken, as set forth in the accompanying declaration of _ _[*name*]_ _, that

[*Continue*]

_ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, moves the Court under Code of Civil Procedure §2025.480 for an order compelling** _ _[*name of deponent*]_ _**, deponent,** _ _[*to answer questions/produce documents*]_ _ **that deponent failed to** _ _[*answer/produce*]_ _ **at** _ _[*his/her*]_ _ **oral deposition on** _ _[*date*]_ _**. This motion is made on the grounds that (1) the** _ _[*questions/documents*]_ _ **are relevant to the subject matter of this action and do not relate to privileged matters, and (2) discovery should be required and sanctions awarded for the failure to permit discovery and for opposing this motion without substantial justification.**

_ _[*Name*]_ _ **further moves the Court for an order that monetary sanctions be imposed against** _ _[*name of deponent, party, and/or attorney*]_ _ **in favor of the moving party in the sum of $**_ _[*amount*]_ _ **as reasonable costs and expenses, including attorney fees, incurred in this proceeding.**

This motion is based on the attached documents and exhibits, including the separate list dated _ _[*date*]_ _**, of** _ _[*questions/demands for production*]_ _ **to which further** _ _[*response/production*]_ _ **is requested** _ _[*; all pleadings, papers, and records filed in this action; and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party; one for nonparty deponent); office copies.

Comment: On procedures for motions to compel, see §§6.112-6.125.

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§6.147 3. Form: Memorandum Supporting Motion to Compel Answers to Questions and Production of Documents at Deposition

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**MEMORANDUM IN SUPPORT**
vs	)	**OF _ _[*NAMES*]_ _'S MOTION**
	)	**TO COMPEL ANSWERS TO**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**QUESTIONS AND**
	)	**PRODUCTION OF**
	)	**DOCUMENTS AT DEPOSITION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
_____	)	

FACTS: _ _[*Succinctly state facts underlying the motion.*]_ _

I. The Court has the authority to determine whether the answers or production sought are subject to discovery. Code of Civil Procedure §2025.480.

II. The Court must impose a monetary sanction (which includes attorney fees and other reasonable expenses) in favor of the prevailing party against any person or party who engages in a misuse of the discovery process, or any attorney advising that conduct, unless the person, party, or attorney unsuccessfully opposing the motion to compel acted with substantial justification or other circumstances make the imposition of the sanction unjust. Code of Civil Procedure §§2023.010(h), 2023.030(a), 2023.040, 2025.480(f).

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: A supporting memorandum must be filed with the motion. Cal Rules of Ct 3.1113.

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Source: Civil Litigation/California Civil Discovery Practice/6 Taking and Defending Oral Depositions/§6.148 4. Form: Declaration Supporting Motion to Compel Answers to Questions and Production of Documents at Deposition

§6.148 4. Form: Declaration Supporting Motion to Compel Answers to Questions and Production of Documents at Deposition

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**DECLARATION OF** _ _[*NAME*]_ _ **SUPPORTING** _ _[*NAME*]_ _**'S MOTION TO** **COMPEL ANSWERS TO** **QUESTIONS** _ _[*AND* *PRODUCE DOCUMENTS*]_ _ **AT DEPOSITION AND FOR** **SANCTIONS**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	
_____	)	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*plaintiff/defendant/attorney for plaintiff/attorney for defendant*]_ _, _ _[*name*]_ _**, in this action. This action is for** _ _[*describe nature of action and give brief statement of case*]_ _**.**

[*Option 1: Deposition agreed to by stipulation*]

2. The deposition of _ _[*name and status of deponent*]_ _**, who resides at** _ _[*address*]_ _**, was taken under Code of Civil Procedure §2016.030 by written stipulation of the parties, attached as Exhibit** _ _[*number*]_ _**.**

[*Option 2: Deposition taken by notice*]

2. The deposition of _ _[*name and status of deponent*]_ _ **was taken under Code of Civil Procedure §§2025.210-2025.280, by notice, attached along with its proof of service, as Exhibit** _ _[*number*]_ _**.**

[*Option 3: Deposition taken by subpoena served on deponent*]

2. The deposition of _ _[*name and status of deponent*]_ _**, who resides at** _ _[*address*]_ _**, was taken under Code of Civil Procedure §§2020.010-2020.510, by personally served subpoena, attached with its proof of service, as Exhibit** _ _[*number*]_ _**.**

[*Continue*]

3. The deposition of _ _[*name of deponent*]_ _ **was taken at the above date and time before** _ _[*name and title of deposition officer*]_ __.

4. At the taking of the deposition, deponent _ _[*refused/failed*]_ _ **to answer certain questions** _ _[*on the advice of counsel*]_ _ **as appears in the transcript** _ _[*lodged with this motion/to be lodged with the Court no later than five (5) days before the hearing of this motion*]_ _ **and in the separate statement that is filed with this motion.**

[*Add if documents were not produced at deposition*]

5. On _ _[*date*]_ _**, deponent was served with the deposition** _ _[*notice/subpoena*]_ _ **(see Exhibit** _ _[*number*]_ _**), properly specifying certain documents to be produced at the deposition as set forth in the separate statement that is filed with this motion. Deponent failed to produce the documents demanded, even though these documents are within the deponent's** _ _[*possession/custody/control*]_ _ **for the reason that deponent** _ _[*state reason*]_ _.

[*Continue*]

[6.] The _ _[*questions/demands for production*]_ _ **that deponent** _ _[*refused/failed*]_ _ **to** _ _[*answer/produce*]_ _ **appear on the attached separate statement listing the** _ _[*questions/documents*]_ _ **as required by California Rules of Court 3.1020.**

[*Add if oral notice of motion given at deposition*]

[7.] Following deponent's _ _[*refusal/failure*]_ _ **to** _ _[*answer the questions/produce the documents*]_ _, _ _[*plaintiff/defendant*]_ _**'s attorney notified** _ _[*deponent/deponent's attorney/both deponent and his or her attorney*]_ _ **that on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, in** _ _[*e.g., Department No.* _ _[*number*]_ _]_ _ **at** _ _[*address*]_ _**, California,** _ _[*name*]_ _ **would move the Court for an order under Code of Civil Procedure §2025.480 requiring** _ _[*answers to the questions propounded/production of the required documents*]_ _ **and payment of reasonable costs and expenses, including attorney fees, incurred in this proceeding. The deposition officer then directed** _ _[*deponent/deponent's attorney/both deponent and his or her attorney*]_ _ **to attend a session of this Court at which such an order would be sought.**

[*Continue*]

[8.] The _ _[*questions/documents*]_ _ **are relevant to the subject matter of this action, do not relate to privileged matters, and should be subject to discovery for the reasons set forth in the attached separate statement listing the** _ _[*questions/documents*]_ _ **as required by California Rules of Court 3.1020.**

[9.] Before filing this motion to compel, I made a reasonable and good faith attempt to resolve this dispute informally with opposing counsel as follows: _ _[*State facts showing that such an attempt was made to resolve each issue presented by the motion*]_ _.

[10.] _ _[*Name*]_ _ **requests the Court to award monetary sanctions against** _ _[*name*]_ _ **in the sum of $**_ _[*amount*]_ _**. The facts set forth in this declaration show that the failure of** _ _[*defendant/plaintiff/deponent*]_ _ **and** _ _[*his/her/its*]_ _ **opposition to this motion are without substantial justification or other circumstances that would make imposition of the sanction unjust. As a result of** _ _[*deponent/defendant/plaintiff*]_ _**'s failure to** _ _[*answer/respond/comply*]_ _, _ _[*plaintiff/defendant*]_ _ **moves to compel necessarily incurred reasonable expenses in the sum of $**_ _[*amount*]_ _**, and reasonable attorney fees in the amount of $**_ _[*amount*]_ _ **, as follows:** _ _[*Set forth details of expenses and attorney fees*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: For discussion of declaration supporting motion to compel, see §6.116.

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Source: Civil Litigation/California Civil Discovery Practice/6 Taking and Defending Oral Depositions/§6.149 5. Form: Separate Statement Listing Questions to Be Answered and Documents to Be Produced

§6.149 5. Form: Separate Statement Listing Questions to Be Answered and Documents to Be Produced

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
vs	)	_ _[*PLAINTIFF/ DEFENDANT*]_ _**'S SEPARATE STATEMENT LISTING**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*QUESTIONS TO BE ANSWERED/DOCUMENTS TO BE PRODUCED*]_ _ **(CAL RULES OF CT 3.1020)**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Plaintiff/Defendant*]_ _, _ _[*name of moving party*]_ _, **seeks:**

[*Option 1: Questions to be answered*]

1. Answers or further answers to the following questions propounded to _ _[*name of deponent*]_ _ **at** _ _[*his/her*]_ _ **oral deposition on** _ _[*date*]_ _**, to which an answer or further answer is requested:**

[*List questions, deponent's responses, and factual and legal reasons for compelling answers*]

[*Option 2: Documents to be produced*]

1. Production of the following documents that were specified in the deposition _ _[*subpoena/notice*]_ _**, attached as Exhibit** _ _[*number*]_ _**, demand for which was made at the deposition of** _ _[*name of deponent*]_ _ **on** _ _[*date*]_ _**, as follows:**

[*List document numbers, deponent's responses, and factual and legal reasons for compelling production*]

[*Option 3: Both questions to be answered and documents to be produced*]

1. Answers or further answers to the following questions propounded to _ _[*name of deponent*]_ _ **at** _ _[*his/her*]_ _ **oral deposition on** _ _[*date*]_ _**, to which an answer or further answer is requested:**

[*List questions, deponent's responses, and factual and legal reasons for compelling answers*]

2. Production of the following documents that were specified in the deposition _ _[*subpoena/notice*]_ _**, attached as Exhibit** _ _[*number*]_ _**, demand for which was made at the deposition of** _ _[*name of deponent*]_ _ **on** _ _[*date*]_ _**, as follows:**

[*List document numbers, deponent's responses, and factual and legal reasons for compelling production*]

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party; one for nonparty deponent); office copies.

Comment: The court rule expressly states that material must not be incorporated by reference. Cal Rules of Ct 3.1020(c). The separate statement must also include: (a) if necessary, the text of all instructions and other matters required to understand each request and the responses; (b) if the response is dependent on a response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the text of the other request and the response to it; and (c) if pleadings or other documents in the court file or other items of discovery are relevant to the motion, a summary of each document or item, by the party relying on them. See §6.115.

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Source: Civil Litigation/California Civil Discovery Practice/6 Taking and Defending Oral Depositions/§6.150 6. Form: Order to Answer Questions and Produce Documents at Deposition and to Pay Sanctions

§6.150 6. Form: Order to Answer Questions and Produce Documents at Deposition and to Pay Sanctions

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Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**ORDER TO ANSWER**
vs	)	**QUESTIONS** _ _[*AND*
	)	*PRODUCE DOCUMENTS*]_ _
_ _[*Name(s)*]_ _,	)	**AT DEPOSITION AND FOR**
Defendant(s)	)	**MONETARY SANCTIONS**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*name*]_ _ for an order requiring _ _[*plaintiff/defendant/name of person*]_ _ to _ _[*answer questions/produce documents*]_ _ at deposition and for monetary sanctions was regularly heard on the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED THAT:

1. The examination of _ _[*name of deponent*]_ _ be resumed before _ _[*name of deposition officer*]_ _ at a time and place _ _[*fixed by stipulation of the attorneys for the respective parties/designated by moving party on _ _[number]_ _ days' written notice to _ _[deponent/defendant/plaintiff*]_ _]_ _, who is hereby ordered to appear.

2. _ _[*Name of deponent*]_ _ answer under oath the following questions and any other questions relevant to the subject matter of those questions and to the above action: _ _[*List questions*]_ _.

3. _ _[*Name of deponent*]_ _ produce at the time of the deposition the following documents: _ _[*List documents*]_ _.

[*Add if appropriate*]

4. This order be made subject to the following conditions: _ _[*Specify*]_ _.

[*Continue*]

It appearing to the Court that the failure of _ _[*deponent/defendant/plaintiff*]_ _ to _ _[*answer/produce*]_ _, as well as the opposition to this motion to compel, was without substantial justification,

IT IS FURTHER ORDERED THAT, as a monetary sanction, _ _[*deponent/defendant/plaintiff*]_ _ _ _[*and*]_ _ _ _[*his or her attorney/the party advising refusal or failure*]_ _ pay _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, the sum of $_ _[*amount*]_ _ for reasonable costs and expenses, including attorney fees, incurred as a result of that

conduct.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (present to judge for signature and file with court clerk; retain conformed copy); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: On procedures for motion to compel, see §§6.112-6.125.

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7

Interrogatories

Shirley K. Watkins

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§7.1 I. SCOPE OF CHAPTER

This chapter covers the use of interrogatories under CCP §§2030.010-2030.410. Topics covered include:

- What interrogatories are and how they are used (see §§7.2-7.7);
- The numerical and timing limitations on interrogatories (see §§7.8-7.16);
- Special considerations and strategic considerations for using interrogatories (see §§7.17-7.20 and 7.25-7.30);
- Who can be served with interrogatories (see §§7.21-7.24);
- Considerations when drafting and serving interrogatories (see §§7.31-7.54);
- The procedures for responding to interrogatories, including objecting to interrogatories (see §§7.55-7.106);
- Compelling answers and further answers to interrogatories (see §§7.107-7.119);
- Obtaining sanctions (see §§7.120-7.121);
- Protective orders (see §§7.122-7.124); and
- Federal procedures related to interrogatories (see §§7.125-7.140);

For a procedural checklist, see §7.141. For forms to use in pursuing discovery under CCP §§2030.010-2030.410, see §§7.142-7.158.

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II. DECIDING TO USE INTERROGATORIES

§7.2 A. Interrogatories Defined

Written questions. Interrogatories are written questions, served by one party on another party in a civil action or proceeding, that must be answered in writing under oath. CCP §§2030.010(a), 2030.250. They may inquire about any matter that is relevant to the subject matter of the action unless the matter is privileged or protected by the work product rule. CCP §§2017.010, 2018.010-2018.080; *Smith v Superior Court* (1961) 189 CA2d 6, 12, 11 CR 165. On permissible scope of interrogatories, see §7.31. On privileges, see chap 3.

Principal purpose. The principal objective of CCP §§2030.010-2030.410 is to ask questions of an adverse party and to authorize the use of the answers against that party whether or not that party is "available to testify, has testified, or will testify at the trial or other hearing." CCP §2030.410; *Associates Discount Corp. v Tobb Co.* (1966) 241 CA2d 541, 551, 50 CR 738.

Subject to objection. Interrogatories are subject to objections (see §§7.84-7.101) and to motions for protective orders (see §§7.122-7.124) by the party to whom they are propounded. Failure to answer interrogatories in a timely manner may result in the responding party's waiver of all objections and an order to compel answers to each question. A responding party's failure to answer interrogatories fully can also result in the imposition of sanctions in favor of the propounding party, ranging from an award of attorney fees, to issue or evidence sanctions at trial, to an order dismissing a pleading. See §§7.120-7.121. On sanctions motions in general, see §§15.85-15.116.

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B. How Interrogatories Are Used

§7.3 1. Ascertain Contentions and Supporting Facts

Interrogatories are commonly used to ascertain a party's contentions, including facts, witnesses, and writings on which a contention is based. CCP §2030.010(b). *Rifkind v Superior Court* (1994) 22 CA4th 1255, 27 CR2d 822 (see §§7.39-7.43). They may also be used to determine the existence and description of documents that may then be the subject of a request to produce for inspection under CCP §2031.010 (see §§7.16-7.47).

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§7.4 2. Facilitating Settlement

Attorneys frequently use interrogatories to facilitate settlement by requiring verified responses to matters of importance to issues of liability or to the case in general. For example, drafting verified interrogatory responses requires counsel and the party to state facts in support of allegations pleaded in the alternative in the complaint or in support of affirmative defenses alleged simply to avoid waiver, and may thus establish that sufficient facts do not exist to support the pleadings. Interrogatories are particularly useful to the propounding party for obtaining the collective knowledge that is available to the responding party (see CCP §2017.010, incorporated in CCP §2030.010(a)), including knowledge of the responding party's agents and attorneys. See *Pantzalas v Superior Court* (1969) 272 CA2d 499, 77 CR 354.

PRACTICE TIP: Interrogatories are much less expensive than depositions and this lesser expense can be a factor in many cases, especially those in which there are limited damages.

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§7.5 3. Focusing Counsel's Thinking

Interrogatories can be an invaluable tool for both sides if used properly. A good faith response, including the duty to investigate when necessary (see CCP §2030.220(c)), may focus the thinking of counsel who drafts the answers. The propounding party in turn benefits from answers based on the collective knowledge of other parties and their attorneys, and from the ability to discover the other side's legal contentions. See §§7.39-7.43.

PRACTICE TIP: There is also a detriment to both sides. The responding party's attorney prepares the interrogatory responses, making it more likely that careful consideration has gone into the responses to minimize the adverse impact on the responding party. As to the propounding party, the nature of the interrogatories may inadvertently disclose to the responding party the thoughts, impressions, and legal theories of the propounding party's attorney.

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§7.6 4. Using as Evidence

As far as admissible under the rules of evidence, the propounding party or any party other than the responding party may, at the trial or any other hearing, use any answer or part of an answer to an interrogatory only against the party giving the answer. CCP §2030.410. It is not grounds for objection to the use of an answer to an interrogatory that the responding party is "available to testify, has testified, or will testify at the trial or other hearing." CCP §2030.410. See *Mayhood v La Rosa* (1962) 58 C2d 498, 24 CR 837.

Interrogatories may be used only against the party supplying the answer. CCP §2030.410. See *Great Am. Ins. Cos. v. Gordon Trucking, Inc.* (2008) 165 CA4th 445, 452, 81 CR3d 65 (in subrogation action, when insured is asked by interrogatory for all facts that support an allegation on subject not within insured's personal knowledge, another party cannot use insured's factually devoid answer to demonstrate that insurer has no facts to prove its allegations); *Levy-Zentner Co. v Southern Pac. Transp. Co.* (1977) 74 CA3d 762, 789, 142 CR 1; *Associates Discount Corp. v Tobb Co.* (1966) 241 CA2d 541, 50 CR 738. Because answers to interrogatories are by nature affidavits or declarations of interested persons and are hearsay, a party cannot introduce his or her own answers as evidence of the matters asserted. *Giesler v Berman* (1970) 6 CA3d 919, 929, 86 CR 205; *Estate of Horman* (1968) 265 CA2d 796, 805, 71 CR 780. The answers are hearsay as against other parties. *Castaline v City of Los Angeles* (1975) 47 CA3d 580, 587, 121 CR 786.

A party's answers to interrogatories can furnish the basis for an order precluding that party's introduction of certain evidence at trial (*Campain v Safeway Stores, Inc.* (1972) 29 CA3d 362, 104 CR 752) or witnesses (*Thoren v Johnston & Washer* (1972) 29 CA3d 270, 105 CR 276). See §7.6.

The responding party may introduce evidence at trial contrary to his or her interrogatory answers. The responding party is then subject to cross-examination or impeachment by his or her interrogatory responses. *Mason v Marriage & Family Ctr.* (1991) 228 CA3d 537, 546, 279 CR 51.

Some courts have local rules governing the use of interrogatories at trial. See, *e.g.,* Los Angeles Ct R 8.70. For use of interrogatories under federal rules, see Fed R Civ P 33(c).

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§7.7 5. Cannot Be "Continuing"

Continuing interrogatories, *i.e.,* those that contain an introductory statement that the party served must supplement earlier answers by furnishing the proponent with subsequently discovered information, are improper in California unless the propounding party obtains leave of court. *Smith v Superior Court* (1961) 189 CA2d 6, 11 CR 165; see also *Biles v Exxon Mobil Corp.* (2004) 124 CA4th 1315, 22 CR3d 282 (no duty to supplement interrogatory responses under California law). The discovery statute specifies that "[a]n interrogatory may not be made a continuing one so as to impose on the party responding to it a duty to supplement an answer to it that was initially correct and complete with later acquired information." CCP §2030.060(g).

Although there are no continuing interrogatories, a party may propound a supplemental interrogatory to "elicit any later acquired information bearing on all answers previously made by any party in response to interrogatories." CCP §2030.070. On supplemental interrogatories, see §7.12.

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§7.8 C. Numerical Limitations on Interrogatories

A party may propound any number of Judicial Council form interrogatories, but specially prepared interrogatories are limited to 35, unless accompanied by a declaration stating why additional questions are warranted. CCP §§2030.030-2030.040. The declaration is commonly referred to as a "Declaration of Necessity." On Judicial Council form interrogatories, see §7.9. For Judicial Council Form DISC-001, Interrogatory 15.1, see §7.142. On specially prepared interrogatories, see §§7.10-7.11.

In addition, a party may propound a supplemental interrogatory to "elicit any later acquired information bearing on all answers previously made by any party in response to interrogatories." CCP §2030.070(a). See §7.12.

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§7.9 1. Judicial Council Form Interrogatories

Various civil actions. The Judicial Council has promulgated official form interrogatories and requests for admission in civil actions based on personal injury, property damage, and unlawful detainer, among others. Judicial Council Forms DISC-020 (Requests for Admission), DISC-001 (Form Interrogatories—General), DISC-003/UD-106 (Form Interrogatories—Unlawful Detainer), DISC-002 (Form Interrogatories—Employment Law). CCP §§2033.710-2033.740. For Judicial Council Form DISC-001, Interrogatory 15.1, see §7.142.

The Judicial Council form interrogatories can be useful in a variety of commercial disputes, as well as in personal injury actions. For example, by using the Judicial Council general form interrogatories (DISC-001), counsel can discover facts regarding business entity type and status (No. 3); insurance coverage (No. 4); damages (Nos. 6-9); witnesses, documents, videotapes (No. 12); the contentions supporting any denials or affirmative defenses (No. 15); and the basis for a contract dispute (No. 50). If served with a set of requests for admissions, form interrogatory No. 17 requires the responding party to identify facts, witnesses, and documents supporting any response that is not an unqualified admission. DISC-001, No. 17. On requests for admission, see chap 9.

The Judicial Council has also promulgated form interrogatories for use in limited civil cases (Judicial Council Form DISC-004). See §§14.20, 14.25.

PRACTICE TIP: Because the Judicial Council form interrogatories cover basic matters relevant to many lawsuits, reviewing the form interrogatories and selecting those relevant to a particular case before drafting specially prepared interrogatories can save counsel much time and expense. Only use the interrogatories that are relevant to the case; a thoughtless selection of all form interrogatories will generate needless disputes.

Use optional. Use of the official form interrogatories and requests for admission is optional. They may be supplemented or not used at all. However, the preface and instructions of the officially approved forms are required, if a preface or instructions are used at all. CCP §2030.060(d); see §§2033.710-2033.740.

Not subject to limit of 35. The Judicial Council form interrogatories are not subject to the limit of 35, nor to the rules against interrogatories that are subjunctive, conjunctive, or that have subparts.

CAUTION: Counsel should not modify form interrogatories or they may be considered "specially prepared" interrogatories subject to the limit of 35. On specially prepared interrogatories, see §§7.10-7.11.

Right to object or assert privilege. The official form interrogatories do not change the law affecting a responding party's right to object or assert a privilege to a question propounded. As a practical matter, however, the authority of the Judicial Council in making its interrogatories the "approved form interrogatories" may affect the willingness of trial courts to rule that a particular question is improper. In *Nacht & Lewis Architects, Inc. v Superior Court* (1996) 47 CA4th 214, 217, 54 CR2d 575, however, the court of appeal reversed the trial court's order to compel an answer in response to former Judicial Council Form FI-120, Interrogatory 12.2 (now Form DISC-001), which requests identifying information regarding persons interviewed by counsel or other persons on the client's behalf. The court held that the identity of potential witnesses *interviewed* by opposing counsel is protected by the qualified work product doctrine. On work product doctrine, see §§3.52-3.68.

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2. Specially Prepared Interrogatories

§7.10 a. Limited to 35

A party may, as a matter of right, propound 35 specially prepared interrogatories to any other party. CCP §2030.030(b). See *Catanese v Superior Court* (1996) 46 CA4th 1159, 1164, 54 CR2d 280.

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§7.11 b. Declaration in Support of Additional Interrogatories

A party propounding more than 35 specially prepared interrogatories for any other party must attach to each set of those interrogatories a declaration that a greater number of specially prepared interrogatories is justified because of one or more of the following (CCP §2030.050):

- The complexity or the quantity of the existing and potential issues in the particular case;
- The financial burden on a party entailed in conducting the discovery by oral deposition;
- The expedience of using this method of discovery to give the responding party the opportunity to conduct an inquiry, investigation, or search of files or records to supply the information sought.

JUDGE'S PERSPECTIVE: Counsel should restrict the number of special interrogatories to the presumptive limit of 35, unless the case reasonably warrants a greater number. Counsel must be prepared to support the need for additional special interrogatories in response to a motion for a protective order by specifically addressing the statutory factors in CCP §2030.040. Otherwise, parties and attorneys may be subject to the imposition of sanctions for the misuse of the Declaration of Necessity under CCP §2030.090(d).

For a sample declaration in support of additional interrogatories under CCP §2030.050, see §7.139.

If no declaration attached. If no declaration is attached, the responding party may object to the balance of the interrogatories on the grounds that the propounding party has exceeded the 35 interrogatory limit. CCP §§2030.030(c); 2030.240. Then the responding party need only respond to the first 35 specially prepared interrogatories served. CCP §2030.030(c).

If declaration attached. The propounding party may propound interrogatories in excess of the limit of 35 if the declaration is attached. However, even when a declaration is served with the additional interrogatories, or the parties have agreed by stipulation under CCP §2016.030 to allow a greater number of interrogatories, the responding party can seek a protective order under CCP §2030.090(b)(1) against having to respond to more than 35. If the responding party seeks a protective order, the propounding party has the burden of justifying each interrogatory in excess of the 35 limit. CCP §2030.040(b). Thus, although many attorneys attached a declaration in support of additional interrogatories as a matter of course, it is crucial that counsel draft the specially prepared interrogatories carefully to call for information that is relevant to the subject matter of the action or reasonably calculated to lead to the discovery of admissible evidence.

PRACTICE TIP: The propounding party should be prepared to demonstrate complexity, the amount at stake, why interrogatories are less burdensome than other means of discovery, and why they are not excessive in the context of the case.

JUDGE'S PERSPECTIVE: The supporting declaration should state with particularity the justification to exceed 35 interrogatories. Boilerplate comments about a "complex case" are not sufficient and may provide the basis for your opponent's successful motion for a protective order specifying that your interrogatories need not be answered. See CCP §2030.090(b)(1). Including a more detailed "Declaration of Necessity" may dissuade opposing counsel from moving for a protective order.

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§7.12 3. Supplemental Interrogatories

Under California law, a party has no duty to supplement interrogatory responses. *Biles v Exxon Mobil Corp.* (2004) 124 CA4th 1315, 22 CR3d 282. However, a party may propound a supplemental or "cleanup" interrogatory to require other parties to update their responses to all previous interrogatories with information acquired after those previous responses were made. CCP §2030.070(a). Supplemental interrogatories are in addition to the unlimited number of form interrogatories and the 35 special interrogatories permitted under CCP §§2030.030-2030.040 and may be propounded, in general, twice before and once after the initial trial date is set. See CCP §2030.070(a)-(b). On the continuing duty to supplement discovery responses under federal law, see §7.135

The court may permit more supplemental interrogatories on a party's motion for good cause shown. CCP §2030.070(c).

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D. Timing Limitations

§7.13 1. First Opportunity to Serve

Plaintiff. A plaintiff may serve interrogatories on a party without first obtaining leave of court at any time that is 10 days (5 days in unlawful detainer cases) after service of summons on or appearance by the party to be served. CCP §2030.020(b)-(c). If a plaintiff wishes to serve interrogatories on an earlier date, the plaintiff must obtain a court order (which may be sought by ex parte application). On motion, the court may permit a plaintiff to propound interrogatories at an earlier time with or without notice. CCP §2030.020(d). The appearance may be general or special, but if it is special, the scope of interrogatories must be limited. *1880 Corp. v Superior Court* (1962) 57 C2d 840, 22 CR 209. On obtaining orders shortening time, see §§15.11-15.29.

PRACTICE TIP: Counsel may want to seek leave to serve interrogatories early if counsel is concerned about gathering evidence before it is destroyed or if a party is terminally ill, necessitating discovery on an expedited basis.

Defendant. A defendant may serve interrogatories on a party without leave of court at any time. CCP §2030.020(a).

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§7.14 2. Deadline to Serve

As a practical matter, counsel should plan on serving the last set of interrogatories by mail no later than 90 days before the trial date. This is not the absolute deadline, but allows leeway for each stage of the procedure to compel responses or further responses. This leeway may be necessary when key time periods end on a Sunday or holiday or when a court cannot schedule a hearing (*e.g.*, on a motion to compel) on the date counsel seeks.

PRACTICE TIP: Because many courts have busy schedules, it may be impossible to schedule discovery motions on the date of counsel's choice. To avoid incurring the additional expense of seeking an ex parte order shortening time for hearing, counsel should be sure to allow ample time to schedule discovery motions within the time requirements of CCP §2024.020. On orders shortening time, see §§15.11-15.29.

Generally, a party has 30 days from the date of service to respond to interrogatories, and motions about discovery must be heard at least 15 days before the initial trial date (CCP §2024.020(a)). For full discussion of the timing requirements in CCP §§1005, 1013, see §§2.22-2.23.

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§7.15 3. Supplemental Interrogatories Timing Limitations

A party may propound supplemental interrogatories to elicit any later acquired information (CCP §2030.070(b)):

- Twice before the initial setting of the trial date; and
- Once after setting of the trial date, subject to the time limits of CCP §§2024.010-2024.060. See §7.12.

On a motion for good cause shown, the court may also grant leave to serve additional supplemental interrogatories. CCP §2030.070(c).

A similar procedure for supplemental demand for documents is provided in CCP §2031.050. See §8.32.

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§7.16 4. Unlawful Detainer Timing Limitations

In an unlawful detainer action, the plaintiff can propound interrogatories to the defendant without leave of court 5 days after the defendant's appearance or service of the summons, whichever occurs first. CCP §2030.020(c). The responding party must answer the interrogatories within 5 days after the date of service, unless the court has shortened the time for response on the propounding party's motion. CCP §2030.260(b). Discovery and the hearing of discovery motions must be completed on or before the fifth day before the date set for trial, except by leave of court or agreement of the parties. CCP §2024.040(b).

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E. Special Considerations

§7.17 1. Effect of Other Discovery

The methods of discovery may be used in any sequence. That a party is conducting discovery by deposition or any another method does not delay another party's use of interrogatories. See CCP §2019.020(a). The court may establish the sequence and timing of discovery, however, on motion and for good cause shown. CCP §2019.020(b).

PRACTICE TIP: Frequently, the order of discovery should be governed by practical considerations. For example, some attorneys prefer first to serve interrogatories on a party whose deposition they intend to take later, so that the answers given can be explored in deposition. Others prefer to take the deposition first to minimize the deponent's state of preparedness, because serving interrogatories first provides an additional opportunity for the responding party and his or her attorney to discuss the case.

An interrogatory that requests information that a party previously supplied in deposition is not necessarily improper. *Coy v Superior Court* (1962) 58 C2d 210, 217, 23 CR 393. See also *Darbee v Superior Court* (1962) 208 CA2d 680, 686, 25 CR 520. The court may, however, issue an order that a party need not answer interrogatories that seek information it has previously given in a deposition that has been read, signed, and filed. *Coy v Superior Court*, 58 C2d at 219. A deposition is not final until it has been read, signed, and filed. Until then it may be corrected or the answers changed. *Coy,* 58 C2d at 218. Moreover, a deposition seeks the individual response of the deponent, whereas interrogatories seek the collective information of the responding party and that party's agents (see §7.28).

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§7.18 2. Effect of Demurrer

Under CCP §2030.020, any party may serve written interrogatories on any other party. That a demurrer has been granted with leave to amend does not make a named person or entity any less a party. *Budget Fin. Plan v Superior Court* (1973) 34 CA3d 794, 110 CR 302. The court in *Budget* held that the plaintiff was entitled to reasonable discovery, even if only to obtain disclosure of facts essential to the stating of a cause of action. 34 CA3d at 798. See also *Credit Managers Ass'n v Superior Court* (1975) 51 CA3d 352, 362, 124 CR 242.

PRACTICE TIP: Until the complaint has been finally amended and the demurrer finally overruled, the allegations of the complaint may be in flux. Propounding contention interrogatories or interrogatories that seek information about allegations of the complaint may waste time.

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§7.19 3. Effect of Class-Certification Hearing

Just as the courts have allowed interrogatories pending a demurrer (see §7.18), they have allowed interrogatories pending a class-certification hearing. *Coriell v Superior Court* (1974) 39 CA3d 487, 493, 114 CR 310. However, the inquiry must be limited to questions relevant to the subject matter of the pending hearing, *i.e.,* the existence of an ascertainable class, the prevalence of common questions of law or fact, the typicality of the class representatives' claims, and the ability of the class representatives to fairly and adequately protect the interests of the class. Interrogatories not relevant to the class-certification hearing and interrogatories directed at liability may properly be deferred until after the hearing. 39 CA3d at 493.

In evaluating whether to permit precertification discovery to determine the identities of potential class members who may become substitute plaintiffs, the court applies a balancing test, identifying the potential abuses of the class action procedure that could occur if the discovery is permitted and weighing the danger of those abuses against the parties' rights under the circumstances. *CashCall v Superior Court* (2008) 159 CA4th 273, 284, 71 CR3d 441, citing *Parris v Superior Court* (2003) 109 CA4th 285, 300, 135 CR2d 90.

On serving interrogatories on named and unnamed class members, see §7.23.

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§7.20 4. Serving Successive Sets of Interrogatories

A party may serve successive sets of specially prepared interrogatories on the same party, provided it does not exceed the 35 interrogatory limit. CCP §2030.050. If the total number of interrogatories exceeds 35, the interrogatories must be accompanied by a declaration in support of additional discovery. CCP §§2030.040(a), 2030.050. See §7.11. On form of declaration, see §7.143.

The responding party may seek a protective order under CCP §2019.030(a)-(b) or §2030.090(b)(1) to limit the number of sets of interrogatories. See §§7.122-7.124.

On supplemental interrogatories, see CCP §2030.070; discussion in §7.12.

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F. Who Can Be Served With Interrogatories

§7.21 1. Parties Only

Counsel may serve interrogatories only on parties. CCP §2030.010(a). On timing of interrogatories, see §§7.13-7.16.

NOTE: Responding to interrogatories can constitute a general appearance. Compare *Chitwood v County of Los Angeles* (1971) 14 CA3d 522, 92 CR 441, with *Semole v Sansoucie* (1972) 28 CA3d 714, 104 CR 897.

Although interrogatories are usually served on an adverse party, they may also be served on any other party. CCP §2030.010(a); *Budget Fin. Plan v Superior Court* (1973) 34 CA3d 794, 110 CR 302. For instance, a plaintiff may serve interrogatories on another plaintiff in that action.

Interrogatories cannot be served on nonparties (CCP §2030.010(a)) or on prospective parties for purposes of perpetuating testimony before an action is filed. See CCP §2035.020. On the use of depositions by written questions, see CCP §§2028.010-2028.080. On discovery from nonparties, see CCP §§2020.010-2020.510. On who may be deposed, see §§5.6-5.15.

PRACTICE TIP: To discover information from a nonparty, use a deposition after first properly serving the witness with a deposition subpoena or subpoena duces tecum. CCP §2025.280. See §5.55.

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§7.22 2. Corporations, Partnerships, and Associations

Counsel may serve interrogatories on any party, including a public or private corporation, a partnership, an association, or a governmental agency. CCP §§2030.010(a), 2030.250. When the party served is a corporation or other business entity, interrogatories can be directed only to the party entity itself; the proponent cannot designate any particular employee, officer, or agent to answer on the entity's behalf. The entity has the right to do that for itself. *Mowry v Superior Court* (1962) 202 CA2d 229, 233, 20 CR 698, disapproved on other grounds in *San Diego Prof. Ass'n v Superior Court* (1962) 58 C2d 194, 203, 23 CR 384. On who may answer on behalf of the entity, see §§7.65-7.67. Thus, counsel should use depositions if information is desired from a particular officer, director, or employee; if a cause of action exists, counsel can add the individual as a party to the suit. On noticing depositions, see §§5.52, 5.54.

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§7.23 3. Parties in Class Actions

In general. Interrogatories may be used in class actions, but until the class has been certified the court may limit their scope to facts bearing on whether the case is properly a class action, *i.e.,* the existence of an ascertainable class, the prevalence of common questions of law or fact, the typicality of the class representatives' claims, and the ability of the class representatives to fairly and adequately protect the interests of the class. *Bartold v Glendale Federal Bank* (2000) 81 CA4th 816, 836, 97 CR2d 226; *Coriell v Superior Court* (1974) 39 CA3d 487, 493, 114 CR 310. See §7.19.

Information about identity of potential class members. "Contact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case." *Pioneer Electronics (USA), Inc. v Superior Court* (2007) 40 C4th 360, 373, 53 CR3d 513 (reversing appellate court decision that required seller not to disclose to named plaintiff identifying information about complaining customers without their affirmative consent). On precertification discovery to determine identities of potential class members, see §7.19.

Unnamed class members. Unnamed class members can be required to answer interrogatories, if counsel has obtained a court order. See Cal Rules of Ct 3.768(c); *National Solar Equip. Owners' Ass'n v Grumman Corp.* (1991) 235 CA3d 1273, 1283, 1 CR2d 325; *Spoon v Superior Court* (1982) 130 CA3d 735, 739, 182 CR 44 ("It is well established that unnamed class members are parties for purposes of discovery [citation] and for permitting interrogatories to be addressed to them").

Before propounding interrogatories to unnamed class members, a party must first apply for a court order. Cal Rules of Ct 3.768(c). In determining whether to allow such interrogatories, the court must consider all of the following (Cal Rules of Ct 3.768(d)):

- The timing of the request;
- The subject matter to be covered;
- The materiality of the information being sought;
- The likelihood that class members have such information;
- The possibility of reaching factual stipulations that eliminate the need for such discovery;
- Whether class representatives are seeking discovery on the subject to be covered; and
- Whether discovery will result in annoyance, oppression, or undue burden or expense for the members of the class.

See *Southern Cal. Edison Co. v Superior Court* (1972) 7 C3d 832, 842, 103 CR 709; *National Solar Equip. Owners' Ass'n v Grumman Corp.* (1991) 235 CA3d 1273, 1283, 1 CR2d 325; *Spoon v Superior Court* (1982) 130 CA3d 735, 739, 182 CR 44; *Danzig v Superior Court* (1978) 87 CA3d 604, 612, 151 CR 185.

Redefining class or adding new individual plaintiffs. Interrogatories may be used in class actions to redefine the class or add new individual plaintiffs. *Pioneer Electronics (USA), Inc. v Superior Court* (2007) 40 C4th 360, 374, 53 CR3d 513; *Howard Gunty Profit Sharing Plan v Superior Court* (2001) 88 CA4th 572, 578, 105 CR2d 896; *Budget Fin. Plan v Superior Court* (1973) 34 CA3d 794, 799, 110 CR 302. The party served with such interrogatories cannot object to them on the ground that they should be deferred pending a class-certification hearing, because such interrogatories relate to the subject of class certification itself. See *Coriell v Superior Court* (1974) 39 CA3d 487, 493, 114 CR 310; §7.19. But see *Safeco Ins. Co. v Superior Court* (2009) 173 CA4th 814, 833, 92 CR3d 814 (to determine whether plaintiff who was never class member is entitled to conduct precertification discovery to identify substitute class representative, court must expressly weigh potential for abuse of class action procedure against rights of parties).

Class representative's obligation to answer for other class members. Although a class representative cannot be compelled to answer interrogatories about the separate claims of another class member, he or she can be compelled, absent a showing of privilege or other valid objection, to supply information possessed by, or readily available to, him or her about another class member that is not equally available to the propounding party. *Alpine Mut. Water Co. v Superior Court* (1968) 259 CA2d 45, 54, 66 CR 250.

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§7.24 4. Foreign Persons and Entities

Whether a party requesting discovery from a foreign person or entity need first utilize the Hague Convention on the taking of evidence in civil or commercial matters (28 USC §1781) is evaluated under the balancing approach set out in *Société Nationale Industrielle Aerospatiale v U.S. Dist. Court* (1987) 482 US 522, 96 L Ed 2d 461, 107 S Ct 2542. See *American Home Assur. Co. v Société Commerciale Toutelectric* (2002) 104 CA4th 406, 423, 128 CR2d 430, rejecting *Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 176 CR 874. On foreign discovery, see chap 13.

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G. Strategic Considerations

§7.25 1. Costs to Propounding Party

For interrogatories to be cost effective, counsel must draft them with care. Although drafting specially prepared interrogatories may require more attorney time than questioning many individuals at depositions, the effort may produce much more information. On drafting interrogatories, see §§7.31-7.52. On taking and defending depositions, see chap 6.

Official form interrogatories are also useful in many cases. See §7.9. Like supplemental interrogatories that merely ask a party to update previously given information (see §7.12), Judicial Council official form interrogatories can be propounded very efficiently with a minimum of attorney time.

The responding party must answer interrogatories based on the collective knowledge of the party and of the party's attorneys, and the party must take reasonable steps to obtain responsive information within the party's control. See CCP §§2017.010-2017.020, 2030.010(b); §7.69. Interrogatories are usually less expensive than depositions, and are particularly useful when information is not readily obtainable from a single individual (*e.g.,* in the case of a corporation). However, if a party does not answer interrogatories or moves for a protective order, or if the answers are inadequate, additional time and money must be spent to compel answers or further answers.

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§7.26 2. Costs to Responding Party

Interrogatories are generally more costly to respond to than to prepare. For example, interrogatories directed to a corporation that pertain to many documents may be prohibitively expensive to answer. The responding party may simply object on grounds of burden or move for a protective order.

JUDGE'S PERSPECTIVE: The responding party may seek a protective order to require that the propounding party utilize another method of discovery such as a request to produce, to allow discovery but to shift the cost burden to the propounding party, or to limit the requests.

The burden of answering may be even more devastating for individual parties because, although interrogatories directed to individuals may not be as time-consuming to answer, an individual usually does not have the resources of a corporation. With the possible exception of a request for production of documents that compels a search of extensive records, interrogatories are probably the most burdensome of discovery procedures, even when proper questions are asked. An attorney who concludes that interrogatories served on a client are excessive regardless of their legal propriety may be tempted to respond with even more burdensome discovery.

Interrogatories may require that a responding party reasonably investigate the electronic information available to it, including such sources as e-mail and other computer files. If the interrogatory requires a technical response requiring professional assistance, the cost of responding may lead to extreme financial burden. For example, an interrogatory seeking metadata or the existence of images may require expensive expert assistance. There may be an issue of the authenticity of a document, or the number of versions of a document. Interrogatories may be used to ascertain the factual contentions relating to issues such as these, and to discover the existence of available electronic data. On seeking the production of electronic evidence, see, *e.g.*, §§8.16-8.27, 8.31, 8.50-8.51, 8.55, 8.59, 8.65, 8.79. On electronic discovery, see chap 4.

Service of interrogatories may inspire an opponent to far greater efforts in preparing the case than otherwise would have been made. Answering a detailed set of interrogatories often forces an attorney to think through a case in greater detail and sooner than usual. The preparation may alert the attorney to facets of the case otherwise not discernible in time for effective remedy.

NOTE: Attempting to gain an advantage over the opposing party by propounding interrogatories designed solely to create a financial burden or impose the need to devote substantial amounts of time to respond is a questionable practice and may be a violation of the State Bar Act. See Bus & P C §6068. It may also be grounds for sanctions under CCP §§2023.010 and 2030.090. Using interrogatories to trap the other party into a position where sanctions would be imposed is a misuse of the discovery process. *Deyo v Kilbourne* (1978) 84 CA3d 771, 781, 149 CR 499. For a statutory description of misuses of the discovery process, and sanctions for misuse, see CCP §§2023.010-2023.040. See discussion in §§7.120-7.122 and §§15.85-15.116.

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§7.27 3. Usefulness of Answers

The usefulness of answers to interrogatories often depends on the ability and integrity of counsel for the responding party. Interrogatories directed to an able and conscientious opponent often produce far more useful results for the propounder than interrogatories directed to one who is unprepared or misconceives the purposes of discovery. Able opponents may be very resourceful in objecting but will often answer accurately and fully interrogatories that seek important facts, even if those answers are detrimental to their client's case.

PRACTICE TIP: If opposing counsel does not respond to interrogatories conscientiously, a deposition may be a more useful discovery device because a witness is more likely to respond spontaneously.

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4. Relationship of Interrogatories to Other Discovery Procedures

§7.28 a. Depositions Compared

Answers to interrogatories can be much more complete than answers to deposition questions. Generally, interrogatories are less expensive than depositions because they do not require court reporter fees, transcript costs, or attorney time in traveling to and from the deposition. Unlike depositions, interrogatories may inquire not only into the responding party's present recollection, but also into the collective knowledge available to him or her (see CCP §§2017.010-2017.020, 2030.010(b)), including knowledge of his or her agents and attorneys (see *Pantzalas v Superior Court* (1969) 272 CA2d 499, 77 CR 354; *Smith v Superior Court* (1961) 189 CA2d 6, 11 CR 165). However, because of the opportunity for deliberation between the responding party and his or her attorney before answering, answers to interrogatories do not have the spontaneity of answers to deposition questions, and therefore do not give the attorney for the proponent an opportunity to evaluate what kind of witness the responding party will make. In addition, unlike depositions interrogatories do not permit the opportunity for spontaneous follow-up questions.

PRACTICE TIP: Because of the opportunity for spontaneous questions and answers, depositions are usually superior to interrogatories for determining what was said in conversations and for eliciting a party's recollection of an occurrence. Interrogatories are usually preferable for identifying relevant documents a party has or knows of and for establishing dates and facts that may be the basis of a claim or defense, *e.g.,* the date on which an event occurred for purposes of determining whether the statute of limitations has run. Depositions may be used to compel nonparties to give testimony, whereas interrogatories cannot. See §5.7.

One important difference between the use of interrogatories and depositions occurs in the questioning of the party about legal contentions and the factual bases for them. Inquiries of this kind are permissible by interrogatory (see §§7.39-7.43) but impermissible in a deposition. *Rifkind v Superior Court* (1994) 22 CA4th 1255, 27 CR2d 822; *Pember v Superior Court* (1967) 66 C2d 601, 58 CR 567. On the difference between oral testimony in deposition and responses to other discovery, see *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 392 n16, 15 CR 90; *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 421, 15 CR 119.

Interrogatories are particularly useful in the following circumstances:

- **Information not obtainable from individual deponent.** When conducting discovery against corporations, *e.g.,* in a products liability case, the plaintiff may need to discover information about every other person injured by the same product. Probably no individual employee of the corporation would know the answer, because it would require a search through records. An interrogatory would require the corporation to search its records and conduct a reasonable investigation to gather the information. See §7.28. It is often useful to have a corporate deponent designate the person who is most qualified to testify on specified matters. See §§5.60, 5.62.
- **Follow-up questions after deposition.** Generally, each deponent may be deposed only once. See CCP §2025.610. Short of moving to redepose the individual, questions arising after the deposition should be addressed in interrogatories. On the one-deposition rule, see §5.15.
- **Supplemental interrogatory.** A party may propound a supplemental or "cleanup" interrogatory to require other parties to update their responses to all previous interrogatories with information acquired after those previous responses were made. CCP §2030.070. See §7.12. There is no similar procedure for requiring a party to update answers to deposition questions.

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§7.29 b. Requests for Admission Compared

Interrogatories may be used to ascertain facts on which a party's contentions are based. Requests for admission, however, may be used to obtain admissions from a party of the truth of relevant facts and of the genuineness of relevant documents and to establish the existence or nonexistence of every fact or issue in a case and what is or is not in dispute. See CCP §2033.010. On requests for admission, see chap 9.

Requests for admission are a better method than interrogatories for obtaining admissions that will lead to removing undisputed issues from the litigation, *e.g.,* on a summary judgment motion. In contrast, under certain circumstances, a party may introduce evidence in court that contradicts his or her answers to interrogatories, although in doing so the party may risk impeachment. See *Mason v Marriage & Family Ctr.* (1991) 228 CA3d 537, 546, 279 CR 51.

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§7.30 c. Production of Documents Compared

Although interrogatories may seek voluntary production of documents or may result in a response option that will make documents available for inspection (see CCP §2030.230), the proper method for requesting or compelling production of documents is covered by CCP §§2031.010-2031.510. On requests for inspection and production of documents see chap 8. Compare subpoena compelling production at trial (CCP §1985) and notice in lieu of subpoena (CCP §1987) to the procedures prescribed by CCP §§2031.010-2031.510. On compelling attendance and production of documents at trial, see California Trial Practice: Civil Procedure During Trial, chap 4 (3d ed Cal CEB 1995).

PRACTICE TIP: To frame an interrogatory requiring the responding party to identify a document, the drafting attorney should request "a description sufficient for identification pursuant to CCP §§2031.010-2031.510" to lay the foundation for a demand for production of the document under CCP §§2031.010-2031.510. A responding party that has given a description of a document in response to an interrogatory calling for a description "sufficient for identification pursuant to CCP §§2031.010-2031.510" cannot take the position that it does not know what documents are called for when the same description is used subsequently in a demand for production.

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III. DRAFTING INTERROGATORIES

§7.31 A. Permissible Scope of Interrogatories

The permissible scope of interrogatories is governed by the criteria applicable to discovery procedures generally, *i.e.,* the interrogatories must be relevant to the subject matter of the pending action or to the determination of any motion made in that action (*Darbee v Superior Court* (1962) 208 CA2d 680, 688, 25 CR 520) or reasonably calculated to lead to discovery of admissible evidence. CCP §§2017.010-2017.020, 2030.010(b); *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 416, 15 CR 119. See *Deaile v General Tel. Co.* (1974) 40 CA3d 841, 850, 115 CR 582 (interrogatories proper for any matter that is not privileged and is relevant to subject matter of litigation, provided the matter is either admissible itself or appears reasonably calculated to lead to discovery of admissible evidence). The provisions setting the permissible scope of discovery (CCP §§2017.010-2017.020) are incorporated by reference in CCP §2030.010(a). On the scope of discovery, see §§1.34-1.79.

Although the statutes that govern the permissible scope of discovery define the areas of permissible inquiry, they do not necessarily provide guidance to a properly drafted interrogatory in a particular case. For example, an interrogatory that asks a party to "describe and state the location of all books and documents relevant to this case," or to "state the name and address of each person having knowledge of facts relevant to this case," is not proper. These are objectionable "shotgun" interrogatories. See §§7.85, 7.89.

There are further limiting factors. A party seeking discovery does not have an untrammeled right to range all over the subject matter of the action, regardless of the actual issues in the case. *Hofmann Corp. v Superior Court* (1985) 172 CA3d 357, 218 CR 355. As the California Supreme Court pointed out in *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 384, 15 CR 90, a trial court, in considering requests for discovery, has the discretion to "weigh the relative importance of the information sought against the hardship which its production might entail." See CCP §2017.020(a), which requires this weighing and balancing. See also §§1.29-1.35.

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§7.32 B. Basic Drafting Principles

The principles of draftsmanship that apply to all legal documents apply to the drafting of interrogatories: strive for clarity and brevity, choose language carefully, and avoid vague descriptions. The interrogatories should be appropriate to the case and, depending on the propounder's objective, comprehensive, *i.e.,* cover all areas into which inquiry might produce useful information. Particular questions should be drafted according to the manner in which the propounder plans to use the answers.

PRACTICE TIP: When the propounding attorney anticipates that the question and answer may be used at trial, the interrogatories should be narrowly drawn to call for short answers because short answers are more difficult to disclaim than longer ones. Broadly drafted interrogatories may either be objected to (see §§7.84-7.100) or produce answers that are too qualified to be of much value. On the other hand, when the purpose of the question is more for gathering information than for use at trial, it may be advisable to draft it broadly to make it as comprehensive as possible.

In addition, interrogatories must comply with the statutory requirements discussed in §§7.33-7.38.

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§7.33 1. Prefaces, Instructions, and Definitions

Prefaces and instructions. To ensure that the limitation on the number of interrogatories is not circumvented by a lengthy preface or instructions that might amount to subparts (see §7.35), each interrogatory must be full and complete; no preface or instructions are allowed unless they have been approved by the Judicial Council under CCP §§2033.710-2033.740. CCP §2030.060(d).

Definitions. Definitions may be used in a set of interrogatories, and defined words must be capitalized whenever they reappear in the interrogatories. CCP §2030.060(e). Definitions can help counsel avoid repetition in drafting interrogatories, but they should be tailored to the particular action. It is important to avoid confusion caused by terms not used in or applicable to the interrogatories propounded.

EXAMPLES: Some examples of the use of definitions include:

- Who was the driver of the VEHICLE at the time of the accident on Nov. 1, 2005? ("VEHICLE" is defined for the purposes of these interrogatories as the 2005 red Jeep Cherokee, California License No. RXV 724.)
- Who was the owner of the VEHICLE at the time of the accident on Nov. 1, 2005?

Form interrogatories. The Judicial Council form interrogatories include instructions and definitions that aid in explaining what is expected of the responding party, and subparts are not prohibited. CCP §2030.060(f). Thus, the use of Judicial Council form interrogatories, instructions, and definitions can prevent arguments about whether an instruction constitutes a prohibited subpart.

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§7.34 2. Format

A party propounding interrogatories must number each set consecutively. The identity of the propounding party, the set number, and the identity of the responding party must appear in the first paragraph immediately below the title of the case. CCP §2030.060(a)-(b). Each interrogatory must be separately set forth and identified by number or letter. CCP §2030.060(c). On limitations on the number of specially prepared interrogatories, see §§7.10-7.11.

There is no requirement that interrogatories must provide space for answers. For sample form showing the required format, see §7.144. On format of responses to interrogatories, see §7.146.

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§7.35 3. No Subparts

Specially prepared interrogatories. Subparts are prohibited in specially prepared interrogatories. CCP §2030.060(f). The responding party should object under CCP §2030.240(b) to any specially prepared interrogatory containing subparts.

NOTE: Subparts are also prohibited in specially prepared interrogatories in limited civil actions under CCP §94(a)(1). See chap 14.

Form interrogatories. Subparts are permitted in approved Judicial Council form interrogatories under CCP §§2033.710-2033.740. Use of the approved form interrogatories is optional, but an inducement to using them is that they contain subparts. See §7.9 on Judicial Council form interrogatories.

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§7.36 4. One Question Only

Interrogatories that are compound, conjunctive, or disjunctive are prohibited. CCP §2030.060(f). An interrogatory cannot be phrased to seem to ask only one question while actually requiring a response to multiple questions. For example, an interrogatory that required the responding party to identify which portions of a witness's deposition testimony were untrue has been held to violate the limit of 35 interrogatories absent a supporting declaration because it required the responding party to consider each question and answer that the witness gave in her deposition. *Catanese v Superior Court* (1996) 46 CA4th 1159, 1164, 54 CR2d 280. On the numerical limitation on specially prepared interrogatories, see §7.10.

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§7.37 5. Full and Complete

Interrogatories must be "self-contained," meaning that each interrogatory must be "full and complete in and of itself." CCP §2030.060(d). The "full and complete" rule "prevent[s] evasion of the statutory limit on the number of interrogatories that one party may propound to the other." *Clement v Alegre* (2009) 177 CA4th 1277, 1287, 99 CR3d 791. An interrogatory that requires the responding party to refer to other documents to understand the question violates this rule. *Catanese v Superior Court* (1996) 46 CA4th 1159, 1164, 54 CR2d 280 (interrogatory that asked whether opposing party contended that deposition testimony of witness was untrue violated self-containment rule, because it required reference to deposition transcript).

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§7.38 6. Not Combined With Requests for Admission

Interrogatories may not be combined in a single document with requests for admission. CCP §2033.060(h). But requests for admission may be served in conjunction with other methods of discovery, particularly with Judicial Council Form DISC-001, Interrogatory 17.1. For a discussion of requests for admission, see chap 9.

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§7.39 C. Contention Interrogatories

One of the most fruitful uses of interrogatories is to ascertain an opponent's contentions. Interrogatories asking an opponent to state whether he or she makes a particular legal contention, to state the factual basis for the contention, and to identify any witnesses or documents supporting the contention, are not only proper but also encouraged because they help to delineate the areas of controversy in a lawsuit. See CCP §2030.010(b); *Burke v Superior Court* (1969) 71 C2d 276, 78 CR 481; *Hernandez v Superior Court* (2003) 112 CA4th 285, 4 CR3d 883. See also CCP §2017.010, incorporated by reference in CCP §2030.010(a) (party may inquire into claim or defense of any other party); *Rifkind v Superior Court* (1994) 22 CA4th 1255, 27 CR2d 822; *Pember v Superior Court* (1967) 66 C2d 601, 58 CR 567. An interrogatory asking whether a party makes a given contention is commonly coupled with interrogatories requesting facts, witnesses, and documents on which the contention is based. Interrogatories may be the only discovery procedure that can be used to discover a party's contentions. See §§7.39-7.43 for examples of contention interrogatories.

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§7.40 1. Consider Possible Objections While Drafting

The drafting attorney should be alert to possible objections to contention interrogatories and the accompanying request that the party state facts, witnesses, and documents on which the contention is based. For example, requests for information about any writing containing any "reference to, or indication of" facts, and about any person "who has or claims to have any knowledge or information" about facts, are very broad and, in a complex case involving many people and voluminous documents, might be objectionable on grounds of oppression. See *U.S. v Loew's, Inc.* (SD NY 1959) 23 FRD 178. The drafting attorney may avoid these objections by inquiring into contentions and basic facts in an initial set of interrogatories, and then, when answers to that set have been received, serving interrogatories requesting more specific information about the first answers.

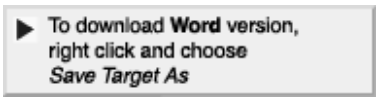
The attorney must also take care to draft such interrogatories so that they do not violate the prohibition against subparts of CCP §2030.060(f). See §§7.39-7.41 for examples of contention interrogatories.

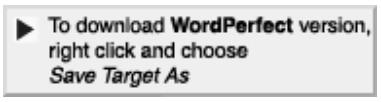
An interrogatory calling on a party to state all of its contentions in support of a claim or defense may be improper. See *Flora Crane Serv., Inc. v Superior Court* (1965) 234 CA2d 767, 780, 45 CR 79 (interrogatories that requested party to state "all contentions" in support of five separate affirmative defenses held improper). But see *Burke v Superior Court* (1969) 71 C2d 276, 284, 78 CR 481, in which the California Supreme Court explained that the interrogatories on "all contentions" condemned in *Flora Crane* actually sought to discover the legal reasoning or theories behind the party's contentions and therefore sought to obtain nondiscoverable work product. See §7.43.

The court in *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 123 CR 283, held that an interrogatory that asked what law or regulation the petitioner relied on to support a particular contention was improper as seeking the legal reasoning and theories behind a party's contention. The court reasoned that the statutes and regulations were equally available to plaintiff and defendant. See CCP §2030.220(c).

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§7.41 2. Asking About Particular Contentions





It is better practice to avoid interrogatories asking for "all contentions" and to request instead only whether a party makes a particular contention, *e.g.*:

Do you contend that plaintiff's claim is barred by the provisions of Code of Civil Procedure §339?

Do you contend that plaintiff is the owner of Blackacre?

Do you contend that defendant A is the alter ego of defendant B?

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Source: Civil Litigation/California Civil Discovery Practice/7 Interrogatories/§7.42 3. Referring to Allegations in Pleading

§7.42 3. Referring to Allegations in Pleading

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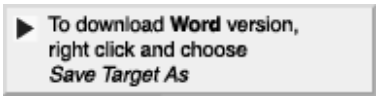
Contention interrogatories are a valuable method for eliciting the facts underlying the allegations in a complaint. Referring to a pleading in an interrogatory will invite an objection that the interrogatory in not "full and complete" under CCP §2030.060(d). To avoid this problem, rather than drafting an interrogatory that reads, "State the facts on which you base your contention that defendant was negligent, as alleged in paragraph 2 of your complaint," counsel should draft the interrogatory in a manner that directly quotes from the pleading without requiring reference to the pleading, *i.e.*:

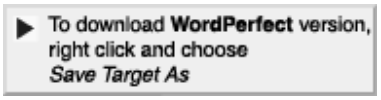
State all facts on which you base your contention that _ _[*quote allegation in pleading*]**_ _.**

JUDGE'S PERSPECTIVE: If there is a motion to compel contention interrogatories, the court will look carefully to see that any quote from or paraphrasing of the pleadings is accurate and precise.

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§7.43 4. Asking for Facts on Which Contention Is Based





Contention interrogatories are frequently combined with interrogatories requesting the factual basis for a contention, *e.g.*:

If you contend that plaintiff's conduct constitutes contributory negligence regarding the accident of January 12, 2006, state the facts on which you base that contention.

If you contend that plaintiff's conduct constitutes contributory negligence regarding the accident of January 12, 2006, identify each person by stating the person's name and address who has knowledge of the facts on which you base that contention.

If you contend that plaintiff's conduct constitutes contributory negligence regarding the accident of January 12, 2006, describe each document that you believe supports that contention.

PRACTICE TIP: Propounding more than 35 specially prepared interrogatories is permissible if accompanied by a proper declaration supporting the reasons for serving more than 35 interrogatories. See §7.11.

Possible objections. A party who inquires by interrogatories whether another party relies on portions of documents in support of a particular contention often encounters objections on grounds of attorney-client privilege or the work product rule. See, *e.g.*, *Sheets v Superior Court* (1967) 257 CA2d 1, 64 CR 753; §§7.90-7.91. However, contention interrogatories are not objectionable on the grounds that an answer would inferentially reveal the work product of the responding party or that the answer would be based on "information obtained or legal theories developed in anticipation of litigation or in preparation for trial." CCP §2030.010(b).

A party can be compelled to state facts on which a contention is based, even though the party has developed those facts:

- Through the work of experts whose opinions are contained in privileged documents (*Tehachapi-Cummings County Water Dist. v Superior Court* (1968) 267 CA2d 42, 72 CR 589); or
- Through legal reasoning and theories that are themselves not discoverable (see *Burke v Superior Court* (1969) 71 C2d 276, 285, 78 CR 481).

When party makes general denial to complaint. A party may also be required to state facts on which it bases a general denial to a complaint. *Burke v Superior Court, supra*.

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D. Interrogatories Relating to Documents or Other Tangibles

1. Documents

§7.44 a. Existence of Document

Interrogatories may inquire into the "existence, description, nature, custody, condition and location" of any "document, tangible thing or land or other property." CCP §2017.010, incorporated by reference in CCP §2030.010(a). However, an interrogatory requesting identification of documents may be objectionable when it cannot be answered without undue burden, *e.g.*, when the documents are voluminous or the information sought is of questionable value to the propounding party. Under CCP §2016.020(c), the words "document" and "writing" mean writing as defined in Evid C §250. On Evid C §250, see §§8.9-8.13.

PRACTICE TIP: The Judicial Council form interrogatories include interrogatories requesting that the responding party identify all documents that support the denial of any material allegation in the complaint or each special or affirmative defense. See Judicial Council Form DISC-001, Interrogatory 15.1. See §7.142.

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§7.45 b. Facts Contained in Documents

Although an interrogatory asking for facts that are contained in documents is proper, courts ordinarily take the position that an interrogatory may not be used instead of a demand for production of documents under CCP §2031.010. See, *e.g., Associated Brewers Distrib. Co. v Superior Court* (1967) 65 C2d 583, 588, 55 CR 772 (pre-Discovery Act case disapproving trial court's ruling that there was no good cause for production of documents because information sought had been provided in interrogatory responses). Instead, the interrogatory should seek to establish the existence, description, and custody of the documents to provide a basis for a demand for production under CCP §2031.010. The interrogatory may ask that the responding party voluntarily attach copies of the documents to the answers, but the responding party need not do so.

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§7.46 c. Identification of Documents

Interrogatories may be used to identify documents in the possession of the opposing party; the opposing party may also be asked to identify specific documents relevant to the subject matter of the case. In that situation, "an adequate response must include a description of the document." *Hernandez v Superior Court* (2003) 112 CA4th 285, 293, 4 CR3d 883. This is true even when the document to be identified contains privileged information. 112 CA4th at 293.

EXAMPLE: IDENTIFY all DOCUMENTS ("DOCUMENTS" as used in these interrogatories means all writings described by Evid C §250) which support your contention that the product had a design defect. ("IDENTIFY" as used in these interrogatories means state the author, recipient, date, subject, and description of the document).

PRACTICE TIP: Many of the Judicial Council form interrogatories include requests for identification of documents. See, *e.g.*, Judicial Council Form DISC-001, Interrogatories 7.2, 9.2, 12.3-12.6, 13.1, 15.1, 16.1-16.10, 17.1, 50.1. See §7.142.

A privilege log is unnecessary when an interrogatory asks the responding party to identify documents even if the responding party may properly refuse to produce the document later based on a claim of privilege. *Best Prods., Inc. v Superior Court* (2004) 119 CA4th 1181, 1190, 15 CR3d 154. On privilege logs, see §3.192.

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§7.47 d. Relationship to Contention Interrogatories

Interrogatories that call for an analysis of documents are often interrelated with those that request a party to state its contentions and facts in support of those contentions. See §§7.39-7.43. For example, in an action to determine a party's duties under a written contract, it would seem proper to request by interrogatory whether the party contends that the contract is ambiguous and, if so, to state the construction he or she places on it, or to ask whether the party contends that a specific passage in the contract has a given meaning.

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§7.48 2. Identifying Sources of Electronic Evidence

When there is a need to gain background information or to determine the existence, description, nature, custody, or condition of any electronic evidence, counsel may want to consider serving interrogatories (or deposing relevant witnesses) before making an inspection or production demand under CCP §§2031.010-2031.510. On how documents can be stored electronically, see §§8.19-8.27. On special considerations when discovering electronic evidence, see §8.31. See also chap 4. After information has been obtained in response to the interrogatory (or deposition question), counsel can define the scope of a demand for inspection and identify, with the reasonable particularity required by CCP §2031.030(c)(1), the electronically stored items to be demanded. On inspection and production demands in general, see chap 8.

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§7.49 3. Photographs and Recordings

Interrogatories seeking to determine the existence of any photographs, films, video and audio recordings, or other graphic representations relevant to the subject matter of the litigation are proper. *Smith v Superior Court* (1961) 189 CA2d 6, 12, 11 CR 165. In *Atchison, Topeka & Santa Fe Ry. v Superior Court* (1962) 208 CA2d 73, 77, 25 CR 54, disapproved in part on other grounds in *D.I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 739 n6, 36 CR 468, the court ordered answers to be given to interrogatories inquiring into the existence of still or moving pictures taken of the plaintiff since the accident occurred. Once the existence of photographs, films, or recordings is determined, counsel may demand inspection under CCP §2031.010. On inspection demands, see chap 8.

PRACTICE TIP: The Judicial Council form interrogatories include requests for identification of photographs and recordings. See, *e.g.,* Judicial Council Form DISC-001, Interrogatories 12.3, 12.4, 13.1. See §7.142.

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§7.50 4. Identity of Lay Witnesses

Persons having knowledge of discoverable matter. A party may properly serve interrogatories requesting the "identity and location of persons having knowledge of any discoverable matter." CCP §2017.010, incorporated by reference in CCP §2030.010(a). See also *Unger v Los Angeles Transit Lines* (1960) 180 CA2d 172, 175, 4 CR 370 (information is not privileged merely because it is contained in privileged document). However, these interrogatories may be objected to on the grounds of relevancy if they are too broad, *e.g.,* when they call for names and addresses "'of all persons … having knowledge of relevant facts.'" *Romero v Hern* (1969) 276 CA2d 787, 794, 81 CR 281.

Although a party can be compelled to disclose in answers to interrogatories the identity of persons having knowledge of facts relevant to a particular issue, it cannot be compelled to identify which lay witnesses will testify at trial. *City of Long Beach v Superior Court* (1976) 64 CA3d 65, 79, 134 CR 468 (identity of percipient witnesses who will testify at trial protected as qualified work product; nature and extent of witnesses' testimony absolutely privileged because it calls for production of writing reflecting attorney's impressions, conclusion, and opinions).

The identity of potential witnesses *interviewed* by opposing counsel is protected by the qualified work product doctrine. *Nacht & Lewis Architects, Inc. v Superior Court* (1996) 47 CA4th 214, 217, 54 CR2d 575.

For discussion of requests for disclosure of witnesses and evidence in limited civil cases in a unified superior court, see chap 14. On compelling disclosure of expert witnesses, see chap 11.

Persons having knowledge of credibility of witness. A party can be compelled to disclose in interrogatory answers the identity of persons who have knowledge of any fact, opinion, or information about the credibility of a potential witness. *Gonzalez v Superior Court* (1995) 33 CA4th 1539, 1546, 39 CR2d 896 (in sexual harassment case, plaintiff compelled to disclose identity of person who allegedly provided information from police files).

PRACTICE TIP: Many of the Judicial Council form interrogatories include requests for identification of witnesses. See, *e.g.,* Judicial Council Form DISC-001, Interrogatories 10.3, 12.1-12.3, 15.1, 16.1-16.10, 17.1, 20.9-20.10, 50.1. See §7.142.

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§7.51 5. Insurance Coverage

Frequently, a matter of interest to a plaintiff in an action for personal injury is the question of the existence and extent of insurance coverage. The propriety of discovering such information by use of interrogatories was upheld in *Pettie v Superior Court* (1960) 178 CA2d 680, 3 CR 267. Noting the relevancy of the information sought, the court allowed questions seeking to ascertain the existence of insurance coverage as well as the policy limits themselves. Knowledge of the information, the court reasoned, would promote "purposeful discussions of settlement" and "effective judicial administration." 178 CA2d at 690. On discovery of insurance policies and applications, see §§1.44-1.46, 3.18, 8.11.

PRACTICE TIP: The Judicial Council form interrogatories include requests for insurance information. See Judicial Council Form DISC-001, Interrogatories 4.1-4.2. See §7.142.

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§7.52 E. Attorney-Drafted Form Interrogatories

Because properly drafted interrogatories are time-consuming to prepare, attorneys constantly seek time-saving drafting methods. The use of attorney-drafted form interrogatories (*i.e.,* printed forms used in other similar cases) may save time, but they cannot produce valuable information unless tailored to the present situation.

Counsel must carefully edit form interrogatories to avoid objections that the questions are "boilerplate." Computer programs can help make the use of attorney-drafted form interrogatories very effective, but there is no substitute for carefully reviewing the final product propounded to the opposing party to ensure that the questions asked are relevant and properly framed.

NOTE: The required declaration (see §7.143) for propounding more than 35 interrogatories contains the assertion that the attorney has read all the interrogatories. The lawyer should always read all interrogatories before serving them to ensure that they are proper and tailored to the case regardless of their number.

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F. Service and Filing

§7.53 1. Time and Manner

Service on party's attorney. Interrogatories are usually served on a party by mailing them to counsel for the responding party and to counsel for all other parties who have appeared in the case (or on any party appearing on their own behalf).

Service on an attorney who has been suspended from the practice of law does not constitute notice to the party, unless it can be shown that the party had actual notice of the interrogatories. *Lovato v Santa Fe Int'l Corp.* (1984) 151 CA3d 549, 553, 198 CR 838.

Retain original. Under CCP §2030.280(b), the propounding party has an obligation to "retain both the original of the interrogatories, with the original proof of service affixed to them, and the original of the sworn response" for a period of 6 months after final disposition of the action. Thereafter, the "originals may be destroyed, unless the court on motion of any party and for good cause shown orders that the originals be preserved for a longer period." CCP §2030.280(b).

On time limits on beginning and ending discovery in general, see §§2.20-2.21.

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§7.54 2. Parties to Be Served; Filing

Serve all parties. Copies of interrogatories must be served on the party to whom they are directed and on all other parties who have appeared in the action. CCP §2030.080. Responses to interrogatories are subject to the same requirements. CCP §2030.260. See §§7.103-7.106. This informs all parties about the discovery being conducted and the results of that discovery.

Possible waiver of service requirement. The court may waive the requirement of service on all other parties on ex parte or noticed motion when enforcing the requirement would be unduly expensive or burdensome. CCP §2030.080(b). On general discovery motions, see chap 15.

New parties to action. Although the discovery law does not expressly address the duty and time in which to serve previously propounded interrogatories on new parties to the action, it seems that the requirements of CCP §§2030.080 and 2030.260 are broad enough to require service on request within a reasonable time absent a court order to the contrary.

Do not file. Interrogatories are not filed with the court. CCP §2030.280(a).

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IV. RESPONDING TO INTERROGATORIES

§7.55 A. Duty to Respond

Possible responses. A party who has been served with interrogatories under CCP §§2030.010-2030.410 has a duty to respond by (CCP §§2030.210-2030.410):

- Answering;
- Exercising the option to produce writings; or
- Objecting.

In general, a party may not respond to interrogatories just by asserting its "inability to respond." *Sinaiko Healthcare Consulting, Inc. v Pacific Healthcare Consultants* (2007) 148 CA4th 390, 409, 55 CR3d 751.

The document filed by the recipient of interrogatories is denominated a "response," rather than an "answer." CCP §2030.210. This distinction in terminology recognizes that responses to interrogatories frequently include more than direct answers and may include objections.

Supplemental responses. A supplemental response is a response that contains newly discovered information and is typically served in response to a supplemental interrogatory. See §7.59. There is no duty under California law to supplement responses unless specifically requested by the propounding party. *Biles v Exxon Mobil Corp.* (2004) 124 CA4th 1315, 22 CR3d 282. Unprompted responses provided to supplement previous responses because of new information are amended responses. CCP §2030.310; §7.71.

Effect of failure to respond. Failure to respond will result in a waiver of certain rights and may be grounds for the imposition of sanctions. CCP §§2030.290-2030.300; see §§7.120-7.121. The duty to respond must be satisfied unless the party served is excused by protective order, on a showing of good cause why no response is necessary. CCP §2030.090; *Coriell v Superior Court* (1974) 39 CA3d 487, 492, 114 CR 310. On protective orders, see §§7.122-7.124; 15.59-15.84.

When defendant challenges jurisdiction. A defendant who is challenging jurisdiction by way of a motion to quash service of summons must answer interrogatories directed at jurisdictional issues. *1880 Corp. v Superior Court* (1962) 57 C2d 840, 22 CR 209. See §1.77.

Complete and straightforward. Each answer must be as "complete and straightforward as the information reasonably available to the responding party permits." CCP §2030.220(a). If the responding party cannot answer an interrogatory completely, it must answer to the extent possible. CCP §2030.220(b). The response must be made in writing and under oath. CCP §§2030.210(a), 2030.250.

JUDGE'S PERSPECTIVE: The court will consider whether a party has made a good faith effort to answer "to the extent possible." When responding to interrogatories, it is important that counsel keep this requirement in mind. Inadequate responses to legitimate interrogatories generally result in sanctions.

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B. Time to Respond

§7.56 1. Statutory Requirements

Usually within 30 days after service. Unless the court extends or shortens the time to respond, the responding party must answer or object to interrogatories within 30 days after the date of service of the interrogatories. CCP §2030.260(a). When service is made by mail, the time to respond is extended under CCP §1013. CCP §2016.050. On extension of time under CCP §1013, see §2.22.

Moving for extension. If a party must move for an extension of time within which to respond, but the motion cannot be heard before expiration of that time, the party should obtain an ex parte order extending the time to reply when filing the notice of motion. On motion practice, see chap 15.

Agreement for extension. The party propounding interrogatories and the responding party may agree to extend the time for service of a response to a set of interrogatories, or to particular interrogatories in a set, to a date beyond that provided in CCP §2030.260(a). CCP §2030.270(a). Although the agreement need not take any special form, it must be "confirmed in a writing that specifies the extended date for service of a response." CCP §2030.270(b). Further, unless the agreement expressly states otherwise, the extension of time to respond includes the right to respond by objection or by producing writings. CCP §2030.270(c).

JUDGE'S PERSPECTIVE: If a motion to compel is made after the statutory deadline, counsel will need to produce the writing confirming any extension in the deadline.

Unlawful detainer. In unlawful detainer cases, the responding party must answer the interrogatories within 5 days from the date of service, unless the court has shortened the time for response on motion of the propounding party. CCP §2030.260(b).

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§7.57 2. Effect of Failure to Make Timely Response

Possible sanctions. The failure of a party to answer interrogatories within the time provided by law will result in a waiver of certain rights and can result in a successful motion to compel answers by the propounder of the interrogatories. CCP §§2030.290-2030.300. Failure to respond within the time allowed may also result in the imposition of sanctions (CCP §§2030.290-2030.300) (see §§7.120-7.121) or in loss of the right to object or produce writings (see *Brown v Superior Court* (1986) 180 CA3d 701, 226 CR 10; *Leach v Superior Cour*t (1980) 111 CA3d 902, 169 CR 42).

A monetary sanction is available for the first instance of failure to respond to interrogatories, with more severe sanctions available thereafter. CCP §2030.290(c). See §§7.120-7.121, 15.85-15.116.

Waiver of options to produce writings or to object. Under CCP §2030.290(a), failure to make a timely response to interrogatories waives any right to exercise the option to produce writings under CCP §2030.230 and any objection to the interrogatories. Such a waiver includes objections based on privilege or on the protection for work product under CCP §§2018.010-2018.080. See *Scottsdale Ins. Co. v Superior Court* (1997) 59 CA4th 263, 272, 69 CR2d 112 (holding that waiver of attorney-client privilege occurs by failing to raise privilege in written response to request for production of documents). See also *Schaff v Superior Court* (1983) 146 CA3d 921, 194 CR 546; *Mannino v Superior Court* (1983) 142 CA3d 776, 191 CR 163. But see *Heda v Superior Court* (1990) 225 CA3d 525, 530, 275 CR 136 (plaintiff contended that defendant waived privacy rights by objecting to interrogatories only on relevancy ground and by disclosing his medical condition to plaintiff; court found no waiver).

Relief from waiver. Relief from the waiver is possible, if, on a motion, the court finds that (CCP §2030.290(a)):

- The responding party has subsequently served a response that is in substantial compliance with CCP §§2030.210-2030.240; and
- The responding party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

NOTE: The remedy for relief from waiver is under the Civil Discovery Act (CCP §2030.290(a)), not under CCP §473, although the standards for obtaining relief are similar. See *Zellerino v Brown* (1991) 235 CA3d 1097, 1 CR2d 222. Before adoption of the Civil Discovery Act, courts had recognized that relief might be obtained under a requirement of proof similar to that required by CCP §473. See *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 414, 15 CR 119, and *Borse v Superior Court* (1970) 7 CA3d 286, 289, 86 CR 559. In *Mannino v Superior Court* (1983) 142 CA3d 776, 779, 191 CR 163, the court held that to show "excusable neglect" sufficient for relief under CCP §473, counsel must show not only a reasonable excuse for delay, but also a reasonable explanation for failure to seek an extension from opposing counsel or more time from the court.

PRACTICE TIP: Counsel should consider filing a motion for relief before a hearing on an opponent's motion to compel a response under CCP §2030.290(a).

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C. Format of Responses

§7.58 1. Initial Responses

The response to interrogatories must show, in the first paragraph below the title of the case (CCP §2030.210(b)):

- The identity of the responding party;
- The identity of the propounding party; and
- The set number of that party's interrogatories being answered.

Each answer, exercise of the option to produce writings, or objection in response to an interrogatory must bear the same identifying number or letter and be in the same sequence as the corresponding interrogatory, but it does not have to repeat the text of the interrogatory. CCP §2030.210(c).

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§7.59 2. Supplemental Responses, Amended Answers, and Further Responses

If the response is other than an initial response, the first paragraph must also include the set number being answered and words describing the nature of the paper, *e.g.*, "supplemental response." Cal Rules of Ct 3.1000(a). For form of response to interrogatories, see §7.146.

Each supplemental response, amended answer, or further response must "be identified by the same number or letter and be in the same sequence as the corresponding interrogatory," but need not repeat the text. Cal Rules of Ct 3.1000(b). For form of verified response to interrogatories, see §7.146.

Supplemental responses are made in response to a supplemental interrogatory. CCP §2030.070. Amended responses are initiated by the responding party upon learning of new or different facts. See CCP §2030.310. On amended answers, see §§7.51-7.55.

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3. Signature and Verification

§7.60 a. By Party

Unless the response contains only objections, it must be made under oath and signed by the party to whom the interrogatories are directed. CCP §2030.250(a). Some attorneys wrongly construe this section to require that the client sign both the response and a separate verification. A party who signs only a verification to the response has both signed and answered under oath.

If the response contains only objections, the party does not need to verify the objections. CCP §2030.250(a). See, *e.g.*, *Food 4 Less Supermkts. v Superior Court* (1995) 40 CA4th 651, 657, 46 CR2d 925 (discussing requests for production, court held that because objection contains legal analysis with no factual content, party need not verify objections).

If party is an entity. When the party "is a public or private corporation, or a partnership, association, or governmental agency, one of its officers or agents shall sign the response under oath on behalf of that party." CCP §2030.250(b) (objections only can be signed by the attorney under CCP §2030.250(c)). *Blue Ridge Ins. Co. v Superior Court* (1988) 202 CA3d 339, 344, 248 CR 346 (objections to production request are effective even if response is unverified).

Effect of party's signature. When a party signs only the response, a presumption arises that he or she has read both the interrogatories and the response. However, the presumption may be rebutted, *e.g.,* by testimony from the party that he or she did not read them. The responding party may then successfully disclaim his or her answers at trial. *LeGrand v Yellow Cab Co.* (1970) 8 CA3d 125, 132, 87 CR 292. This situation is far less likely to occur when the party signs a verification stating that he or she has read both the interrogatories and the response and knows their contents.

PRACTICE TIP: Counsel should make certain the answers to interrogatories are signed under oath (*i.e.,* verified by the responding party), because, unless they are made under oath, the responding party may successfully disclaim the answers. *LeGrand v Yellow Cab Co.* (1970) 8 CA3d 125, 87 CR 292. However, the answers need not be made under oath to constitute a prior inconsistent or consistent statement. Evid C §§1235-1236; 8 CA3d at 129.

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§7.61 b. By Party's Attorney

The responding party's attorney must sign any responses that contain an objection. CCP §2030.250(c).

The attorney should not verify factual responses, however. If an attorney, including in-house counsel, verifies a response to an interrogatory, the result will be a waiver of the attorney-client privilege and attorney work product protection as to the sources of the information used by the attorney who prepares the response. As CCP §2030.250(b) explicitly states:

> If the officer or agent [of a public or private corporation, or a partnership, association, or governmental agency] signing the response on behalf of that party is an attorney acting in that capacity for the party, that party waives any lawyer-client privilege and any protection for work product under Chapter 4 (commencing with section 2018.010) during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response.

NOTE: Attorneys are not generally permitted to sign an affidavit or declaration on the client's behalf (see *In re Marriage of Reese & Guy* (1999) 73 CA4th 1214, 1222, 87 CR2d 339) and although CCP §446 permits attorneys to verify pleadings in certain circumstances (*e.g.,* when the client is out of the county in which the attorney's offices are located), §446 applies to pleadings, not discovery documents. Moreover, the attorney's verification can result in loss of attorney-client privilege or attorney work product protection and if the attorney is forced to testify as a witness at trial or deposition, he or she has a potential conflict of interest with the client.

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§7.62 c. Form of Oath

Code of Civil Procedure §2030.250 does not state what form the oath must take. Although a simple declaration under penalty of perjury is probably satisfactory (see CCP §2015.5), most attorneys use a form of verification similar to that prescribed by CCP §446 for verified pleadings (see form in §7.146). This form has the advantage of distinguishing between matters known to the party by personal knowledge and those known on information and belief. See also *Nagler v Admiral Corp.* (SD NY 1958) 167 F Supp 413. This distinction is important, *e.g.*, when the verification is signed by a corporate officer on behalf of the corporation. Code of Civil Procedure §2015.5 also specifies a form of declaration to be used by an out-of-state declarant. This avoids the inconvenience of obtaining an affidavit. The form in §7.146 follows the form in CCP §2015.5 because it is applicable to an in-state as well as an out-of-state declarant.

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§7.63 d. Use of Presigned Verification

Use of a presigned verification form in discovery proceedings, without first verifying the accuracy of the facts asserted, is a serious misuse of the discovery process and an ethical violation. *Drociak v State Bar* (1991) 52 C3d 1085, 278 CR 86 (30 days of actual suspension, 1 year of stayed suspension, and 2 years of supervised probation given to attorney for attaching presigned verification form to interrogatory responses).

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D. Answering Interrogatories

§7.64 1. Who Prepares Answers

Although answers to interrogatories are ordinarily prepared by the attorney for the responding party with information supplied by the client, attorneys differ on whether the client's presence is necessary during preparation of the answers. Preparation of answers usually begins when counsel sends a copy of the interrogatories to the client with a letter explaining what is expected. This letter places the initial burden of preparing answers on the client. For a form letter that may be used for this purpose, see §7.145.

Some attorneys prefer to review the answers and prepare the final version from the information supplied by the client. Others believe that the importance of interrogatories justifies a more thorough approach. They prefer to have the client come to the office to go over the questions and prepare answers with the attorney.

Attorneys often use litigation legal assistants in preparing responses to interrogatories. The legal assistant meets with the client and develops the facts necessary to provide responsive answers. It is important, however, that the attorney remember the professional responsibility considerations of providing supervision and reviewing the work product of legal assistants before it is released.

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§7.65 2. Who May Answer for Party

Responses to interrogatories, including response by production of documents, must be under oath and signed by the party to whom they are directed, unless they are only objections, in which case, the party's attorney must sign the responses. CCP §2030.250(a). Even though, in practice, answers are prepared by attorneys or persons working in law offices and are signed by the parties, interrogatories should be sent to the client immediately on receipt to obtain the client's knowledge and input. Then the attorney may put the answers and any additional information in proper legal form and state any objections.

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§7.66 a. When Party Is an Entity

When the party served is a public or private corporation or a partnership, association, or governmental agency, one of its officers or agents must sign the response under oath on behalf of the party. CCP §2030.250(b). The right to select the officer or agent rests with the entity, which is the party bound by the responses and presumably the best judge of who should answer.

CAUTION: There are serious consequences when the officer or agent signing the response on behalf of the party is the party's attorney or is in-house counsel for the party. In any subsequent discovery from that attorney that is related to the sources of the information in the response, the attorney-client privilege and attorney work product protection are waived. CCP §2030.250(b). See §7.61.

Instructions from the proponent that attempt to designate the individual who must sign the responses on behalf of the entity are inappropriate. *Mowry v Superior Court* (1962) 202 CA2d 229, 233, 20 CR 698, disapproved on other grounds in *San Diego Prof. Ass'n v Superior Court* (1962) 58 C2d 194, 203, 23 CR 384. However, the officer or agent must have an ongoing relationship with the entity for which he or she responds. The officer or agent cannot, for example, be a person whose only relationship with the entity is that of an expert witness who was hired for a particular purpose and whose employment has terminated. 202 CA2d at 235. The officer or agent need have no personal knowledge of the matters stated in the response; in many cases he or she would have no such knowledge. Verification of the answers is then made on information and belief. The answers are nonetheless binding on the entity.

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§7.67 b. Person With Disability

When the party served is a minor or a person with a disability under Prob C §3603, the guardian ad litem is the proper person to answer and verify the responses to interrogatories under CCP §§372 and 2030.250. *Regency Health Servs., Inc. v Superior Court* (1998) 64 CA4th 1496, 76 CR2d 95 (mentally deficient party); *De Los Santos v Superior Court* (1980) 27 C3d 677, 166 CR 172 (a minor).

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§7.68 3. Duty to Answer Truthfully, Clearly, Concisely, and Responsively

Parties must state "the truth, the whole truth, and nothing but the truth" in answering written interrogatories. *Union Bank v Superior Court* (1995) 31 CA4th 573, 580 n3, 37 CR2d 653. Answers must not be evasive or deftly worded conclusions. *Deyo v Kilbourne* (1978) 84 CA3d 771, 783, 149 CR 499.

Answers must disclose sufficient information to be clear, concise, and responsive. See CCP §§2030.210-2030.220. Each interrogatory answer must "be as complete and straightforward as the information reasonably available to the responding party permits." CCP §2030.220(a)-(b).

Nonresponsive or evasive answers to properly drafted interrogatories are a misuse of the discovery process (see CCP §2023.010(f)). They increase the likelihood that the propounding party will move to compel further answers (see §§7.107-7.119), the defense of which wastes the court's time and the client's money. As a result, a responding party must weigh the likelihood of defending a motion to compel further responses if a less-than-complete answer is given.

PRACTICE TIP: Counsel should resist the temptation to give a nonresponsive or evasive answer in the hope that it will be less effective if used against the client at trial. On occasion, responding counsel may find it tactically wise to divulge information voluntarily that may help later in settlement negotiations.

Courts tend to apply a "rule of reason" in determining whether an answer to a particular interrogatory is sufficient. For example, when a party is asked to state the facts on which he or she bases a particular contention, it is not sufficient to state ultimate facts in the answers, *e.g.,* "plaintiff made misrepresentations." In *Tehachapi-Cummings County Water Dist. v Superior Court* (1968) 267 CA2d 42, 46, 72 CR 589, the court stated that the answer to an interrogatory calling for facts relied on in support of a defense should state "the asserted facts constituting the general positions upon which the parties base their claimed defenses." On the other hand, in *Flora Crane Serv., Inc. v Superior Court* (1965) 234 CA2d 767, 778, 45 CR 79, it was held that an interrogatory stating, "Itemize by nature and value all assets and all liabilities of this defendant," does not, when reasonably construed, require the specified information in minute detail. The court concluded that the question could be answered by producing balance sheet information setting forth general categories of assets and liabilities, in accordance with recognized accounting practices.

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§7.69 4. Duty to Investigate Before Answering

The answer to an interrogatory must, at a minimum, reflect all the information available to a party, including that in the possession of the party's attorney (unless privileged). Each answer in the response must "be as complete and straightforward as the information reasonably available to the responding party permits." CCP §2030.220(a). If an interrogatory cannot be answered completely, it must be answered to the extent possible. CCP §2030.220(b).

Making good faith effort to obtain information. If the responding party does not have enough personal knowledge to respond fully to an interrogatory, the party must state this and make a reasonable and good faith effort to obtain the information by asking other persons or organizations within the party's control, except when the information is equally available to the propounding party. CCP §2030.220(c). See *Jones v Superior Court* (1981) 119 CA3d 534, 552, 174 CR 148; *Deyo v Kilbourne* (1978) 84 CA3d 771, 782, 149 CR 499; *Sigerseth v Superior Court* (1972) 23 CA3d 427, 433, 100 CR 185; *Pantzalas v Superior Court* (1969) 272 CA2d 499, 504, 77 CR 354.

JUDGE'S PERSPECTIVE: Counsel often overlook the obligation to make a good faith effort to obtain information by inquiry to others within the party's control. Responding with only that information that is directly in possession of the party is often insufficient for a full and complete response.

Unprivileged information known to attorney. The duty to investigate requires that a party disclose information known or available to its attorney, if it is not otherwise privileged. *Smith v Superior Court* (1961) 189 CA2d 6, 11 CR 165. A deliberate refusal to investigate until after answering interrogatories may be grounds for barring the responding party from introducing at trial evidence that would have been revealed if it had made the investigation. *Thoren v Johnston & Washer* (1972) 29 CA3d 270, 105 CR 276.

PRACTICE TIP: Insufficient responses can result in grant of summary judgment against the responding party. In *Union Bank v Superior Court* (1995) 31 CA4th 573, 580, 37 CR2d 653, "factually devoid" interrogatory responses were used to support a summary judgment motion to show that there is no triable issue of fact.

Usually does not extend to third parties. The duty to investigate does not extend to sources beyond the responding party's control, *i.e.,* to independent third parties (see, *e.g., Holguin v Superior Court* (1972) 22 CA3d 812, 821, 99 CR 653), or to sources in the possession or under the control of or equally available to the propounding party (CCP §2030.220(c)) (see, *e.g., Bunnell v Superior Court* (1967) 254 CA2d 720, 62 CR 458). In those instances, the propounding party bears the burden of conducting the investigation. In other words, one purpose of discovery law is to enable a party to prepare its case for trial, not to require it, at its expense, to prepare its opponent's case. See *Bunnell v Superior Court, supra*.

However, in *Jones v Superior Court* (1981) 119 CA3d 534, 552, 174 CR 148*,* a plaintiff in a DES drug case was required to make a reasonable investigation to ascertain facts relating to her mother, a nonparty, in response to interrogatories propounded to the plaintiff. The court noted that making inquiry of the plaintiff's mother imposed no discernible burden on her and that her mother had been cooperating closely in the daughter's lawsuit and that she would be free to refuse to divulge information for privacy or other reasons, if appropriate.

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§7.70 5. Duty to Investigate in Class Actions

Class representatives. Special problems arise in connection with the responding party's duty to investigate before answering interrogatories in a suit filed on behalf of a class of individuals. Because of the nature of class actions, it would be unfair to require class representatives to answer interrogatories about each class member (many of whom they may not know) and the extent of their interest in the litigation (which may not be available to class representatives). To require this would be to dissipate the benefits derived from class actions. *Alpine Mut. Water Co. v Superior Court* (1968) 259 CA2d 45, 54, 66 CR 250. It would be equally unfair, however, to deny a defendant in a class action information to which it is entitled by excusing the representative from answering any such interrogatories.

Courts have thus far taken a middle course by providing that ordinarily the class representative can be compelled to supply the propounding party with information about members of the class and their interests in the litigation that is in his or her possession or readily available to the representative and that is not equally available to the propounding party. A class representative who is not in possession or control of this information need not furnish it unless the interrogatory is directly related to the:

- Representative's own standing to maintain the action;
- Existence of an ascertainable class; or
- Existence of the community of interest required to maintain a class action.

259 CA2d at 54, cited with approval in *Southern Cal. Edison Co. v Superior Court* (1972) 7 C3d 832, 841 n7, 103 CR 709.

PRACTICE TIP: Class action defendants should be careful when responding to a form interrogatory requesting identification of percipient witnesses. In a wage and hour class action, it was deemed grossly overbroad, nonresponsive, and sanctionable for an employer to respond, as it argued it had, with a long list of employees who were not percipient witnesses. *Puerto v Superior Court* (2008) 158 CA4th 1242, 1248, 70 CR3d 701.

Unnamed class members. Unnamed members of a class may be required to respond to interrogatories if the propounding party makes a showing that the interrogatories are:

- Necessary to the trial of proper class issues;
- Not unduly burdensome to the absent class members; and
- Not propounded with the purpose of, nor will foreseeably have the effect of, decreasing the size of the class.

Danzig v Superior Court (1978) 87 CA3d 604, 612, 151 CR 185. See also *Spoon v Superior Court* (1982) 130 CA3d 735, 739, 182 CR 44. For other discussion on interrogatories in class actions, see §§7.19, 7.23.

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6. Amending Answers

§7.71 a. No Statutory Duty to Amend Answers

A party has no statutory duty to supplement interrogatory responses to reflect information that is obtained after the initial answer. *Biles v Exxon Mobil Corp.* (2004) 124 CA4th 1315, 22 CR3d 282 (error to exclude from consideration of summary judgment motion declaration of witness who was discovered only after summary judgment motion had been filed). See also *Browne v Turner Constr. Co.* (2005) 127 CA4th 1334, 1349, 26 CR3d 433; CCP §2030.310(a). For discussion of duty to amend or supplement responses under federal procedures, see §7.135.

Moreover, a party can offer evidence at trial that differs from or contradicts previous answers to interrogatories, *i.e.*, the contradiction between an answer to an interrogatory and a witness's testimony does not in itself affect the testimony's admissibility. *Phillips v Cooper Labs.* (1989) 215 CA3d 1648, 1661, 264 CR 311. See *Singer v Superior Court* (1960) 54 C2d 318, 326, 5 CR 697. The party can be impeached with a prior interrogatory answer, however.

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§7.72 b. Possible Sanctions for Deliberate Concealment

Although there is no duty to supplement or amend interrogatory answers under California law (*Biles v Exxon Mobil Corp.* (2004) 124 CA4th 1315, 22 CR3d 282), if a party learns new information, counsel should immediately file amended interrogatory responses. The court may view a failure to do so as a deliberate attempt to conceal known facts.

When a party deliberately conceals known facts in the answers to interrogatories, it may be subject to imposition of sanctions. See CCP §§2023.010-2023.040, 2030.300(d)-(e); *Deyo v Kilbourne* (1978) 84 CA3d 771, 789, 149 CR 499. In *Thoren v Johnston & Washer* (1972) 29 CA3d 270, 105 CR 276, a party who knowingly omitted the identity of a witness from his answers to interrogatories was barred from having the witness testify at trial. See *Biles v Exxon Mobil Corp.*, 124 CA4th at 1324 (distinguishing *Thoren* on ground that defendant in *Thoren* did not learn about omission of witness until start of trial, over 2 years after plaintiff had served his interrogatory answer). Other sanctions also may be imposed, such as issue, evidence, or terminating sanctions. See *Deeter v Angus* (1986) 179 CA3d 241, 254, 224 CR 801. See also *Browne v Turner Constr. Co.* (2005) 127 CA4th 1334, 1349, 26 CR3d 433 (even if duty to supplement answers existed, it would not ordinarily justify sanction of exclusion of evidence unless there had been "a *willful* violation of an *order* for disclosure"). On sanctions in general, see §§15.85-15.116.

JUDGE'S PERSPECTIVE: Counsel requesting issue or evidence sanctions should present specific suggestions and proposed language for the court's consideration.

Similarly, in *Campain v Safeway Stores, Inc.* (1972) 29 CA3d 362, 104 CR 752, the defendant was granted a new trial on the issue of damages on the ground that he was prejudiced by the plaintiff's introduction of evidence on loss of earnings after the plaintiff had stated in her answers to interrogatories that she did not claim such damages. Plaintiff had also testified in deposition that she was unemployed at the time of the accident and, after having answered interrogatories, moved to amend her complaint to increase the amount of the demand. Neither in her supporting papers nor in argument on the motion was loss of earnings mentioned as a reason for the motion. Compare *Campain v Safeway Stores, Inc., supra*, with *Milton v Montgomery Ward & Co.* (1973) 33 CA3d 133, 108 CR 726, in which plaintiff's answers to interrogatories were made in good faith and defendant could not claim surprise when plaintiff introduced conflicting evidence at trial.

On amending an interrogatory answer, see §§7.71-7.75.

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§7.73 c. Reasons to Amend Answers

When a responding party discovers an error in the initial response or acquires information that would affect the initial response, amending an answer may be the wisest course. See CCP §2030.310(a).

By amending an answer the responding party avoids arguments of surprise and concealment and the possibility of a court granting a continuance at trial or excluding the new information altogether. See *Castaline v City of Los Angeles* (1975) 47 CA3d 580, 591, 121 CR 786. See also *Singer v Superior Court* (1960) 54 C2d 318, 325, 5 CR 697; *Guzman v General Motors Corp.* (1984) 154 CA3d 438, 444, 201 CR 246; *Thoren v Johnston & Washer* (1972) 29 CA3d 270, 274, 105 CR 276 (willfully false answer to interrogatory is same as no answer at all and deliberately omitting name of witness may result in order barring that witness from testifying). For cases discussing whether an initial answer was in good faith or whether there will be substantial prejudice to the propounding party if the new facts are allowed to be introduced into evidence, see, *e.g.*, *Williams v American Cas. Co.* (1971) 6 C3d 266, 274, 98 CR 814; *Universal Underwriters Ins. Co. v Superior Court* (1967) 250 CA2d 722, 731, 58 CR 870. On sanctions see §§15.85-15.116.

Amended answers to interrogatories are distinct from supplemental responses. An amended answer is voluntarily made when counsel or a party discovers information that was inadvertently omitted or mistakenly stated in the initial interrogatory responses. Supplemental answers to interrogatories are made in response to a specific request under CCP §2030.070, seeking any later acquired information bearing on all answers previously made in response to interrogatories.

NOTE: In most cases, the propounding party poses a supplementary interrogatory before trial to elicit later acquired information. CCP §2030.070(a). On supplemental interrogatories, see §7.12.

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§7.74 d. How and When to Amend Answer

No need for motion. To amend an interrogatory response, a party does not need to obtain a court order (CCP §2030.310(a)) or file a motion for relief under CCP §473. *Guzman v General Motors Corp.* (1984) 154 CA3d 438, 444, 201 CR 246 ("[d]iscovery of an incorrect answer to interrogatories does not place a party in default" and a party is not required to file a motion seeking permission to amend interrogatory responses).

Format. Amended answers to interrogatories must comply with California Rules of Court and the Code of Civil Procedure sections applicable to interrogatories. For example, the amended responses must comply with Cal Rules of Ct 3.1000, and should be formatted and served in the same manner as answers to interrogatories. See §7.70.

No time limitation. There is no limitation on when an amended answer may be served. CCP §2030.310(a). The provisions of CCP §§2016.060, 2024.010-2024.060 provide for a cutoff time by which all discovery, including responses, must be completed, however. On timing problems, see §7.14. Moreover, because a trial judge might be more likely to find prejudice to the propounding party if the "new answer" is not disclosed until the time of the trial or hearing, it seems prudent to determine and correct faulty answers as far in advance of a trial or hearing as possible. On time limitations on discovery, see §§2.20-2.21.

Use at trial. If a party serves an amended answer, at the trial or other hearing the propounding party may use the initial answer to the interrogatory against the responding party as far as admissible under the rules of evidence. CCP §§2030.310-2030.410. However, the responding party can then be permitted to use the amended answer. CCP §§2030.310(a), 2030.410.

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§7.75 e. Order That Initial Answer Be Deemed Binding

On being served with an amended answer, the propounding party is permitted to move for an order that the initial answer to the interrogatory be deemed binding on the responding party for the purpose of the pending action. CCP §2030.310(b). This motion must be accompanied by a declaration stating facts showing that "a reasonable and good faith attempt" was made informally to resolve each issue presented by the motion. CCP §§2016.040, 2030.310(b). The granting of such a motion can provide a practical advantage to the propounding party at trial and emphasizes the importance of providing accurate responses to interrogatories the first time. On discovery motion practice, see chap 15.

Under CCP §2030.310(c), the court must grant the motion that the initial interrogatory answer be deemed binding if it determines that:

- The initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced the party who propounded the interrogatory;
- The responding party has failed to show substantial justification for the initial answer to that interrogatory; and
- Prejudice to the propounding party cannot be cured either by a continuance to permit further discovery or by the use of the initial answer under CCP §2030.410, which allows for use of answers to interrogatories at trial or other hearings.

Because of the third requirement, it is possible that "deemed binding" orders may be difficult to obtain unless the amended answer is not served until very shortly before the date set for trial. Prudence would certainly dictate that a party that wishes to amend its answers to interrogatories should do so as soon as new information is discovered. Otherwise the court may conclude that the failure to timely amend is inexcusable. See *Biles v Exxon Mobil Corp.* (2004) 124 CA4th 1315, 1327, 22 CR3d 282. See also *Gordon v Superior Court* (1984) 161 CA3d 157, 166, 207 CR 327.

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§7.76 7. Response as General Appearance

If a party who has not otherwise appeared in a lawsuit responds to interrogatories, the interrogatory responses may constitute a general appearance by that party. *Semole v Sansoucie* (1972) 28 CA3d 714, 723, 104 CR 897; *Chitwood v County of Los Angeles* (1971) 14 CA3d 522, 92 CR 441. To determine whether a response to interrogatories constitutes a general appearance, the courts look at factors such as the reason the particular person or entity is responding to the interrogatories, *e.g.,* whether the responding entity believes itself to be a party or whether an individual is answering in a representative capacity (such as an agent, director, or officer of a defendant corporation), and the likelihood that the plaintiff may be misled into believing that the responding entity has appeared in the action and therefore has not taken further action to join the responding entity. See *Semole v Sansoucie, supra; Chitwood v County of Los Angeles, supra*.

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§7.77 8. Propriety of "I Don't Know" Answer

Whether the responding party may properly state that it does not know the answer to a proper interrogatory, or has insufficient information with which to answer it, depends in part on the type of question asked and when it is asked. For instance, when a party is asked early in the litigation whether it makes a particular contention and, if so, the facts on which the contention is based (see §§7.40-7.43), the party may not be able to answer, although later in the litigation the party would be expected to know the answer. In this situation, the party may answer that it does make a particular contention, but that it presently knows of no facts on which the contention is based. The party should state also that it has not yet completed its investigation in this area. The proponent may commit the responding party to a position by serving supplemental interrogatories after the party has had a reasonable time for investigation. CCP §2030.070; see §7.20.

Ordinarily, a party is entitled to an answer to its interrogatories unless a valid objection is raised. *Durst v Superior Court* (1963) 218 CA2d 460, 464, 32 CR 627. Verification of the answers (see §§7.60-7.63) is, in effect, a declaration under oath that the responding party has disclosed in the answer all information that is available to it. See *Kaiser Found. Hosps. v Superior Court* (1969) 275 CA2d 801, 805, 80 CR 263. See also *Lindgren v Superior Court* (1965) 237 CA2d 743, 47 CR 298; *Chodos v Superior Court* (1963) 215 CA2d 318, 30 CR 303. Although *Lindgren* and *Chodos* dealt with requests for admission, the same principle should apply to interrogatories because in both modes of discovery answers are prepared in a manner that permits reflection and consultation with counsel (see *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 392 n16, 15 CR 90). In *Lindgren*, the court said that an answer stating that the responding party lacks personal knowledge of a matter does not necessarily mean that he or she has no other sources of information or means of obtaining knowledge of the matter. 237 CA2d at 746. Facts known to a party's attorney must also be disclosed as long as they are not privileged. *Smith v Superior Court* (1961) 189 CA2d 6, 11 CR 165. Although a statement that the responding party lacks personal knowledge is not by itself a sufficient answer, a party who is unable to answer after reasonable inquiry may so state.

On the other hand, if the party does not have the information and has fulfilled the duty to investigate, it is sufficient to state "that the information is unavailable or to refer to the person or entity which can provide the information." See *Pantzalas v Superior Court* (1969) 272 CA2d 499, 503, 77 CR 354.

A party generally may not respond to interrogatories simply by asserting its inability to respond. *Sinaiko Healthcare Consulting, Inc. v Pacific Healthcare Consultants* (2007) 148 CA4th 390, 406, 55 CR3d 751.

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§7.78 9. Answer by Producing Writings

Under CCP §§2030.210(2) and 2030.230, the responding party has the option of producing writings in lieu of an answer containing the information sought to be discovered. Whether the party chooses to do this will depend on how important it is to prevent the propounding party from seeing the documents, the relevance of the documents to the proceedings, the likelihood that the propounding party will file a demand for inspection under CCP §2031.010, and how much time and money the party wishes to spend opposing the demand.

Produce within 30 days. The option to produce writings, like other responses to interrogatories, must be exercised within 30 days after the date of service, unless the court extends or shortens the time. CCP §2030.260(a). Time to respond may be extended based on the method of service. See CCP §§2016.050, 1013; §2.22.

If production is untimely, the party waives the right to exercise the option to produce writings under CCP §2030.230. CCP §2030.290(a).

On the option to produce the writing in lieu of an answer, see §§7.79-7.80.

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§7.79 a. When Answer Requires Making Compilation, Abstract, Audit, or Summary

A party is relieved from the burden of examining and summarizing voluminous documents to answer an interrogatory if (CCP §2030.230):

- The answer would require the responding party to make "a compilation, abstract, audit, or summary of or from the documents of the party to whom the interrogatory is directed"; and
- The burden or expense of preparing or making it would be substantially the same for the propounding party as for the responding party.

Such an interrogatory is sufficiently answered by referring to CCP §2030.230 and by specifying the documents from which the answer may be derived or ascertained, "in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which the answer may be ascertained." CCP §2030.230.

JUDGE'S PERSPECTIVE: A compilation, abstract, or summary may be derived from electronic data in the possession of the responding party. If this option is used, the responding party must make that data available to the propounding party.

The "reference-to-documents" answer cannot be used if:

- A compilation, abstract, audit, or summary of business records already exists and is in the party's possession or under its control (see CCP §2030.230);
- A complete answer cannot be derived from the records offered (*Kaiser Found. Hosps. v Superior Court* (1969) 275 CA2d 801, 80 CR 263 (finding, in this case, that a complete answer *could* be derived from the records)).

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§7.80 b. Granting Propounding Party Right to Inspect Documents

A responding party that refers answers by reference to documents under CCP §2030.230 rather than making a summary and providing the answer, must give the propounding party "a reasonable opportunity to examine, audit, or inspect these documents and to make copies, compilations, abstracts, or summaries of them." CCP §2030.230. The responding party cannot use the reference-to-documents answer when:

- The responding party is unwilling to permit a search of its records (*Brotsky v State Bar* (1962) 57 C2d 287, 304, 19 CR 153); or
- The propounding party is not offered reasonable opportunity to inspect and copy the records (*Fuss v Superior Court* (1969) 273 CA2d 807, 815, 78 CR 583).

A party who answers interrogatories by reference to documents must specify the documents from which the answers may be derived or ascertained with sufficient particularity that they can be located and identified as readily by the propounding party as by the responding party. CCP §2030.230; *Deyo v Kilbourne* (1978) 84 CA3d 771, 784, 149 CR 499. An answer such as "see business records" is insufficient. See CCP §2030.230; *Fuss v Superior Court, supra*. A similar conclusion has been reached in federal court. See *Budget Rent-A-Car v Hertz Corp.* (WD Mo 1972) 55 FRD 354.

EXAMPLE: If producing 8000 pages of documents, the responding party must indicate that pages 100 through 120 are responsive to interrogatory number 2. It is good practice to separate each set of responsive documents with tabs corresponding to the interrogatory number. Then the propounding party can go to tab number 2 and find all the documents responsive to interrogatory number 2. This should alleviate any objection that the documents have not been specified with enough particularity.

PRACTICE TIP: When the opposing party is given access to records, it is important that counsel take time to review the documents beforehand. Privileged communications should not be compromised and documents not previously identified or reviewed should not be allowed to surface, to the surprise and chagrin of the unsuspecting, by failure to conduct such a review.

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10. Specific Problems in Drafting Answers

§7.81 a. Answering Ambiguous Interrogatories

Although counsel may object to ambiguous interrogatories (see §7.92), the purpose of discovery law is better served when the attorney for the responding party rewords the question and gives the information to which the propounding party is entitled. This is especially true when the intent of the question is clear despite the ambiguity, *e.g.,* when the ambiguity is created by a mistaken word or other obvious error.

PRACTICE TIP: An answer to an ambiguous interrogatory might be: "Assuming this interrogatory was intended to refer to (*e.g.,* Code of Civil Procedure section 339, instead of Code of Civil Procedure section 337), and assuming that this interrogatory refers only to (state limiting construction), the answer is (continue with answer to interrogatory as construed)."

It is clearly improper to deliberately misconstrue a question for the purpose of supplying an evasive answer. *Deyo v Kilbourne* (1978) 84 CA3d 771, 783, 149 CR 499.

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§7.82 b. Answering by Reference to Other Answers or Other Sources

Reference to another interrogatory. Interrogatories are sometimes drafted in a repetitious manner, *i.e.,* several interrogatories may request identical or similar information. Counsel should draft separate responses to each interrogatory and may not simply choose one such interrogatory and set forth in the answer a complete statement of all facts requested by that interrogatory (usually in a narrative or chronological format), and then answer the related interrogatories by stating "See answer to interrogatory number __." See CCP §2030.210(a) ("The party to whom interrogatories have been propounded shall respond in writing under oath separately"); *Deyo v Kilbourne* (1978) 84 CA3d 771, 784 n10, 149 CR 499 (specifically disapproving of the practice).

If separately answering each interrogatory is truly unduly repetitious and oppressive, the responding party may move for a protective order. If the responses are identical, word processing technology makes it easy to copy and paste text, however, and counsel should answer each interrogatory completely. See CCP §2030.220.

Reference to another source. A related problem is the extent to which an interrogatory may be sufficiently answered by reference to information from other sources, *e.g.,* "See my deposition," "See paragraph III of the complaint on file in this action." Because of the differences in the rules under which interrogatories and depositions are conducted (see §7.28), reference to an answer given in a deposition is not proper. However, when appropriate in response to an interrogatory, reference to a pleading or other document may be proper if the responding party identifies it by title and date of filing and summarizes or quotes from it when appropriate. *Deyo v Kilbourne* (1978) 84 CA3d 771, 783, 149 CR 499. In addition, under certain circumstances reference to voluminous business records is proper when the opposing party is given a reasonable opportunity to inspect and copy. CCP §2030.230; see §§7.78-7.80.

See §§7.60-7.63 on verification of answers.

PRACTICE TIP: When records are disclosed that contain attorney-client or work product protected items, counsel should take care to ensure that a privilege is not waived. See Evid C §912.

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§7.83 c. Reservation About Subsequently Discovered Facts

An interrogatory "may not be made a continuing one so as to impose on the party responding to it a duty to supplement an answer to it that was initially correct and complete with later acquired information." CCP §2030.060(g). However, because a responding party may desire to supplement an answer at a later time (CCP §2030.310(a)), it may be helpful for responses to interrogatories to provide for the possibility of subsequently discovered facts. Reserving the right to amend or supplement the response is not a commitment to do so. *Biles v Exxon Mobil Corp.* (2004) 124 CA4th 1315, 1328, 22 CR3d 282 (no duty to supplement interrogatory responses under California law).

An answer to an interrogatory does not prevent the responding party from introducing evidence of subsequently discovered facts. *Singer v Superior Court* (1960) 54 C2d 318, 326, 5 CR 697. However, the *Singer* court suggested that when a party is concerned that because of subsequently discovered information its earlier answers might be unduly limiting at trial, it may protect itself by stating the facts then known to it and adding that the answers are without prejudice to its producing subsequently discovered facts. 54 C2d at 326.

In view of this suggestion, a party answering an interrogatory about which there is a possibility of discovering additional facts should preface its reply with a statement such as:

> Respondent has not completed investigation of the facts relating to this case, has not completed discovery in this action, and has not completed preparation for trial; the following answer is given without prejudice to its right to produce evidence of any subsequently discovered facts. At this time, as far as is known _ _[*complete answer*]_ _.

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E. Objecting to Interrogatories

§7.84 1. If More Than 35 Specially Prepared Interrogatories

Under CCP §2030.030(c), if more than 35 specially prepared interrogatories are served *without* an accompanying CCP §2030.050 declaration, the responding party need only answer the first 35 if it also objects to the balance on the ground that the limit has been exceeded. CCP §2030.240; see §§7.10-7.11. If more than 35 interrogatories are served with an accompanying declaration, the responding party must seek a protective order if the party objects to the number of interrogatories served. CCP §2030.040(b); *Catanese v Superior Court* (1996) 46 CA4th 1159, 1165, 54 CR2d 280. On protective orders, see §§7.122-7.124; §§15.59-5.84.

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2. General Grounds for Objection

§7.85 a. Irrelevant to Subject Matter of Action

Irrelevant. Because interrogatories must be relevant to the subject matter of the action or appear reasonably calculated to lead to the discovery of admissible evidence, an objection on the ground that the interrogatory is irrelevant to the subject matter and not reasonably calculated to lead to the discovery of admissible evidence is proper. *Deaile v General Tel. Co.* (1974) 40 CA3d 841, 850, 115 CR 582. However, because the standard of relevancy in discovery proceedings is quite broad (see §§1.27-1.30, 1.34-1.37), courts do not favor objections on grounds of irrelevancy.

Overbroad ("shotgun interrogatories"). Although there is no statutory provision for an objection on the ground that interrogatories are "too broad," this unauthorized objection has been used by courts to refer to interrogatories that request, *e.g.*:

- The identity of "all" persons or "every" person having knowledge of relevant facts (*Romero v Hern* (1969) 276 CA2d 787, 794, 81 CR 281; *City of Los Angeles v Superior Court* (1961) 196 CA2d 743, 746, 16 CR 851);
- Information totally alien to the subject matter (*City of Los Angeles v Superior Court* (1973) 33 CA3d 778, 109 CR 365); or
- Information so remote that it would be of little or no practical benefit to the propounder (*Columbia Broadcasting Sys. v Superior Court* (1968) 263 CA2d 12, 18, 69 CR 348; *Ryan v Superior Court* (1960) 186 CA2d 813, 9 CR 147).

Such inquiries, known as "shotgun interrogatories," are objectionable on grounds of oppression (see §7.86) as well as irrelevance or that they are too general.

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§7.86 b. Annoyance, Embarrassment, Oppression

A party may object to interrogatories when being required to answer would result in "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." CCP §2023.010(c). See *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 15 CR 119; *Mead Reins. Co. v Superior Court* (1986) 188 CA3d 313, 232 CR 752.

Constitutional rights. Annoyance, embarrassment, or oppression can result from requiring disclosure of information that is constitutionally protected. For example, in *NAACP v Alabama ex rel Patterson* (1958) 357 US 449, 2 L Ed 2d 1488, 78 S Ct 1163, the Supreme Court overturned a state court order holding the NAACP in contempt for refusing to disclose its membership list. The court found that earlier disclosure had resulted in "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," which would deter present members from associating and dissuade others from joining, in violation of the First Amendment right to freedom of association. 357 US at 462, 2 L Ed 2d at 1500. See also *Griset v Fair Political Practices Comm'n* (1994) 8 C4th 851, 35 CR2d 659 (upholding limited disclosure requirements under Govt C §84305 as applied to candidates and candidate-controlled committees).

In *Britt v Superior Court* (1978) 20 C3d 844, 860, 143 CR 695, the court followed *NAACP v Alabama* and upheld a party's right to associational privacy against a similar discovery request. At least one court, however, has held that the public's interest in preventing racial or gender discrimination outweighs an individual's right to associational privacy if affected individuals receive notice of disclosure to protect their privacy. In *Olympic Club v Superior Court* (1991) 229 CA3d 358, 282 CR 1, the court of appeal upheld a trial court's order requiring an all-white male club to produce a list of rejected applicants on the condition that applicants receive notice of pending disclosure and have an opportunity to obtain protective orders. Note that the requested production of documents was part of a city's investigation of possible violations of antidiscrimination laws and not "ordinary civil litigation." 229 CA3d at 363.

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§7.87 c. Unreasonably Cumulative or Undue Burden and Expense

Attorneys frequently object to interrogatories on the ground that they are burdensome. The discovery statutes specifically recognize "burden" as a valid basis to object or seek a protective order. See CCP §§2017.020(a), 2019.030(a)(1)-(2), 2023.010(c), 2030.090(b). The court may also limit discovery on a showing that "[t]he discovery sought is unreasonably cumulative or duplicative." CCP §2019.030(a)(1). On a motion for a protective order, the court must limit discovery if it finds that the burden, expense, or intrusiveness of the discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." CCP §2017.020(a).

PRACTICE TIP: Rather than making a motion for protective order, responding counsel should consider making the appropriate objection to the interrogatory, which puts the burden on the propounding party to move to compel a response. The objections must be made in good faith, however, or the responding party and counsel may be subject to sanctions.

The court may impose restrictions on the frequency or extent of use of any discovery method, if it determines that a more convenient, less burdensome or less expensive method of discovery exists. CCP §2019.030(a)-(b). It may restrict discovery if, after taking into consideration the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation, it finds the discovery unduly burdensome. CCP §2019.030(a)(2). See, *e.g.*, *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 417, 15 CR 119 (decided before Civil Discovery Act inclusion of "burden" as ground for objection; court recognized that objection of "burden" might be valid when demonstrated that discovery request results in injustice); *Perkins v Superior Court* (1981) 118 CA3d 761, 173 CR 596; *Borse v Superior Court* (1970) 7 CA3d 286, 86 CR 559; *Columbia Broadcasting Sys. v Superior Court* (1968) 263 CA2d 12, 18, 69 CR 348.

The court may order that part of the requested information be supplied, but that the propounder use other discovery procedures to obtain the additional information, or that the propounder attempt to obtain it from other sources before answers to interrogatories will be compelled.

JUDGE'S PERSPECTIVE: When responding to a motion to compel or making a protective order, to make an adequate showing of undue burden, counsel must identify specific facts to illustrate why the request is "burdensome" or "expensive." For example, instead of simply arguing that it will take 40 hours to compile the documents, counsel should also include the facts that underlie the conclusion—where and how the records are maintained, what data must be gathered, and the time estimated to do so.

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§7.88 d. Information Equally Available to Both Parties

Although CCP §2030.220(c) requires a party to make a reasonable and good faith effort to obtain information when interrogatories are propounded, CCP §2019.030(a)(1) recognizes that a protective order may be proper if "[t]he discovery sought is… obtainable from some other source that is more convenient, less burdensome, or less expensive." Thus, a party may object on the ground that the information sought is unduly burdensome because it is equally available to the propounding party. Several courts have held that when information is equally available to both propounding and responding parties, it would be oppressive to compel the responding party to supply the information through answers to interrogatories. This rule is also stated as a prohibition against using discovery to compel an adversary to prepare one's own case. See *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 123 CR 283; *Holguin v Superior Court* (1972) 22 CA3d 812, 821, 99 CR 653; *Bunnell v Superior Court* (1967) 254 CA2d 720, 724, 62 CR 458.

However, it is not always oppressive to request information that is equally available to both parties. For example, interrogatories requesting a statement of facts on which a party bases his or her own contention, or requesting a party to state his or her version of a transaction or occurrence, are proper even though both parties have knowledge or means for obtaining knowledge of the event. See *Singer v Superior Court* (1960) 54 C2d 318, 324, 5 CR 697.

The objection of undue burden when the information sought is equally available to both parties is applicable when an interrogatory seeks to compel an opponent to make a compilation from, or investigation of, information that is equally available to both parties, such as is in public records. *Alpine Mut. Water Co. v Superior Court* (1968) 259 CA2d 45, 66 CR 250. But see *Perkins v Superior Court* (1981) 118 CA3d 761, 173 CR 596; *Bunnell v Superior Court* (1967) 254 CA2d 720, 62 CR 458.

PRACTICE TIP: Rather than making a motion for protective order, responding counsel should consider making the appropriate objection to the interrogatory which puts the burden on the propounding party to move to compel a response. The objections must be made in good faith, however, or the responding party and counsel may be subject to sanctions.

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§7.89 e. Boilerplate and Shotgun Interrogatories

Interrogatories that are "boilerplate" (standard form questions having no relation to a particular case) or "shotgun" (questions that entail expending unnecessary time and effort by requiring a party to refer back to preceding interrogatories) are objectionable on grounds of oppression. See, *e.g.*, *Wooldridge v Mounts* (1962) 199 CA2d 620, 18 CR 806 (boilerplate); *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 419, 15 CR 119 (shotgun). Shotgun interrogatories may also be objected to as ambiguous and confusing. See *Cembrook v Superior Court* (1961) 56 C2d 423, 428, 15 CR 127.

The term "shotgun interrogatories" sometimes also refers to excessively broad interrogatories, *e.g.*, interrogatories that request the identity "of all persons… having knowledge of relevant facts." *Romero v Hern* (1969) 276 CA2d 787, 794, 81 CR 281. The objection must be limited to the portion of the interrogatory that is burdensome or oppressive; the court may require the interrogatory to be rephrased rather than refuse to compel an answer entirely. *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 419, 15 CR 119.

Attorneys sometimes answer boilerplate interrogatories with the phrase "not applicable." Because these words do not constitute a proper objection, it is better practice to state an objection on grounds of lack of relevance or oppression or to move for a protective order under CCP §§2019.030(a)(1) and 2030.090. The requirement that objections be stated with specific grounds set forth clearly is in CCP §2030.240(b).

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§7.90 f. Work Product Protection

Interrogatories are objectionable if they call for matter that falls within the attorney's work product. CCP §§2018.010-2018.080. For example, interrogatories are objectionable on grounds of work product when they call for an opponent's legal reasoning or theories (CCP §2018.030(a); *Burke v Superior Court* (1969) 71 C2d 276, 78 CR 481), or for the names of persons contacted during a party's investigation of the case (*Uinta Oil Ref. Co. v Continental Oil Co.* (D Utah 1964) 226 F Supp 495). For a discussion of the work product protection concerning the identity and anticipated testimony of lay witnesses, see §7.50. On work product protection generally, see §§3.52-3.68.

The identity of potential witnesses *interviewed* by opposing counsel is protected by the qualified work product doctrine. *Nacht & Lewis Architects, Inc. v Superior Court* (1996) 47 CA4th 214, 217, 54 CR2d 575.

Interrogatories that seek information about the identity of the "preparers" of answers may be improper as violating the work product rule. For discussion, see Powers, *A Guide to Interrogatories in California Practice*, 48 S Cal L Rev 1221, 1251 (1975). However, such interrogatories are common, especially when the defendant is a corporation and it is necessary to know who prepared the answer. The Judicial Council form interrogatories include an interrogatory seeking the identity of the person who prepared the responses. Judicial Council Form DISC-001, Interrogatory 1.1. See §7.142. Under CCP §2030.250(b), if an agent or officer signing answers to interrogatories is an attorney acting in that capacity for the party, the work product protection is waived in any subsequent discovery from that attorney that is related to the sources of the information contained in the response. See §7.61.

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§7.91 g. Privilege

Claims of privilege ordinarily may be raised by objection or by motion for protective order under CCP §2030.090 (see §§7.122-7.124; §§15.59-15.84). Of course, privileged communications can be waived if any holder of the privilege, without coercion, discloses a significant part of the communication or consents to disclosure by another. Evid C §912. See also *Jones v Superior Court* (1981) 119 CA3d 534, 546, 174 CR 148. For discussion of privilege generally, see chap 3.

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§7.92 h. Uncertain, Ambiguous, or Confusing Interrogatories

Objections to interrogatories on the grounds that they are uncertain, ambiguous, or confusing are permissible. See *Cembrook v Superior Court* (1961) 56 C2d 423, 428, 15 CR 127. The responding party must answer in good faith as well as she or he can. *Deyo v Kilbourne* (1978) 84 CA3d 771, 783, 149 CR 499. On drafting responses to ambiguous interrogatories, see §7.81. Shotgun interrogatories may be objectionable on the ground that they are uncertain, ambiguous, or confusing. *Cembrook*, 56 C2d at 428.

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§7.93 i. Continuing Interrogatories

Continuing interrogatories are improper in California. CCP §2030.060(g) (interrogatory may not be made continuing "so as to impose on the party responding to it a duty to supplement an answer to it that was initially correct and complete with later acquired information"). See *Smith v Superior Court* (1961) 189 CA2d 6, 11 CR 165. See also *Biles v Exxon Mobil Corp*. (2004) 124 CA4th 1315, 22 CR3d 282 (no duty to supplement interrogatory responses under California law).

Supplemental interrogatories are allowed as a follow-up under CCP §2030.070. See §7.12. For discussion of federal rules regarding duty to supplement or amend responses to interrogatories, see §7.135.

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§7.94 j. Invasion of Privacy of Third Party Nonlitigant

The right of privacy of third party nonlitigants may provide a valid basis for objection to interrogatories. In *Willis v Superior Court* (1980) 112 CA3d 277, 297, 169 CR 301, the court acknowledged "zones of privacy" that may warrant issuance of a protective order limiting the information that must be disclosed. *Willis* involved two brothers formerly associated in the practice of law who became involved in litigation against each other. Objections to certain interrogatories, along with a request for protective orders, raised the issue of attorney-client privilege. Although the court required disclosure of names, addresses, and fee arrangements with certain clients, it placed limitations on the defendant's and his attorney's use of the information beyond the immediate litigation. The court reasoned that a proper balance between the expectation of privacy and the important state interest of facilitating discover of truth in legal proceedings required the court to order the limited disclosures.

The court considered the constitutional right of privacy of a third party nonlitigant in *Jones v Superior Court* (1981) 119 CA3d 534, 174 CR 148. The plaintiff in *Jones* claimed injury as a result of her mother's ingestion of the drug diethylstilbestrol (DES) while pregnant with the plaintiff. To what extent could the mother claim in a deposition that her medical history was privileged and not subject to disclosure? Finding that the mother had waived the physician-patient privilege by answering some questions, and that the privilege simply did not apply to other questions, the court required the mother to answer, subject to limitations on disclosure of the answers to nonlitigants. Though recognizing a constitutional right to privacy held by third party nonlitigants, the court held that the right was "by no means absolute." 119 CA3d at 550. For further discussion of the right to privacy, see §§3.156-3.164.

PRACTICE TIP: A third party may object to the disclosure of private information by filing a motion for a protective order or a motion to quash a subpoena. On procedures and notice required for seeking third party records, see §§5.85-5.107. On motion for protective order see §§15.59-15.84.

In *Gonzalez v Superior Court* (1995) 33 CA4th 1539, 1546, 39 CR2d 896, the court of appeal refused to recognize a privilege of confidentiality when a plaintiff refused to divulge the identity of a third party who allegedly conveyed evidence of sexual harassment to the plaintiff, despite the plaintiff's fears of employer retaliation against the third party. Under such circumstances, there is at most only a "conditional privilege." 33 CA4th at 1548. The party asserting that conditional privilege has the burden of proving that the risk of harm to the third party caused by disclosure outweighs the interrogator's need for information. The plaintiff in *Gonzalez* failed to establish important preliminary facts showing the risk of retaliation and whether in fact the third party even existed. The court stated, though, that a third party's identity might be protected as a matter of public policy if that person qualified as a "whistleblower." There was, however, no evidence offered in *Gonzalez* to qualify the third party as a whistleblower. 33 CA4th at 1545 n4. On protection of whistleblowers, see *John Z. v Superior Court* (1991) 1 CA4th 789, 2 CR2d 556. Special concerns arise when weighing the constitutional right of privacy for employees and volunteers working at an abortion clinic against the need for disclosure of their home addresses and telephone numbers. *Planned Parenthood Golden Gate v Superior Court* (2000) 83 CA4th 347, 369, 99 CR2d 627 (because of political issues involved in abortion rights, privacy interests of employees and volunteers who have knowledge of the litigation outweigh need for disclosure).

On whistleblower protection, see §3.144.

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§7.95 k. Prejudice to Party

An insured may obtain a stay of the requirement to respond to interrogatories and to produce documents when these demands are prejudicial to its position in the underlying liability action. *Haskel, Inc. v Superior Court* (1995) 33 CA4th 963, 39 CR2d 520. The insured in *Haskel* filed a declaratory relief action against its insurers to determine the insurers' duty to defend an insurance claim raised by a third party. Discovery in the declaratory relief action was stayed until the claim by the third party was resolved.

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§7.96 I. Tax Return Information

Closely related to the discussion of the right to privacy is the extent to which tax and other financial information may be the subject of discovery by interrogatories.

Generally it is a valid objection that questions related to the contents of either federal or state tax returns, as well as W-2 forms, are privileged. *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 6, 123 CR 283; *Webb v Standard Oil Co.* (1957) 49 C2d 509, 319 P2d 621; *Brown v Superior Court* (1977) 71 CA3d 141, 139 CR 327. In addition, courts have held that estate tax returns are privileged. *Deary v Superior Court* (2001) 87 CA4th 1072, 105 CR2d 132. The judicially created privilege derives from former Rev & T C §19282 (now Rev & T C §19542, which is virtually identical). *Wilson v Superior Court* (1976) 63 CA3d 825, 828, 134 CR 130. It has even been held that limited protection is available for financial information not specifically set forth in a tax return. See *Hofmann Corp. v Superior Court* (1985) 172 CA3d 357, 362, 218 CR 355, and cases cited in the opinion. The privilege also applies to corporations. See *Aday v Superior Court* (1961) 55 C2d 789, 13 CR 415; Rev & T C §§19542, 19565.

For an in-depth discussion of the privilege for tax return information, and its possible waiver, see §§3.116-3.119.

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§7.97 m. Information Too Remote From Subject Matter of Action

It is a valid objection to interrogatories that they stray too far from the issues and seek information that cannot reasonably serve the acknowledged purpose of pretrial discovery. *Columbia Broadcasting Sys. v Superior Court* (1968) 263 CA2d 12, 18, 69 CR 348. The objection that the information sought is too remote from the subject matter of the action as disclosed by the issues framed by the pleadings is similar to a relevancy objection (see §7.85) and may also involve the objection of expense and oppression (see §§7.86-7.87).

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§7.98 3. Invalid Objections

Objections that are applicable to questioning of a trial witness ordinarily have been held invalid when raised in response to interrogatories. These include objections that the question:

- Calls for matters that would be inadmissible at trial (*Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 391, 15 CR 90);
- Calls for incompetent testimony, *e.g.,* testimony that is hearsay, that assumes facts not in evidence, or that calls for an opinion or conclusion (56 C2d at 392; see *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 417, 15 CR 119);
- Is a "fishing expedition" (*Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 384 n10, 15 CR 90);
- Seeks information about matters on which the propounding party has the burden of proof at trial (*Burke v Superior Court* (1969) 71 C2d 276, 78 CR 481).

Counsel should not interpose an objection in response to interrogatories that a term is vague when counsel has used that same term in a prior discovery request or response; such an objection may be considered evasive and sanctionable. *Clement v Alegre* (2009) 177 CA4th 1277, 1286, 99 CR3d 791.

Ordinarily, it is not a valid objection to an interrogatory that the question has been asked of the party in an earlier deposition, or that when asked in deposition the question was objected to and the objection sustained. *Darbee v Superior Court* (1962) 208 CA2d 680, 25 CR 520. However, a court may consider these factors and may order that the interrogatories need not be answered because they are oppressive. See CCP §2030.090(b)(1). The issue of oppression may be raised by a motion for protective order (see §§7.122-7.124; chap 15). It may also be raised by objection and response to a subsequent motion to compel further answers (see *Bunnell v Superior Court* (1967) 254 CA2d 720, 62 CR 458).

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4. Drafting Objections

§7.99 a. Basic Principles

There is no special language that must be used in presenting an objection to an interrogatory. CCP §§2030.210-2030.240. The objection to an interrogatory or part of it must clearly state the ground of the objection. Objections based on privilege must clearly state the particular privilege relied on. If the work product doctrine under CCP §§2018.010-2018.080 is invoked, the objection must expressly assert that claim. CCP §2030.240(b).

Objections to interrogatories may be stated either in simple conclusionary terms, *e.g.,* "Plaintiff objects to interrogatory no. 4 on the ground that the interrogatory is oppressive," or in a lengthier fashion, in which the ground for objection is augmented by a factual explanation.

An interrogatory may be objected to in its entirety or answered in part and objected to in part.

JUDGE'S PERSPECTIVE: Code of Civil Procedure §2030.240(a) requires that nonobjectionable parts of the interrogatory be answered. The court will consider this when determining whether objections are in good faith or a delaying tactic.

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§7.100 b. Combining Answer and Objection

When only part of an interrogatory is objectionable, CCP §2030.240(a) requires that the remainder of the interrogatory be answered. In fact, it is often more effective for the responding party to give a partial answer along with the objections to a question. Often the responding party can avoid having to respond to a motion to compel further answers because the propounding party:

- Decides to settle for the partial information received; or
- Is persuaded by the factual basis for the objection to part of the interrogatory that a motion would be unsuccessful.

Even if a motion to compel further answers is made, the responding party may be able to demonstrate that it has made a good faith effort to give an adequate response, that it is not attempting to obstruct discovery, and that the propounding party has all the information it needs or to which it is entitled.

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§7.101 5. Waiver of Objections

Serve within 30 days. Objections, like other responses to interrogatories, must be served within 30 days after the date of service, unless the court extends or shortens the time. CCP §2030.260(a). Time for response may be extended depending on the method of service. See CCP §§2016.050, 1013. See also §2.22.

When objection untimely. If objection is untimely, the party waives the right to object or to exercise the option to produce writings under CCP §2030.230. CCP §2030.290(a). The waiver of the right to object includes objections based on privilege and work product under CCP §§2018.010-2018.080. CCP §2030.290(a). In *Coy v Superior Court* (1962) 58 C2d 210, 222, 23 CR 393, the Supreme Court held that a trial court generally has no power to consider an objection not timely made. The court in *Willis v Superior Court* (1980) 112 CA3d 277, 289 n5, 169 CR 301, noted that failure to make timely objection results in a waiver of the right to object, although a motion for relief may be brought under CCP §473. Note, however, that the *Willis* case was decided prior to the 1986 enactment of the Civil Discovery Act.

NOTE: If, in response to interrogatories seeking the identification of documents, a party makes a timely response and identifies the documents as well as objecting to the interrogatories on the grounds of privilege, the party's failure to submit a privilege log along with its objections does not waive its privilege-based objections. *Best Prods., Inc. v Superior Court* (2004) 119 CA4th 1181, 1189, 15 CR3d 154 (privilege log is unnecessary in response to interrogatories). On privilege logs, see §§3.192-3.193. On duty to identify documents, see *Hernandez v Superior Court* (2003) 112 CA4th 285, 4 CR3d 883.

If a party fails to make any response in a timely manner, there is no requirement that the propounding party try to resolve disputed issues before filing a motion for further answers. CCP §2030.290. *Leach v Superior Court* (1980) 111 CA3d 902, 905, 169 CR 42.

Relief from failure to timely object. Under CCP §2030.290(a), the court may grant relief if it determines that "(1) [t]he party has subsequently served a response that is in substantial compliance with [CCP §§2030.210-2030.240], and (2) [t]he party's failure to serve a timely response was the result of mistake, inadvertence or excusable neglect." See *Mannino v Superior Court* (1983) 142 CA3d 776, 779, 191 CR 163, for the showing that is required before relief will be granted.

JUDGE'S PERSPECTIVE: Failure to serve timely responses will leave counsel at the mercy of an opponent who may be unwilling to accept a late response and will insist that the court enforce waiver of all objections. Avoiding this result requires a motion for relief and a special showing by the party failing to respond. The law and the equities make this an uphill battle.

Unlawful detainer. In unlawful detainer cases, the responding party must answer the interrogatories within 5 days after the date of service, unless the court has shortened the time for response on motion of the propounding party. CCP §2030.260(b).

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§7.102 F. Producing Writings in Lieu of Answer

Under CCP §§2030.210(2) and 2030.230, the responding party has the option of producing writings in lieu of an answer containing the information sought to be discovered. On answering interrogatories by producing writings in lieu of an answer, see §§7.78-7.80.

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G. Serving and Filing Responses

§7.103 1. How to Serve

Responses may be served personally, by mail, express mail, overnight delivery service, or, if the parties have agreed and made written confirmation of that agreement, by facsimile, or electronic transmission. See CCP §§1010-1020, 2016.030. Interrogatory responses, including a signed verification, are usually served by mail, with a proof of service, to the attorney for each party.

On extensions of time for various methods of service, see CCP §1013; §2.22.

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§7.104 2. Whom to Serve

The original of the response must be sent to the propounder of the interrogatories. CCP §2030.260(a). If a party is represented, counsel should serve discovery on the party's attorney.

A copy of the response must be served on counsel for all other parties who have appeared in the action, unless the court on motion with or without notice has determined that service on all other parties would be unduly expensive or burdensome and thus the responding party is relieved from this requirement. CCP §2030.260(c).

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§7.105 3. When to Serve

Within 30 days after service of interrogatories. Unless the court extends or shortens the time for service, the response to interrogatories must be served on the propounding party within 30 days after service of the interrogatories. CCP §2030.260(a). Failure to do so within the time provided may result in the imposition of sanctions (see §§7.120-7.122) or in the responding party's loss of its option to produce writings under CCP §2030.230 or raise objections to the interrogatories, including objections based on privilege or work product protection. CCP §2030.290(a). See §7.101.

Extension. The time to respond may be extended depending on the method by which the interrogatories were served and may be extended further by stipulation. See CCP §1013. See §2.22.

Unlawful detainer. In unlawful detainer cases, the responding party must answer the interrogatories within 5 days after the date of service, unless the court has shortened the time for response on motion of the propounding party. CCP §2030.260(b).

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§7.106 4. Retaining Original; Filing

The propounding party is required under CCP §2030.280(b) to "retain both the original of the interrogatories, with the original proof of service affixed to them, and the original of the sworn response until 6 months after final disposition of the action."

Responses are not filed with the court. CCP §2030.280(a).

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V. COMPELLING ANSWERS AND FURTHER ANSWERS TO INTERROGATORIES

§7.107 A. Motion to Compel Response

When a party on whom interrogatories have been served refuses or fails to respond to them within the time required by CCP §2030.260(a), the propounding party's remedy is a motion to compel response. CCP §2030.290(b)-(c).

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§7.108 1. No Specific Time Limit on Motion to Compel Response

There is no statutory time limit for bringing a motion to compel a response to interrogatories. See CCP §2030.290(b); *Deyo v Kilbourne* (1978) 84 CA3d 771, 788, 149 CR 499. As a practical matter, however, the basic discovery time limitations supply the deadline. See §7.14. See also §§2.21, 2.23.

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§7.109 2. No Meet-and-Confer Requirement

Code of Civil Procedure §2030.290(c) does not require the parties to meet and confer when the responding party completely fails to respond to the interrogatories within the statutory time limit. Failure to respond waives any objections under CCP §§2018.010-2018.080, 2030.240(b) (CCP §2030.290(a)), so there is nothing left for the parties to resolve. *Leach v Superior Court* (1980) 111 CA3d 902, 169 CR 42. When there has been no response to the interrogatories, no declaration or affidavit is required setting forth the efforts made to resolve the disputed issues with opposing counsel. CCP §2030.290(b)-(c).

PRACTICE TIP: As a practical matter, counsel should contact opposing counsel in writing advising of the intent to file a motion to compel answers. A letter may be persuasive in obtaining a response and thereby save the time and expense of bringing a motion to compel. In addition, the conduct of opposing counsel in refusing otherwise reasonable requests may be persuasive to a law and motion judge who is considering the imposition of sanctions.

JUDGE'S PERSPECTIVE: Failure to respond to a letter may also be relevant if counsel moves under CCP §473 (see §7.57) and must show that "failure to serve a timely response was the result of mistake, inadvertence or excusable neglect."

On filing motion to compel, see §§7.107-7.119; chap 15.

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§7.110 B. Motion to Compel Further Answers

A motion to compel further answers under CCP §2030.300(a) is the proper remedy when the interrogatories have been answered, but the propounding party believes that:

- An answer is evasive or otherwise incomplete;
- The responding party's exercise of the option to produce documents under CCP §2030.230 is unwarranted or the required specification of those documents is inadequate; or
- An objection to an interrogatory is without merit or too general.

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1. Time Limitation on Motion to Compel Further Answers

§7.111 a. 45-Day Limit to Bring Motion

Unlike a motion to compel a response under CCP §2030.290(b)-(c), unless the propounding party and the responding party agree otherwise in writing, a motion to compel further answers must be made within 45 days after the date of service of the response (extended under CCP §2016.050 when service is by mail or certain other methods). CCP §2030.300(c). See CCP §1013; see also §2.22. Failure to file the motion within the time prescribed is considered a waiver of the right to move to compel further answers. CCP §2030.300(c); *O'Brien v Superior Court* (1965) 233 CA2d 388, 43 CR 815. The court has no authority to rule on untimely motions to compel other than to deny them. *Sexton v Superior Court* (1997) 58 CA4th 1403, 1410, 68 CR2d 708.

When the propounding party fails to file a motion compelling further response within the statutory time limit of CCP §2030.300(c), the party may not circumvent this limit and avoid the consequences of the delay by asking the same question, even with minor changes, in a second set of interrogatories. *Professional Career Colleges, Magna Inst., Inc. v Superior Court* (1989) 207 CA3d 490, 255 CR 5. The rule of CCP §2030.300(c) essentially codifies the holding in *Vidal Sassoon, Inc. v Superior Court* (1983) 147 CA3d 681, 195 CR 295. When supplemental responses to interrogatories are made, the 45-day time limit runs from the date of service of the supplemental response. CCP §2030.300(c).

As long as the notice of motion to compel further answers is timely served under CCP §2030.300(c), there is no basis for an objection that actual filing with the court did not occur within the time limits of the code. *Karz v Karl* (1982) 137 CA3d 637, 187 CR 183.

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§7.112 b. Extension by Stipulation

The time limit to bring a motion to compel further answers may be extended by stipulation, *e.g.,* when in exchange for a stipulation from the propounding party extending the time in which to respond to interrogatories, the responding party agrees to extend the time for filing any motion to compel that the propounder later considers necessary. CCP §2030.270(a); see *Deyo v Kilbourne* (1978) 84 CA3d 771, 785, 149 CR 499. However, the agreement extending the time must be in writing to be effective. CCP §§2030.270(b), 2030.300(c); see *Vidal Sassoon, Inc. v Superior Court* (1983) 147 CA3d 681, 195 CR 295, in which the propounding party lost her right to compel further answers despite questionable practices by the responding party.

JUDGE'S PERSPECTIVE: Counsel should include all terms and conditions of the stipulation in the letter and specify the date by which the answers or motion must be filed. This will avoid later misunderstanding, *e.g.*, as to when the time limit started to run.

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§7.113 2. When Wholly Evasive or Frivolous Answers Can Be Considered Refusals to Answer

Because CCP §2030.290(b)-(c) does not limit the time in which to compel answers to interrogatories when the party on whom they were served refuses to answer (whereas a 45-day limit applies under CCP §2030.300(c) when the party has answered evasively, has inappropriately exercised the option to produce business records, or has improperly objected), the question arises whether wholly evasive answers or frivolous objections may be considered a refusal to answer within the meaning of CCP §2030.290(b)-(c). See *Frey v Superior Court* (1965) 237 CA2d 201, 204, 46 CR 747, in which the court held that such a response not only constituted a refusal to answer but also was "without substantial justification" under former CCP §2034(a) (now CCP §2030.290(c)) and therefore was subject to monetary sanctions. See also *Fairfield v Superior Court* (1966) 246 CA2d 113, 54 CR 721 (trial court has power to award sanctions under former CCP §2034(a) (now CCP §2030.290(c)) if party refuses to obey order compelling further answer to interrogatories). Arguably, wholly evasive answers or frivolous objections should be considered a refusal to answer without substantial justification. See Fed R Civ P 37(a)(3); §§7.138-7.139. A contrary interpretation encourages subversion of the discovery process through dilatory answers or objections.

JUDGE'S PERSPECTIVE: Although the court may determine that a response was so evasive as to be tantamount to no response at all, the better practice is to file the motion to compel further response within the jurisdictional 45-day limit in the event that the court determines otherwise.

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3. Meet-and-Confer Requirement

§7.114 a. Good Faith Effort to Attempt to Resolve Objections

Counsel must make a reasonable and good faith attempt to resolve objections and disputed issues before filing the motion to compel further answers and must include with the motion a declaration setting forth the efforts at resolution that have been made. CCP §2030.300(b); *Volkswagenwerk AG v Superior Court* (1981) 122 CA3d 326, 330, 175 CR 888. See §7.149. Although there are 45 days in which to bring a motion to compel further responses, a trap for the unwary still exists. Counsel should err on the side of more "meet and confer" rather than less.

EXAMPLE: In *Obregon v Superior Court* (1998) 67 CA4th 424, 79 CR2d 62, the plaintiff sent overly broad interrogatories to which the defendant objected. Plaintiff then sent a brief letter, 13 days before the deadline to file a motion to compel, generally stating that the interrogatories were proper. Defendant responded the day before the motion-to-compel deadline that the interrogatories were improper and overbroad. Plaintiff then filed its motion to compel. Finding an inadequate attempt to informally resolve the dispute, the trial court denied plaintiff's motion to compel. Although an appellate court held that a trial court could not automatically deny plaintiff's motion to compel based on an insufficient good faith effort to meet and confer, the appellate court remanded the issue to the trial court to determine if denying the motion to compel was the appropriate sanction or if a lesser sanction, including a monetary sanction, would be appropriate.

PRACTICE TIP: The propounding party should act swiftly to resolve disputes informally as required under CCP §2030.300(b) to avoid the possibility of an expiration of the time to serve a motion to compel, caused by the responding party's delaying tactics. In *Vidal Sassoon, Inc. v Superior Court* (1983) 147 CA3d 681, 195 CR 295, the court held that delaying tactics by a responding party do not toll the mandatory period within which to serve a motion to compel further answers to interrogatories under former CCP §2030(*l*) (now CCP §2030.300(c)), nor do such tactics act as an estoppel.

Failure to include the meet-and-confer declaration or affidavit, or to attempt to resolve the matter in good faith is a misuse of the discovery process under CCP §2023.010(i) for which a mandatory monetary sanction will be imposed (see CCP §2023.020); it could also be deemed an action not based on good faith, which is frivolous, or which causes unnecessary delay under CCP §128.5. Failure to meet and confer might also result in additional, discretionary sanctions under CCP §2023.030(b). Courts usually have not imposed terminating sanctions for failure to meet and confer. See *McElhaney v Cessna Aircraft Co.* (1982) 134 CA3d 285, 288, 184 CR 547 (former CCP §2034(b)(2)(C); former Cal Rules of Ct 222.1); §15.70.

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§7.115 b. Moving Party Must Initiate Discussion

The burden of initiating the informal discussion is on the party moving to compel a further answer to interrogatories. *Leach v Superior Court* (1980) 111 CA3d 902, 905, 169 CR 42. In *Volkswagenwerk AG v Superior Court* (1981) 122 CA3d 326, 330, 175 CR 888, the court found that a reasonable attempt by the moving party to resolve the disputed issues had not occurred when the attorney took no action until 25 days after service of answers to interrogatories (at that time motions to compel further answers were required to be made within 30 days), made only one or two incomplete telephone calls to resolve the disputed matters, and refused the plaintiff's offer of an extension of time in which to file a motion to compel so that the matter could be discussed.

As a practical matter, the court may be more inclined to be receptive to a moving party's position if that party has made several reasonable, good faith attempts to resolve the dispute before filing the motion.

PRACTICE TIP: As soon as the responses are received, counsel should send a letter detailing the disputed discovery and outlining the insufficient responses, the basis for the request for further responses, and a reasonable time frame within which responses are expected. Keeping the letter professional (*i.e.*, not personally attacking opposing counsel) is advisable because the moving party may attach the letter as an exhibit to the motions papers showing compliance with the meet-and-confer requirements of CCP §2023.040. Following up the letter with at least one telephone call or meeting shows further evidence of reasonableness.

JUDGE'S PERSPECTIVE: To increase the likelihood of a successful meet-and-confer experience, counsel should conduct it in person when possible, or by telephone. The impersonal nature of letters eliminates the interactivity which often produces results and can make it very time consuming to achieve results. E-mail is a good option but be sure to save it if there is a motion to compel. Meet-and-confer communications should avoid threats, and focus on the legal and factual basis for the positions that would ultimately be before the court.

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C. Format of Motion

§7.116 1. When No Response Made

In making a motion to compel response when none has been made, the moving party must follow the format requirements of Cal Rules of Ct 3.1110, 3.1113, and 3.1115. A supporting memorandum must be filed with the notice of motion. Cal Rules of Ct 3.1113. On motion practice, see chap 15.

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§7.117 2. When Response Inadequate or Evasive; Separate Statement

In making a motion to compel further responses to interrogatories, the moving party must follow the format requirements of Cal Rules of Ct 3.1110, 3.1113, and 3.1115 and, in addition, accompany the motion with a separate statement setting forth (Cal Rules of Ct 3.1020(c)):

- The text of each interrogatory for which further response is requested;
- The text of each response, answer, objection, and any further responses or answers;
- A statement of the factual and legal reasons for compelling further responses or answers regarding each matter in dispute;
- If necessary, the text of all instructions and other matters required to understand each request and the responses;
- If the response is dependent on a response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the text of the other request and the response to it; and
- If pleadings or other documents in the court file, or other items of discovery are relevant to the motion, a summary of each document or item, by the party relying on them.

Material must not be incorporated by reference into the separate statement. Cal Rules of Ct 3.1020(c). Even if the interrogatories or answers have been lodged with the court, the required format under Rule 3.1020 is to set forth fully and completely the questions and responses in dispute.

JUDGE'S PERSPECTIVE: The separate statement allows the court and the parties to use it as a working document instead of flipping back and forth between the documents to juxtapose the interrogatory and its response.

The motion must identify the interrogatories by set and number. Cal Rules of Ct 3.1020(d).

PRACTICE TIP: When a large number of interrogatories are in dispute, some courts require a grouping by subject (*e.g.,* questions relating to liability or damages) to promote efficiency in considering the issues. It is good practice to group by subject matter when seeking further answers to more than a few interrogatories.

A supporting memorandum must be filed with the notice of motion. Cal Rules of Ct 3.1113. For form of separate statement, see §7.150.

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§7.118 3. Burden of Proof

The burden of proving that an interrogatory is improper is on the objector. *Coy v Superior Court* (1962) 58 C2d 210, 220, 23 CR 393. The responding party must file a supporting memorandum and, if appropriate, declarations to establish the basis for the objection. Notwithstanding that the burden of proof is on the objecting party, the party challenging the validity of the objections must set forth each interrogatory for which further response is requested, any response given, and the factual and legal reasons for compelling a further response. Cal Rules of Ct 3.1020(c). See §7.116.

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§7.119 4. Judicial Review of Orders

Lower court orders granting or denying motions to compel answers or further answers to interrogatories are themselves nonappealable under CCP §§904.1-904.2. Appellate review of them is most effectively obtained by extraordinary writ. For discussion of writs and appeals related to discovery motions, see chap 16.

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VI. OBTAINING SANCTIONS

§7.120 A. Scope of Sanctions Available

The discovery law provides for both discretionary and mandatory monetary sanctions. Like each statute governing a particular discovery method, CCP §§2030.090(d), 2030.290(c), 2030.300(d)-(e), and 2030.310(d) contain their own provisions for sanctions in cases involving interrogatories. In addition, CCP §§2023.010-2023.040, which apply to all discovery methods, set forth a list of nonexclusive misuses of discovery (CCP §2023.010) and define the five types of sanctions that may be imposed against those engaging in a misuse of discovery: monetary, issue, evidence, terminating, and contempt (CCP §2023.030). For further discussion of available discovery sanctions, see §§15.85-15.116.

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§7.121 B. Mandatory Monetary Sanctions

Mandatory monetary sanctions must be imposed under CCP §§2030.090(d), 2030.290(c), 2030.300(d), 2030.310(d), and 2023.010-2023.040 against any party, person, or attorney who unsuccessfully makes or opposes a motion:

- For a protective order under CCP §2030.090(d);
- To compel a response to interrogatories under CCP §2030.290(c);
- To compel a further response to interrogatories under CCP §2030.300(d);
- To deem binding an initial answer to an interrogatory under CCP §2030.310(b).

In each case, the court must impose the monetary sanction unless it finds that the unsuccessful party, person, or attorney acted with "substantial justification or that other circumstances make the imposition of the sanction unjust." CCP §§2030.090(d), 2030.290(c), 2030.300(d), 2030.310(d).

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VII. PROTECTIVE ORDERS

§7.122 A. Methods for Obtaining Protection

A party or affected organization that believes that the discovery being sought causes unwarranted annoyance, embarrassment, oppression, or undue burden and expense, and either should not be permitted or should be permitted only with certain safeguards, should seek protection by one or more of the available methods. There are three primary methods for obtaining protection:

- Stipulation or informal agreement among the parties is usually the least costly and most efficient. CCP §2016.030.
- Objection is an inexpensive and effective method that shifts the responsibility of going forward with the discovery effort to the party seeking discovery. See §§7.87-7.98. Often a validly stated objection ends a party's effort to obtain particular discovery, and the affirmative act of moving for protection becomes unnecessary.
- The third method is a promptly filed motion for a protective order. CCP §§2017.020(a), 2019.030(a)-(b), 2030.090.

For procedures applicable to a motion for protective order, see §§15.59-15.84.

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§7.123 B. Protective Orders and Objections Compared

Motions for protective orders and objections to interrogatories differ significantly, and often an objection is the simplest procedure for the responding party. However, it may be possible to obtain a protective order excusing a party from answering an entire set of interrogatories or prohibiting service of further interrogatories, *e.g.,* when a party receives boilerplate or shotgun interrogatories. Sustaining a "blanket objection" to an entire set of interrogatories may be improper if any interrogatory in the set is not objectionable. *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 418, 15 CR 119; *Cembrook v Superior Court* (1961) 56 C2d 423, 428, 15 CR 127; *Borse v Superior Court* (1970) 7 CA3d 286, 86 CR 559; *Day v Rosenthal* (1985) 170 CA3d 1125, 1172, 217 CR 89. Thus, a responding party is often forced to object separately to each interrogatory considered objectionable.

A motion for a protective order, although a more complicated procedure, may be used to seek relief not available by objection. For example, confidential information or trade secrets can be protected against disclosure by a motion for a protective order (CCP §2030.090(b)(6)), but an objection on these grounds is invalid. *Ryan v Superior Court* (1960) 186 CA2d 813, 820, 9 CR 147. Similarly, if the propounding party has already sent numerous sets of interrogatories covering the same matter:

- The responding party may ask the court to order that the propounding party serve no further interrogatories without leave of court;
- If the second set is served within a year of the first set, a court may limit the answers required to the 1-year period following the first set; or
- If interrogatories cover subject matter that was also covered in an earlier deposition and a showing can be made of undue expense caused by the duplication, a protective order may issue.

Another alternative available to a party moving for a protective order is for the court to order that lengthy and complex interrogatories be segmented, and that the responding party be permitted to answer specific portions at appropriate and different times. A court has wide discretion in framing protective orders to meet the facts of a case. See CCP §§2019.030(a)-(b), 2030.090(b); *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 380, 15 CR 90.

When information sought by way of interrogatories has been deemed "confidential" by the respondent, a protective order is considered to be the proper procedural safeguard. CCP §2030.090(b)(6); see *Columbia Broadcasting Sys. v Superior Court* (1968) 263 CA2d 12, 23, 69 CR 348. When the rights of third party nonlitigants are involved, protective orders have also been used to limit use of the information sought. *Jones v Superior Court* (1981) 119 CA3d 534, 174 CR 148 (physician-patient privilege).

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§7.124 C. Protective Orders Against Interrogatories

The court may make any order necessary to protect any party or other natural person or organization from undue burden and expense or unwarranted annoyance, embarrassment, or oppression. CCP §2030.090(b). A protective order may direct that:

- The set of interrogatories or particular interrogatories in the set need not be answered (CCP §2030.090(b)(1));
- The number of specially prepared interrogatories beyond 35 is, despite the representations in the declaration for additional discovery, unwarranted (CCP §2030.090(b)(2));
- The time specified in CCP §2030.260(a) to respond to the set of interrogatories, or to particular interrogatories in the set, be extended (CCP §2030.090(b)(3));
- The response be made only on specified terms and conditions (CCP §2030.090(b)(4));
- The method of discovery be an oral deposition instead of interrogatories (CCP §2030.090(b)(5));
- A trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a certain way (CCP §2030.090(b)(6)); and
- Some or all of the answers to interrogatories be sealed and thereafter opened only on order of the court (CCP §2030.090(b)(7)).

The court has the power to fashion other protective orders as may be appropriate, since the list set forth in CCP §2030.090(b) is considered illustrative and not exhaustive. Under CCP §2017.020(a), the court "must limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." Section 2017.020(a) allows the court to make such a determination pursuant to a motion for protective order.

The provisions of CCP §2019.030(a)-(b) are specifically made applicable for the protection of the party responding to interrogatories. CCP §2019.030(b). Under CCP §2019.030(a)(1), a protective order is available if the court determines that the "discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." Code of Civil Procedure §2019.030(a)(2) provides for a protective order when interrogatories are "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation."

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VIII. INTERROGATORIES IN FEDERAL COURT CASES

§7.125 A. Federal Rules Governing Interrogatories

In federal actions, Fed R Civ P 33 is the principal rule governing the use of interrogatories, although other rules also have an impact on how and when interrogatories may be used. The two additional rules that the practitioner should be immediately familiar with are Fed R Civ P 26 and 37. Rule 26 delineates the general provisions of federal discovery, such as the timing of discovery, required initial disclosures and the disclosure of expert witnesses, the scope of discovery, and protective orders. Rule 37 deals with motions to compel and sanctions.

Although in many respects the purpose and use of interrogatories in federal actions are similar to California practice, there are significant procedural differences of which the practitioner should be aware and which are described below. One immediately apparent difference is the relative brevity of the federal discovery rules as compared with the provisions of the California Discovery Act. For example, California law details precisely how interrogatories and responses must be numbered, styled, and formatted. See CCP §§2030.060, 2030.210 and §§7.32-7.38, 7.58-7.59. By contrast, Fed R Civ P 33 says virtually nothing on this topic, although a federal district's local rules or an individual judge's standing orders may provide some further guidance. See, *e.g.*, ED Cal Local R 33-250, which requires interrogatories to be arranged so that after each separate question there is a blank space to allow the answering party to insert the answers or objections.

JUDGE'S PERSPECTIVE: It is impossible to overemphasize the importance of becoming familiar with the local rules of the particular district court and the standing orders of the judge who may pass judgment on the practitioner's handiwork. Requirements of formatting and timing as well as special procedures that flesh out the language of the Federal Rules of Civil Procedure are frequently covered in local rules and standing orders and present pitfalls for the unwary or inattentive lawyer. Some judges are forgiving about such "procedural" missteps. Some are not.

For further discussion of the federal rules on interrogatories, see 4 Wright, Miller, Federal Practice and Procedure: Civil 3d, chap 33 (3d ed 2000).

NOTE: Amendments to the Federal Rules of Civil Procedure relating to electronically stored information took effect December 1, 2006. See §8.104.

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B. Procedures for Propounding Interrogatories in Federal Court

§7.126 1. Persons to Whom Interrogatories May Be Propounded

In federal actions, any party may serve interrogatories on any other party. Fed R Civ P 33(a). If a corporation or other entity is named as a party, it is that corporation or entity to which the interrogatories must be propounded.

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§7.127 2. Time for Service of Interrogatories

Interrogatories may not be served until the parties have met their obligations under Fed R Civ P 26, which requires the parties to meet and confer "as soon as practicable" or at least 21 days before a scheduling conference or before a scheduling order is due under Fed R Civ P 16(b). Fed R Civ P 26(d)(1), (f)(1). This meet-and-confer requirement differs substantially from California practice, in which interrogatories may be served by a defendant at any time and by a plaintiff at any time that is 10 days after service of summons on or appearance by the party to be served. See CCP §2030.020. On the timing of service of interrogatories in state court, see §§7.13-7.16.

PRACTICE TIP: Meet-and-confer conferences are usually done over the telephone. Counsel should check local rules for specific requirements. For example, ND Cal Local Rule 16-3 requires that the conferring and planning be done by lead counsel. Some courts require that the meet-and-confer be done in person.

Interrogatories may be served before the parties have met and conferred either by leave of court or by written stipulation. Fed R Civ P 26(d)(1), (f)(1).

JUDGE'S PERSPECTIVE: In the Northern District of California, a party seeking early discovery must establish that the need for expedited discovery outweighs the possible prejudice to the responding party. *Semitool, Inc. v Tokyo Electron Am.* (ND Cal 2002) 208 FRD 273, 276. Other courts apply a more stringent standard. See, *e.g.*, *Notaro v Koch* (SD NY 1982) 95 FRD 403, 405 (requiring that party seeking early discovery meet standard similar to that required for granting injunction, including demonstrating irreparable injury and probability of success on merits).

The issue of early discovery arises most often when a plaintiff wants immediate discovery to support a motion for a preliminary injunction. It may also arise when the plaintiff does not know the identity of a proposed defendant and must subpoena third party records to identify the name of an intended defendant (for example, a subpoena to an Internet service provider to learn the name of a party who has use the Internet to facilitate wrongdoing).

Local rules, a standing order, or a scheduling order entered in the case in question will usually set a date for a discovery cutoff. Unless otherwise defined, this is the date by which discovery must be complete. Thus, counsel must serve interrogatories early enough so that the answers are due before the cutoff date. Counsel must also be familiar with what local rules or orders say about timing and deadlines for motions to compel. On timing and discovery cutoffs in state court, see §§2.20-2.23.

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§7.128 3. Limit of 25 Interrogatories

Each party is allowed to serve on any other party 25 interrogatories, including all discrete subparts. Fed R Civ P 33(a)(1). Rule 33 leaves the term "discrete subparts" undefined, but the Advisory Committee Notes state that a question asking about communications of a particular type "should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication." See, *e.g.*, *Williams v Board of County Comm'rs* (D Kan 2000) 192 FRD 698, 701 (plaintiff's seven interrogatories, which contained 117 subparts, exceeded 25-question limit).

JUDGE'S PERSPECTIVE: The phrase "discrete subparts" eludes precise definition and results in knotty disagreements over whether or not the 25 interrogatory limit has been reached or exceeded. One court's attempt at a definition is: "interrogatory subparts are to be counted as one interrogatory … if they are logically or factually subsumed within and necessarily related to the primary question." *Safeco of Am. v Rawston* (CD Cal 1998) 181 FRD 441, 445, citing *Kendall v GES Exposition Servs.* (D Nev 1997) 174 FRD 684.

Unlike California practice, which permits a party to exceed the 35-question limit for special interrogatories by providing a declaration for additional discovery (see CCP §§2030.040(a), 2030.050) a federal party may propound more than 25 interrogatories only by leave of court or by a written stipulation. On exceeding the 35-question limit in state court, see §§7.10-7.11.

PRACTICE TIP: Because each *party* may propound 25 interrogatories, if multiple parties cooperate in drafting interrogatories, as a group they may be able to propound many more than the total of 25 to an opposing party.

In granting leave to exceed the 25-question limit, federal courts are guided by the considerations in Fed R Civ P 26(b)(2), *i.e.*:

- Whether the discovery is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- Whether the party seeking discovery has already had ample opportunity to obtain the information; or
- Whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the proposed discovery in resolving the issues.

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§7.129 4. Format of Interrogatories

Unlike the California Civil Discovery Act, Fed R Civ P 33 does not itself provide guidance regarding the proper format of interrogatories, but a federal district court's local rules or an individual judge's standing order may. For example, in the United States District Court of the Eastern District of California, interrogatories must be arranged so that after each separate question there is a blank space to enable the answering party to insert the answers or objections. ED Cal Local R 33-250. See also, *e.g.*, *Struthers Scientific & Int'l Corp. v General Foods Corp.* (SD Tex 1968) 45 FRD 375, 379 (interrogatories need not be phrased with technical precision and are proper if it is clear what responding party is called on to answer).

All discovery requests must be signed by at least one attorney of record or by an unrepresented party. Fed R Civ P 26(g)(1). The signature constitutes a certification that the request is (Fed R Civ P 26(g)(1)(A)-(B)):

- Consistent with the Federal Rules of Civil Procedure and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
- Not made for any improper purpose such as harassment or delay; and
- Not unreasonably or unduly burdensome or expensive.

An unsigned interrogatory request must be stricken unless it is signed promptly after the propounding party has been notified of the omission. Fed R Civ P 26(g)(2). Additionally, if without substantial justification the certification is violated in any way, the court, on its own initiative or on a motion by a party, must impose "an appropriate sanction," which may include an order to pay the amount of the reasonable costs and attorney fees incurred because of the violation. Fed R Civ P 26(g)(3).

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§7.130 5. Scope of Interrogatories

Like California law, the permissible scope of interrogatories in federal actions is broadly construed. Interrogatories may relate to any non-privileged matter that is relevant to the claim or defense of any party. Fed R Civ P 26(b)(1), 33(a)(2). Relevant matter need not be admissible at trial; it is discoverable if it appears reasonably calculated to lead to the discovery of admissible evidence. Fed R Civ P 26(b)(1). Discoverable material includes the existence, nature, custody, condition, and location of any documents or other tangible things as well as the identity of any persons having knowledge of any discoverable matter. Fed R Civ P 26(b)(1).

JUDGE'S PERSPECTIVE: Although the scope of interrogatories is relatively broad, counsel must show good cause to reach the broader scope "… any matter relevant to the subject matter involved in the action." See Fed R Civ P 26(b)(1).

The court must nonetheless limit the scope of interrogatories if it determines that (Fed R Civ P 26(b)(2)(C)):

- The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- The party seeking discovery has had ample opportunity to obtain the information; or
- The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the proposed discovery in resolving the issues.

NOTE: A party need not provide discovery of electronically stored evidence from sources that are "not reasonably accessible because of undue burden or cost" (Fed R Civ P 26(b)(2)(B)), although a motion to compel may be brought on this issue; see §8.104.

Opinions and contentions. Interrogatories may ask for an opinion or contention that relates to fact or the application of law to fact. Fed R Civ P 33(a)(2). See *Coles v Jenkins* (WD Va 1998) 179 FRD 179, 180 (in negligence action brought against bicycle tour operator, interrogatory that sought to discover standard of care that tour operator owed to its customers was proper because it was related to facts of the case). On a motion for protective order, the court may order that interrogatories of this type need not be answered until certain discovery has already been completed or until some other later time. Fed R Civ P 33(a)(2). On motions for protective orders, see §7.140; chap 15.

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C. Responding to Interrogatories

§7.131 1. 30 Days to Respond

A party must serve answers and any objections within 30 days after service of the interrogatories. Fed R Civ P 33(b)(2). A shorter or longer time period may be ordered by the court or agreed to by the parties in writing, subject to Fed R Civ P 29. Fed R Civ P 33(b)(2). The calculation of time limits—*i.e.*, how to calculate what "30 days after service" actually means—is governed by Fed R Civ P 6 and by local rule.

JUDGE'S PERSPECTIVE: Any stipulation extending the time for a response is subject to Fed R Civ P 29(b), which provides that "a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial."

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§7.132 2. Persons Who May Respond

Interrogatories directed to an individual must be answered and signed by that individual. Fed R Civ P 33(b)(1). If the responding party is a public or private corporation, a partnership, an association, or a governmental agency, the interrogatories may be answered by any officer or agent of that entity, "who must furnish the information available to the party." Fed R Civ P 33(b)(1)(B).

Answers must be signed by the person making them and objections must by signed by the attorney. Fed R Civ P 33(b)(5).

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§7.133 3. Format of Responses

As with the format of interrogatories (see §7.129), Fed R Civ P 33 does not itself provide guidance regarding the format of responses, except to say that each interrogatory must be answered separately and fully in writing. District court local rules and individual judges' standing orders may offer further guidance, and the practitioner should check both before responding. See, *e.g.*, ND Cal Civ Local R 33-1, which states that answers and objections to interrogatories must set forth each question in full before each answer or objection.

The response must be signed by at least one attorney of record or by an unrepresented party. Fed R Civ P 26(g)(1). On effect of signature, see §7.129. If the certification is violated in any way, the court, on its own initiative or on a motion by a party, must impose "an appropriate sanction," which may include an order to pay the amount of the reasonable costs and attorney fees incurred because of the violation. Fed R Civ P 26(g)(3).

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§7.134 4. Answering Interrogatories

Each interrogatory must be answered separately and fully in writing under oath and signed by the person making the answers. Fed R Civ P 33(b)(5). Answers must be "true, explicit, responsive, complete, and candid." *Hansel v Shell Oil Corp.* (ED Pa 1996) 169 FRD 303, 305; *Pilling v General Motors Corp.* (D Utah 1968) 45 FRD 366, 369. On what answers are responsive, see, *e.g.*, *Miller v Doctor's Gen. Hosp.* (WD Okla 1977) 76 FRD 136, 140. If a party is unable to answer an interrogatory, that party may not simply refuse to answer, but must state under oath both that it is unable to provide the information and the reasonable efforts it undertook to obtain the information. *Hansel*, 169 FRD at 305.

An attorney who objects must sign the objections. Fed R Civ P 33(b)(5).

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§7.135 a. Continuing Duty to Supplement Answers

Unlike in state court (see §§7.7, 7.12, 7.93) a party answering interrogatories in federal court is under a continuing duty to supplement its answers as relevant information becomes available if that party is directed to do so by the court or if the new information renders an answer incomplete or incorrect in some material respect and the information has not already been made known to the other parties. Fed R Civ P 26(e)(1). A party must supplement or correct its earlier responses "in a timely manner." Fed R Civ P 26(e)(1)(A).

JUDGE'S PERSPECTIVE: Counsel must make supplemental answers promptly; the decision to supplement must be made on a case-by-case basis, but in no event should counsel delay in an effort to undermine or disadvantage the opposing party. The practitioner who does not supplement promptly may be severely discomfited when the judge excludes that information from evidence at trial.

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§7.136 b. Option to Produce Business Records

In certain circumstances, a party responding to interrogatories may opt to produce business records, including electronically stored information, rather than serve written responses. Fed R Civ P 33(d). The California Civil Discovery Act contains a similar provision, albeit using the broader language of "documents of the party." See CCP §2030.230. On the production of documents in lieu of written answers in state court, see §§7.78-7.80.

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§7.137 5. Objections

Objections must be signed by the attorney making them and must be served on the propounding party at the same time that the answers are served. Fed R Civ P 33(b). Fed R Civ P 26(g)(1)'s certification requirement applies to objections. See §7.129.

"The grounds for objecting to an interrogatory must be stated with specificity" and any ground not stated in a timely objection is waived unless that party's failure is excused by the court for good cause. Fed R Civ P 33(b)(4). See, *e.g., Alexander v F.B.I.* (D DC 2000) 192 FRD 50, 53 (simply objecting that interrogatory is unduly burdensome without further information or explanation does not satisfy the Rule 33(b)(4) requirement that objections be stated "with specificity").

It is not ground for objection if an interrogatory involves an opinion or contention that relates to fact or to the application of law to fact. Fed R Civ P 33(a)(2). However, on a motion for a protective order, the court may order that such an interrogatory need not be answered until discovery has been completed or until some other later time. Fed R Civ P 33(a)(2). On motions for protective orders, see §7.140; chap 15.

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§7.138 D. Motion to Compel

The party submitting the interrogatories may move for an order compelling disclosure or discovery under Fed R Civ P 37(a) with respect to any objection to or other failure to answer an interrogatory. As in California practice, the parties must meet and confer in a good faith effort to resolve the discovery dispute before filing a motion to compel. Fed R Civ P 37(a)(1).

If a motion to compel is granted or if the requested discovery is provided only after a motion to compel has been filed, the responding party will be required to pay the reasonable expenses of the moving party, including attorney fees, unless the court finds either that the moving party did not first make a good faith effort to meet and confer or that the nondisclosure, response, or objection was substantially justified or other circumstances exist that would make a fee award unjust. Fed R Civ P 37(a)(5)(A).

JUDGE'S PERSPECTIVE: Counsel should check local rules for additional requirements regarding counsel's obligations to meet and confer. Under ND Cal Civ Local Rule 37-1(a), "[t]he Court will not entertain a request or a motion to resolve a disclosure or discovery dispute unless, pursuant to Fed R Civ P 37, counsel have previously conferred for the purpose of attempting to resolve all disputed issues." The Northern District's local rules define "meet and confer" as "direct dialogue and discussion—either in a face to face meeting or in a telephone conversation." ND Cal Civ Local Rule 1-5(n). Simply sending written, electronic, or voicemail communication does not satisfy the obligation.

Some judges bar motions to compel discovery with out leave of court, requiring the submission of a letter brief explaining the need for the motion. Most judges believe that many discovery motions could have been avoided if counsel had invested more time trying to resolve their disagreement and less time exchanging angry, accusatory letters.

If a motion to compel is denied, the court may enter any protective order that it deems necessary under the circumstances to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed R Civ P 26(c)(1), 37(a)(5)(B). Additionally, the court must require the moving party or the attorney or both to pay the reasonable expenses of the party opposing the motion, including attorney fees, unless the motion was substantially justified or other circumstances exist that would make those sanctions unjust. Fed R Civ P 37(a)(5)(B).

If a motion to compel is granted in part and denied in part, the court may enter any appropriate protective order and "apportion the reasonable expenses for the motion." Fed R Civ P 37(a)(5)(C).

PRACTICE TIP: Local rules or standing orders may prescribe special procedures for seeking sanctions. For example, in the Northern District of California, counsel must make a request for sanctions (including attorney fees and costs) in a separately filed motion. See ND Cal Civ Local R 7-8 and 37-3.

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§7.139 E. Sanctions for Failure to Respond to Interrogatories

If a party fails to answer or object to properly propounded interrogatories, the court may make "further just orders," including (Fed R Civ P 37(b)(2)(A), (d)):

- An order that the matters embraced in the order or other designated facts be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; and
- An order striking out pleadings in whole or part, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding in whole or part, or rendering a judgment by default against the disobedient party.

JUDGE'S PERSPECTIVE: It would be rare for a judge to order the sanctions listed above for a failure to answer. Instead, the judge would order the responding party to prepare and submit answers. If the answers still were not forthcoming, then a stronger sanction would be appropriate.

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§7.140 F. Motion for Protective Order

A party may move for a protective order to protect it against "annoyance, embarrassment, oppression, or undue burden or expense." Fed R Civ P 26(c)(1). The motion may request, *e.g.*, that (Fed R Civ P 26(c)(1)):

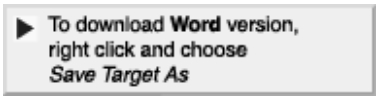
- The disclosure or discovery not be had;
- The disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- The discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- Certain matters not be inquired into, or the scope of the disclosure or discovery be limited to certain matters; and
- A trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.

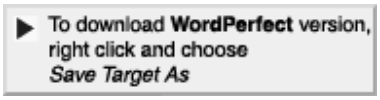
The party that unsuccessfully makes or opposes a motion for a protective order may be ordered to pay the reasonable fees, including attorney fees, of the opposing party. Fed R Civ P 26(c)(3), 37(a)(5).

Before a motion for a protective order is filed, the parties must meet and confer in a good faith effort to resolve the dispute without court intervention. Fed R Civ P 26(c)(1).

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§7.141 IX. CHECKLIST: PROCEDURES FOR INTERROGATORIES





PROPOUNDING PARTY

- Decide whether to use interrogatories (see §§7.2-7.30)
- Draft and serve set of written interrogatories (see §§7.31-7.54)

If specially prepared interrogatories exceed 35:

- Attach declaration for additional discovery (see §§7.10-7.11)
- Retain originals of sets and responses (see §§7.53-7.54)

RESPONDING PARTY

Serve responses and objections:

- Determine time for service of response (see §7.56)
- Forward interrogatories to client for response or information for use in drafting responses (see §§7.64-7.67)
- Draft responses and objections (see §§7.64-7.102)
- Return responses to client for review
- Obtain client verification to responses (see §§7.60-7.63)

If protective order needed:

- Make reasonable, good faith attempt to resolve informally (see §7.114)
- Serve notice of motion and motion for protective order (see §§15.59-15.84)

If additional time needed:

- Meet and confer with opposing counsel and seek stipulation for additional time to respond; or
- Make a motion for additional time to respond (see §7.56)

If answer in served response must be changed:

- Serve amended answer (and use at trial if initial answer used) (see §§7.71-7.75)

If response is served late:

- Serve notice of motion for relief from waiver of objections (see §7.57)

PROPOUNDING PARTY

If timely response not received:

- Move for order compelling response (see §§7.107-7.109)

If response is evasive, incomplete, defective, or inadequate:

- Make reasonable, good faith attempt to resolve informally (see §§7.114-7.115)
- Serve notice of motion and motion for order compelling further response (see §§7.117-7.118)

If order not obeyed:

- Move for sanctions (see §§7.120-7.121)

If later acquired information needed:

- Serve supplemental interrogatories (see §7.12)

At trial, if amended answer was served:

- Move for order that initial answer be deemed binding (see §7.75)

ANY PARTY, AT TRIAL

- Use answer (including initial answer) against responding party (see §7.6)

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X. SAMPLE INTERROGATORIES AND RELATED FORMS

§7.142 A. Form: Form Interrogatories—General (Judicial Council DISC-001)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
SHORT TITLE OF CASE:	
FORM INTERROGATORIES—GENERAL **Asking Party:** **Answering Party:** **Set No.:**	CASE NUMBER:

Sec. 1. Instructions to All Parties

(a) Interrogatories are written questions prepared by a party to an action that are sent to any other party in the action to be answered under oath. The interrogatories below are form interrogatories approved for use in civil cases.

(b) For time limitations, requirements for service on other parties, and other details, see Code of Civil Procedure sections 2030.010–2030.410 and the cases construing those sections.

(c) These form interrogatories do not change existing law relating to interrogatories nor do they affect an answering party's right to assert any privilege or make any objection.

Sec. 2. Instructions to the Asking Party

(a) These interrogatories are designed for optional use by parties in unlimited civil cases where the amount demanded exceeds $25,000. Separate interrogatories, Form *Interrogatories—Limited Civil Cases (Economic Litigation)* (form DISC-004), which have no subparts, are designed for use in limited civil cases where the amount demanded is $25,000 or less; however, those interrogatories may also be used in unlimited civil cases.

(b) Check the box next to each interrogatory that you want the answering party to answer. Use care in choosing those interrogatories that are applicable to the case.

(c) You may insert your own definition of **INCIDENT** in Section 4, but only where the action arises from a course of conduct or a series of events occurring over a period of time.

(d) The interrogatories in section 16.0, Defendant's Contentions–Personal Injury, should not be used until the defendant has had a reasonable opportunity to conduct an investigation or discovery of plaintiff's injuries and damages.

(e) Additional interrogatories may be attached.

Sec. 3. Instructions to the Answering Party

(a) An answer or other appropriate response must be given to each interrogatory checked by the asking party.

(b) As a general rule, within 30 days after you are served with these interrogatories, you must serve your responses on the asking party and serve copies of your responses on all other parties to the action who have appeared. See Code of Civil Procedure sections 2030.260–2030.270 for details.

(c) Each answer must be as complete and straightforward as the information reasonably available to you, including the information possessed by your attorneys or agents, permits. If an interrogatory cannot be answered completely, answer it to the extent possible.

(d) If you do not have enough personal knowledge to fully answer an interrogatory, say so, but make a reasonable and good faith effort to get the information by asking other persons or organizations, unless the information is equally available to the asking party.

(e) Whenever an interrogatory may be answered by referring to a document, the document may be attached as an exhibit to the response and referred to in the response. If the document has more than one page, refer to the page and section where the answer to the interrogatory can be found.

(f) Whenever an address and telephone number for the same person are requested in more than one interrogatory, you are required to furnish them in answering only the first interrogatory asking for that information.

(g) If you are asserting a privilege or making an objection to an interrogatory, you must specifically assert the privilege or state the objection in your written response.

(h) Your answers to these interrogatories must be verified, dated, and signed. You may wish to use the following form at the end of your answers:

I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.

_____ _____

(DATE) *(SIGNATURE)*

Sec. 4. Definitions

Words in **BOLDFACE CAPITALS** in these interrogatories are defined as follows:

(a) *(Check one of the following)*:

☐ (1) **INCIDENT** includes the circumstances and events surrounding the alleged accident, injury, or other occurrence or breach of contract giving rise to this action or proceeding.

Form Approved for Optional Use
Judicial Council of California
DISC-001 [Rev. January 1, 2008]

FORM INTERROGATORIES—GENERAL

CEB

Code of Civil Procedure,
§§ 2030.010-2030.410, 2033.710
www.courtinfo.ca.gov

Print

☐ (2) **INCIDENT** means *(insert your definition here or on a separate, attached sheet labeled "Sec. 4(a)(2)"):*

(b) YOU OR ANYONE ACTING ON YOUR BEHALF includes you, your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf.

(c) **PERSON** includes a natural person, firm, association, organization, partnership, business, trust, limited liability company, corporation, or public entity.

(d) **DOCUMENT** means a writing, as defined in Evidence Code section 250, and includes the original or a copy of handwriting, typewriting, printing, photostats, photographs, electronically stored information, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(e) **HEALTH CARE PROVIDER** includes any **PERSON** referred to in Code of Civil Procedure section 667.7(e)(3).

(f) **ADDRESS** means the street address, including the city, state, and zip code.

Sec. 5. Interrogatories

The following interrogatories have been approved by the Judicial Council under Code of Civil Procedure section 2033.710:

CONTENTS

1.0 Identity of Persons Answering These Interrogatories
2.0 General Background Information—Individual
3.0 General Background Information—Business Entity
4.0 Insurance
5.0 *[Reserved]*
6.0 Physical, Mental, or Emotional Injuries
7.0 Property Damage
8.0 Loss of Income or Earning Capacity
9.0 Other Damages
10.0 Medical History
11.0 Other Claims and Previous Claims
12.0 Investigation—General
13.0 Investigation—Surveillance
14.0 Statutory or Regulatory Violations
15.0 Denials and Special or Affirmative Defenses
16.0 Defendant's Contentions Personal Injury
17.0 Responses to Request for Admissions
18.0 *[Reserved]*
19.0 *[Reserved]*
20.0 How the Incident Occurred—Motor Vehicle
25.0 *[Reserved]*
30.0 *[Reserved]*
40.0 *[Reserved]*
50.0 Contract
60.0 *[Reserved]*
70.0 Unlawful Detainer *[See separate form DISC-003]*
101.0 Economic Litigation *[See separate form DISC-004]*
200.0 Employment Law *[See separate form DISC-002]*
Family Law *[See separate form FL-145]*

1.0 Identity of Persons Answering These Interrogatories

☐ 1.1 State the name, **ADDRESS,** telephone number, and relationship to you of each **PERSON** who prepared or assisted in the preparation of the responses to these interrogatories. (*Do not identify anyone who simply typed or reproduced the responses.)*

2.0 General Background Information—individual

☐ 2.1 State:
(a) your name;
(b) every name you have used in the past; and
(c) the dates you used each name.

☐ 2.2 State the date and place of your birth.

☐ 2.3 At the time of the **INCIDENT,** did you have a driver's license? If so state:
(a) the state or other issuing entity;
(b) the license number and type;
(c) the date of issuance; and
(d) all restrictions.

☐ 2.4 At the time of the **INCIDENT,** did you have any other permit or license for the operation of a motor vehicle? If so, state:
(a) the state or other issuing entity;
(b) the license number and type;
(c) the date of issuance; and
(d) all restrictions.

☐ 2.5 State:
(a) your present residence **ADDRESS;**
(b) your residence **ADDRESSES** for the past five years; and
(c) the dates you lived at each **ADDRESS.**

☐ 2.6 State:
(a) the name, **ADDRESS,** and telephone number of your present employer or place of self-employment; and
(b) the name, **ADDRESS,** dates of employment, job title, and nature of work for each employer or self-employment you have had from five years before the **INCIDENT** until today.

☐ 2.7 State:
(a) the name and **ADDRESS** of each school or other academic or vocational institution you have attended, beginning with high school;
(b) the dates you attended;
(c) the highest grade level you have completed; and
(d) the degrees received.

☐ 2.8 Have you ever been convicted of a felony? If so, for each conviction state:
(a) the city and state where you were convicted;
(b) the date of conviction;
(c) the offense; and
(d) the court and case number.

☐ 2.9 Can you speak English with ease? If not, what language and dialect do you normally use?

☐ 2.10 Can you read and write English with ease? If not, what language and dialect do you normally use?

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☐ 2.11 At the time of the **INCIDENT** were you acting as an agent or employee for any **PERSON?** If so, state:
(a) the name, **ADDRESS,** and telephone number of that **PERSON:** and
(b) a description of your duties.

☐ 2.12 At the time of the **INCIDENT** did you or any other person have any physical, emotional, or mental disability or condition that may have contributed to the occurrence of the **INCIDENT?** If so, for each person state:
(a) the name, **ADDRESS,** and telephone number;
(b) the nature of the disability or condition; and
(c) the manner in which the disability or condition contributed to the occurrence of the **INCIDENT.**

☐ 2.13 Within 24 hours before the **INCIDENT** did you or any person involved in the **INCIDENT** use or take any of the following substances: alcoholic beverage, marijuana, or other drug or medication of any kind (prescription or not)? If so, for each person state:
(a) the name, **ADDRESS,** and telephone number;
(b) the nature or description of each substance;
(c) the quantity of each substance used or taken;
(d) the date and time of day when each substance was used or taken;
(e) the **ADDRESS** where each substance was used or taken;
(f) the name, **ADDRESS,** and telephone number of each person who was present when each substance was used or taken; and
(g) the name, **ADDRESS,** and telephone number of any **HEALTH CARE PROVIDER** who prescribed or furnished the substance and the condition for which it was prescribed or furnished.

3.0 General Background Information—Business Entity

☐ 3.1 Are you a corporation? If so, state:
(a) the name stated in the current articles of incorporation;
(b) all other names used by the corporation during the past 10 years and the dates each was used;
(c) the date and place of incorporation;
(d) the **ADDRESS** of the principal place of business; and
(e) whether you are qualified to do business in California.

☐ 3.2 Are you a partnership? If so, state:
(a) the current partnership name;
(b) all other names used by the partnership during the past 10 years and the dates each was used;
(c) whether you are a limited partnership and, if so, under the laws of what jurisdiction;
(d) the name and **ADDRESS** of each general partner; and
(e) the **ADDRESS** of the principal place of business.

☐ 3.3 Are you a limited liability company? If so, state:
(a) the name stated in the current articles of organization;
(b) all other names used by the company during the past 10 years and the date each was used;
(c) the date and place of filing of the articles of organization;
(d) the **ADDRESS** of the principal place of business; and
(e) whether you are qualified to do business in California.

☐ 3.4 Are you a joint venture? If so, state:
(a) the current joint venture name;
(b) all other names used by the joint venture during the past 10 years and the dates each was used;
(c) the name and **ADDRESS** of each joint venturer; and
(d) the **ADDRESS** of the principal place of business.

☐ 3.5 Are you an unincorporated association?
If so, state:
(a) the current unincorporated association name;
(b) all other names used by the unincorporated association during the past 10 years and the dates each was used; and
(c) the **ADDRESS** of the principal place of business.

☐ 3.6 Have you done business under a fictitious name during the past 10 years? If so, for each fictitious name state:
(a) the name;
(b) the dates each was used;
(c) the state and county of each fictitious name filing; and
(d) the **ADDRESS** of the principal place of business.

☐ 3.7 Within the past five years has any public entity registered or licensed your business? If so, for each license or registration:
(a) identify the license or registration;
(b) state the name of the public entity; and
(c) state the dates of issuance and expiration.

4.0 Insurance

☐ 4.1 At the time of the **INCIDENT,** was there in effect any policy of insurance through which you were or might be insured in any manner (for example, primary, pro-rata, or excess liability coverage or medical expense coverage) for the damages, claims, or actions that have arisen out of the **INCIDENT?** If so, for each policy state:
(a) the kind of coverage;
(b) the name and **ADDRESS** of the insurance company;
(c) the name, **ADDRESS,** and telephone number of each named insured;
(d) the policy number;
(e) the limits of coverage for each type of coverage contained in the policy;
(f) whether any reservation of rights or controversy or coverage dispute exists between you and the insurance company; and
(g) the name, **ADDRESS,** and telephone number of the custodian of the policy.

☐ 4.2 Are you self-insured under any statute for the damages, claims, or actions that have arisen out of the **INCIDENT?** If so, specify the statute.

5.0 *[Reserved]*

6.0 Physical, Mental, or Emotional Injuries

☐ 6.1 Do you attribute any physical, mental, or emotional injuries to the **INCIDENT?** *(If your answer is "no," do not answer interrogatories 6.2 through 6.7).*

☐ 6.2 Identify each injury you attribute to the **INCIDENT** and the area of your body affected.

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☐ 6.3 Do you still have any complaints that you attribute to the **INCIDENT?** If so, for each complaint state:
(a) a description;
(b) whether the complaint is subsiding, remaining the same, or becoming worse; and
(c) the frequency and duration.

☐ 6.4 Did you receive any consultation or examination (except from expert witnesses covered by Code of Civil Procedure sections 2034.210–2034.310) or treatment from a **HEALTH CARE PROVIDER** for any injury you attribute to the **INCIDENT?** If so, for each **HEALTH CARE PROVIDER** state:
(a) the name, **ADDRESS,** and telephone number;
(b) the type of consultation, examination, or treatment provided;
(c) the dates you received consultation, examination, or treatment; and
(d) the charges to date.

☐ 6.5 Have you taken any medication, prescribed or not, as a result of injuries that you attribute to the **INCIDENT?** If so, for each medication state:
(a) the name;
(b) the **PERSON** who prescribed or furnished it;
(c) the date it was prescribed or furnished;
(d) the dates you began and stopped taking it; and
(e) the cost to date.

☐ 6.6 Are there any other medical services necessitated by the injuries that you attribute to the **INCIDENT** that were not previously listed (for example, ambulance, nursing, prosthetics)? If so, for each service state:
(a) the nature;
(b) the date;
(c) the cost; and
(d) the name, **ADDRESS,** and telephone number of each provider.

☐ 6.7 Has any **HEALTH CARE PROVIDER** advised that you may require future or additional treatment for any injuries that you attribute to the **INCIDENT?** If so, for each injury state:
(a) the name and **ADDRESS** of each **HEALTH CARE PROVIDER;**
(b) the complaints for which the treatment was advised; and
(c) the nature, duration, and estimated cost of the treatment.

7.0 Property Damage

☐ 7.1 Do you attribute any loss of or damage to a vehicle or other property to the **INCIDENT**? If so, for each item of property:
(a) describe the property;
(b) describe the nature and location of the damage to the property;
(c) state the amount of damage you are claiming for each item of property and how the amount was calculated; and
(d) if the property was sold, state the name, **ADDRESS,** and telephone number of the seller, the date of sale, and the sale price.

☐ 7.2 Has a written estimate or evaluation been made for any item of property referred to in your answer to the preceding interrogatory? If so, for each estimate or evaluation state:
(a) the name, **ADDRESS,** and telephone number of the **PERSON** who prepared it and the date prepared;
(b) the name, **ADDRESS,** and telephone number of each **PERSON** who has a copy of it; and
(c) the amount of damage stated.

☐ 7.3 Has any item of property referred to in your answer to interrogatory 7.1 been repaired? If so, for each item state:
(a) the date repaired;
(b) a description of the repair;
(c) the repair cost;
(d) the name, **ADDRESS,** and telephone number of the **PERSON** who repaired it;
(e) the name, **ADDRESS,** and telephone number of the **PERSON** who paid for the repair.

8.0 Loss of Income or Earning Capacity

☐ 8.1 Do you attribute any loss of income or earning capacity to the **INCIDENT**? *(If your answer is "no," do not answer interrogatories 8.2 through 8.8).*

☐ 8.2 State:
(a) the nature of your work;
(b) your job title at the time of the **INCIDENT;** and
(c) the date your employment began.

☐ 8.3 State the last date before the **INCIDENT** that you worked for compensation.

☐ 8.4 State your monthly income at the time of the **INCIDENT** and how the amount was calculated.

☐ 8.5 State the date you returned to work at each place of employment following the **INCIDENT.**

☐ 8.6 State the dates you did not work and for which you lost income as a result of the **INCIDENT.**

☐ 8.7 State the total income you have lost to date as a result of the **INCIDENT** and how the amount was calculated.

☐ 8.8 Will you lose income in the future as a result of the **INCIDENT?** If so, state:
(a) the facts upon which you base this contention;
(b) an estimate of the amount;
(c) an estimate of how long you will be unable to work; and
(d) how the claim for future income is calculated.

9.0 Other Damages

☐ 9.1 Are there any other damages that you attribute to the **INCIDENT?** If so, for each item of damage state:
(a) the nature;
(b) the date it occurred;
(c) the amount; and
(d) the name, **ADDRESS,** and telephone number of each **PERSON** to whom an obligation was incurred.

☐ 9.2 Do any **DOCUMENTS** support the existence or amount of any item of damages claimed in interrogatory 9.1? If so, describe each document and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT.**

10.0 Medical History

☐ 10.1 At any time before the **INCIDENT** did you have complaints or injuries that involved the same part of your body claimed to have been injured in the **INCIDENT?** If so, for each state:
(a) a description of the complaint or injury;
(b) the dates it began and ended; and
(c) the name, **ADDRESS,** and telephone number of each **HEALTH CARE PROVIDER** whom you consulted or who examined or treated you.

☐ 10.2 List all physical, mental, and emotional disabilities you had immediately before the **INCIDENT.** *(You may omit mental or emotional disabilities unless you attribute any mental or emotional injury to the **INCIDENT.**)*

☐ 10.3 At any time after the **INCIDENT,** did you sustain injuries of the kind for which you are now claiming damages? If so, for each incident giving rise to an injury state:
(a) the date and the place it occurred;
(b) the name, **ADDRESS,** and telephone number of any other **PERSON** involved;
(c) the nature of any injuries you sustained;
(d) the name, **ADDRESS,** and telephone number of each **HEALTH CARE PROVIDER** who you consulted or who examined or treated you; and
(e) the nature of the treatment and its duration.

11.0 Other Claims and Previous Claims

☐ 11.1 Except for this action, in the past 10 years have you filed an action or made a written claim or demand for compensation for your personal injuries? If so, for each action, claim, or demand state:
(a) the date, time, and place and location (closest street **ADDRESS** or intersection) of the **INCIDENT** giving rise to the action, claim, or demand;
(b) the name, **ADDRESS,** and telephone number of each **PERSON** against whom the claim or demand was made or the action filed;
(c) the court, names of the parties, and case number of any action filed;
(d) the name, **ADDRESS,** and telephone number of any attorney representing you;
(e) whether the claim or action has been resolved or is pending; and
(f) a description of the injury.

☐ 11.2 In the past 10 years have you made a written claim or demand for workers' compensation benefits? If so, for each claim or demand state:
(a) the date, time, and place of the **INCIDENT** giving rise to the claim;
(b) the name, **ADDRESS,** and telephone number of your employer at the time of the injury;
(c) the name, **ADDRESS,** and telephone number of the workers' compensation insurer and the claim number;
(d) the period of time during which you received workers' compensation benefits;
(e) a description of the injury;
(f) the name, **ADDRESS,** and telephone number of any **HEALTH CARE PROVIDER** who provided services; and
(g) the case number at the Workers' Compensation Appeals Board.

12.0 Investigation—General

☐ 12.1 State the name, **ADDRESS,** and telephone number of each individual:
(a) who witnessed the **INCIDENT** or the events occurring immediately before or after the **INCIDENT;**
(b) who made any statement at the scene of the **INCIDENT;**
(c) who heard any statements made about the **INCIDENT** by any individual at the scene; and
(d) who **YOU OR ANYONE ACTING ON YOUR BEHALF** claim has knowledge of the **INCIDENT** (except for expert witnesses covered by Code of Civil Procedure section 2034).

☐ 12.2 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** interviewed any individual concerning the **INCIDENT?** If so, for each individual state:
(a) the name, **ADDRESS,** and telephone number of the individual interviewed;
(b) the date of the interview; and
(c) the name, **ADDRESS,** and telephone number of the **PERSON** who conducted the interview.

☐ 12.3 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** obtained a written or recorded statement from any individual concerning the **INCIDENT?** If so, for each statement state:
(a) the name, **ADDRESS,** and telephone number of the individual from whom the statement was obtained;
(b) the name, **ADDRESS,** and telephone number of the individual who obtained the statement;
(c) the date the statement was obtained; and
(d) the name, **ADDRESS,** and telephone number of each **PERSON** who has the original statement or a copy.

Print

☐ 12.4 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** know of any photographs, films, or videotapes depicting any place, object, or individual concerning the **INCIDENT** or plaintiff's injuries? If so, state:

(a) the number of photographs or feet of film or videotape;
(b) the places, objects, or persons photographed, filmed, or videotaped;
(c) the date the photographs, films, or videotapes were taken;
(d) the name, **ADDRESS,** and telephone number of the individual taking the photographs, films, or videotapes; and
(e) the name, **ADDRESS,** and telephone number of each **PERSON** who has the original or a copy of the photographs, films, or videotapes.

☐ 12.5 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** know of any diagram, reproduction, or model of any place or thing (except for items developed by expert witnesses covered by Code of Civil Procedure sections 2034.210–2034.310) concerning the **INCIDENT?** If so, for each item state:

(a) the type (i.e., diagram, reproduction, or model);
(b) the subject matter; and
(c) the name, **ADDRESS,** and telephone number of each **PERSON** who has it.

☐ 12.6 Was a report made by any **PERSON** concerning the **INCIDENT?** If so, state:

(a) the name, title, identification number, and employer of the **PERSON** who made the report;
(b) the date and type of report made;
(c) the name, **ADDRESS,** and telephone number of the **PERSON** for whom the report was made; and
(d) the name, **ADDRESS,** and telephone number of each **PERSON** who has the original or a copy of the report.

☐ 12.7 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** inspected the scene of the **INCIDENT?** If so, for each inspection state:

(a) the name, **ADDRESS,** and telephone number of the individual making the inspection (except for expert witnesses covered by Code of Civil Procedure sections 2034.210–2034.310); and
(b) the date of the inspection.

13.0 Investigation—Surveillance

☐ 13.1 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** conducted surveillance of any individual involved in the **INCIDENT** or any party to this action? If so, for each surveillance state:

(a) the name, **ADDRESS,** and telephone number of the individual or party;
(b) the time, date, and place of the surveillance;
(c) the name, **ADDRESS,** and telephone number of the individual who conducted the surveillance; and
(d) the name, **ADDRESS,** and telephone number of each **PERSON** who has the original or a copy of any surveillance photograph, film, or videotape.

☐ 13.2 Has a written report been prepared on the surveillance? If so, for each written report state:

(a) the title;
(b) the date;
(c) the name, **ADDRESS,** and telephone number of the individual who prepared the report; and
(d) the name, **ADDRESS,** and telephone number of each **PERSON** who has the original or a copy.

14.0 Statutory or Regulatory Violations

☐ 14.1 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** contend that any **PERSON** involved in the **INCIDENT** violated any statute, ordinance, or regulation and that the violation was a legal (proximate) cause of the **INCIDENT?** If so, identify the name, **ADDRESS,** and telephone number of each **PERSON** and the statute, ordinance, or regulation that was violated.

☐ 14.2 Was any **PERSON** cited or charged with a violation of any statute, ordinance, or regulation as a result of this **INCIDENT?** If so, for each **PERSON** state:

(a) the name, **ADDRESS,** and telephone number of the **PERSON;**
(b) the statute, ordinance, or regulation allegedly violated;
(c) whether the **PERSON** entered a plea in response to the citation or charge and, if so, the plea entered; and
(d) the name and **ADDRESS** of the court or administrative agency, names of the parties, and case number.

15.0 Denials and Special or Affirmative Defenses

☐ 15.1 Identify each denial of a material allegation and each special or affirmative defense in your pleadings and for each:

(a) state all facts upon which you base the denial or special or affirmative defense;
(b) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of those facts; and
(c) identify all **DOCUMENTS** and other tangible things that support your denial or special or affirmative defense, and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT.**

16.0 Defendant's Contentions—Personal Injury

☐ 16.1 Do you contend that any **PERSON,** other than you or plaintiff, contributed to the occurrence of the **INCIDENT** or the injuries or damages claimed by plaintiff? If so, for each **PERSON:**

(a) state the name, **ADDRESS,** and telephone number of the **PERSON;**
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts; and
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.2 Do you contend that plaintiff was not injured in the **INCIDENT?** If so:

(a) state all facts upon which you base your contention;
(b) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts; and
(c) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

Print

☐ 16.3 Do you contend that the injuries or the extent of the injuries claimed by plaintiff as disclosed in discovery proceedings thus far in this case were not caused by the **INCIDENT**? If so, for each injury:
(a) identify it;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts; and
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.4 Do you contend that any of the services furnished by any **HEALTH CARE PROVIDER** claimed by plaintiff in discovery proceedings thus far in this case were not due to the **INCIDENT**? If so:
(a) identify each service;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts; and
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.5 Do you contend that any of the costs of services furnished by any **HEALTH CARE PROVIDER** claimed as damages by plaintiff in discovery proceedings thus far in this case were not necessary or unreasonable? If so:
(a) identify each cost;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts; and
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.6 Do you contend that any part of the loss of earnings or income claimed by plaintiff in discovery proceedings thus far in this case was unreasonable or was not caused by the **INCIDENT**? If so:
(a) identify each part of the loss;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts; and
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.7 Do you contend that any of the property damage claimed by plaintiff in discovery Proceedings thus far in this case was not caused by the **INCIDENT**? If so:
(a) identify each item of property damage;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts; and
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.8 Do you contend that any of the costs of repairing the property damage claimed by plaintiff in discovery proceedings thus far in this case were unreasonable? If so:
(a) identify each cost item;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of the facts; and
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.9 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** have any **DOCUMENT** (for example, insurance bureau index reports) concerning claims for personal injuries made before or after the **INCIDENT** by a plaintiff in this case? If so, for each plaintiff state:
(a) the source of each **DOCUMENT;**
(b) the date each claim arose;
(c) the nature of each claim; and
(d) the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT.**

☐ 16.10 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** have any **DOCUMENT** concerning the past or present physical, mental, or emotional condition of any plaintiff in this case from a **HEALTH CARE PROVIDER** not previously identified (except for expert witnesses covered by Code of Civil Procedure sections 2034.210–2034.310)? If so, for each plaintiff state:
(a) the name, **ADDRESS,** and telephone number of each **HEALTH CARE PROVIDER;**
(b) a description of each **DOCUMENT**; and
(c) the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT.**

17.0 Responses to Request for Admissions

☐ 17.1 Is your response to each request for admission served with these interrogatories an unqualified admission? If not, for each response that is not an unqualified admission:
(a) state the number of the request;
(b) state all facts upon which you base your response;
(c) state the names, **ADDRESSES,** and telephone numbers of all **PERSONS** who have knowledge of those facts; and
(d) identify all **DOCUMENTS** and other tangible things that support your response and state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

18.0 *[Reserved]*

19.0 *[Reserved]*

20.0 How the Incident Occurred—Motor Vehicle

☐ 20.1 State the date, time, and place of the **INCIDENT** (closest street **ADDRESS** or intersection).

☐ 20.2 For each vehicle involved in the **INCIDENT,** state:
(a) the year, make, model, and license number;
(b) the name, ADDRESS, and telephone number of the driver;

Print

(c) the name, **ADDRESS,** and telephone number of each occupant other than the driver;
(d) the name, **ADDRESS,** and telephone number of each registered owner;
(e) the name, **ADDRESS,** and telephone number of each lessee;
(f) the name, **ADDRESS,** and telephone number of each owner other than the registered owner or lien holder; and
(g) the name of each owner who gave permission or consent to the driver to operate the vehicle.

☐ 20.3 State the **ADDRESS** and location where your trip began and the **ADDRESS** and location of your destination.

☐ 20.4 Describe the route that you followed from the beginning of your trip to the location of the **INCIDENT,** and state the location of each stop, other than routine traffic stops, during the trip leading up to the **INCIDENT.**

☐ 20.5 State the name of the street or roadway, the lane of travel, and the direction of travel of each vehicle involved in the **INCIDENT** for the 500 feet of travel before the **INCIDENT.**

☐ 20.6 Did the **INCIDENT** occur at an intersection? If so, describe all traffic control devices, signals, or signs at the intersection.

☐ 20.7 Was there a traffic signal facing you at the time of the **INCIDENT?** If so, state:
(a) your location when you first saw it;
(b) the color;
(c) the number of seconds it had been that color; and
(d) whether the color changed between the time you first saw it and the **INCIDENT.**

☐ 20.8 State how the **INCIDENT** occurred, giving the speed, direction, and location of each vehicle involved:
(a) just before the **INCIDENT;**
(b) at the time of the **INCIDENT;** and (c) just after the **INCIDENT.**

☐ 20.9 Do you have information that a malfunction or defect in a vehicle caused the **INCIDENT**? If so:
(a) identify the vehicle;
(b) identify each malfunction or defect;
(c) state the name, **ADDRESS,** and telephone number of each **PERSON** who is a witness to or has information about each malfunction or defect; and
(d) state the name, **ADDRESS,** and telephone number of each **PERSON** who has custody of each defective part.

☐ 20.10 Do you have information that any malfunction or defect in a vehicle contributed to the injuries sustained in the **INCIDENT?** If so:
(a) identify the vehicle;
(b) identify each malfunction or defect;
(c) state the name, **ADDRESS,** and telephone number of each **PERSON** who is a witness to or has information about each malfunction or defect; and
(d) state the name, **ADDRESS,** and telephone number of each **PERSON** who has custody of each defective part.

☐ 20.11 State the name, **ADDRESS,** and telephone number of each owner and each **PERSON** who has had possession since the **INCIDENT** of each vehicle involved in the **INCIDENT.**

25.0 *[Reserved]*

30.0 *[Reserved]*

40.0 *[Reserved]*

50.0 Contract

☐ 50.1 For each agreement alleged in the pleadings:
(a) identify each **DOCUMENT** that is part of the agreement and for each state the name, **ADDRESS,** and telephone number of each **PERSON** who has the **DOCUMENT;**
(b) state each part of the agreement not in writing, the name, **ADDRESS,** and telephone number of each **PERSON** agreeing to that provision, and the date that part of the agreement was made;
(c) identify all **DOCUMENTS** that evidence any part of the agreement not in writing and for each state the name, **ADDRESS,** and telephone number of each **PERSON** who has the **DOCUMENT;**
(d) identify all **DOCUMENTS** that are part of any modification to the agreement, and for each state the name, **ADDRESS,** and telephone number of each **PERSON** who has the **DOCUMENT;**
(e) state each modification not in writing, the date, and the name, **ADDRESS,** and telephone number of each **PERSON** agreeing to the modification, and the date the modification was made;
(f) identify all **DOCUMENTS** that evidence any modification of the agreement not in writing and for each state the name, **ADDRESS,** and telephone number of each **PERSON** who has the **DOCUMENT.**

☐ 50.2 Was there a breach of any agreement alleged in the pleadings? If so, for each breach describe and give the date of every act or omission that you claim is the breach of the agreement.

☐ 50.3 Was performance of any agreement alleged in the pleadings excused? If so, identify each agreement excused and state why performance was excused.

☐ 50.4 Was any agreement alleged in the pleadings terminated by mutual agreement, release, accord and satisfaction, or novation? If so, identify each agreement terminated, the date of termination, and the basis of the termination.

☐ 50.5 Is any agreement alleged in the pleadings unenforceable? If so, identify each unenforceable agreement and state why it is unenforceable.

☐ 50.6 Is any agreement alleged in the pleadings ambiguous? If so, identify each ambiguous agreement and state why it is ambiguous.

60.0 *[Reserved]*

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Source: Civil Litigation/California Civil Discovery Practice/7 Interrogatories/§7.143 B. Form: Declaration Supporting Request for Additional Discovery

§7.143 B. Form: Declaration Supporting Request for Additional Discovery

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S REQUEST**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FOR ADDITIONAL DISCOVERY**
	)	

_ _[*Name*]_ _ **declares:**

1. I am _ _[*a party to this action or proceeding appearing in propria persona/presently the attorney for* _ _[*name*]_ _, *a party to this action or proceeding*]_ _**.**

2. I am propounding to _ _[*name*]_ _ **the attached set of interrogatories.**

3. This set of interrogatories will cause the total number of specially prepared interrogatories propounded to the party to whom they are directed to exceed the number of specially prepared interrogatories permitted by Code of Civil Procedure §2030.030.

4. I have previously propounded a total of _ _[*number*]_ _ **interrogatories to this party, of which** _ _[*number*]_ _ **interrogatories were not official form interrogatories.**

5. This set of interrogatories contains a total of _ _[*number*]_ _ **specially prepared interrogatories.**

6. I am familiar with the issues and previous discovery conducted by all the parties in this case.

7. I have personally examined each of the questions in this set of interrogatories.

8. The number of questions is warranted under Code of Civil Procedure §2030.040(a) because _ _[*state each factor described in CCP §2030.040(a) that is relied on and explain reasons why any factor applies to lawsuit*]_ _**.**

9. None of the questions in this set of interrogatories is being propounded for any improper purpose, such as to harass the party (or the attorney for the party) to whom it is directed or to cause unnecessary delay or needless increase in the cost of litigation.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original; copies for service (one for each attorney of record and unrepresented party); office copies.
Comment: The declaration must be attached to each set of interrogatories containing more than 35 interrogatories.

See CCP §2030.050.

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Source: Civil Litigation/California Civil Discovery Practice/7 Interrogatories/§7.144 C. Form: Format of Specially Prepared Interrogatories

§7.144 C. Form: Format of Specially Prepared Interrogatories

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**INTERROGATORIES SET NO.** _ _[*NUMBER*]_ _ **(Nos. _ _ to _ _)**
_ _[*Name(s)*]_ _, **Defendant(s)**	

PROPOUNDING PARTY: _ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _

SET NO: _ _

RESPONDING PARTY: _ _[*Defendant/Plaintiff*]_ _, _ _[*name*]_ _

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, **requests that** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _, **answer the following interrogatories, set no.** _ _[*number*]_ _, **under oath within 30 days from the date of service, under Code of Civil Procedure §§2030.010-2030.410.**

[*Add if more than one party to answer*]

_ _[*Plaintiff/Defendant*]_ _ **requests that either the answers to these interrogatories be signed by all** _ _[*defendants/plaintiffs*]_ _ **or that each of them sign a separate set of answers on** _ _[*his/her*]_ _ **own behalf.**

[*Continue*]

Interrogatory no. _ _[*number*]_ _**:** _ _[*Set out interrogatory.*]_ _

Interrogatory no. _ _[*number*]_ _**:** _ _[*Set out interrogatory.*]_ _

Date: _ _ _ _ _ _

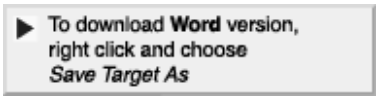
__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

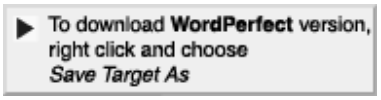
Copies: Original (retain, with original proof of service, for possible filing with court); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: There is a presumptive limit of 35 on the number of specially prepared interrogatories that can be propounded, unless a declaration for additional discovery is attached. See §§7.10-7.11.

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§7.145 D. Form: Letter to Client Accompanying Interrogatories





Re: _ _[*Title of case*]_ _

Dear _ _[*name*]_ _:

We are enclosing a copy of interrogatories served by the attorneys for _ _[*e.g., plaintiff*]_ _ in the above action. The law requires that you answer these questions fully, accurately, and in detail.

We have placed an asterisk next to the questions that you should answer. We will answer the others on your behalf. Please go over each designated question carefully and answer it as best you can. If the question calls for data from records or other writings in your possession or under your control (such as business records), locate and use these records or writings in preparing your answer. Do not guess.

Please set out your answers on a separate sheet of paper and return them to us with the interrogatories. We will then review your answers, supplement them with information in our file, and _ _[*send the final answers to you for your signature/contact you for an appointment to discuss the matter further*]_ _. When completed, the answers will become part of the record in your case.

The law requires that these answers must be served within 30 days. Therefore, to give us time to prepare your answers in final form, please return them to us within ten (10) days from the date of this letter.

If you have any problems or questions in preparing these answers, please telephone this office.

Very truly yours,

__[*Signature*]__
_ _[*Typed name*]_ _

Comment: To minimize any anxiety that may develop when a legal document is served on a lay person, the cover letter should be simple, brief, and reassuring. It is helpful to the client also to indicate on the interrogatories only the questions he or she should answer. Questions that are couched in legal verbiage or that request conclusions of law, for example, should be answered by the attorney and should not be the concern of the client. The attorney who makes this clear in the letter helps put the client at ease and may avoid having to do so later on the telephone.

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Source: Civil Litigation/California Civil Discovery Practice/7 Interrogatories/§7.146 E. Form: Response to Interrogatories; Verification

§7.146 E. Form: Response to Interrogatories; Verification

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**RESPONSE TO INTERROGATORIES**
_ _[*Name(s)*]_ _, **Defendant(s)**	

RESPONDING PARTY: _ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _

SET NO: _ _[*Number*]_ _

PROPOUNDING PARTY: _ _[*Defendant/Plaintiff*]_ _, _ _[*name*]_ _

_ _[*Response/Supplemental Response*]_ _

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, _ _[*responds/makes a supplemental response*]_ _ **to interrogatories, set no.** _ _[*number*]_ _, **served on** _ _[*him/her/it*]_ _ **by** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _, **as follows:**

[*Option 1: Answer to interrogatory*]

Response no.: _ _[*State answer to interrogatory.*]_ _

[*Option 2: Objection to interrogatory*]

Response no.: _ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, **objects to this interrogatory on the grounds that** _ _[*state all grounds for objection, e.g., the question calls for information that is protected by the attorney-client privilege and is irrelevant to the subject matter of this action*]_ _.

[*Continue with remaining responses*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

VERIFICATION

I am the _ _[*e.g., plaintiff*]_ _ **in this action. I have read the above responses to interrogatories, set no.** _ _[*number*]_ _, **and know their contents. The responses are true of my own knowledge except for matters stated on my information and belief, and as to those matters, I believe them to be true.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__

_ _[*Typed name*]_ _

Copies: Original (to initiating party, with original proof of service affixed); copies for service (one for each party); office copies.

Comment: CCP §2030.250(a) requires that the responses to interrogatories be made under oath and that the responses be signed by the "party to whom the interrogatories are directed." On signature and verification, see §§7.60-7.63.

The attorney's signature on the response to interrogatories form is required only if the response contains an objection. CCP §2030.250(c). Thus, if there are no objections, the attorney's signature is not needed. If the response consists only of objections, the party need not sign the form. CCP §2030.250(a).

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F. Motion to Compel Answers or Further Answers to Interrogatories and for Sanctions

§7.147 1. Form: Notice of Motion and Motion for Order Compelling Answers or Further Answers to Interrogatories and for Sanctions

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION FOR ORDER COMPELLING** _ _[*ANSWERS/ FURTHER ANSWERS*]_ _ **TO INTERROGATORIES (CCP §2030.290(b)** _ _[*CCP §2030.300(d)*]_ _**) AND FOR SANCTIONS (CCP §§2023.030, 2030.290(c)); SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*NAME*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*name of moving party*]_ _ **moves the Court for an order compelling** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _**, to serve** _ _[*answers/further answers*]_ _ **to interrogatories** _ _[*set no.*]_ _ _ _[*nos.*]_ _**, which were served on** _ _[*defendant/plaintiff*]_ _ **on** _ _[*date*]_ _. _ _[*Name of moving party*]_ _ **further moves the Court for an order that** _ _[*defendant/plaintiff/attorney*]_ _ _ _[*name*]_ _ **pay a monetary sanction of $**_ _[*amount*]_ _ **if this motion is unsuccessfully opposed.**

This motion is made under Code of Civil Procedure §2030.290(b), _ _[*CCP §2030.300*]_ _ **and CCP §§2023.010-2023.040 on the grounds that (1) the question(s)** _ _[*is/are*]_ _ **relevant to the subject matter of this action and** _ _[*are not/is not/do not relate to/does not relate to*]_ _ **privileged matters and**

[*Option 1: No answers or response served*]

(2) no _ _[*answers have/response has*]_ _ **been served as required by law.**

[*Option 2: Inadequate answers served*]

(2) the answers served are _ _[*e.g., incomplete, not responsive, evasive, ambiguous*]_ _ **in the particulars set forth in the separate statement of interrogatories filed and served with this motion.**

[*Option 3: Objections should be overruled*]

(2) the objections served should be overruled for the reasons set forth in the supporting memorandum and supporting declaration of _ _[*name*]_ _, filed and served with this motion.

[*Continue*]

This motion is made on the further grounds that discovery should be required and the refusal or failure to permit discovery was without substantial justification.

This motion is based on this notice; the pleadings, records, and files in this action; and the attached supporting memorandum, supporting declaration of _ _[*name*]_ _,

[*Add if evidence to be presented*]

and any evidence presented at the hearing.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: "Estimated time" of the hearing should be specified in the caption if required by local rules.

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Source: Civil Litigation/California Civil Discovery Practice/7 Interrogatories/§7.148 2. Form: Memorandum Supporting Motion for Order Compelling Answers (or Further Answers) to Interrogatories and for Sanctions

§7.148 2. Form: Memorandum Supporting Motion for Order Compelling Answers (or Further Answers) to Interrogatories and for Sanctions

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**MEMORANDUM SUPPORTING _ _[*NAME*]_ _'S MOTION FOR ORDER COMPELLING _ _[*FURTHER*]_ _ ANSWERS TO INTERROGATORIES AND FOR SANCTIONS**
_ _[*Name(s)*]_ _, **Defendant(s)**	
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _
	Action filed: _ _[*date*]_ _
	Trial date: _ _[*if set*]_ _

FACTS: _ _[*Briefly state facts underlying the motion.*]_ _

[*Option 1: Motion to compel if no response*]

The Court has the power to compel answers when there is a refusal or failure to respond. Code of Civil Procedure §2030.290.

[*Option 2: Motion to compel further response*]

The Court has the power under Code of Civil Procedure §2030.300(a) to compel further response when:

[*Choose all of the following bases that are applicable*]

An answer is evasive or incomplete;

Production of documents under Code of Civil Procedure §2030.230 is unwarranted or the required specification of those documents is inadequate; and/or

An objection to an interrogatory is without merit or too general.

[*Continue*]

When the refusal or failure to respond constitutes a misuse of discovery as defined in Code of Civil Procedure §2023.010, the Court may order the refusing or failing party or attorney advising refusal or failure, or both, to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney fees. CCP §2023.030(a).

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: All supporting memorandums should contain a reference to CCP §§127.5, 2023.010-2023.040, 2030.290(c), and 2030.300(d). On requirements when sanctions are requested in discovery matters, see CCP §2023.040. The memorandum must contain a statement of facts; a concise statement of the law; evidence and arguments supporting the motion; and discussion of supporting statutes, cases, and textbooks. Cal Rules of Ct 3.1113(b). If the memorandum exceeds 10 pages, it must include a table of contents and table of authorities. Cal Rules of Ct 3.1113(f). If the memorandum exceeds 15 pages, it must include an opening summary of argument. Cal Rules of Ct 3.1113(f). On page limitations on supporting memorandums, see Cal Rules of Ct 3.1113(d). A separate statement is not required when no response has been provided to the request for discovery. Cal Rules of Ct 3.1020(b). See separate statement form for compelling further answers to interrogatories in §7.150.

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§7.149 3. Form: Declaration Supporting Motion for Order Compelling Answers or Further Answers to Interrogatories and for Sanctions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _**,** **Defendant(s)**	)	**ORDER COMPELLING**
	)	_ _[*FURTHER*]_ _ **ANSWERS**
	)	**TO INTERROGATORIES AND**
	)	**FOR SANCTIONS**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*e.g., plaintiff/attorney for plaintiff*]_ _**,** _ _[*name*]_ _**, in this action. This action is for** _ _[*describe nature of action, referring to pleadings, other documents on file, and items of discovery relevant to the motion; summarize each relevant document and, if appropriate, attach portions as exhibits*]_ _**.**

2. On _ _[*date*]_ _**,** _ _[*defendant/plaintiff*]_ _**,** _ _[*name*]_ _**, was served with interrogatories** _ _[*e.g., first set, nos. 1-25*]_ _**.**

[*Option 1: No answers or responses filed*]

3. Although the time to respond has expired, _ _[*defendant/plaintiff*]_ _ **has** _ _[*refused/failed*]_ _ **to serve the response to the interrogatories.**

[*Option 2: Inadequate answers filed*]

3. _ _[*Defendant/Plaintiff*]_ _**'s response is inadequate, and the objections stated should be overruled for the reasons set forth in the accompanying list of interrogatories to which** _ _[*answers/further answers*]_ _ **are requested.**

[*Option 3: Motion to compel further answers*]

3. Before the motion to compel further answers to interrogatories, I attempted to resolve _ _[*e.g., objections/disputed issues*]_ _ **with the attorney for** _ _[*defendant/plaintiff*]_ _**, as follows:** _ _[*Set forth efforts made to comply with Code of Civil Procedure §2030.300(b)*]_ _**. This attempt was unsuccessful, however, and unresolved issues remain as set forth in this declaration.**

[*Option 4: Objections filed*]

3. Objection to Interrogatory no. _ _[*number*]_ _**:** _ _[*Set forth verbatim objection*]_ _**.**

3. Objection to Interrogatory no. _ _[*number*]**_ _ is improper and should be overruled in that _ _**[*set out factual reasons why objection is improper*]**_ _.**

[*Continue*]

4. The interrogator[*y/ies*]**_ _ _ _**[*is/are*]**_ _ relevant to the subject matter of this action in that _ _**[*it does not/they do not*]**_ _ relate to privileged matters. As a result, _ _**[*defendant/plaintiff*]**_ _ should be ordered to answer each of the interrogatories fully. The refusal or failure by _ _**[*defendant/plaintiff*]**_ _ _ _**[*and the advice of his or her attorney*]**_ _ is without substantial justification and constitutes an abuse of discovery in that _ _**[*state lack of justification*]**_ _.**

5. As a result of the refusal or failure of _ _[*defendant/plaintiff*]**_ _ _ _**[*and advice of his or her attorney*]**_ _ to respond, _ _**[*plaintiff/defendant*]**_ _ incurred reasonable expenses, in seeking an order, in the sum of $_ _**[*amount*]**_ _ and reasonable attorney fees in the amount of $_ _**[*amount*]**_ _ as follows: _ _**[*Set forth details of expenses and rate and hours of attorney fees*]**_ _.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: It is an open question whether declarations, if attached to a notice of motion, must also comply with Cal Rules of Ct 3.1110(b), which requires the motion's date and time of hearing, the number or designation of the department or division to which the motion is assigned, and the trial date (if set). See California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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§7.150 4. Form: Separate Statement Listing Interrogatories to Which Further Responses Are Requested

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**SEPARATE STATEMENT LISTING INTERROGATORIES TO WHICH FURTHER RESPONSES ARE REQUESTED (CAL RULES OF CT 3.1020)**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The interrogatories to which further responses are requested are listed as follows:

1. Interrogatory no. _ _[*set/number*]_ _**:** _ _[*Repeat interrogatory in full; do not incorporate by reference.*]_ _

2. Response: _ _[*Repeat response, answer, or objection in full.*]_ _**.**

3. Argument: _ _[*State the factual and legal reasons for compelling further response or answer.*]_ _

[*Repeat 1, 2, and 3 above for each interrogatory to which answer or further answer is required*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: If the proponent is moving to compel answers when no response has been made, a separate statement listing the interrogatories is not required. Cal Rules of Ct 3.1020(b). See §§7.107-7.109.

If moving to compel further answers to interrogatories, the separate statement must also include (Cal Rules of Ct 3.1020(c)): (a) the text of the interrogatory; (b) the text of each response, including objections; (c) a statement of factual and legal reasons for compelling further responses as to each matter in dispute; (d) if necessary, the text of all definitions, instructions, and other matters required to understand each interrogatory and the response to it; (e) if the response to the interrogatory is dependent on the response to another interrogatory, the other request and its response; and (f) any pleading or other document relevant to the motion. See §7.117.

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§7.151 5. Form: Order Compelling or Denying Answers or Further Answers to Interrogatories and for Sanctions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER COMPELLING** _ _[*ANSWERS/FURTHER ANSWERS*]_ _ **TO INTERROGATORIES (CCP §2030.290(b)**_ _[*CCP §2030.300(d)*]_ _**) AND FOR MONETARY SANCTIONS AGAINST** _ _[*DEFENDANT/PLAINTIFF*]_ _, _ _[*NAME*]_ _ **(CCP §2023.030)**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, for an order requiring** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _**, to** _ _[*further*]_ _ **answer interrogatories and to pay reasonable expenses and attorney fees was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

[*Option 1: Order compels answers or further answers to interrogatories*]

1. _ _[*Defendant/Plaintiff*]_ _ **serve and file answers without objections, under oath, definitely and precisely to the extent of all information available to** _ _[*him/her*]_ _**, to interrogatories nos.** _ _[*numbers*]_ _ **within** _ _[*number*]_ _ **days after service of this order.**

[*Option 2: Objections to interrogatories overruled*]

1. The objections to interrogatories nos. _ _[*numbers*]_ _ **are overruled, and, within** _ _[*number*]_ _ **days after entry of this order,** _ _[*defendant/plaintiff*]_ _ **must serve on the attorney for**_ _[*plaintiff/defendant*]_ _ **answers to those interrogatories without further objection.**

[*Option 3: Objections sustained*]

1. _ _[*Defendant/Plaintiff*]_ _**'s objections to interrogatories nos.** _ _[*numbers*]_ _ **are sustained.**

[*Continue*]

[*Add if appropriate*]

2. This order is made subject to the following conditions: _ _[*State*]_ _**.**

[*Add if refusal or failure to comply constituted*

abuse of discovery under Code of Civil Procedure §2023.030]

It appearing to the Court that the refusal or failure of _ _[*defendant/plaintiff*]**_ _ to _ _**[*state refusal or failure*]**_ _ was without substantial justification, or other circumstances that would make the imposition of the sanction unjust,**

IT IS FURTHER ORDERED that _ _[*defendant/plaintiff*]**_ _ _ _**[*and*]**_ _ _ _**[*his or her attorney/the party advising refusal or failure*]**_ _ pay to _ _**[*plaintiff/defendant*]**_ _ the sum of $_ _**[*amount*]**_ _ as reasonable costs and expenses, including attorney fees, necessarily incurred in this proceeding.**

[*Continue*]

Date: _ _ _ _ _ _ **__**[*Signature*]**__**
Judge of the _ _[*title of court*]**_ _**

Copies: Original and copy (present to judge for signature and file with court clerk; retain conformed copy); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: After the motion has been heard and granted, the court usually prepares a minute order stating briefly that the order has been granted. Some courts request that the prevailing party prepare an order for the court's signature. It is good practice for the attorney to draft the order, stating exactly what the court has decided, and submit it to the court for signature and to serve conformed copies on all parties rather than relying on a minute order entered in the clerk's record. Thus, counsel for the prevailing party should ask to prepare an order when the court does not request it.

Some courts require that a proposed order accompany the filed motion. Check local court rules for specific requirements.

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Source: Civil Litigation/California Civil Discovery Practice/7 Interrogatories/ G. Motion for Sanctions for Failure to Obey Court Order/§7.152 1. Form: Notice of Motion and Motion for Order Imposing Sanctions

G. Motion for Sanctions for Failure to Obey Court Order

§7.152 1. Form: Notice of Motion and Motion for Order Imposing Sanctions

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION FOR ORDER IMPOSING SANCTIONS FOR FAILURE TO OBEY PRIOR COURT ORDER; SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*NAME*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*name of moving party*]_ _ **moves the Court for an order imposing against** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, the following sanctions:** _ _[*e.g., order dismissing action; see Code of Civil Procedure §§2030.290(c), 2030.300(e), incorporating CCP §§2023.010-2023.040*]_ _**.** _ _[*Defendant/Plaintiff*]_ _ **further moves the Court for an order that** _ _[*plaintiff/defendant*]_ _ _ _[*and/or the attorney advising refusal or failure*]_ _, _ _[*name(s)*]_ _**, pay a monetary sanction of $**_ _[*amount*]_ _ **as reasonable expenses, including attorney fees, incurred in this proceeding. This motion is made under CCP §§2023.010-2023.040 and** _ _[*CCP §§2030.290(c), 2030.300(e)*]_ _ **on the grounds that (1)** _ _[*plaintiff/defendant*]_ _ **refused to obey the order of this Court, dated** _ _[*date*]_ _, _ _[*set out general nature of prior order, e.g., requiring answers be given to interrogatories 5, 10, 14, 20, dated* _ _[*date*]_ _]_ _**, (2) his or her attorney advised that the failure or refusal take place contrary to court order, and (3) the sanctions requested in this notice are reasonably necessary to enforce the order of this Court and to compensate** _ _[*plaintiff/defendant*]_ _ **for attorney fees and costs incurred in bringing this motion.**

This motion is based on this notice; the supporting memorandum served and filed with this notice; declaration(s) of _ _[*name*]_ _**; all papers and records on file in this action;** _ _[*identify documents not filed, e.g., interrogatories*]_ _**; and any evidence presented at the hearing.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: Attach supporting memorandum. See CCP §§2030.290(c), 2030.300(e). Use the memorandum format

shown in §7.148. The motion must identify any person against whom a sanction is sought (*e.g.,* a person, party, or attorney), specify the sanction sought, cite authority for the sanction, and be accompanied by a declaration supporting the amount of any monetary sanction sought. CCP §2023.040. See also Cal Rules of Ct 3.1113(b). CCP §2030.290(c) or §2030.300(e), incorporating CCP §§2023.010-2023.040, should always be cited.

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Source: Civil Litigation/California Civil Discovery Practice/7 Interrogatories/§7.153 2. Form: Declaration Supporting Motion for Order Imposing Sanctions

§7.153 2. Form: Declaration Supporting Motion for Order Imposing Sanctions

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**DECLARATION OF** _ _[*NAME OF ATTORNEY FOR MOVING PARTY*]_ _ **SUPPORTING** _ _[*NAME*]_ _**'S MOTION FOR ORDER IMPOSING SANCTIONS AND FOR REASONABLE EXPENSES, INCLUDING ATTORNEY FEES, FOR FAILURE TO OBEY PRIOR COURT ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	
	Hearing: _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the attorney of record for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, and make this declaration supporting the motion for an order imposing sanctions.**

2. This action is for _ _[*present short but concise statements of nature of case and importance of answers to interrogatories previously ordered answered*]_ _**.**

3. On _ _[*date*]_ _**, an order directing discovery against** _ _[*defendant/plaintiff*]_ _ **was made as follows:** _ _[*Set forth specific verbatim order*]_ _**.**

4. _ _[*Defendant/Plaintiff*]_ _ **has failed or refused to comply with this order in that** _ _[*specify disobedience for each order, e.g., no further answer has been given with respect to interrogatory no.* _ _[*number*]_ _]_ _**.**

5. At no time was any reason given regarding _ _[*defendant/plaintiff*]_ _**'s noncompliance with the Court's order. No reason is known that would prevent compliance with the Court's order, even though** _ _[*defendant/plaintiff*]_ _ **was given adequate notice and an opportunity to respond.**

6. _ _[*Plaintiff/Defendant*]_ _ **was prejudiced by** _ _[*defendant/plaintiff*]_ _**'s failure to comply with the Court's order in that** _ _[*e.g., the information sought is within* _ _[*defendant/plaintiff*]_ _**'s** *knowledge, and considerable time and expense will be incurred in obtaining answers from other sources*]_ _**.**

[*Add if appropriate*]

7. Sanctions have previously been imposed on _ _[*e.g.,* _ _[*defendant/plaintiff*]_ _]_ _**, as follows:** _ _[*Set forth prior sanctions imposed and reasons for them*]_ _**.**

[*Continue*]

[8.] _ _[*Plaintiff/Defendant*]_ _ **has incurred the following reasonable costs and expenses, including attorney fees, in prosecuting this proceeding:** _ _[*Specify fees and costs*]_ _**. Therefore,** _ _[*plaintiff/defendant*]_ _ **requests that the Court impose a monetary sanction against** _ _[*name of party and/or his or her attorney*]_ _ **in the sum of $**_ _[*amount*]_ _**.**

[9.] Further, _ _[*plaintiff/defendant*]_ _ **requests that the Court impose an additional sanction under** _ _[*Code of Civil Procedure §2030.290(c) and/or §2030.300(e)*]_ _ **and §§2023.010-2023.040, as follows:** _ _[*Specify each type of additional sanction requested*]_ _**.**

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

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Source: Civil Litigation/California Civil Discovery Practice/7 Interrogatories/§7.154 3. Form: Order Imposing Sanctions

§7.154 3. Form: Order Imposing Sanctions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER IMPOSING SANCTIONS AND FOR REASONABLE EXPENSES, INCLUDING ATTORNEY FEES, FOR FAILURE TO OBEY PRIOR COURT ORDER (CCP §2030.290(c)** _ _[*CCP §2030.300(e)*]_ _**)**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, for an order imposing sanctions and for reasonable expenses, including attorney fees, was regularly heard on** _ _[*date*]_ _**. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

[*Set out in detail relief obtained by sanction*]

[*Option 1: Issue sanction*]

1. The following designated facts be taken as established: _ _[*List facts*]_ _**.**

[*Option 2: Evidence sanction*]

1. _ _[*Defendant/Plaintiff*]_ _ **be prohibited from introducing into evidence facts relating to the following designated matters:** _ _[*Specify*]_ _**.**

[*Option 3: Terminating sanction*]

1. The following pleadings _ _[*or portions of pleadings*]_ _ **be stricken:** _ _[*List*]_ _**.**

[*then either*]

2. Further proceedings by _ _[*defendant/plaintiff*]_ _ **be stayed until order of this Court to** _ _[*e.g., answer interrogatories nos.* _ _[*number*]_ _ *to* _ _[*number*]_ _]_ _ **is satisfied.**

[*or*]

2. The action be stricken from the trial calendar and all further proceedings be stayed until _ _[*describe conditions that must be met*]_ _**.**

[*Continue with terminating sanction*]

3. The action _ _[*or portions of the action*]_ _ **be dismissed.**

4. A judgment by default be granted against _ _[*defendant/plaintiff*]_ _**.**

[*Continue for all sanctions*]

In addition, _ _[*party/attorney defending action for sanctions*]_ _, _ _[*name(s)*]_ _**, pay** _ _[*party moving for sanction*]_ _, _ _[*name*]_ _**, as a monetary sanction the sum of $**_ _[*amount*]_ _ **as reasonable expenses, including attorney fees.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original and copy (present to judge for signature and file with court clerk; retain conformed copy); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: After the motion has been heard and granted, the court usually prepares a minute order stating briefly that the order has been granted. Some courts request that the prevailing party prepare an order for the court's signature. It is good practice for the attorney to draft the order, stating exactly what the court has decided, and submit it to the court for signature and to serve conformed copies on all parties rather than relying on a minute order entered in the clerk's record. Thus, counsel for the prevailing party should ask to prepare an order when the court does not request it.

Some courts require that a proposed order accompany the filed motion. Check local court rules for specific requirements.

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Source: Civil Litigation/California Civil Discovery Practice/7 Interrogatories/ H. Motion for Protective Order/§7.155 1. Form: Notice of Motion and Motion for Protective Order

H. Motion for Protective Order

§7.155 1. Form: Notice of Motion and Motion for Protective Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR PROTECTIVE**
	)	**ORDER (CCP §2030.090) AND**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FOR SANCTIONS;**
	)	**SUPPORTING**
	)	**MEMORANDUM;**
	)	**DECLARATION OF**
	)	_ _[*NAME*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*name of moving party*]_ _ **moves the Court for a protective order that (1) interrogatories nos.** _ _[*numbers*]_ _ **propounded to the moving party on** _ _[*date*]_ _**, need not be answered,**

[*Add one or more of the following if appropriate*]

(2) the time to respond to interrogatories nos. _ _[*number*]_ _ **to** _ _[*number*]_ _ **be extended, (3) the responses to interrogatories nos.** _ _[*number*]_ _ **to** _ _[*number*]_ _ **be made only on specified terms and conditions, (4) an oral deposition be substituted in lieu of interrogatories nos.** _ _[*number*]_ _ **to** _ _[*number*]_ _**, (5) trade secrets need not be disclosed as required by interrogatories nos.** _ _[*number*]_ _ **to** _ _[*number*]_ _**, (6) interrogatory answers nos.** _ _[*number*]_ _ **to** _ _[*number*]_ _ **be sealed and thereafter opened only on order of the Court,**

[*Continue*]

and for reasonable attorney fees and costs incurred in this proceeding. This motion is made on the ground that there has been _ _[*briefly state ground, e.g., a violation of a rule of court/a violation of statutory privilege/unwarranted annoyance, embarrassment, or oppression or undue burden or expense under Code of Civil Procedure §2030.090(b)*]_ _.

This motion is based on this notice; all pleadings, records, and files in this action; the attached supporting memorandum and supporting declaration of _ _[*name*]_ _**;** _ _[*any evidence presented at the hearing;*]_ _ **and** _ _[*the attached order shortening time*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and

unrepresented party); office copies.

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§7.156 2. Form: Memorandum Supporting Motion for Protective Order

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**MEMORANDUM SUPPORTING** _ _[*NAMES*]_ _**'S MOTION FOR PROTECTIVE ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

FACTS: _ _[*Succinctly state facts underlying the motion.*]_ _

1. On a showing of good cause, the Court may make any discovery order that justice requires to protect the moving party from unwarranted annoyance, embarrassment, or oppression, or undue burden or expense. Code of Civil Procedure §2030.090(b).

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The supporting memorandum should also refer to CCP §§2017.020(a) and 2019.030(a)-(b) (instructive guidelines to issuance of protective orders) and specifically set forth authorities in support of the relief sought. Reference should also be made to CCP §2023.030(a), governing monetary sanctions. "Estimated time" of the hearing should be specified in the caption if required by local rules.

On page limitations on supporting memoranda, see Cal Rules of Ct 3.1113.

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Source: Civil Litigation/California Civil Discovery Practice/7 Interrogatories/§7.157 3. Form: Declaration Supporting Motion for Protective Order

§7.157 3. Form: Declaration Supporting Motion for Protective Order

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**DECLARATION OF** _ _[*NAME OF ATTORNEY FOR MOVING PARTY*]_ _ **SUPPORTING** _ _[*NAME*]_ _**'S MOTION FOR PROTECTIVE ORDER (CCP §§2017.020(a), 2019.030(a)-(b), 2023.030(a), 2030.090)**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the attorney of record for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, and make this declaration supporting the motion for protective order.**

2. _ _[*Plaintiff/Defendant*]_ _ **seeks an order of this Court limiting discovery as set forth in the notice of motion filed simultaneously with this motion. This protective order is necessary to protect** _ _[*plaintiff/defendant*]_ _ **from unwarranted annoyance, embarrassment, or oppression or undue burden or expense in that** _ _[*specify facts and basis supporting need for protective order*]_ _**.**

3. Before filing the motion, I spoke to _ _[*counsel for opposing party*]_ _ **for the purpose of resolving the issues raised in this motion. Despite these efforts, no resolution could be reached. Attached as Exhibit A and incorporated by reference is a letter sent to counsel summarizing these efforts. Exhibit B is counsel's response, refusing to offer any relief sought by declarant.**

4. If this motion is unsuccessfully opposed, I request that the Court impose a monetary sanction against _ _[*name of party and/or attorney*]_ _ **in the sum of $**_ _[*amount*]_ _**. The following attorney fees and costs have been incurred in bringing this motion:** _ _[*Itemize, e.g., rates and hours*]_ _**.**

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

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§7.158 4. Form: Order Limiting Discovery

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER LIMITING DISCOVERY AND FOR REASONABLE COSTS AND EXPENSES, INCLUDING ATTORNEY FEES (CCP §§2023.030(a), 2030.090)**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, for a protective order** _ _[*under Code of Civil Procedure §§2023.030(a) and 2030.090*]_ _ **was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

[*Specify protection granted*]

[*Add if appropriate*]

[1.]_ _[*Defendant/Plaintiff*]_ _ **pay to** _ _[*plaintiff/defendant*]_ _ **the sum of $**_ _[*amount*]_ _ **as reasonable costs and expenses, including attorney fees.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original and copy (present to judge for signature and file with court clerk; retain conformed copy); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: After the motion for protective order has been heard and granted, the court usually prepares a minute order stating briefly that the order has been granted. Some courts also request the prevailing attorney to prepare an order for the court's signature. It is good practice for the attorney to draft the order, stating exactly what the court has decided, and submit it to the court for signature and to serve conformed copies on all parties rather than relying on a minute order entered in the clerk's record. Thus, counsel for the prevailing party should ask to prepare an order when the court does not request it.

Some courts require that a proposed order accompany the filed motion. Check local court rules for specific requirements.

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8

Demands for Inspection or Production

Michael R. Overly
Tami S. Smason

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§8.1 I. SCOPE OF CHAPTER

This chapter focuses on the procedures for demanding and responding to demands for inspection, copying, testing, sampling, and production of documents, tangible objects, and electronically stored information (ESI), and for entry on and inspection of real property, under CCP §§2031.010-2031.510. Topics covered include the following:

- Deciding to use inspection demands under CCP §§2031.010-2031.510, including what an inspection demand is (see §8.2); how inspection demands are used (see §§8.3-8.5); who is subject to inspection demands (see §8.6); what is subject to inspection (see §§8.7-8.14); strategic considerations (see §§8.16-8.33); and alternatives to inspection demands (see §§8.34-8.46);
- Drafting demands (see §§8.47-8.69);
- Responding to demands (see §§8.70-8.85);
- Moving for protective order (see §§8.86-8.89);
- Compelling discovery under CCP §§2031.300-2031.320 (see §§8.90-8.96); and
- Federal procedures for inspection demands under Fed R Civ P 34 and other federal rules (see §§8.97-8.119).

For a procedural checklist, see §8.120. For forms to use in pursuing discovery under CCP §§2031.010-2031.510, see §§8.121-8.129.

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II. DECIDING TO USE INSPECTION DEMANDS

§8.2 A. What a Demand for Inspection Is

A written demand for inspection or production is the discovery method set out in CCP §§2031.010-2031.510 that permits a party, in the absence of an agreement between the parties, to:

- Inspect and copy various documents and records (CCP §2031.010(b));
- Inspect and test tangible things (CCP §2031.010(c));
- Inspect and test real property and objects or operations located on real property (CCP §2031.010(d)); and
- Inspect, copy, test, or sample electronically stored information (ESI) (CCP §2031.010(e)). On discovery of electronic evidence such as computer records, see §§8.16-8.27.

The demanding party sets a time for the inspection, copying, testing, or sampling that is at least 30 days after service of the demand, unless on good cause the court has granted leave to specify an earlier date. See CCP §2031.030(c)(2). The responding party serves a written response within 30 days after service of that demand (CCP §§2031.210(a), 2031.260), stating separately for each request:

- An intention to comply by the date set for inspection, copying, testing, or sampling;
- The inability to comply and reasons for the inability to comply; or
- An objection to the demand.

The responding party may combine any of these three possible responses as well as move for a protective order under CCP §2031.060. On responding to a production demand, see §§8.70-8.85.

NOTE: The term "inspection demand," as used in this chapter and in the Code of Civil Procedure, includes what some lawyers more commonly call "demands to produce." A "demand to produce" or "production demand" is simply another way of saying the opposing party is required to produce documents or things for inspection, copying, testing, and sampling.

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B. How Inspection Demands Are Used

§8.3 1. Inspection and Copying of Documents; Entry to Land

Discovery under CCP §§2031.010-2031.510 is used for a variety of purposes, but most frequently to:

- Obtain specific documents, electronically stored information (ESI), or other items known to exist or to verify that such documents, ESI, or items do not exist;
- Gain entry on land or other property for a specific purpose; or
- Gather general background information from, *e.g.,* documents or ESI showing how a party's business is organized or how its records are kept.

A demand to produce/inspect is most commonly used for the inspection and copying of documents or writings and ESI.

The inspection procedure under CCP §§2031.010-2031.510 is the only formal discovery method that provides for gaining entry to land for discovery purposes. Unless the parties stipulate otherwise, a party seeking to inspect either (1) real property in the custody or control of another party or (2) items or operations located on the property must proceed under CCP §§2031.010-2031.510. See alternative methods described in §§8.34-8.46.

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§8.4 2. Photographing, Testing, Measuring

A broad range of discovery is permitted by CCP §§2031.010-2031.510 in addition to inspection and copying. The present language in CCP §2031.010 adopts that of Fed R Civ P 34 and expressly permits a party to "photograph, test or sample any tangible things," to "measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it," and to "inspect, copy, test, or sample electronically stored information" (ESI). CCP §2031.010(c)-(e).

The demanding party must specify in the demand any inspection, copying, testing, sampling, or related activity that is intended as well as the manner in which the activity will be performed and whether the activity will permanently alter or destroy the subject item or property. CCP §2031.030(c)(4). See §8.60.

The language of CCP §2031.010 authorizes photographing a person's face and body. See *Shepherd v Superior Court* (1976) 17 C3d 107, 130 CR 257, overruled in part on other grounds in *People v Holloway* (2004) 33 C4th 96, 131, 14 CR3d 212. In *Shepherd*, a wrongful death action against city police officers, the court upheld an order requiring the defendants to submit to being photographed in the clothes they wore on the night of the shooting in question. On when a party may be required to make a nonverbal response during a deposition, see §5.79.

NOTE: A demand to "photograph, test or sample" or "measure, survey, photograph, test, or sample" may also be made to inspect, *e.g.,* a computer hard drive for ESI that may have been encrypted or deleted and thus would not normally be produced in response to an ESI inspection demand. On how computers eliminate stored information, see §4.3. On encryption, see §8.23.

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§8.5 C. No Numerical Limitations on Inspection Demands

There is no statutory limit on the number of times a party can make an inspection demand on another party or on the number of requests within each demand. See CCP §§2031.010-2031.510.

This is different from some other written discovery methods (*e.g.,* only 35 interrogatories can be propounded without a declaration of need for additional discovery; see §7.8). Of course, if the number of requests is so excessive that it is unreasonable under the circumstances of the case, the responding party may move for a protective order. In addition, if the responding party refuses the inspection, the propounding party must show "good cause" to obtain a court order, which may be more difficult if the number of requests seems large in the circumstances of the case. See CCP §2031.310(b)(1).

For discussion of protective orders, see §§8.86-8.89, 15.59-15.84. For discussion of motions to compel inspection, see §§8.90-8.96, 15.30-15.58.

NOTE: The majority of voluminous requests are those tied to the key paragraphs of the pleadings and to the responses to other discovery methods. Typical examples of requests are "All documents that support the allegations in paragraph 7 of the complaint that… " or "all documents identified in response to interrogatory number 1." When propounding voluminous requests, avoid tying the requests to every paragraph of the pleadings and every written discovery response regardless of whether it makes sense to do so. Requests drafted in a rote manner to include requests for documents in support of the paragraphs of the complaint that correctly recite statutory language or allege other noncontroversial matter could lead a court to believe that the purpose of the entire set of requests is harassment, thus making it less likely that the court will compel compliance with even those requests that are legitimate. Such carelessly drafted requests may even subject the propounding party to sanctions.

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§8.6 D. Who Is Subject to Inspection Demand

Party only. Only items or property in the possession, custody, or control of a party can be inspected under CCP §§2031.010-2031.510. On possession, custody, and control under federal law, see §8.109.

In civil cases, state agencies are not considered a party to the People's litigation because they are not officers, directors, managing agents, or employees of the People; thus, district attorneys do not have possession, custody, or control over documents of a state agency. See *People ex rel Lockyer v Superior Court (Cole Nat'l Corp.)* (2004) 122 CA4th 1060, 1076, 19 CR3d 324. State agencies are separate entities from "the People," and a party must serve a deposition subpoena on the agencies as nonparties under CCP §2020.010 to obtain documents from them. See 122 CA4th at 1078.

Similarly, an officer, director, or managing agent of a party is not a party, and production demands may not be directed to them. Although a demand to a party for documents, tangible things, and ESI in its possession, custody, or control includes documents, things, and ESI possessed by those individuals, it might not include items that are in their personal possession and stored at a residence or other location that is not controlled by the party. To reach items in the personal possession of an officer, director, managing agent, or employee of a party, use the methods for demanding items from a nonparty discussed below.

Nonparty not subject to demand. A nonparty can be compelled to produce documents, other tangible items, and ESI only by other methods (see CCP §2020.010), *i.e.:*

- Oral deposition under CCP §§2025.010-2025.620 (see chaps 5-6);
- Written deposition under CCP §2028.010 (expressly incorporating all procedures of CCP §2025 except when modified) (see §§5.160-5.199); or
- Deposition for the production of business records under CCP §§2020.410-2020.440 (see §§5.85-5.107).

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E. What Is Subject to Inspection

§8.7 1. Must Be Within Party's Possession, Custody, or Control

To be subject to discovery under CCP §§2031.010-2031.510, an item or real property need not be in the actual possession of a party, but it must at least be within the party's custody or control. CCP §2031.010. What constitutes control by a party is a factual question. See, *e.g., Unger v Los Angeles Transit Lines* (1960) 180 CA2d 172, 4 CR 370; *Clark v Superior Court* (1960) 177 CA2d 577, 2 CR 375 (documents in custody or control of insurance company or its counsel are discoverable; insurance company attorneys defending an insured must be treated as party-defendant's attorneys).

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§8.8 2. Must Be Within Scope of Discovery

As with other discovery methods, only matters within the scope of CCP §2017.010, and subject to the restrictions set forth in CCP §2019.030(a), may be inspected, copied, tested, or sampled under CCP §2031.010(a). CCP §2031.010. Section 2017.010 authorizes discovery of any matter, not privileged, that is relevant to the subject matter of the action or to a motion pending in the action, if the matter is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Under CCP §2019.030(a)-(b), the court must restrict the frequency or extent of discovery if the discovery sought is unduly burdensome or expensive or is obtainable from a more convenient source. On broad scope of discovery balanced by court's discretion, see chap 1.

As with other discovery methods, the attorney work product protection and the attorney-client and other discovery privileges apply to inspection demands. See CCP §§2018.010-2018.080. See also chap 3. On privacy protections, see §§3.156-3.164.

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§8.9 3. Includes "Writings"

Documents that may be inspected under CCP §2031.010(b) include any "writings" that are handwritten, typed, printed, photostatted, or photographed as well as "every other means of recording upon any tangible thing any form of communication or representation including letters, words, pictures, sounds, or symbols, or combinations thereof." See Evid C §250; CCP §2016.020. See also §§8.10-8.13.

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§8.10 a. Electronic "Writings"

The definition of "writings" in Evid C §250 includes virtually every form of data recordation, including information stored electronically or in any other manner, and e-mail or facsimile transmissions. See CCP §2016.020. Electronically stored information (ESI) is also expressly discoverable under CCP §2031.010(e).

NOTE: The Electronic Discovery Act (EDA) (Stats 2009, ch 5) integrated procedures for discovery of electronically-stored information (ESI) into the existing framework of the Civil Discovery Act (CCP §§2016.010-2036.050). It appears that the drafters intended the Civil Discovery Act's references to "documents" to continue to include ESI, as they had by case interpretation before the EDA. The definition of ESI was added for clarity, not to contract permissible discovery. The EDA added references to ESI only in those provisions in which it was necessary to address specific procedures applicable to the discovery of ESI.

If necessary, the responding party must, at the reasonable expense of the demanding party, use its own detection device (*e.g.*, software that is used to create, compress, and read data) to translate the data into reasonably usable form. See CCP §2031.280(e), discussed in §8.33.

NOTE: Difficulties can arise if the responding party provides data that can only be translated into usable form by a proprietary detection device, including software. Proprietary devices include those developed by the party itself or those that may not be used because they are considered by their owner to be a trade secret. If the responding party will not make its detection device available, the propounding party will need to bring a motion to compel. See §8.51. Similarly, a motion to compel may be needed if a party will not provide decrypted data. Locating and identifying the requested data may also be time-consuming and expensive, *e.g.*, when certain types of documents exist only on electronically stored backup tapes. On the allocation of the expense of locating and identifying ESI, see §8.33. For discussion of motions to compel, see §§8.90-8.96; chap 15.

For discussion of ESI and how to demand its production, see §§8.16-8.27. On what constitutes ESI, see §§8.14A, 8.19-8.27. On discovery of ESI in general, see chap 4. On allocating expense of production of ESI that is not reasonably accessible, see §8.33.

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§8.11 b. Insurance Policies

A party is entitled to obtain production of insurance policies. Even though CCP §2017.210 authorizes the discovery of insurance coverage information and does not specifically refer to inspection of the policy itself, CCP §§2017.010 and 2031.010-2031.050, read together, authorize production of the policy. *Irvington-Moore, Inc. v Superior Court* (1993) 14 CA4th 733, 18 CR2d 49. The *Irvington-Moore* court noted, however, that (14 CA4th at 742):

> unless the application [for insurance] is incorporated into the policy or is otherwise made part of it, the application would not constitute part of the contents of the policy and hence would not be separately discoverable.

A party who does not wish to reveal private information contained in an application that is part of a policy can:

- Object to production of the policy on the ground of privacy; or
- Move for a protective order under CCP §2031.060.

PRACTICE TIP: Counsel should be aware that the insurance application may be relevant to other issues.

On the scope of discovery of information relating to insurance, see §§1.44-1.46. On the scope of discovery of information relating to medical and privacy issues, see §§1.47, 1.57, 1.62. On privileges, see chap 3.

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§8.12 c. Settlement Agreements

Under the collateral source rule, the amount of a client's settlement with a third party, such as a property insurer, is not admissible to reduce damages in an action against a tortfeasor, including a defendant in a legal malpractice action. See CC §3333.1. A settlement agreement between the client and the insurer is nonetheless discoverable because it may lead to the discovery of other admissible evidence in the tort action. *Norton v Superior Court* (1994) 24 CA4th 1750, 30 CR2d 217 (case remanded so trial court could inspect documents in chambers to determine whether they were relevant to an issue other than mitigation of damages or would lead to discovery of other admissible evidence). Settlement agreements between a plaintiff and a codefendant are discoverable if there is any factual dispute regarding the amount of credit available to the nonsettling defendant. *Mediplex of Cal., Inc. v Superior Court* (1995) 34 CA4th 748, 40 CR2d 397.

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§8.13 d. Tax Returns

Under California law, tax returns are not generally discoverable in civil actions. *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 6, 123 CR 283; *Webb v Standard Oil Co.* (1957) 49 C2d 509, 513, 319 P2d 621. See *Schnabel v Superior Court* (1993) 5 C4th 704, 721, 21 CR2d 200 (tax return protection not absolute but subject to express and implied waiver); *Deary v Superior Court* (2001) 87 CA4th 1072, 105 CR2d 132 (estate tax returns privileged against compelled disclosure in civil proceedings). Federal law recognizes no privilege for tax returns. *Stokwitz v U.S.* (9th Cir 1987) 831 F2d 893, 896.

On the scope of the tax return protection from discovery, see §§3.116-3.119. On the use of interrogatories to inquire about tax returns, see §7.96.

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§8.14 4. Includes Tangible Things, Other Property, and Objects or Operations

The tangible things that can be inspected under CCP §2031.010(c), the "other property" that can be entered, or the "object[s] or operation[s]" that can be inspected under CCP §2031.010(d) are not defined. California law defining which things are encompassed within these categories is sparse. See, *e.g., Shepherd v Superior Court* (1976) 17 C3d 107, 130 CR 257, overruled in part on other grounds in *People v Holloway* (2004) 33 C4th 96, 14 CR3d 212 ("objects or tangible things" as used in former CCP §2031(a) is broad enough language to permit photographing a person's face and body), overruled in part on other grounds in *People v Holloway* (2004) 33 C4th 96, 131, 14 CR3d 212. But cases interpreting Fed R Civ P 34 indicate a broad range of discoverable items. See 7 Moore, Moore's Federal Practice ¶34.12[2] (3d ed 1997). On the applicability of federal precedents to California discovery, see §§8.97-8.119. See also §1.82.

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§8.14A 5. Includes Electronically Stored Information

Electronically stored information (ESI) can be inspected, copied, tested, or sampled under CCP §2031.010(e). ESI is defined as "information that is stored in an electronic medium." CCP §2016.020(e). "Electronic," in turn, is broadly defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." CCP §2016.020(d). On similar provisions under Fed R Civ P 34(a)(1)(A), see §§8.104-8.105.

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§8.15 F. Timing Limitations on Demand for Production/Inspection

Earliest time to serve. A defendant may serve a demand for inspection, copying, testing, or sampling on the plaintiff, without leave of court, at any time; a plaintiff may serve a demand on any defendant any time that is 10 days after that defendant has been served or has appeared in the action, whichever occurs first. CCP §2031.020(a)-(b). A plaintiff may serve an earlier demand on a defendant, however, if a court order, for good cause shown, has been obtained. See CCP §2031.020(d).

Latest time to serve. Technically, a demand can be personally served on a party as late as 60 days before trial. This timing allows inspection, copying, testing, or sampling to take place 30 days after the demand is served (CCP §2031.030(c)(2)) but no later than 30 days before trial (CCP §2024.020(a)). Additional time must be added as provided in CCP §1013 if service is by mail. Note, however, that if the demand is served this late in the litigation process, the demanding party will not have enough time to provide 16 court days' notice for a motion to compel compliance by the 15th day before trial, as required by CCP §§1005(b) and 2024.020(a). On timing of motions to compel, see §§8.92-8.96. On timing limitations in general, see §§2.20-2.28.

Thus, counsel should personally serve the demand at least 90 days before the date scheduled for trial to ensure that there will be sufficient time before trial to complete inspection, copying, testing, or sampling, engage in any meet-and-confer process needed, and to make any follow-up motions that may be required. Allow more time if serving the demand by mail, fax, or overnight delivery. See CCP §1013. See also §2.22.

PRACTICE TIP: When calculating the amount of time needed to serve discovery requests before trial, remember that because many courts have busy schedules, counsel may not be able to schedule discovery motions on the date of his or her choice. Counsel must be sure to allow ample time to schedule discovery motions within the time requirements of CCP §2024.020. Otherwise a party may need to incur the additional expense of seeking an ex parte order shortening time for hearing. For discussion of orders shortening time, see §§15.11-15.29.

If the demand is served close to the date of trial, counsel should calendar the dates on which the response is due and the inspection is scheduled to ensure that the response is served and the inspection completed within the time permitted by CCP §2024.020(a). Demands served close to the trial date should be personally served in order to save time, as should any motions to compel further discovery.

On federal timing requirements, see §8.99.

When documents must be produced. Documents must be produced on the date specified in the demand under CCP §2031.030(c)(2), unless an objection to the date has been made. CCP §2031.280(b). If the date for inspection, copying, testing, or sampling has been extended by agreement under §2031.270, the documents must be produced on the agreed on date. CCP §2031.280(b).

Unlawful detainer. In unlawful detainer actions, the plaintiff can serve a demand for inspection, copying, testing, or sampling without leave of court within 5 days after service of the summons or appearance by the defendant, whichever occurs first. CCP §2031.020(c). The party seeking inspection must set a reasonable time for inspection, copying, testing, or sampling at least 5 days after service of the demand, unless the court shortens that period for good cause. CCP §2031.030(c)(2).

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G. Strategic Considerations

1. Preserving Electronic Evidence

§8.16 a. Seeking Preservation Order (Injunction)

If the case involves electronically stored information (ESI), counsel should consider seeking a preservation order in the form of an injunction from the court at the outset of the litigation. See *Dodge, Warren & Peters Ins. Servs., Inc. v Riley* (2003) 105 CA4th 1414, 130 CR2d 385 (affirming preliminary injunction "freezing" defendants' ESI so that it would be available for discovery); *Northpoint Homeowners Ass'n v Superior Court* (1979) 95 CA3d 241, 157 CR 42 (protective order to prevent evidence destruction is not authorized by discovery statutes but is essentially an injunction). See also §§2.11, 2.46. On obtaining an injunction, see generally California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004).

ESI can be easily altered or deleted without a trace, and such an order will require that sources of ESI are preserved pending discovery. At a minimum, the order should require preservation of all versions of relevant word processing documents, databases, graphics files, e-mail, data compilations, voice mail, and schedules, regardless of whether they reside in networks, personal computers, laptops, magnetic tapes, optical disks, or floppy disks. If the responding party does not take reasonable steps to preserve evidence pending completion of discovery, the requesting party should seek appropriate judicial relief. See *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248. For discussion of the legal responsibility to preserve evidence, see §§4.6-4.8. On the steps a party can take to preserve ESI, see §§4.9-4.12. Under CCP §§2023.010-2023.040, sanctions are available to deter the spoliation of evidence. On sanctions, see §§15.85-15.116. On safe harbor provisions for sanctions relating to ESI, see §§8.87A, 8.91, 8.93A.

A party's preservation order may also require that previously deleted files that are retrievable through reasonable means be immediately retrieved and produced. Because such an order may be burdensome, the entity subject to the order should carefully examine its ability to comply and ensure that the order does not impose unreasonably broad or even technically impossible efforts. The entity may also ask the court to place the financial burden of compliance on the requesting party. See *Toshiba Am. Electronic Components, Inc. v Superior Court* (2004) 124 CA4th 762, 772, 21 CR3d 532. See discussion in §8.33.

JUDGE'S PERSPECTIVE: Courts will look closely at requests that appear to be overly broad. A localized lawsuit against a national or international company may not justify precluding it from using its normal document retention policies throughout the company. In such a situation, the order may be limited to the offices or specific computer systems of the company that reasonably could possess documents relating to the subject lawsuit.

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§8.17 b. Form: Letter Alternative to Formal Preservation Order

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

As an alternative to, or in advance of, a formal preservation order, the requesting party should consider sending the responding party a letter that specifically details the type of ESI sought and potential sources of that information. Because this letter can be sent at the outset or even in advance of litigation, it provides early notice to the opposing party which may regularly delete electronic documents in the ordinary course of its business. See §8.106. The letter should also include a paragraph stating, in substance:

Responding party may have relevant evidence including e-mail and draft documents stored in electronic form (*e.g.,* hard disks, floppy disks, magnetic tape, CD-ROMs). This evidence (including metadata) may not be available from any other source and can be easily destroyed through inadvertence. The responding party is under the same duty to preserve this essential source of evidence as it is to preserve any other form of evidence. If the responding party does not take reasonable measures to preserve this evidence pending completion of discovery, the requesting party will seek appropriate sanctions under *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 74 CR2d 248.

For a sample "legal hold" letter that can be sent by an entity to the custodians of its electronic data, see §4.38.

NOTE: Counsel should be aware that a broadly worded letter may spur the recipient to move for a protective order and should prepare for such a possibility. On protective orders, see §§15.59-15.84. In matters involving ESI, it can be most helpful if counsel reach agreement with each other about, *e.g.*, the format in which electronic evidence will be produced. See §§4.18, 4.35.

PRACTICE TIP: A third party witness is not under the same obligation to preserve potential evidence as is a party. However, counsel may want to consider sending a preservation letter to an essential third party witness, after weighing the potentially greater likelihood of preservation against the potential of intentional destruction once the third party is put on notice. If ESI may reasonably be considered to be under the opposing party's control, even though held by third parties (*e.g.*, the opposing party's lawyers, Internet security firm, ASPs (application service providers), offsite storage vendors, accountants (see §8.7)), counsel may consider adding to the preservation letter a paragraph identifying these third parties, describing the ESI they are likely to hold, asserting that the ESI is under the opposing party's control, and then copying the third parties on the letter.

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§8.18 2. Deciding What to Demand

Depending on the issues in the case and when in the discovery process the production and inspection is to take place, answers to the following questions may assist counsel in determining which items or entry to demand as well as what type of inspection to conduct:

- Does available information indicate that there are documents, ESI, other items, real property, objects, or operations on real property that lend themselves to inspection? Can they be specifically identified? Can the category to which they belong be designated with reasonable particularity? See CCP §2031.030(c)(1).
- Who has possession, custody, or control of the property?
- What information relevant to the issues of the case could be learned from the inspection, and what inspection activities would best reveal this information?
- Where will relevant documents or ESI be found? Are they stored off-site, either by the party or by a third party (see §8.17)?

If these questions cannot be easily answered, counsel should conduct other preliminary investigation and discovery before going forward with a demand for production or entry and inspection.

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§8.19 3. Deciding What Electronically Stored Information to Demand

When the case involves electronically stored information (ESI), in addition to the questions set out in §8.18, counsel may focus on answers to the following questions in determining which items or entry to demand as well as what type of inspection to conduct:

- What are the potential types and locations of ESI?
- Did any of the parties or witnesses use e-mail or exchange documents electronically?
- Are there likely to be draft documents stored electronically?
- Is the ESI stored or archived with a third party, perhaps in a distant location?
- What is the software used to create and view it?
- What are the computer systems (*e.g.,* servers, laptops, cell phones) that contain ESI?
- What ESI destruction or retention policies are in use?
- Is it likely than any ESI is encrypted?
- Do backup tapes or data exist?

For a list of questions to ask a data custodian, see §§4.15, 4.40.

PRACTICE TIP: Companies that specialize in the forensic examination of computers can be an invaluable tool in conducting discovery of ESI. They can provide guidance in drafting appropriate discovery requests and can perform on-site inspections of a responding party's computer system or assist in the retrieval of encrypted or deleted documents. Such forensic experts can also advise counsel on whether ESI production is complete and all expected data was provided, and help obtain software with which to review, de-duplicate (*i.e.,* remove identical copies of documents or e-mail from the data), and translate the data into other more useful formats. On de-duplicating electronic data, see §4.21. Note that the same ESI need not be produced in more than one form. CCP §2031.030(a)(2).

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.20 a. Stand-Alone Computer, Network System, Printer and Facsimile Memory

§8.20 a. Stand-Alone Computer, Network System, Printer and Facsimile Memory

Stand-alone computers. Stand-alone computers may be connected to other computers through the use of a modem or other networking device. A "modem" is a communications device that converts digital data from a computer into analog audio signals that can pass through a standard telephone line. Local, wide area, and worldwide digital networks are also used to connect stand-alone computers. Such networks may use a variety of connections such as an Ethernet cable, wireless technology such as Bluetooth, and telephone communication lines.

Stand-alone computers include traditional desktop computers, laptop computers, personal electronic organizers, and cell and other telephones. They contain two primary sources of electronically stored information (ESI): the internal hard disk and any removable storage media (*e.g.,* floppy disks, magnetic tape, and writable CD-ROMs). It is possible to search the internal random access memory (RAM) of the computer, but this will probably not be helpful because RAM is erased every time the computer is turned off or rebooted.

NOTE: A "CD" is an individual compact disk; a "CD-ROM" is a high capacity method of storage using laser optics for reading data; and "ROM" is the acronym for "read only memory." Storage media also include very high capacity DVDs (digital video disks) and very small solid state drives located on USB (Universal Serial Bus) devices.

Network systems. Stand-alone computers can be connected together to form a computer network. Computers can be networked in two basic ways: peer-to-peer and client-server:

- Peer-to-peer networks are networks in which each computer is connected to every other computer and there is no central or independent file storage. Each networked computer has its own individual hard disk for file storage. Because peer-to-peer networks are relatively inexpensive to construct, they are popular in small businesses. They are normally used to connect only a few computers and their peripheral devices, *e.g.,* printers and internet routers. Discovery of this type of network will require examination of the hard disk of each computer. Peer-to-peer networks also exist in the context of the Internet, with computers across the globe sharing files and data. Obviously, discovery of computer data that is not under the direct control of the opposing party or an identified third party will be difficult.
- Most networks used in business are the client-server type. In a client-server network, each employee's desktop computer is a "client" of one or more central "server" computers. Most files on the network are stored on the server. The server typically has substantial hard disk space. Files may also be stored on the hard disk of the client computers, but that is discouraged because other users may not be able to access them easily. The distinction between peer-to-peer networks, in which users have access to each other's hard disks, and client-server networks, in which users share files stored in a central location, is blurring as network software evolves.

Discovery on a client-server network should include, at a minimum, an examination of the server's hard disk and the client hard disks of relevant employees; and deposition of the computer manager or system operator for information regarding, among other things:

- System topology and maintenance;
- File location;
- Instances of unauthorized access to the network (hacking);
- Lost data incidents;
- Recent occurrences of viruses;
- File retention policies requiring the periodic deletion of files;
- The software applications on the system;
- Whether any files are encrypted;
- Location of e-mail and backup files; and
- Identification of any third parties who touch the data (*e.g.*, any out-sourced archival, security, maintenance, or data storage service which may be in a remote location, perhaps abroad).

NOTE: The hard disk contains one or more inflexible platters coated with material in which data can be recorded magnetically, together with read/write heads, head-positioning mechanism, and spindle motor in a sealed case. The topology of a computer system is the layout of the network formed by the connections between the computers in the network or between two or more networks.

Internet-based networks. People also communicate using Internet-based chat "rooms," web logs (blogs), instant messaging, and e-mail. Such services may be provided by a company's own server or by a third party provider, *e.g.,* Yahoo!, AOL, Google, or MSN, or by a telecommunications company. Companies such as Facebook and MySpace also host voluminous exchanges of data. Company and third party services may have relevant ESI and documents. Increasingly, software programs (applications) and data are stored remotely with third parties. Not only back up and archive files but current and active files, such as e-mail, spreadsheets, calendars, and word processing, may be in the possession of ASPS (application service providers) and providers such as Microsoft and Google.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.21 b. Computer Logs, Audit Trails, and Access Lists

§8.21 b. Computer Logs, Audit Trails, and Access Lists

Computer logs and audit trails. Computer logs or audit trails are computer files in which information is stored about when, where, and who accesses the system. The level of detail can include the exact desktop computer at which an employee was working (or at least logged on) on a specified date and time. Logs and audit trails may also contain information about who modified a file last, when the modification was made, whether an unauthorized attempt was made to enter the computer system, and the company's response to any unauthorized entry attempt.

In certain instances, relevant audit trails may also be maintained by third parties. Companies that use EDI (electronic data interchange) usually transmit their documents through value-added networks (VANs) owned by third parties. One of the services offered by VAN operators is the recording of audit trails regarding each transaction, which will confirm when a document was sent and by whom. In addition, VANs may retain copies of each document sent. Third parties that provide security services for corporate networks may have relevant logs and files.

In certain instances, the responding party may have willingly prepared the ultimate audit trail. A growing number of employers install specialized software to monitor every action their employees take while using the computer. The software dutifully records such information as programs used, files accessed, e-mail sent and received, locations visited on the World Wide Web, and computer bulletin boards contacted. A special interrogatory or deposition question should be directed at determining whether the responding party is using this type of employee-monitoring software. Then, counsel can follow up with an inspection demand seeking the employee monitoring data.

Access control records. Access control records or, as they are more commonly known, Access Control Lists (ACLs), show which employees are given rights by the ACL to access and edit files on the file server (a file-storage device on a network). These rights often depend on the employee's group or department. For example, the ACL for accounting files may be limited to persons working in the accounting department and upper management. All other employees will be unable to access or modify the files. The ACL for critical research and development files may be limited to only a handful of workers.

If a particular file is at issue in a litigation, reviewing the ACL for the file will reveal the employees who had access to it. These persons can then be identified for deposition.

Backup software. Prudent businesses use backup software to copy the information stored on hard disks to tape or some other storage medium, in order to protect against a catastrophic loss when a critical file is inadvertently deleted or a hard disk fails. Normally, the backup copy is stored off-site for added security. The location where backup copies are kept should be identified during discovery through a special interrogatory or deposition question. Many companies also use redundant arrays of storage devices onsite, so that multiple copies of files may be available.

The system operator or manager should be questioned to ascertain the backup schedule. Because backup software is usually automated to perform backups late at night, the software itself can be examined to ascertain when backups are made. Many businesses run daily backups each night on magnetic tape. These tapes are normally overwritten each week. Weekly and monthly backups are usually stored off-site for extended periods of time, even years.

The backup tapes can provide a snapshot of the files from a particular computer system on a specified date. These files can be compared with existing files to detect modifications, tampering, or intentional deletion.

The advent of Internet backup software has added a new wrinkle to discovery of backups. Individual users and businesses can back up their computer files over the Internet to a third party's computer, where the files are stored. The storage company may be located anywhere, including in another state or another country. This type of Internet storage should not impose a significant burden on discovery because a party can be compelled to produce records located in another state or country if they are under the party's control. See, *e.g., Boal v Price Waterhouse & Co.* (1985) 165 CA3d 806, 810, 212 CR 42; but see *Amoco Chem. Co. v Certain Underwriters at Lloyd's of London* (1995) 34 CA4th 554, 40 CR2d 80 (CCP §1989 may limit a nonresident party's obligation to produce documents at trial).

NOTE: Counsel should be aware that employees sometimes back up their own files on, *e.g.*, personal home computers or flash drives, including small USB storage devices.

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§8.22 c. Computer Programs

Another area of inquiry is the type of program that created the electronically stored information (ESI). For example, if a critical memorandum is at issue, it may be important to know that most word-processing programs make automatic backup copies of the last revision of a document. In addition, word-processing programs are often configured to track the creator of a document, the date and time of creation, the last person to edit the document, and the date and time of the last edit. This information (sometimes referred to as metadata) may be crucial in constructing the history of a document. Many other programs, *e.g.,* spreadsheets, drawing programs, and project management software, also create metadata. On metadata, see §§4.5, 4.17-4.19, 4.34.

Discovery requests such as interrogatories or deposition questions should be tailored to identify the program used to create the ESI, the version number of the program, whether the program has been modified in any way by the responding party, whether the program is located on the file server or the client computer, and where the files are stored. Counsel can then use the responses to draft demands for inspection, copying, testing, or sampling.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.23 d. Data Encryption

§8.23 d. Data Encryption

Many businesses now use encryption programs to protect their confidential documents and e-mail from prying eyes. These programs can encode messages or documents using sophisticated mathematics so that only authorized persons can decode them using a software "key" or password. Modern encryption programs can provide a level of protection that even law enforcement agencies cannot penetrate.

NOTE: In typical "public key encryption," the public key encrypts data which is sent to the recipient who uses a corresponding secret key to decrypt it. Often, only the recipient (not the sender) can decrypt the encrypted text. Counsel should be aware that even if the encrypted text is inaccessible, *e.g.*, because the recipient is not available to give the password, the plain text version may still be located on the creator's computer and perhaps on the recipient's computer if he or she chose to save a decrypted version. The recipient or sender may have printed the decrypted version. Counsel should also be aware that current word-processing and other software may contain mechanisms for selective encryption that, *e.g.,* authorize different recipients to view the document, view only certain portions of it, edit it, or print it, at different times, or up to a certain date after which the document becomes permanently inaccessible. In such a case, it will be necessary to reach the author of the document to obtain the complete original.

Discovery should inquire into whether encryption has been used on any relevant electronically stored information (ESI) and, if so, the specific software and methods used to perform the encoding. This discovery can be done by interrogatory or deposition. Consider deposing the "most qualified" or knowledgeable person of an entity under CCP §2025.230 about these topics, and follow up with appropriate inspection demands. In addition, all individuals who had or have access to the encryption passwords should be identified because they may be the only people who can modify or view the encrypted files. As discussed in the Note above, these people are likely to be recipients, not authors, of the document. Most companies that routinely use encryption also have a master key or password that can be used to decrypt any file created at the company. On questions to ask a custodian of ESI, see §§4.15, 4.40.

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§8.24 e. E-Mail

Document and electronically stored information (ESI) demands should be specifically constructed to include e-mail. In addition, discovery requests should be directed at identifying the type of e-mail system used and whether a third party service (*e.g.,* Yahoo!, MSN, Google, America Online) was used to communicate e-mail to recipients outside the company or organization. As with value-added networks (VANs), third party services may retain backup copies of e-mail forwarded through them and may have audit trails showing when and where messages were sent.

PRACTICE TIP: It is good practice to include e-mail in any document or ESI request seeking correspondence or other communications. For example, request "All documents evidencing communication between X and Y regarding subject ABC, including but not limited to paper correspondence, electronic correspondence, e-mail (including attachments), and notes of conversations, whether paper or electronic." Also request metadata such as e-mail headers, which will contain e-mail routing information, recipients, and other details about the transmission.

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§8.25 f. Cookies and History Files

Cookies. It may be important to ascertain whether the responding party or one of its employees visited a particular site on the World Wide Web. When an individual visits a location on the Internet, the site frequently installs a small piece of data, known as a "cookie," on the user's hard disk. The cookie is read by the site when it is revisited to track the site areas of interest to the user. Sites also use cookies to gain marketing information about their visitors.

The computer file containing the cookie information may be a source of revealing information concerning the user's activities on the Internet. Parties seeking discovery of this information should be aware, however, that some programs allow users to block cookie information from being stored on their hard disks or automatically erase this information after it is stored. Some users routinely delete cookies from the drives. Cookies can be difficult to trace to a site and forensic experts will be required to do so.

History file. The history file may also be helpful. A history file is created by the user's web browser to record each of the locations visited on the Internet within a particular time period or up to a certain maximum number of sites. The history file assists users in easily returning to sites they have previously visited. If they have not been deleted, history files can be used with cookies to provide some record of a user's Internet activities.

PRACTICE TIP: Counsel can ask for the preservation and print out of the history file or can ask to inspect the drive if necessary.

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§8.26 g. Laptops and Home Computers

Laptop computers owned by a business and the home computers of its employees may contain long-forgotten files that are not available from any other source. These files may include early versions of technical drawings, preliminary drafts of documents, spreadsheet analyses of projects, comments regarding proposals, and e-mail.

The main problem with physical inspection demands seeking access to the other side's computers and other storage devices is that these devices will almost always contain much data that is not relevant to the litigation, implicating privacy, over-breadth, and trade secret concerns, as well as concerns over accidental deletion or corruption of data. For these reasons, courts are reluctant to order inspections of computers in all but the most clear-cut cases, *e.g.*, when there is evidence that one party improperly destroyed a document that may still exist on the person's computer. When inspections are compelled by the court, experts are almost always employed to do these inspections, and/or the demanding party or its expert monitors the inspection. Also, limitations are either volunteered or imposed on what files can be inspected on the device and how it can be done.

If the device is in current use, parties may be unwilling to have it offline or unavailable for use for any substantial length of time. In such a case counsel should consider "mirroring" or copying the hard drive. Although obtaining a mirror image (sometimes called a forensic image; see §4.19) may not permit the same recovery of deleted files that may be possible if counsel has access to the original drive, a mirror image can be a good compromise when the original drive is in general use. On obtaining a mirror image or forensic image, see §4.19.

NOTE: In the case of laptops or home computers, it is often more appropriate to make sure that these devices are searched to find the demanded files than to demand that the devices be physically produced for inspection.

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§8.27 h. Personal Digital Assistants

Personal Digital Assistants (PDAs) and smart phones often contain notes, calendars, contact lists, e-mail, saved text messages, and other data that may be relevant and useful to demand. Sometimes they are partially synchronized with the party's computer network, so that they may contain copies of e-mail, calendars, or contacts, even if those files have been deleted from the computer hard drive.

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§8.28 4. Coordinating Inspection With Other Discovery

The CCP §§2031.010-2031.510 inspection should be coordinated with interrogatories, depositions, and requests for admission. On planning discovery generally, see chap 2.

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§8.29 a. When Inspection Should Follow Other Discovery

Counsel should serve interrogatories or depose witnesses before obtaining discovery under CCP §§2031.010-2031.510 when there is a need to gain background information or to determine the existence, description, nature, custody, or condition of any books, documents, ESI, or other tangible property. Information obtained in this manner can be used to define the scope of a demand for inspection and to identify, with the reasonable particularity required by CCP §2031.030(c)(1), the items to be demanded.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.30 b. When Inspection Should Precede Other Discovery

§8.30 b. When Inspection Should Precede Other Discovery

Interrogatories or depositions should *follow* the CCP §§2031.010-2031.510 discovery when discovery under CCP §§2031.010-2031.510 reveals that more specific information is needed. This sequence is most effective when a large amount of material is obtained under CCP §§2031.010-2031.510 in, *e.g.,* complex business litigation cases. Whether counsel should use interrogatories or depositions, or a combination of the two, to obtain this information depends on the case. Statutory limitations on use of these other forms of discovery must be considered. On depositions, see generally chaps 5-6. On interrogatories, see chap 7. The relative cost of the discovery is also a factor. In a case in which standard interrogatories can be used, the demanding party will find interrogatories significantly less costly and time consuming than depositions.

PRACTICE TIP: It is useful to follow CCP §§2031.010-2031.510 discovery with requests for admission when there is a need to define or narrow the issues for trial. In particular, use requests for admission to require the opposing party to admit the genuineness of any documents or electronically stored information (ESI) produced under CCP §§2031.010-2031.510 that the demanding party wants to introduce as evidence. On requests for admission, see chap 9.

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§8.31 c. Special Considerations for Electronically Stored Information

In the rapidly evolving world of electronically stored information (ESI), technology experts are often necessary, adding significantly to the cost of discovery. It is often prudent to retain a consulting expert to help formulate discovery requests and translate the responses, and to help formulate objections or propose limitations on the discovery. Experts can advise on the types of media and systems to search, the types of files to demand, the metadata likely to be available, and the apparent integrity of the information that is produced. Experts can also help organize and review ESI both for the producing party and the recipient. On creating and using a discovery team for ESI, see §§4.13, 4.18.

An expert's declaration may also be necessary in connection with a motion for a protective order or motion to compel, to help educate the court.

JUDGE'S PERSPECTIVE: Remember that courts require declarations with first-hand, personal knowledge when it comes to describing the ease or difficulty of accessing ESI.

Experts are also necessary for inspection of computers and other electronic equipment. Even when experts are not involved, the cost of producing ESI may be substantially higher, and the court may shift some or all of the costs to the requesting party (see CCP §§2031.060(e), 2031.310(f)). On cost-shifting in protective orders, see §8.87A. On cost-shifting in orders compelling further response, see §8.93A. Counsel should consider the costs and potential for cost-shifting when formulating his or her discovery plan, and consider retaining appropriate experts at an early stage if substantial discovery of ESI is anticipated.

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§8.32 5. Considering Supplemental Demand

To ensure that all documents and ESI acquired or discovered by a party are produced during the litigation, counsel should consider sending a supplemental demand for documents and ESI before trial subject to the time constraints in CCP §§2016.060, 2024.010-2024.060. A supplemental demand for inspection, copying, testing, or sampling may be made "twice before the initial setting of a trial date" and once after the initial setting of the date as long as a demand was previously served by the demanding party. CCP §2031.050(b). In addition, the court may permit additional supplemental demands on a party's motion for good cause shown. CCP §2031.050(c).

Unlike federal procedure (see Fed R Civ P 26(e)(1)-(2)), there is no continuing duty under California law to supplement responses to inspection demands absent service of a supplemental demand (except as specified in CCP §2031.510(b) regarding certain land patents or grants).

PRACTICE TIP: It is possible that the court may preclude a party from using at trial any documents, ESI, or tangible things that were not produced pursuant to an appropriate inspection demand, even if they were discovered after the response was served. For that reason, prudence suggests giving consideration to voluntary production of later-discovered evidence that the party might want to use at trial.

For discussion of federal rules and procedures governing inspection demands, see §§8.97-8.119.

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§8.33 6. Considering Cost

Generally, the responding party pays the costs associated with responding to discovery requests. See *Toshiba Am. Electronic Components, Inc. v Superior Court* (2004) 124 CA4th 762, 772, 21 CR3d 532. An exception to this rule applies to data compilations. Under CCP §2031.280(e), the demanding party bears the burden of, if necessary, paying the "reasonable expense" of "translating any data compilations included in the demand into reasonably usable form." See §8.51. Federal law does not have this express cost-shifting provision. 124 CA4th at 770. See §8.116. Although CCP §2031.280(e) shifts the cost of translating data compilations to the demanding party in certain circumstances, the demanding party need not always pay the entire cost because "reasonableness" and "necessity" are issues of fact that the trial court may be called on to resolve. 124 CA4th at 773. The trial court must, if asked, exercise its discretion to determine whether and to what extent §2031.280(e) applies. In *Toshiba,* the court reversed and remanded an order under former CCP §2031(g)(1) (now §2031.280(e)) compelling the demanding party to pay the entire cost of retrieving usable data from backup tapes.

Courts are also authorized to allocate the expense of discovery in a protective order or an order compelling further response if the court finds good cause for the production of ESI that is not reasonably accessible. CCP §§2031.060(e), 2031.310(f). On cost-shifting in protective orders, see §8.87A. On cost-shifting in orders compelling further response, see §8.93A.

On discovery of ESI, see §§8.16-8.27. See also chap 4. For discussion of special cost considerations related to ESI, see §8.31. For discussion of federal law regarding cost-shifting, see §8.116.

JUDGE'S PERSPECTIVE: Counsel should be aware of the cost and time burdens that production demands may place on the producing party or nonparty. Demanding the production of large numbers of documents, or requiring the producing party to sift through thousands of documents to find the one requested, may cause a court to restrict the requested production, or condition it on the requesting party's compensating the producing party for the costs of complying with the request. The parties and the court may also consider conducting a first wave of discovery designed to identify, *e.g.,* the specific computers or files that are most likely to contain relevant materials so that other sources need not be searched. The parties should also consider reducing costs by first sampling or testing data, or taking a "quick peek" at a series of sources, to determine if a more elaborate search is worthwhile.

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H. Alternatives for Obtaining Documents and Things From Other Parties

§8.34 1. Notice to Produce at Deposition

Documents and other tangible items can be obtained before trial from a party (or an officer, director, managing agent, or employee of a party) by notice to produce at an oral or written deposition. CCP §§2025.280(a), 2028.010. See §§5.54, 5.173.

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§8.35 a. How Deposition Request Differs

The scope of production under CCP §§2025.010-2025.620 is similar, but not identical, to that under CCP §§2031.010-2031.510. Only documents and tangible things may be inspected (see CCP §2025.280(a)), not real property or things on real property (see CCP §2031.010). The items to be produced are for "inspection and copying"; no mention is made of the extensive testing activities permitted by CCP §§2031.010-2031.510. See CCP §2025.280(a). Compare CCP §2025.280(a) with CCP §§2020.510(a) and 2020.220(c), which authorize a party to inspect, photocopy, test, and sample objects produced at a deposition by a *nonparty*.

There are advantages and disadvantages to both the CCP §§2025.010-2025.620 and the CCP §§2031.010-2031.510 procedures, and a party seeking discovery should consider each alternative before deciding which to use.

NOTE: A party serving a notice of taking of a deposition and for production of documents subjects himself or herself to jurisdiction, even though the appearance is designated as special and the notice is never filed with a court. *Creed v Schultz* (1983) 148 CA3d 733, 196 CR 252.

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§8.36 b. Reasons to Use Deposition Request

Reasons to use CCP §§2025.010-2025.620 for the production of documents and things for inspection and copying are discussed in §§8.37-8.40.

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§8.37 (1) Initiate Discovery Sooner

A plaintiff may serve a deposition notice 20 days after any defendant has been served with the summons or appeared in the action. CCP §2025.210(b). Under CCP §2031.020(b), the plaintiff must wait until 10 days after service of the summons on or the appearance by a party from whom production is sought to serve the inspection demand. Thus, under some circumstances, a plaintiff may commence discovery against a particular defendant sooner under CCP §§2025.010-2025.620 than under CCP §2031.020(b) as long as another defendant has been served with the summons.

If a plaintiff obtains a court order authorizing it to serve a deposition notice within the 20-day period after service of summons or any defendant's appearance, opposing counsel may want to seek a protective order. See *O'Grady v Superior Court* (2006) 139 CA4th 1423, 1454, 44 CR3d 72, discussed in §15.69.

PRACTICE TIP: The deposition notice should be served only after service of process is effective or the party has appeared.

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§8.38 (2) Earlier Date for Production

The actual production of documents and things can occur more quickly under CCP §§2025.010-2025.620 than under CCP §2031.020. A deposition can be scheduled for most deponents as early as 10 days after the notice is served. CCP §2025.270(a). In contrast, CCP §2031.030(c)(2) authorizes production no earlier than 30 days after the demand for inspection is served, unless the court for good cause grants leave to specify an earlier date. The shorter period between service of a deposition notice and the deposition date on which the items are produced also means that a party can serve notice of a deposition closer to the trial date than it can serve a demand for inspection. Note, however, that if the deposition notice constitutes a subpoena for production of consumer records as defined in CCP 1985.3, the deposition cannot take place until at least 20 days after issuance of that subpoena. CCP §2025.270. See §5.116. On requirements for completion of discovery, see CCP §§2016.060, 2024.010-2024.060.

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§8.39 (3) Immediate Record of Items Produced

A deposition ensures that items produced will be identified and, perhaps, authenticated. See §§6.42-6.44.

Moreover, the party producing the documents at a deposition has a strong incentive to produce all of them on a timely basis; otherwise, the requesting party may have good cause to depose the witness again when the pertinent documents are produced. See CCP §2025.610(b). For further discussion, see §6.76.

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§8.40 (4) Immediate Follow-Up

A deposition allows the party seeking discovery to obtain immediate, additional discovery concerning the items produced. Counsel can ask questions that might otherwise have to be asked in follow-up interrogatories or depositions, *e.g.,* the identity of documents, organization of files, background concerning the facts stated in the documents, extent of the search for the items produced, and existence or nonexistence of additional items. To obviate a need for follow-up requests for admission, counsel can establish that the item is authentic. On requirements for authenticating writings, see Evid C §§1400-1421.

PRACTICE TIP: To ensure that the deposition runs smoothly, examining counsel should attempt to gain the witness's agreement to produce the documents at some point before the deposition. Production even a few hours before the deposition will give examining counsel valuable time to review the documents and organize the witness's examination. In cases involving voluminous documents, examining counsel should consider having another attorney or a paralegal present to assist in reviewing and locating documents and identifying potential areas of examination.

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§8.41 c. Reasons to Use Inspection Demand

In general, the deposition production procedure should be used only when the noticing party expects the production of a relatively few, simple documents. It is difficult to conduct a deposition effectively while simultaneously trying to review a large number of documents, and thus in complex cases it is generally prudent to serve an inspection demand under CCP §§2031.010-2031.510 first and follow that up with a deposition.

EXAMPLE: In many personal injury and employment cases, plaintiffs frequently do not have a large volume of pertinent documents, and defense counsel could examine all of the documents during a break in the deposition. Conversely, the defendants in these cases typically have a much larger volume of documents than the plaintiffs, making it likely for a plaintiff's attorney to use a separate demand under CCP §2031.010 for documents before deposing the defendant or its employees.

The practical advantages in using the CCP §§2031.010-2031.510 demand to produce procedure include:

Cost. A deposition requires participation by a stenographic reporter, transcription of testimony, and attendance by attorneys. Some of this cost can be offset, however, by the money saved by avoiding follow-up discovery.

Convenience. Production by inspection demand is more convenient for voluminous records and large items.

More planning time. Production by inspection allows more time to reflect on the items produced and plan for follow-up discovery. This is particularly important when the items are sought for general background information and only a small portion of them are expected to be directly relevant to the issues of the case. When production is by deposition, counsel can obtain some planning time by scheduling the production early on the day of the deposition so that the deposition can be based on the documents produced.

No number limitation. A party can make more than one inspection demand on another party; CCP §§2031.010-2031.510 contains no provision limiting the number of times it can be used. In contrast, CCP §2025.610 limits to one the number of times a witness can be deposed without a court order, placing a premium on counsel's careful timing and preparation for the deposition.

Supplemental demand. A party, provided that a demand was previously served, may serve a supplemental demand for production of later acquired or discovered documents (a) twice before the initial setting of a trial date and (b) once after the initial date is set subject to the discovery time limits of CCP §2024.020(a). The court may permit a party to propound additional supplemental demands on a motion for good cause shown. CCP §2031.050(c). A supplemental demand requires the responding party to update its previously served responses to requests for documents.

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2. Inspection by Stipulation

§8.42 a. When Appropriate

A written stipulation is often a feasible means for obtaining inspections of documents, ESI, and tangible things as well as land or other property in the possession, custody, or control of a party. CCP §2016.030. For a sample stipulation, see §8.121. Because of the practical problems of arranging inspections, particularly inspections of physical objects and real property, stipulation is often the most efficient method of procuring the discovery. The parties can use written stipulations at any time during the discovery process to modify all or only some of the procedures provided for in CCP §§2031.010-2031.510. See CCP §2016.030. See also CCP §2031.270 (parties may agree to extend dates for inspection or time for service).

Stipulations are also useful when the evidence is in electronic format. Counsel can often resolve issues like authenticity, accuracy of translation, and chain of custody, which can present special issues with electronic evidence, by using a stipulation.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.43 b. Contents of Stipulation

§8.43 b. Contents of Stipulation

Counsel for the demanding party should draft the stipulation specifying:

- The items to be produced or real property to be entered. Items or real property should be specifically identified whenever possible. If specific identification is not possible, categories should be described with sufficient particularity to allow the responding party to discern items easily within the category. For electronic evidence, the stipulation might include a description of the media (*e.g.,* magnetic tape, CDs), a description of the type of files or data contained on the media (*e.g.,* e-mail, document database), and the format of the data.
- That the items to be produced are not privileged, or, if the stipulation refers only to categories of items to be produced, that, *e.g.*, "all nonprivileged items within the following categories" will be produced.

NOTE: For electronic discovery, it is useful to include in a discovery stipulation a "claw-back" provision that sets out steps to be taken when one side determines that it has inadvertently produced a privileged document. See §4.33. California law also includes a statutory claw-back provision. CCP §2031.285. See §3.183.

- That items the responding party withholds as privileged will be identified and the basis for the claim of privilege stated.
- The time, place, and manner of delivery or of entry and inspection.
- The format or the file type of electronic documents.
- The inspections that will be performed and, in particular, whether any tests or related activity will permanently alter or destroy the items or land inspected. Counsel should consider what requirements should be prescribed for copies of reports of any testing.
- Whether the parties will cooperate in making a record of the items produced and, if so, the method chosen for making the record.
- That the responding party admits that (1) all original documents are authentic, (2) all copies of documents to be produced are genuine, and (3) no further discovery (*i.e.*, requests for admission) need be conducted to establish genuineness of copies or authenticity of originals. If appropriate, counsel should add a stipulation that the originals are business records. Electronic evidence often presents special authentication problems, especially if what the demanding party takes away from the inspection is in a different format than what was inspected. If the demanding party's expert conducts the inspection and makes the copy, he or she must carefully document what was done and be prepared to testify to it. The responding party may be willing to enter into authenticity stipulations if it will limit the time or intrusiveness of the inspection.
- If relevant, the names of those who will attend the inspection.
- Any protective provisions required by the responding party, *e.g.*, that tests will be monitored, disclosure will be limited, or work will not be disrupted if the inspection will occur where the items are regularly kept.

Attorneys for all affected parties should sign the original stipulation. Counsel for the demanding party should serve copies of it on all other parties. It is good practice for counsel for the demanding party to retain the original stipulation, as counsel does the inspection demand, with the original proof of service attached, until 6 months after final disposition of the action. See CCP §2031.290(b).

For a sample form of stipulation, see §8.121. For examples of provisions concerning tests and activities related to the inspection, see §8.60.

PRACTICE TIP: In many instances, the parties may agree to share some or all of the costs of an inspection, particularly if testing or some form of recording will be done, or in a case involving electronic discovery, if the parties have agreed that the producing party will get a copy of the inspection results, *e.g.*, a translation of electronic data into a usable format. If such an agreement is made, it should be reflected in the discovery stipulation.

In cases in which both parties expect a high volume of electronic evidence, they may agree to share the costs of

a third party data depository. Each side can then upload the electronic documents it is producing for the other side's inspection, and typically, for redirection by the other side into its own case management system which tracks the evidence accumulated in the case. On electronic discovery, see chap 4.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.44 c. Considerations for Obtaining Originals or Copies

§8.44 c. Considerations for Obtaining Originals or Copies

If the parties agree to stipulate to the inspection, counsel conducting discovery should decide whether originals or copies of the documents should be produced. In the absence of a stipulation or court order, parties must produce originals. Considerations that might influence the decision to obtain originals or copies include the following:

- Admissibility as evidence. See generally California Trial Objections, chap 24 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 32 (4th ed CJA-CEB 2009).
- Control over quality and cost of copies. If the appearance of the copies is important, counsel should ensure their quality by making arrangements to have the copying done by representatives of the demanding party. When many documents are requested as background information, the labor and copying costs of producing documents can be considerable, and it may be more cost effective for the attorney for the demanding party to examine the original files and copy only those documents that are necessary to the case.
- Thoroughness of discovery. Examining originals rather than copies ensures that the party conducting discovery will see everything on the documents, *e.g.*, marks or notations that do not copy well, different colors of ink, and staple marks. In some instances, counsel might find it necessary to arrange to inspect originals *and* copies of the same documents, *e.g.*, copies annotated by readers when their notes are relevant to the case. When seeking electronic documents, consider specifically demanding production of the metadata. Although it might be automatically included in the definition of what is being demanded, it will not necessarily be produced without a specific reference.

PRACTICE TIP: Because lawyers (and judges) often operate with vastly differing levels of knowledge and sophistication regarding electronic evidence, it is especially important to be as specific as possible about what is being sought. In this regard, experts or employees of the client who are well versed in electronic storage and retrieval may be particularly valuable in helping to formulate requests and responses and in overseeing the actual production of electronic data. On production of electronic information, see §§4.33-4.35.

Counsel may encounter great difficulty in reviewing electronic documents because many copies of the same e-mail or other document may be produced. Although eliminating duplicates (de-duping or de-duplication; see §4.21) may be necessary, it is important not to lose track of the identity of the persons who were sent, or who saw, the e-mail or other documents. In addition, e-mail attachments are usually lost when e-mail is forwarded from person-to-person and counsel should carefully inspect documents that are produced to determine if the attachments are viewable and correctly associated with the relevant e-mail.

Although the statute requires only that the responding party permit the party conducting discovery to inspect the documents and copy them, parties who stipulate to an inspection may find it more convenient for the responding party to produce copies of the documents and deliver them by mail. If there are only a few documents, the parties might stipulate to delivery by e-mail, or if the document volume is large, the documents might be produced on a CD-ROM. The responding party may determine that it is less disruptive to provide copies than to allow another party's representatives on the premises or to allow the documents to remain in the possession of another party for an undetermined time.

PRACTICE TIP: When the parties agree to production of copies, the stipulation should state that the cost of copying is to be charged to the demanding party and should specify the cost per page. If the copies are to be made by the party not having custody of them, counsel should consider requesting a guaranty that the documents will not be harmed or additional copies made.

If the parties determine that delivery of copies by mail is sufficient, the stipulation should require the responding party to execute an affidavit or declaration establishing that (a) the copies produced are "true copies" of documents within the possession, custody, or control of the responding party and (b) the originals are authentic (Evid C §1401) and are business records (Evid C §1271).

Be careful to specify what is demanded when seeking electronic documents. For example, the "original" of a contract is the printed and signed copy, and its production complies with the demand. If the drafting history is important, the demanding party will want to consider demanding all electronic copies of the contract, including all drafts and prior versions, and the metadata for each.

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§8.45 3. Voluntary Production in Answer to Written Interrogatories

Documents may be voluntarily produced by a party in answer to interrogatories whenever answering an interrogatory would require preparation of a compilation, abstract, audit, or summary of the writings and the cost of doing so would be approximately the same for either party. CCP §2030.230. See §§7.78-7.80. The responding party refers to CCP §2030.230, specifies the writings from which the answer may be derived or ascertained, and then gives the propounding party a reasonable opportunity to examine, audit, or inspect and make copies, compilations, abstracts, or summaries of the specified documents.

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§8.46 4. Documents Used to Refresh Witness's Memory

If requested, any document used to refresh a witness's memory regarding any matter on which the witness testifies (including testimony at a deposition) must be produced at a hearing. Evid C §771. The examining attorney need not establish admissibility of the particular document used to refresh the witness's memory on a particular subject before demanding production of the document. Once it is established that the witness used a document to refresh his or her memory, an adverse party may request that the document be produced at the deposition or hearing at which the witness testifies. *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 282 CR 783.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.47 III. DRAFTING DEMAND FOR INSPECTION

§8.47 III. DRAFTING DEMAND FOR INSPECTION

A party initiates discovery under CCP §§2031.010-2031.510 by making a demand for inspection, copying, testing, or sampling. A demand must be in writing and:

- Set forth separately each item or category of items to be inspected, copied, tested, or sampled (CCP §2031.030(c)(1); see §8.48);
- Specify a reasonable time and place for the inspection, copying, testing, or sampling (CCP §2031.030(c)(2)-(3); see §§8.52-8.59); and
- Specify any inspection, copying, testing, sampling, or related activity that will be performed (CCP §2031.030(c)(4); see §§8.60-8.62).

NOTE: It is often desirable for both sides to work out the particulars of the inspection, copying, testing, or sampling with opposing counsel. The demanding party wants to avoid the delays and expense associated with court involvement, and the responding party wants to ensure there will be minimal disruption and potential damage. Normally, all parties are entitled to attend an inspection, copying, testing, or sampling absent a protective order, and the responding party may want to limit the presence of people to counsel and/or experts if feasible.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.48 A. Describing Categories With 'Reasonable Particularity'

§8.48 A. Describing Categories With "Reasonable Particularity"

Each demand must designate the documents, tangible things, land or other property, or electronically stored information (ESI) to be inspected, copied, tested, or sampled by either specifically describing each individual item or by reasonably particularizing each category of item. CCP §2031.030(c)(1). The demand may also specify the form in which each item of ESI is to be produced. CCP §2031.030(a)(2).

The requirement of reasonable particularity was carried over, in substance, from former CCP §2031. Few California appellate cases have interpreted this requirement. See, *e.g., Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 851, 176 CR 874 (circumstances of case justified "undeniably broad" description); *Flora Crane Serv., Inc. v Superior Court* (1965) 234 CA2d 767, 786, 45 CR 79 ("omnibus" description of documents did not adequately apprise custodian of records what he was required to produce).

Courts considering the parallel federal rule, Fed R Civ P 34(b), have interpreted "reasonable particularity" to mean that degree of specification that would allow a reasonable person to know what documents or things must be produced. See generally 7 Moore, Moore's Federal Practice ¶34.11[3] (3d ed 1997). For discussion of demands for inspection under federal rules and procedures, see §§8.97-8.119. On recent amendments to the federal rules relating to the discovery of ESI, see §8.104.

There are no Judicial Council forms for inspection demands. However, in some cases a good starting place may be to demand, in separately numbered categories, inspection of each document identified by the opposing party in its pleading, in its interrogatory responses, and in deposition testimony, as well as notes, correspondence, or other documents that refer to or memorialize meetings or oral conversations identified by the opposing party. Also useful may be separately numbered demands for inspection of the documents that support (or contradict) the material factual allegations in the opposing party's pleading.

Depending on the case, consider whether a demand for typical categories of business records is appropriate, *e.g.,* financial statements, meeting minutes, correspondence between the parties or between the responding party and relevant third parties, sales records, employment records, contracts.

PRACTICE TIP: Clients themselves, as well as expert consultants, often have good information about potentially useful documents to demand.

Counsel should consider posing a series of demands, ranging from those seeking very specific documents to those seeking a broader category of documents.

EXAMPLE: If counsel is trying to determine a corporation's income in a particular year, the first demand may seek the party's income statement for that fiscal year, the second may seek the party's financial statements, and the third may seek all the accounting records for the year.

Making one demand for inspection of all the documents that refer to or reflect the finances, income, or accounting of that party is likely to produce an objection that may very well be appropriate. On responses to inspection demands, see §§8.70-8.85. By going from the specific to the broad when drafting demands for inspection of documents, counsel are more likely to receive at least the narrow documents requested and still retain the right to make a motion to compel production of the broader categories.

PRACTICE TIP: Although it is important to be inclusive, demands that try to do too much often draw objections. Consider avoiding demands for all documents that "relate" to a subject, or demands that are so wordy that they must be carefully parsed.

JUDGE'S PERSPECTIVE: Counsel should take care in identifying the materials to be produced. A description that is too broad may be the basis for granting a protective order. If the request appears to be boilerplate language (*i.e.,* not crafted to the specific witness and materials to be produced), the court will be much more inclined to restrict the production request or quash it altogether. In considering any motion to compel production, the court will also consider whether, while fulfilling its obligation to meet and confer, the requesting party made a reasonable effort to

narrow the request, *e.g.,* to documents created during time periods relevant to the subject matter of the case.

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§8.49 1. Describing Electronically Stored Information

It is frequently worthwhile to specifically identify types of items that are of particular interest, especially when electronically stored information (ESI) is sought. For example, the definition of ESI in the inspection demand can be tailored to include the following: data stored in a computer, data stored on removable magnetic or optical media (*e.g.,* magnetic tape, solid state drives such as USBs, floppy disks, zip drives, and recordable optical disks), data stored in personal digital assistants (PDAs), other handheld computers and devices, and in cell phones, e-mail, data used for electronic data interchange, audit trails, digitized pictures and video (*e.g.,* data stored in MPEG (Motion Picture Expert Group), JPEG (Joint Pictures Expert Group), and GIF (Graphics Interchange Format) formats), digitized audio, and voice mail. As with hard copies of documents, it is helpful to specify that drafts of documents are demanded if they are important to the request. Similarly, with demands for e-mail, it may be helpful to specify that the demand includes files attached to e-mail, and all "unique" copies of the e-mail, such as those showing blind copies (bcc's). Counsel should also consider seeking metadata such as the source code of web pages, e-mail headers, spreadsheet formulae, document authors, and so on. The demand may also specify the form in which ESI is to be produced. CCP §2031.030(a)(2). On a similar provision under Fed R Civ P 34(b)(2), see §8.104.

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2. Special Considerations When Requesting Inspection of Electronically Stored Information

§8.50 a. Authentication

Writings must be authenticated before they can be introduced into evidence at trial. Evid C §1401(a). Authentication is a particular problem for electronically stored information (ESI) because it can generally be edited or altered without leaving a trace. There is a danger that if the identity of the originator or the content of an item of ESI is disputed, the item may be difficult, if not impossible, to authenticate. This should be kept in mind during discovery so that specific requests and questions can be tailored to ensure that ESI can be authenticated at trial.

There are two types of authentication problems with ESI: authentication of the "originals" produced in discovery, and authentication of the "copies" created by the demanding party. The specific requests and tailored questions in discovery can help authenticate originals. To address the issue of authenticating copies of ESI, consider seeking a stipulation of authenticity at the time of production, or have the expert or other person who created the copy prepared to testify as to the "chain of custody."

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§8.51 b. Requesting Translation of Electronic Information Into "Reasonably Usable Form"

If necessary, the responding party must by use of its "detection devices" (software that can turn otherwise unreadable electronic data into a readable version) translate data compilations into reasonably usable form at the reasonable expense of the demanding party. CCP §2031.280(e). See *Toshiba Am. Electronic Components, Inc. v Superior Court* (2004) 124 CA4th 762, 773, 21 CR3d 532. This is an exception to the general rule that the responding party pays the cost of production. See §8.33. In addition, the demanding party may specify the form in which each type of electronically stored information (ESI) is to be produced. CCP §2031.030(a)(2). If the form is not specified, the ESI must be produced in the form in which it is ordinarily maintained or in a form that is reasonably usable. CCP §2031.280(d)(1).

Requesting that ESI be produced in a specific form or that a data compilation be translated into a reasonably usable form should generally be done when the method of storage is unknown or the data is stored in a format that requires proprietary software to access. Counsel should be aware of the risk that any translation, even from one electronic form to another, may alter or delete data or its formatting, which can have a material impact on the document. See §§4.5, 4.17. If the data was created by an "off-the-shelf" computer program, it may be worthwhile to request that the data be produced in both electronic (*i.e.,* on tape, DVD-ROMS, or CD-ROMs) and hard-copy form. In some cases the responding party may argue that it is only required to produce the data in one form (*e.g.,* either as paper or in a particular electronic format), but if the demanding party is either (1) willing to pay any additional costs or (2) can justify the need for another form, *e.g.,* to permit easier access to the data, the responding party should generally honor the request for an additional format. Note, however, that unless the parties otherwise agree or the court otherwise orders, the responding party need not produce the same ESI in more than one form. CCP §2031.280(d). On a similar provision under Fed R Civ P 34(b)(2), see §8.104.

NOTE: Counsel should evaluate carefully offers to provide only electronic documents; paper copies may often exist even if the electronic versions have been deleted and cannot be retrieved. For a case in which both hard and electronic versions of documents were discoverable, see *In re Bristol-Myers Squibb Secs. Litig.* (D NJ 2002) 205 FRD 437.

Obtaining the data in electronic form can greatly speed review of the material because the disks can be quickly searched electronically for keywords using readily available software; they can be searched by a large number of people working simultaneously; and they can be integrated into case management software. If evidence is produced on disk, the program used to create the information must be identified. In most instances, the responding party will volunteer this information as part of the production. If the information is not given voluntarily, a meet and confer session or special interrogatory can be used to identify the program.

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B. Specifying Reasonable Time and Place for Inspection

§8.52 1. Choosing Time and Place of Inspection

The demanding party is responsible for choosing a reasonable time and place for the inspection, copying, testing, or sampling. See CCP §2031.030(c)(2)-(3). The responding party may seek a protective order for good cause shown to extend the time to respond or to change the place specified in the demand. See CCP §2031.060(b)(2)-(3). See also §§8.86-8.89.

Both the demanding and the responding parties are under a duty to confer informally and attempt to work out the terms and conditions of the inspection without the court's intervention. Like other provisions of the discovery statute, CCP §2031.060(a) encourages all parties to remain flexible and consider the needs of other parties concerning any disputes about the inspection. Much time and effort can be saved, as well as possible sanctions avoided, if these details are agreed on in advance and included in the demand or in a stipulation of the parties.

Counsel should consider the many practical questions that may arise in arranging an inspection under CCP §§2031.010-2031.290, including:

- Where are the items to be produced located?
- Where should the items be produced?
- What is the volume of material to be produced?
- How, if at all, should a record of items produced be made?
- What time, convenient for both parties, should be chosen for the inspection?
- When are the persons who will perform the inspection available?
- If the demanding party will conduct activities other than inspection and copying, what arrangements must be made and what protections might the responding party desire?

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§8.53 2. Reasonable Time of Inspection

A demand must specify a "reasonable" time for inspection, copying, testing, or sampling that is at least 30 days after the demand is served unless the court for good cause shown has granted leave to specify an earlier date. CCP §2031.030(c)(2)-(3).

If service is by mail, the minimum 30-day period is extended as provided by CCP §1013 (5 calendar days if the address is within California, 10 calendar days if in another state, and 20 calendar days if outside the United States). On §1013 extension of time, see §2.22.

Documents must be produced on the date specified in the demand unless an objection to the date has been made. CCP §2031.280(b). If the date for inspection has been extended by agreement (see CCP §2031.270) the documents must be produced on the agreed on date. CCP §2031.280(b).

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§8.54 a. Depends on Circumstances of Case

Whether the time specified for production is reasonable depends on the circumstances of the case. Factors such as the location and volume of material demanded and whether original documents or copies will be produced may affect the reasonableness of the time chosen. For good cause shown, a party may obtain a protective order extending the time to respond to the set of demands. CCP §2031.060(b)(2). Presumably, this would also extend the time for the production specified in the demand. See CCP §2031.030(c)(2) (on good cause, court may grant leave to specify an earlier date in demand).

NOTE: A "reasonable time" may be quite different for the production of electronically stored information (ESI), particularly if the responding party must translate data into usable format, identify files from a large volume of backup or archived files that may be off-site, or dedicate to the production employees or hardware normally used for other purposes.

When production is by stipulation, the parties can work various factors into the agreed time for production. On production by stipulation, see §§8.42-8.44. If production is by demand, the demanding party might be unable to anticipate the scheduling needs of the responding party. One solution is for counsel to specify in the demand that production will take place the minimum number of days after service of the demand and then allow opposing counsel to negotiate a change in the schedule.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.55 b. Time Considerations When Demanding Electronically Stored Information

§8.55 b. Time Considerations When Demanding Electronically Stored Information

Although electronically stored information (ESI) is often quicker and easier to access than paper data, the volume of ESI usually far exceeds the volume of paper data that is requested in discovery. If the responding party must restore data from backup tapes or devices, translate data into usable form, or review ESI for trade secret or privacy issues, more time may be required for production, depending on the volume of data and the capacity of the responding party.

PRACTICE TIP: If the responding party claims an inability to comply within a reasonable time, consider hiring an independent expert or asking the court to appoint an independent expert to do the tasks necessary for the inspection. The court may grant the request if the responding party's claimed inability to comply is due to a lack of staff and if the responding party is unwilling to let the requesting party or its experts have access to the necessary electronic equipment or records.

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§8.56 c. Unlawful Detainer Actions

In unlawful detainer actions, the inspection, copying, testing, or sampling must be set at a reasonable time at least 5 days after service of the demand, unless the court for good cause grants leave to specify an earlier date. CCP §2031.030(c)(2). For a sample form of demand, see §8.123.

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§8.57 3. Reasonable Place for and Method of Production

The party conducting discovery must choose a reasonable place for production. CCP §2031.030(c)(3). Items that can be easily moved are usually produced at the office of the attorney for the demanding party, at the copy service chosen to copy any documents, or at the place where the demanded items are regularly kept. Demands sometimes include an option allowing the responding party to produce copies of documents by mail at the office of the demanding party's attorney, instead of producing the original documents for inspection, copying, testing, or sampling.

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§8.58 a. On-Site Production

Inspection, copying, testing, or sampling frequently take place on the premises where the demanded items are located. The responding party may find it desirable to produce the items without moving them, to ensure that they will not be lost or their return delayed. On-site production is particularly appropriate, *e.g.*, when voluminous business records will be produced. If the demanding party is not agreeable to inspecting, copying, testing, or sampling the items where they are located, the responding party may seek a protective order to change the place of production specified in the demand. See CCP §2031.060(b)(3).

JUDGE'S PERSPECTIVE: Most of the disputes on the logistics of document inspections can be worked out with common sense and some appreciation of the other party's needs. Consider arranging a meeting of experts and/or chief information officers from both sides to resolve practical issues. Court intervention in the form of protective orders or sanctions should be a last resort. Seeking court intervention will most likely delay the discovery process and increase the intransigence of the parties.

Demanding counsel should make arrangements to cause as little disruption as possible to persons on the premises when production occurs. For examples of practical solutions to the problem of arranging on-site tests and related activities in addition to inspection and copying, see sample stipulation clauses in §8.122. If copies are to be made, demanding counsel should ensure that copying equipment is available for use on the premises or should have the equipment brought in from elsewhere.

PRACTICE TIP: The needs of both parties must be balanced when an on-site production is made. Counsel for the responding party will frequently appoint someone to act as a "documents watcher" to ensure that representatives of the demanding party behave appropriately on the premises where the items are kept. At the same time, the demanding party's representatives should have a right to consult privately to discuss the items being produced. The presence of a "documents watcher," usually a paralegal or law clerk, is particularly important when original documents are produced as they are kept in the ordinary course of business. The watcher can ensure that documents are handled properly and returned to their correct files.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.59 b. Place for Production of Electronically Stored Information

§8.59 b. Place for Production of Electronically Stored Information

For discussion of the physical inspection of computer systems, see §8.62.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.60 C. Specifying Any Activity to Be Performed

§8.60 C. Specifying Any Activity to Be Performed

The demanding party must notify the responding party when any inspection, copying, testing, sampling, or related activity will be performed and whether that activity could permanently alter or destroy the item involved. CCP §2031.030(c)(4). Any other party (or affected person or organization) may object to the tests and seek a protective order under CCP §2031.060 to halt the production or allow it only on specified terms and conditions.

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§8.61 1. Object and Land Tests

When objects or other property are to be tested and possibly destroyed, it is standard practice for counsel for all parties to work out testing procedures. These will vary according to needs of the case. For example, counsel may agree that all parties take samples and conduct their own tests; that, after a single test, those test samples and their residues be retained; or, in rare cases, that the opposing party be present to observe the testing.

When destructive or invasive testing is required, the parties usually enter into an agreement concerning how the testing will be conducted. Such agreements arise frequently in construction defect actions in which occupied homes may have to be tested. In these cases, the agreements may require that only bonded, licensed contractors perform the testing and that the area tested be promptly repaired. Only those parties that request destructive testing or agree to participate in the cost of such testing are required to contribute to the cost of the testing. *San Diego Unified Port Dist. v Douglas E. Barnhart, Inc.* (2002) 95 CA4th 1400, 116 CR2d 65 (defendant opposed to destructive testing not required to share in cost, despite fact that defendant would potentially receive benefit from the testing).

PRACTICE TIP: When inspection may pose a risk of physical harm to the participants (*e.g.,* when structures damaged by landslides, fires, or earthquakes must be inspected), counsel should consider requesting a liability waiver. When testing may release hazardous materials, a number of environmental protection requirements may need to be addressed, including the testing party's (or counsel's) liability for any inadvertent release or contamination.

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§8.62 2. Physical Inspection of Computer Systems

Documents produced from computers will represent only a small fraction of the electronically stored information (ESI) that may exist. Putatively "deleted" documents will not be produced. On how a computer eliminates stored documents, see §4.3. Thus, the requesting party may consider serving a demand for the physical inspection of the responding party's computer system. See CCP §2031.010(c). The decision whether to conduct a more thorough examination of the computer system will ultimately be an economic one. The requesting party must balance the potentially high cost of the examination against the possibility of discovering important evidence that it might not otherwise discover. Although mirroring the hard drive (see §4.19) will obtain copies of all existing and possibly some deleted files, other deleted data can only be retrieved by an expert from the original hard drive.

A physical inspection of a company's computer system will without doubt raise issues regarding the protection of trade secrets, as well as proprietary and confidential information, leading the responding party to seek a protective order. CCP §2031.060. See §§8.86-8.89. The requesting party may argue in response that a physical inspection is necessary for the identification and preservation of evidence. In many cases, valuable evidence in a computer system can be discovered only by a trained computer expert.

PRACTICE TIP: Conceptually, this problem is no different from the one that arises when the responding party makes only a cursory search of paper files but a well-trained, highly motivated file researcher might find additional relevant documents if permitted to examine all the paper files. Computer storage is, in some ways, easier to search, and ESI is easier to alter or discard.

Exigent circumstances may exist if files are likely to be deleted in the near future or have recently been deleted, *e.g.*, pursuant to a company's automated document destruction policy. An immediate inspection of the computer may be necessary to preserve essential evidence, because deleted files may not be recoverable if the drive has received too much use since their deletion.

PRACTICE TIP: To reduce the likelihood of a motion for a protective order by the responding party, the requesting party should consider offering to enter into a strict confidentiality agreement to protect sensitive information stored on a computer from public disclosure and to limit its use to the pending litigation.

Given the intrusiveness of a computer system inspection by the opposing party in litigation, a court may be inclined to grant a motion for a protective order barring the examination. To avoid being barred from inspecting the computer system, the party seeking the inspection may propose that the court appoint a neutral expert to perform the inspection. The parties may split the cost of the inspection. Each party's experts should be present at the inspection to monitor the computer areas examined and the appointed expert's methods.

JUDGE'S PERSPECTIVE: A court will be reluctant to permit unrestricted, direct examination of a party's computer system. The party seeking the discovery should be prepared to answer all the legitimate concerns of the party moving for a protective order, including trade secret concerns. Counsel should demonstrate to the court that the information reasonably relates to the litigation and probably cannot be obtained by another, less intrusive means, *e.g.,* there is reason to believe a physical inspection is necessary because files have previously been deleted.

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§8.63 D. Seeking Agreement With Responding Party on How to Make Record of Production

Both the demanding party and the responding party should consider making a record of the items that were produced and, possibly, of how the production was conducted. Such a record can prevent or discourage questions arising later regarding what was produced at the inspection.

PRACTICE TIP: In some situations, a video recording may be the best tool for documenting conditions and behavior during production. This is especially useful in the inspection of real property in construction defect cases. To avoid any controversy at the time of inspection, specify in the demand that the inspection will be videotaped.

The record should be made cooperatively, with the parties agreeing on the scope of production (*e.g.*, whether all items responsive to the demand were produced or whether certain specified items were withheld under a claim of privilege).

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§8.64 1. When Documents Are Voluminous

The larger the number of documents, the more important it is to make a record of everything that is produced. Assigning a number to each document is the best way to keep track of what is produced. If there are multiple parties, alphabetic characters can precede the number to identify which party produced the document (*e.g.,* SMITH1012, JONES000012). Most copy services can attach the numbers as they make copies of the documents. It is increasingly common practice to have the responding party produce the originals to a copying service that makes the copies for the demanding party.

Document management becomes a central issue in cases involving voluminous documents. In many instances, a computer database must be used to track the documents so that they can easily be searched and located. The presence of document numbers provides the link between the physical documents and the computer database. Typical data fields in the database include, but are not limited to, the following:

- Date;
- Creators;
- Recipients;
- Type of document (*e.g.,* letter, memo, draft, report);
- Summary of document;
- Legal issues (*i.e.,* tying the document to the causes of action at issue); and
- Privilege.

For a definition of "database" and discussion on using a database as a litigation support tool, see §4.26.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.65 2. When Documents Are Stored or Produced Electronically

§8.65 2. When Documents Are Stored or Produced Electronically

Making an accurate record of what is produced electronically is particularly important for both the requesting party and the producing party because electronically stored information (ESI) can easily be modified or destroyed.

PRACTICE TIP: One method is for each side to store and date a "reference" copy of each disk or tape that is produced. If the data will be in substantial controversy, it may be worth the expense of depositing the reference copy with an independent third party. Many of the companies that serve as escrows for source code in software contracts also provide this service, which is useful if there is any question as to what has been produced or if a party inadvertently alters its copies and requires, in effect, a reproduction.

NOTE: Independent third parties may also be used when a large number of parties on one side must have access to the same data or when the data must be reviewed by people in distant locations. Third party consultants can provide a wide range of services, *e.g.,* de-duplication and elementary decryption. On providing services to computers that connect from remote locations ("hosting"), see §4.25.

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§8.66 3. When Inspection Activities Performed

It is important to make a record when inspection activities such as copying, sampling, testing, surveying, and measuring will be performed. Such a record will protect both parties. Generally, a record can be made for the demanding party by the person performing the inspection. There may be occasions, however, when the responding party wishes to have a record made, particularly when the inspection might alter or destroy the property being inspected. When this is the case, it may be advisable for the responding party to designate an observer to record, but not participate in, the inspection. On sample provisions that can be included in stipulations, see §8.122.

NOTE: If a mirror image of a hard drive is made, each side to the litigation may keep one image as a reference; the requesting party can use images of the reference to test and recover "deleted" files. It is important to keep a chain of custody because the forensic expert may be required later to testify that the files he or she reviewed were obtained from the mirror image that he or she made at the opposing party's site. On obtaining a forensic or mirror image, see §4.19.

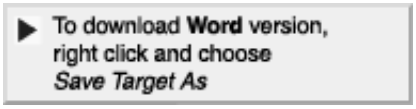
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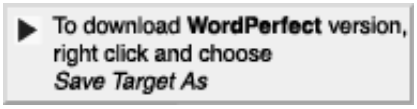
§8.67 4. If No Agreement Reached

If the responding party refuses to cooperate in making this record, the demanding party could have someone identify each item produced to a certified shorthand reporter present at the time of production. An attorney who expects to participate in the case at trial should not be the one to identify the documents for the record because this dual role could create a conflict between the attorney as counsel and as witness if the attorney has to testify at trial on the events concerning the production of the documents. See Cal Rules of Prof Cond 5-210.

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§8.68 5. Sending Follow-Up Letter





It is often good practice for the attorney for the demanding party to follow up production of documents or other items with a letter to opposing counsel listing, separately, the items that were produced and those that were not. The letter may conclude with a paragraph stating, in substance:

We rely on your production of _ _[*date*]_ _ to be a complete production of all _ _[*documents/items*]_ _ described by our demand. If you doubt whether _ _[*documents/items*]_ _ withheld by you are required by our demand, please respond within 30 days to this letter by describing the _ _[*documents/items*]_ _ withheld and stating why they should not be produced. Should you attempt to introduce at trial any _ _[*documents/items*]_ _ described in our demand and not produced for us, we will move to have them excluded from evidence.

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§8.69 E. Service and Filing

Demanding counsel must serve a copy of the demand on the party to whom it is directed and on all other parties who have appeared in the action. CCP §2031.040. Counsel for the demanding party must retain the original demand and original proof of service (together with the original response to the demand when it is received) until 6 months after final disposition of the action. At that time, the originals may be destroyed unless the court, on a showing of good cause, orders that they be kept for a longer period. CCP §2031.290(b). They are not filed with the court.

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IV. RESPONDING TO DEMAND

§8.70 A. Duty to Respond

A party served with a demand to inspect, copy, test, or sample has a duty to respond by (CCP §2031.240(b)):

- Stating that the party will comply with the particular demand (see §8.76);
- Stating that the party lacks the ability to comply with the demand for a particular item or category of item (see §8.77); or
- Objecting to the particular demand (see §8.78).

The responding party must make a diligent search and a reasonable inquiry in an effort to comply with the demand. CCP §2031.230. The responding party must produce responsive items in its possession, custody, or control. This includes items in the physical custody of a third party, but which belong to or are controlled by the party. Examples include items in the custody of a party's attorney or accountant.

On required elements of the response, see §§8.76-8.84.

For a sample form of response to the demand, see §8.124.

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§8.71 1. Duty to Organize Documents

The party under a duty to produce documents for inspection, copying, testing, or sampling must produce the documents as they are kept in the usual course of business or organize and label them to correspond with the categories in the demand. CCP §2031.280(a).

Ordinarily, the cost of responding is borne by the responding party. See *Toshiba Am. Electronic Components, Inc. v Superior Court* (2004) 124 CA4th 762, 769, 21 CR3d 532. The court may allocate the expense of discovery in a protective order or in an order compelling further response if the court finds good cause for the production of electronically stored information (ESI) that is not reasonably accessible. CCP §§2031.060(e), 2031.310(f). On cost-shifting in protective orders, see §8.87A. On cost-shifting in orders compelling further response, see §8.93A.

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§8.72 2. Duty to Translate Data Compilations Into Reasonable Usable Form

Under certain circumstances, the responding party must also, if necessary, translate data compilations or other computer records or electronic information into a reasonably usable form at the reasonable expense of the demanding party. CCP §2031.280(e). See *Toshiba Am. Electronic Components, Inc. v Superior Court* (2004) 124 CA4th 762, 773, 21 CR3d 532.

Whether translation is necessary is often a question of fact, and it is within the court's discretion to decide. Usually, if the data can be read only by proprietary software or an older version of software that is not available to the demanding party, translation is necessary. If the data can be read with off-the-shelf software, the demanding party can seek the electronic data or the media containing it, *e.g.*, the magnetic backup tapes themselves. It is important to remember that any translation, including from one electronic format to another, risks the loss of data or formatting that may be required to make sense of the data.

NOTE: Because the statute requires only the *demanding* party to pay the reasonable expense when necessary, it is risky for the producing party to incur the expense of translation and seek reimbursement without first having contacted the demanding party to work out the details, including payment arrangements.

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§8.73 B. Time to Respond

The party to whom the demand is directed must respond to it, in writing, within 30 days after it is served. CCP §2031.260(a). If the demand was served by mail, the period is extended as provided by CCP §1013. On extensions of time under CCP §1013, see §2.22. The court may order the time for response shortened on the demanding party's motion or extended on the responding party's motion. CCP §2031.260. On orders shortening time, see §§15.11-15.29.

Unlawful Detainer. In unlawful detainer actions, the inspection must be set at a reasonable time at least 5 days after service of the demand, unless the court shortens that time for good cause. CCP §2031.030(c)(2). The response to the demand in unlawful detainer actions must be served within 5 days after service of the demand. The responding party has at least 5 days from the date of service of the demand to respond, unless the court has shortened that time on motion of the demanding party. CCP §2031.260(b).

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§8.74 1. Agreement to Extend Time

The demanding and responding parties also may agree to extend the time for responding to all or part of the demand or the date for inspection, copying, testing, or sampling. CCP §2031.270(a).

This agreement may be informal, but it must be confirmed in a writing that specifies the extended date for inspection, copying, testing, or sampling, or service of the response. CCP §2031.270(a)-(b). Ordinarily, a confirmation letter drafted by counsel for the responding party and signed by the opposing counsel is sufficient; it is good practice to have opposing counsel sign and return a copy of the letter. Unless this letter expressly states otherwise, the agreement to extend time preserves the responding party's right to respond to the demand in any manner, *i.e.,* no objections or other grounds for refusing to comply with the demand are waived by agreeing to extend time under CCP §2031.270(c).

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§8.75 2. Effect of Failure to Serve Timely Response

A party who fails to serve a timely response to a demand waives any objections to it, including ones based on privilege and work product. CCP §2031.300(a). The failure to assert a timely objection to a request to produce may constitute consent to disclosure. *Hiott v Superior Court* (1993) 16 CA4th 712, 719, 20 CR2d 157 (plaintiff's failure to assert attorney-client privilege regarding a video-recorded conversation between herself and her attorney constituted consent to disclosure under Evid C §912).

On the party's motion, the court may, under CCP §2031.300(a), relieve the party of this waiver if:

- The party has subsequently served a response that is in substantial compliance with the requirements of CCP §§2031.210-2031.240 and 2031.280; and
- The party's failure to respond was the result of mistake, inadvertence, or excusable neglect.

NOTE: Failure to serve a timely privilege log for the production will not result in waiver of the attorney-client privilege. See, *e.g., Best Prods., Inc. v Superior Court* (2004) 119 CA4th 1181, 1187, 15 CR3d 154 (only if defendant failed to file a timely response can court find waiver of privilege); *Korea Data Sys. Co. v Superior Court* (1997) 51 CA4th 1513, 59 CR2d 925. See also *Burlington Northern & Santa Fe Ry. Co. v U.S. Dist. Court* (9th Cir 2005) 408 F3d 1142, 1149 (privilege is not necessarily waived by failure to produce privilege log within Fed R Civ P 34 time limit); *U.S. v Union Pac. Ry. Co.* (ED Cal May 23, 2007) 2007 US Dist Lexis 40178, *12 (no waiver under *Burlington Northern* factors when party provided privilege log four days after document production and amended logs less than a month later).

Although *People ex rel Lockyer v Superior Court (Cole Nat'l Corp.)* (2004) 122 CA4th 1060, 1074, 19 CR3d 324 seems to suggest that the need for privilege log arises only if a party makes a motion under CCP §2031.310 (former CCP §2031(m)) seeking a further and more specific identification of documents withheld on the basis of privilege, this is not true in practice. Under CCP §2031.240(b), the response to a demand must identify with particularity any document or thing falling within the category to which an objection is made and set out the particular privilege being invoked. One way to do this is by providing a privilege log, but if the objection is properly stated, failure to produce a privilege log will not result in a waiver of any objections. See *Cole Nat'l Corp., supra*, and *Best Prods., Inc. v Superior Court, supra.*

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§8.76 C. Required Elements of Response

The first paragraph of the response, immediately below the title of the case, must identify the demanding party, the responding party, and the set number. CCP §2031.210(b). The response must address, separately, each demanded item or category of items as follows (CCP §2031.210):

- State that the party will comply with the particular demand for inspection, copying, testing, or sampling by the date set under §2031.030(c)(2) and with any related activities (see §8.77);
- Represent that the party lacks the ability to comply with the demand for inspection of a particular item or category of item (see §8.78); or
- Object to the particular demand (see §8.80).

These responsive statements are not mutually exclusive. If only part of a demand for a specific item or category is objectionable, the response must contain a statement of compliance or a representation of inability to comply to the remainder. CCP §2031.240(a). It is also logical, when appropriate, to combine a statement of compliance with a representation of inability to comply, although this is not expressly required by statute. See CCP §§2031.220-2031.230.

Each statement of compliance, representation of inability to comply, and objection in the response must bear the same number and be in the same sequence as the corresponding item or category in the demand, but the text of the demand for the particular item or category need not be repeated. CCP §2031.210(c).

For a sample form of response to the demand for inspection, see §8.124.

If the responding party will produce the documents but is unable to do so by the date set in the demand, the responding party should specifically object to the date set and provide a date when the production will be completed.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.77 1. Statement of Compliance

§8.77 1. Statement of Compliance

Under CCP §2031.220, a statement that the party will comply with a particular demand must state both of the following:

- The production, inspection, copying, testing, or sampling, and related activity demanded, will be allowed in whole or in part.
- All documents or things in a demanded category that are in the possession, custody, or control of the responding party and to which no objection is made will be produced.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.78 2. Representation of Inability to Comply

§8.78 2. Representation of Inability to Comply

A representation of inability to comply under CCP §2031.230 must affirm that the responding party has made a diligent search and a reasonable inquiry in an effort to comply with the demand and must specify that the party is unable to comply because the particular item or category of items has:

- Never existed;
- Been destroyed;
- Been lost; or
- Never been, or is no longer, in the possession, custody, or control of the responding party.

If the item or category of items is not in the party's possession, custody, or control, the responding party must give the name and address of any person or organization known or believed to have possession, custody, or control. CCP §2031.230.

JUDGE'S PERSPECTIVE: An assertion of inability to comply may preclude the responding party from using a "recently discovered" requested document at trial unless the responding party can establish that a good faith effort was made to discover the document, and that the document was not available at the time of the response. Because the ability to search for the document rests with the responding party, any mistake or neglect in the search may well accrue to the detriment of the responding party, thus limiting the responding party's ability to "sandbag" the requesting party at trial.

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§8.79 3. Representation of Inability to Comply When Electronically Stored Information Requested

If the responding party claims an inability to comply with a demand for electronically stored information (ESI) because it has been deleted, the demanding party should inquire about backup systems and consider demanding an inspection of a hard drive or other hardware from which the evidence might be restored.

PRACTICE TIP: The demanding party should consider following up on the responding party's denial of the existence of backup systems or relevant hardware with interrogatories or deposition questions, to, *e.g.*, the "person most knowledgeable" about the computer system. For questions that may be asked of this person, see §§4.15, 4.40. The person preparing the response to the demand might not conduct a thorough inquiry for alternative methods of obtaining the data unless the demanding party serves additional discovery requests.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.80 4. Objections

§8.80 4. Objections

The responding party who objects to any item or category of item under CCP §2031.240(b) must do the following:

- Identify with particularity any document, tangible thing, land, or electronically stored information (ESI) falling within any category of item in the demand to which objection is being made; and
- Set forth the extent of, and the specific ground for, the objection.

The responding party who objects to the discovery of ESI on the basis that it is from a source that is not reasonably accessible because of undue burden or expense and that the responding party will not search the source without an agreement with the demanding party or court order must identify the types or categories of sources of ESI that it asserts are not reasonably accessible. CCP §2031.210(d). In this case, the responding party need *not* identify with any particularity the items withheld.

The text of the demand for the item or category to which response is being made need not be repeated. CCP §2031.210(c). If only part of a demand for the item or category of item is objectionable, the response must contain a statement of compliance or a representation of inability to comply with respect to the remainder of that demanded item or category. CCP §2031.240(a).

PRACTICE TIP: When counsel for a party objects to production of documents under CCP §2031.240(b), counsel implies that the documents in question exist and have been reviewed. Objections made to requests for production of documents that do not exist or are not in the attorney's or party's possession violate an attorney's ethical duty under Bus & P C §6068(d) to act truthfully and constitute bad faith. *Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 991 n5, 16 CR2d 787, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 16 CR2d 787. The court in *Bihun* ruled that when counsel admitted at trial that a file could not be located, his previous objection to its production on the grounds of privacy and irrelevancy was in bad faith and violated Bus & P C §6068(d). Note that this tip does *not* apply when there is an objection that ESI is not reasonably accessible.

JUDGE'S PERSPECTIVE: It is common for counsel to make "boilerplate" objections listing virtually the same objections to most or all of the demands and then to state that, notwithstanding the objections, responsive non-privileged documents not subject to objection will be produced. Sometimes this response is made before the attorney has collected and reviewed the documents. Aside from objecting to ESI which is not reasonably accessible, this response not only violates the attorney's ethical duty when made about documents that do not exist, but it also makes it impossible for the demanding party to know which documents are withheld and for which reason, and indeed whether any are withheld at all. The result, generally the intended one, is to delay the process until meet-and-confer correspondence provides the information that should have been in the response in the first place. Under these circumstances the court is fully justified in imposing severe sanctions on the responding party. On sanctions, see §§15.85-15.116.

Objections generally have the effect of shifting the burden to the demanding party to move to compel under CCP §2031.310 if attempts to informally resolve the disputed matter fail. When a demand has been properly made under the procedures of CCP §§2031.010-2031.050, but to comply would cause the responding party unwarranted annoyance, embarrassment, or oppression or undue burden and expense, counsel may raise the issue in a motion for a protective order and must do so if the objection is not made in the written response. CCP §2031.060. On moving for a protective order, see §§8.86-8.89. On waiving objections to a demand by failure to serve a timely response, see §8.92.

There are several possible grounds for objecting to a demand. See §§8.81-8.83.

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§8.81 a. Privilege

The statute expressly recognizes that a party may object to particular items within a demand as calling for information that is privileged or is protected work product. For an objection based on privilege, the particular privilege must be invoked. A claim that the information sought is protected work product must be expressly asserted. CCP §2031.240(b). See, *e.g.*, *State ex rel Dep't of Transp. v Superior Court* (1980) 102 CA3d 25, 162 CR 78. The court can require the responding party to provide a privilege log under CCP §2031.240; however, the failure to provide a privilege log does not allow the court to find a waiver of privilege. *People ex rel Lockyer v Superior Court (Cole Nat'l Corp.)* (2004) 122 CA4th 1060, 1074, 19 CR3d 324; *Best Prods., Inc. v Superior Court* (2004) 119 CA4th 1181, 1188, 15 CR3d 154. See Note in §8.75.

Documents withheld under exemptions in the Legislative Open Records Act (Govt C §§9070-9080) need not be identified in a privilege log. *The Zumbrun Law Firm v California Legislature* (2008) 165 CA4th 1603, 1621, 82 CR3d 525. A proper response is to state that records are being withheld under the exemption claimed. 165 CA4th at 1622. The statutory exemptions are not the equivalent of evidentiary privileges and are not waived by disclosure. 165 CA4th at 1623.

On work product doctrine and privileges, see chap 3.

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§8.82 b. Outside Scope of Discovery

Objection might also be made under CCP §§2031.010-2031.510 that the demanded information is not designed to lead to the discovery of admissible evidence or is otherwise outside the scope of discovery authorized by CCP §2017.010. See, *e.g.*, *Associated Brewers Distrib. Co. v Superior Court* (1967) 65 C2d 583, 55 CR 772. On the scope of discovery, see chap 1.

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§8.83 c. Demand Does Not Comply With Statutory Requirements

Additionally, the responding party might object that a particular demand or the set of demands generally fails to comply with the requirements of the statute. For example, the description of a particular category might give insufficient notice of what is to be included within the category (see CCP §2031.030(c)(1)), or the time set for the inspection, copying, testing, or sampling may be less than the required 30 days after the demand was served. See CCP §2031.030(c)(2).

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§8.84 D. Signature and Verification

Party signs under oath. Unless the response contains only objections, the responding party must sign the response under oath. CCP §2031.250(a). When the party signing the response is a corporation, partnership, association, or government agency, an officer or agent signs it under oath on the party's behalf.

An attorney can sign the response as an officer or agent of an organization but cannot, by doing so, shield the client from additional discovery concerning the sources of information contained in the response. When the attorney signs the response on the party's behalf, the responding party waives any attorney-client privilege and any protection for work product for subsequent discovery from that attorney concerning the identity of these sources. CCP §2031.250(b). Thus, in general, counsel should not sign the response for the client.

Attorney signs responses containing objections. Counsel for the responding party must "sign any responses that contain an objection." CCP §2031.250(c). Counsel who is also an officer or agent of an organization should use caution when doing so, making it clear that the other officer or agent signing the response is doing so on behalf of the organization and that the attorney is signing merely because of an objection (or objections), as required by CCP §2031.250(c). It may be best for counsel in this situation to sign each individual response containing an objection, rather than sign the entire document in the usual manner on the last page, or to make clear in some other way that counsel is signing solely as to the objections.

Although a response to a demand must be verified, a party need not verify objections to such a request. Likewise, if only a portion of the response consists of objections, a party need not verify the objections. Verification is unnecessary to assert objections under CCP §2031.250. *Blue Ridge Ins. Co. v Superior Court* (1988) 202 CA3d 339, 248 CR 346. *Blue Ridge* was followed in *Food 4 Less Supermkts. v Superior Court* (1995) 40 CA4th 651, 46 CR2d 925, in which the court held that verification of objections is unnecessary. The court noted that the lack of verification of fact-specific responses permits a party to file a motion to compel further response to obtain the verification. It does not, however, waive the objections. Objections would be waived only if the unverified response contained no objections or if no response at all was made within the statutory time period. 40 CA4th at 657.

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§8.85 E. Service of Responses

Within 30 days after service of a demand, the responding party must serve the original of the response on the demanding party and copies on all other parties who have appeared in the action. CCP §2031.260(a). The demanding party must retain the original response, along with the original demand and proof of service, until 6 months after final disposition of the action. CCP §2031.290(b). See §8.69.

Unlawful detainer. In an unlawful detainer action, the responding party must serve the response at least 5 days from the date of service of the demand unless the court has shortened or extended the time for response. CCP §2031.260(b).

The response is not filed with the court.

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V. MOTION FOR PROTECTIVE ORDER

§8.86 A. When Motion Is Appropriate

A party to whom a demand for inspection, copying, testing, or sampling is directed, or any other person affected by the demand, may move for an order for protection against unwarranted annoyance, embarrassment, or oppression or undue burden and expense. CCP §2031.060(b). A motion for protective order is the appropriate procedure to use when the demand complies with the statute but is unreasonable in light of some facts not apparent in the exchange of demand and response, *e.g.*, the party wants to limit production of trade secrets or other confidential information. See CCP §2031.060(b)(5).

NOTE: Resort to a motion for a protective order is not necessary when the reason for resisting the inspection is based on an objection to particular items in the demand. The objection should be asserted in the response to the demand under CCP §2031.240(b). See §8.70.

A party might move for a protective order if an apparently otherwise proper demand:

- Seeks voluminous, marginally relevant background information;
- Asks for information that is personally embarrassing or is a trade secret;
- Sets a time for the production that is unreasonable in light of the amount of material that must be produced or, if the responding party's premises will be entered, that is unduly disruptive to work being performed on the premises;
- Designates a place for production that is unduly burdensome when another, more appropriate, place exists;
- Specifies that destructive tests will be performed but makes no provision for protecting the responding party's interests; or
- Seeks electronically stored information (ESI) that is difficult or expensive to locate. See §8.87A.

Although CCP §2031.060(b) lists several types of protection that might be sought, the list is illustrative, not exhaustive.

Courts have broad discretion to use CCP §2031.060(b)(5) to protect confidential commercial information. In *Fireman's Fund Ins. Co. v Superior Court* (1991) 233 CA3d 1138, 286 CR 50, the court of appeals held that the trial court should not have ordered production of correspondence between an insurance company and its reinsurers in an action involving bad faith settlement negotiations without requiring review in chambers. Such review was considered necessary to determine the value of the documents to the demanding party and whether any sensitive or irrelevant matters should be excised before disclosure.

JUDGE'S PERSPECTIVE: Discovery requests requiring in camera inspection of documents are usually viewed as very time-consuming and thus burdensome to the court. Although the practice is discouraged, the court may appoint a referee or discovery master to perform this task and require one or more of the parties to pay the cost. The use of a referee substantially increases the time required before the demanding party receives the discoverable document. Because referees may be busy practicing lawyers or may lack incentive to complete their assignments rapidly, counsel should seek to ensure that the order of reference includes deadlines for hearings and resulting orders of recommendation. On discovery referees, see §§2.68-2.72.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.87 B. Court's Authority to Make Protective Orders; Sanctions

§8.87 B. Court's Authority to Make Protective Orders; Sanctions

The court, on a showing of good cause, can make "any order that justice requires" to protect against unwarranted annoyance, embarrassment, or oppression or undue burden or expense. CCP §2031.060(b). This broad authority to shape a protective order to the circumstances of the case includes, but is not limited to, the types of orders set out in CCP §2031.060(b), *i.e.*:

- That all or some of the items or categories of items in the inspection demand need not be produced at all;
- That the time to respond to the demand or to a particular item or category be extended;
- That the place of production be other than that specified in the demand;
- That the response be made only on specified terms and conditions;
- That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only to specific persons or only as specified; or
- That the items produced be sealed and thereafter be opened only on court order.

The list of protective orders illustrated in CCP §2031.060(b)(1)-(6) makes it clear that the court's focus in ruling on the motion is not simply on whether grounds for issuing the order exist but also on the type of protection needed by the moving party. If the motion for protective order is denied in whole or in part, the court may order that the responding party permit the discovery "on terms and conditions that are just." CCP §2031.060(c). As a practical matter, counsel for the moving party should be prepared to propose alternatives to the court to the terms and conditions contained in the demand.

JUDGE'S PERSPECTIVE: When seeking a protective order, counsel should be clear about the scope of the order sought and the reasons for seeking it. The court will probably be unfamiliar with the moving party, its procedures, or the sensitivity of the documents being sought. The parties should thus avoid using boilerplate supporting memoranda covering the applicable law (with which the court is probably quite familiar) and provide the court with the fundamental factual basis for granting the motion. Generally, the evidentiary basis for the motion must appear in declarations with admissible (non-hearsay) evidence, and usually attorneys are, therefore, not appropriate declarants. If trade secret protection is claimed, the moving party should provide a declaration addressing each factor needed to determine that information is indeed a trade secret. See §3.121.

As with other discovery motions, the court must order sanctions against any party, person, or attorney who unsuccessfully makes or opposes a motion for protective order, unless it finds that the one subject to the sanction acted with substantial justification or other circumstances make the sanction unjust. CCP §2031.060(d). However, absent exceptional circumstances, sanctions may not be imposed for failure to provide electronically stored information (ESI) that has been "lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system." CCP §2031.060(h)-(i). See §8.87A. On similar provisions under Fed R Civ P 37(e), see §§8.104, 8.108, 8.118. On sanctions, see §§15.85-15.116.

The issuance and terms of a protective order are matters left largely to the discretion of the trial court. See §§15.59-15.84. There is no abuse of discretion in permitting counsel to share confidential discovery with other counsel in similar pending litigation when counsel agree to be bound by an appropriate protective order. *Raymond Handling Concepts Corp. v Superior Court* (1995) 39 CA4th 584, 590, 45 CR2d 885 (trial court's order "accommodated the public interest in allowing the sharing of information with litigants in similar cases and the interest of [defendants] in protecting confidential information and trade secrets from disclosure to their competitors"). See also *McGinty v Superior Court* (1994) 26 CA4th 204, 213, 31 CR2d 292 (evidence and expert witness preclusion sanctions not proper when plaintiffs' expert in one case shared documents not realizing they were subject to protective order with plaintiffs' counsel in a similar matter because documents would have been discoverable in the related action).

NOTE: A preexisting protective order or agreement between parties is extinguished when incorporated into a court order. Thus, when counsel enters into an agreement with the opposing party to keep the information received

through discovery secret, and the agreement is merged into a court order, neither party has a right of action for breach of contract or tort because the obligations imposed are no longer governed by agreement but by court order. *Westinghouse Elec. Corp. v Newman & Holtzinger* (1995) 39 CA4th 1194, 46 CR2d 151 (violation of discovery order might result in contempt sanctions but could not serve as basis for breach of contract or tort action).

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§8.87A C. Protective Order for Electronically Stored Information

A party or affected person who seeks a protective order on the basis that electronically stored information (ESI) is not reasonably accessible because of undue burden or expense bears the burden of so demonstrating. CCP §2031.060(c). If it is established that the ESI is from a source that is not reasonably accessible because of undue burden or expense, the court may order discovery on a showing of good cause by the demanding party, subject to any limitations on the frequency or extent of discovery imposed under CCP §2031.060(f). CCP §2031.060(d). If the court finds that there is good cause for the production of ESI from a source that is not reasonably accessible, it may set conditions for discovery of the information, including allocation of the expense of discovery. CCP §2031.060(e).

The court must limit the frequency or extent of discovery of ESI, even from a source that is reasonably accessible, if the court determines that (1) it is possible to obtain the information from a more convenient, less burdensome, or less expensive source, (2) the discovery sought is unreasonably cumulative or duplicative, (3) the demanding party had ample opportunity by discovery to obtain the information sought, or (4) the likely burden or expense of the discovery outweighs the likely benefit. CCP §2031.060(f).

On similar provisions under Fed R Civ P 26(b)(2)(B), see §§8.102, 8.104.

Although the court is required to order sanctions in certain circumstances (see §8.87), there is a safe harbor provision for ESI. Absent exceptional circumstances, sanctions may not be imposed for failure to provide ESI that has been "lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system." The safe harbor provision is not to be construed to alter any obligation to preserve discoverable information. CCP §2031.060(h)-(i). On similar provisions under Fed R Civ P 37(e), see §§8.104, 8.108, 8.118.

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§8.88 D. Procedures for Making Motion; Timing

After attempting to resolve an issue informally, a party or other affected person or organization can move for a protective order by filing a notice of motion, accompanied by a supporting memorandum and by one or more declarations showing that good cause exists for the order. This procedure is essentially the same as for other types of discovery protective orders. The form of motion for protective order in §§7.155-7.158 may be adapted for use under CCP §2031.060. For discussion of procedures for discovery motions, including motions for protective orders, see chap 15.

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§8.89 E. Stipulated Protective Order

A responding party who has special concerns (*e.g.*, protection of a trade secret) should try to reach a stipulated agreement with counsel for the demanding party before applying to the court for a protective order. A sample form of a stipulated protective order (confidential information) is set out in §8.124.

PRACTICE TIP: Counsel for the demanding party should be careful before stipulating to a protective order to ensure that nothing in it would prevent demanding counsel from using the information obtained from the inspection, copying, testing, or sampling to contact witnesses or other persons. See generally *Colonial Life & Acc. Ins. Co. v Superior Court* (1982) 31 C3d 785, 793, 183 CR 810.

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VI. COMPELLING DISCOVERY UNDER CCP §§2031.300-2031.320

§8.90 A. Types of Motions Available

Three types of motions can be brought to compel a party's compliance with the terms of the statute:

- A motion to compel a response to the demand (CCP §2031.300(b)) (see §8.92);
- A motion to compel further response to the demand (CCP §2031.310) (see §§8.93-8.95); and
- A motion to compel compliance in accordance with a prior response (CCP §2031.320(a)) (see §8.96).

Although each of these motions is made in response to a different situation, they share procedural similarities. All motions to compel discovery under CCP §§2031.300-2031.320 are made by filing with the court a notice of motion and all supporting papers in the usual manner (see CCP §1005; Cal Rules of Ct 3.1300, 3.1302), with the original inspection demand and proof of service attached. On motion procedures, see §§15.30-15.58. The original response should be attached to a motion to compel a response to the inspection demand and to a motion to compel compliance in accordance with a prior response.

For a motion to compel further responses, material must not be incorporated by reference, and a separate statement must accompany the motion. Cal Rules of Ct 3.1020. See §8.92. A separate statement is not required when no response has been provided to the requests. Cal Rules of Ct 3.1020(b).

For discussion of format requirement for motions to compel, see chap 15 and forms in §§8.126-8.129.

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§8.91 B. Possible Sanctions

As is true of motions to compel in general, sanctions may be available to the moving or opposing party or attorney unless the court finds that the unsuccessful party or attorney acted with substantial justification or that other circumstances make the imposition of sanctions unjust. CCP §§2031.300, 2031.310, 2031.320.

Electronically stored information (ESI). With regard to ESI, particular attention must be paid to the possibility of sanctions because they can be particularly costly. For example, if an expert declaration is used as part of the moving or opposing papers, as is often the case in explaining the need for or difficulty in producing the ESI, the court may include the expert costs in the sanction award. However, absent exceptional circumstances, sanctions may not be imposed for failure to provide ESI that has been "lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system." This safe harbor provision is not to be construed to alter any obligation to preserve discoverable information. CCP §§2031.300-2031.320. On similar provisions under Fed R Civ P 37(e), see §§8.104, 8.108, 8.118.

If a party fails to comply with a court order regarding production, issue sanctions, evidence sanctions, and terminating sanctions can be awarded in addition to monetary sanctions. CCP §§2031.310-2031.320. For this reason, it may be particularly important when opposing a motion regarding ESI to consult with appropriate technical personnel or experts and fully disclose the limitations and time requirements attendant to the electronic evidence demand. Otherwise a responding party may find itself subject to a court order with which it cannot physically comply, risking severe sanctions.

Counsel should be alert to possible miscommunications with a client's technology staff in determining whether documents are available and in making representations to opposing counsel and the court about the existence of documents and burdens of production. Counsel who are unfamiliar with technology and the client's computer systems may well make misleading representations and fail to produce discoverable files which are later in the ordinary course of business destroyed. Under these circumstances, severe sanctions may be imposed. See, *e.g., U.S. v Philip Morris USA, Inc.* (D DC 2004) 327 F Supp 2d 21 (monetary and evidentiary sanctions for failure to preserve electronic evidence); *Zubulake v UBS Warburg LLC* (SD NY 2003) 220 FRD 212 (sanctions for failure to preserve electronic evidence). On electronic discovery in general, see chap 4.

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C. Specific Motions to Compel

§8.92 1. Motion to Compel Response

When a party fails to respond to the demand for inspection, copying, testing, or sampling within the time permitted by CCP §2031.260, the demanding party may move for an order compelling a response to it. CCP §2031.300(b). For discussion of the format requirements for a motion to compel, see chap 15 and forms in §§8.126-8.129.

Section 2031.300 sets no time limit on moving to compel a response (in contrast with CCP §2031.310, which requires a motion to compel further response to be made within 45 days after the response was served); however, the motion to compel a response should be made promptly to prevent the responding party from arguing that a waiver has occurred. See sample forms of motion to compel response and accompanying declaration in §§8.126-8.129.

Unlike CCP §2031.310, which governs a motion to compel *further* response, CCP §2031.300 does not require that specific facts be set forth showing good cause to justify the requested discovery. Thus, a separate list setting forth each demand and the factual and legal reasons for compelling it does not appear to be necessary when a party fails to serve a timely response to a demand for production. In fact, this failure waives all objections to the demand, including those based on privilege or protected work product. CCP §2031.300(a). As a result, the responding party is not permitted to object unless the court has found that the failure to make a timely response was due to mistake, inadvertence, or excusable neglect. CCP §2031.300(a). Absent relief from the failure to timely respond and justified objections, the demanding party is entitled to a response to each item. See CCP §2031.210(a).

A party that moved to compel responses to its inspection demands after the discovery cutoff date was not entitled to have its motion heard, because it had not moved to reopen discovery. *Pelton-Shepherd Indus., Inc. v Delta Packaging Prods., Inc.* (2008) 165 CA4th 1568, 1586, 82 CR3d 64. In a case it called "a classic example of how not to conduct … or manage discovery" (165 CA4th at 1573), the court of appeal held that the trial court prejudicially erred in granting the motion to compel in the absence of a motion to reopen discovery under CCP §2024.050, because without the motion to reopen, the trial court could not consider the issues relevant to deciding whether reopening discovery was warranted.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/ 2. Motion to Compel Further Response/§8.93 a. When to Bring Motion to Compel Further Response

2. Motion to Compel Further Response

§8.93 a. When to Bring Motion to Compel Further Response

A motion to compel further response (CCP §2031.310) should be brought when:

- A statement of compliance with the demand is incomplete;
- A representation of inability to comply is inadequate, incomplete, or evasive; or
- An objection in the response is without merit or too general (including an objection based on privilege that does not identify the subject documents with particularity).

Counsel can initially determine whether a response is adequate by examining the response in light of the technical requirements of CCP §§2031.210-2031.250; however, a full evaluation, particularly of the merits of any objections, may require significant research.

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§8.93A b. Motion to Compel Further Response Relating to Electronically Stored Information

In a motion to compel further response relating to electronically stored information (ESI), a party or affected person who objects to or opposes production, inspection, copying, testing, or sampling on the basis that the ESI is from a source that is not reasonably accessible because of undue burden or expense bears the burden of so demonstrating. CCP §2031.310(d). If it is established that the ESI is from a source that is not reasonably accessible because of undue burden or expense, the court may order discovery on a showing of good cause by the demanding party, subject to any limitations on the frequency or extent of discovery imposed under CCP §2031.310(g). CCP §2031.310(e). If the court finds that there is good cause for the production of ESI from a source that is not reasonably accessible, it may set conditions for discovery of the information, including allocation of the expense of discovery. CCP §2031.310(f).

The court must limit the frequency or extent of discovery of ESI, even from a source that is reasonably accessible, if the court determines that (1) it is possible to obtain the information from a more convenient, less burdensome, or less expensive source, (2) the discovery sought is unreasonably cumulative or duplicative, (3) the demanding party had ample opportunity by discovery to obtain the information sought, or (4) the likely burden or expense of the discovery outweighs the likely benefit. CCP §2031.310(g).

On similar provisions under Fed R Civ P 26(b)(2)(B), see §§8.102, 8.104.

Although the court must impose sanctions on the unsuccessful party, person, or attorney in certain circumstances (see §8.91), there is a safe harbor provision for sanctions related to ESI. Absent exceptional circumstances, sanctions may not be imposed for failure to provide ESI that has been "lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system." The safe harbor provision is not to be construed to alter any obligation to preserve discoverable information. Proposed amended CCP §2031.310(h)-(j). See Judge's Perspective in §4.7. On similar provisions under Fed R Civ P 37(e), see §§8.104, 8.108, 8.118.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.94 c. Format for Motion to Compel Further Response

§8.94 c. Format for Motion to Compel Further Response

A motion to compel further response to an inspection demand must comply with Cal Rules of Ct 3.1020, which requires a separate statement to accompany the motion. The separate statement must list (Cal Rules of Ct 3.1020(c)):

- The text of each inspection demand to which further response or production is requested;
- The text of each response or objection, and any further responses;
- A statement of the factual and legal reasons for compelling further responses or production;
- If necessary, the text of all definitions, instructions, and other matters necessary to understand each inspection demand and the responses to it;
- If the response to a particular inspection demand is dependent on the response given to another inspection demand, or if the reasons a further response to a particular inspection demand is deemed necessary are based on the response to some other inspection demand, the other inspection demand and the response to it must be set forth; and
- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them must summarize each relevant document.

The separate statement must identify the inspection demands by set and number. Cal Rules of Ct 3.1020(d). Material must not be incorporated into the separate statement by reference. Cal Rules of Ct 3.1020(c).

A separate statement is not required when no response has been provided to the requests. Cal Rules of Ct 3.1020(b).

The motion must also be accompanied by a supporting memorandum, which may be a simple one because the separate statement required by Cal Rules of Ct 3.1020 will contain the legal and factual argument for the specific items for which further response is desired.

Finally, the motion should be accompanied by a declaration by counsel for the demanding party and any other declarations if facts not known to counsel are needed to support the motion. Counsel's declaration must include a showing of a reasonable attempt at an informal resolution of each issue presented by the motion.

JUDGE'S PERSPECTIVE: To develop an understanding of the motion, the court uses the separate statement that sets forth each demand to which further answer is sought, the response to the demand, and the factual and legal reasons for compelling further response. Glossing over the requirements of this document will severely hamper the moving party in obtaining the relief sought. The court expects the moving party to spell everything out in one place. With the press of court business, if the court has to look from the separate statement to the declaration and to the supporting memorandum, it might well move on to other, better-prepared motions.

PRACTICE TIP: A motion to compel *further* responses may take considerably more time to prepare than one to compel a response when there has been no attempt to respond, particularly when many unfounded objections to demands must be individually researched. When substantial time is spent in preparing a motion and attempting to resolve informally issues related to the motion, counsel should supply the court with greater detail to provide a basis for appropriate sanctions. See form of motion in §8.128.

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§8.95 d. Timing for Motion to Compel Further Response

Counsel must serve the notice of motion to compel further responses within 45 days after service of the response or on or before any specific later date to which the parties have agreed in writing. CCP §2031.310(c). The 45-day period is extended as provided for in CCP §1013 when service of the response is made by mail. A party who fails to give notice of the motion within the 45-day period waives any right the party may have to a further response. CCP §2031.310(c). The statute does not specify any procedure for relief from failure to bring the motion within the required time.

PRACTICE TIP: A party who fails to give notice within the required time should seek relief from waiver under CCP §473. The responding party might then argue that the Legislature, had it intended to permit relief from this type of waiver, would have specifically allowed for it (as it has under CCP §2031.300(a)). If the demanding party tries to nullify the effect of the waiver by serving a new demand for the same inspection, the responding party might object to the new demand on the grounds that it duplicates the earlier demand and that the demanding party's right to further response was previously waived.

A motion to compel further response to a demand for production under CCP §2031.310(c) is untimely when the motion is made more than 45 days after service of the response, even when the motion is brought less than 45 days after the date set for production. *Standon Co. v Superior Court* (1990) 225 CA3d 898, 275 CR 833 (referring to former CCP §2031(*l*)). Parties can, however, agree to extend the time in which the demanding party can move to compel a further response. 225 CA3d at 904 n6.

JUDGE'S PERSPECTIVE: The party seeking production frequently grants one or more extensions to the responding party when that party claims that it needs additional time to make the requested production. Such courtesy is commendable, but if the extensions cause the requesting party to come up against the discovery cutoff or trial dates, the court may well deny a request to continue the date of the party's stipulations.

NOTE: Failure to file a motion to compel further response to a request for production of documents under CCP §§2031.300-2031.320 does not preclude the party seeking discovery from requesting that the same documents be brought to a deposition under CCP §§2025.010-2025.620.

There are two procedures to compel production of documents from a party—inspection demands and deposition notices. Unless there is a finding of undue burden under CCP §2019.030(a)-(b), the failure to use one procedure does not prevent use of the other. *Carter v Superior Court* (1990) 218 CA3d 994, 267 CR 290. In issuing a writ of mandate directing the trial court to grant the petitioner's motion to compel production at deposition, the court of appeal in *Carter* distinguished *Professional Career Colleges, Magna Inst., Inc. v Superior Court* (1989) 207 CA3d 490, 255 CR 5, on the ground that in the latter case both discovery requests had been made under the same code section rather than under different sections. 218 CA3d at 997.

PRACTICE TIP: If necessary, a trial subpoena may be used to compel production at trial (see CCP §§1985, 1987). On compelling attendance and production of documents at trial, see California Trial Practice: Civil Procedure During Trial, chap 4 (3d ed Cal CEB 1995).

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§8.96 3. Motion to Compel Compliance in Accordance With Prior Response

When a responding party fails to permit inspection, copying, testing, or sampling in accordance with a statement of compliance contained in a response, the demanding party may bring a motion under CCP §2031.320(a) to compel compliance with the response.

The statute does not specify a time within which this motion to compel must be made (see CCP §2031.320(a)), but counsel should do so promptly. A motion should be appropriate under this section not only when the party fails to comply with the express terms of the response, for example, by failing to produce promised documents, but also when the party fails to cooperate in the statutory requirements for inspection, copying, testing, or sampling. For example, a motion under CCP §2031.320(a) appears to be appropriate if the party fails to organize the documents or provide a transcription of computer records as required by CCP §2031.280.

As with motions to compel further response, the factual basis for a motion to compel compliance will vary, and the declarations supporting them are not reducible to a single format. At a minimum, the motion should be supported by a declaration of counsel stating that a demand and response were served, that the actual inspection failed to comply with the response, the particulars of such failure, and the amount of time counsel has spent preparing the motion to compel compliance. The declaration in §8.126 can be adapted to provide the basic information.

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§8.97 VII. INSPECTION DEMANDS IN FEDERAL COURT

In federal actions, Fed R Civ P 34 (which governs "Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes") is the principal rule governing the use of inspection demands (termed "requests to produce" in federal practice). The practitioner should also be familiar with Fed R Civ P 26 and 37, however. Rule 26 delineates the general provisions of federal discovery, such as the timing of discovery, required initial disclosures, the disclosure of expert witnesses, the scope of discovery, and protective orders. Rule 37 deals with motions to compel and sanctions.

NOTE: Counsel must also be familiar with the specific judge's standing orders and rules, as well as with the local rules of the district court. Some judges, *e.g.*, bar the filing of discovery motions without leave of court, or permit only short letter briefs and hold argument by telephone.

In many respects inspection demands in federal actions are used just as they would be in state court cases. But there are significant procedural differences of which the practitioner should be aware and which are described below.

For further discussion of the federal rules on inspection demands, see 7 Moore, Moore's Federal Practice (3d ed 1997); 8A Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d (2d ed 1994). On the federal rules, see §8.104.

NOTE: Federal practitioners usually refer to "requests to produce" rather than "inspection demands"; this chapter uses "inspection demands" throughout for purposes of consistency.

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A. Procedures for Making Inspection Demands in Federal Court

§8.98 1. Persons to Whom Inspection Demands May Be Made

In federal actions, any party may serve an inspection demand on any other party. Fed R Civ P 34(a). Nonparties may be compelled to produce documents and things (including electronically stored information (ESI)) or to submit to an inspection of land through the subpoena procedures outlined in Fed R Civ P 45. Fed R Civ P 34(c). This is similar to California law, although the Discovery Act does not specifically allow for the inspection of nonparty land. See CCP §§2020.010-2020.510; Note, *Rule 34(c) and Discovery of Nonparty Land*, 85 Yale LJ 112 (1975).

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§8.99 2. Time for Service of Inspection Demands

Except on leave of court or written stipulation, inspection demands may not be served until the parties have fulfilled the early disclosure and meet-and-confer requirements of Fed R Civ P 26. See Fed R Civ P 26(d)(1). Parties must meet and confer "as soon as practicable" or at least 21 days before a scheduling conference or before a scheduling order is due under Fed R Civ P 16(b). Fed R Civ P 26(f)(1). See Fed R Civ P 26(d). The purpose of the meet-and-confer conference is to encourage the parties, at an early stage in the litigation, to explore settlement options and to develop an overall discovery plan that addresses issues about electronically stored information (ESI), including the preservation of discoverable information and the format in which it will be produced. See Fed R Civ P 26(f).

The court may permit an earlier service if there is a risk that delay might cause the loss of papers or things. The court may also be receptive to earlier service when the material is required for a motion for temporary restraining order or preliminary injunction.

In general, the meet-and-confer session takes place in person and the participants address asserted deficiencies in early mandatory disclosure and the need for further discovery. The substance of agreements and disagreements is confirmed by letter, usually from the plaintiff's counsel, after the meet-and-confer conference. At the first status or scheduling conference the judge usually addresses the disputes and sets the sequence of discovery.

The federal meet-and-confer requirement differs substantially from California practice, in which inspection demands may be served by a defendant at any time and by a plaintiff at any time that is 10 days (5 days in unlawful detainer actions) after service of summons on or appearance by the party to be served. See CCP §2031.020. On the time for service of inspection demands in state court, see §8.15.

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§8.100 3. Number of Inspection Demands

As in state practice, the federal rules do not limit the number of inspection demands that a party may serve on another party, although excessive demands may invite a motion for a protective order. See Fed R Civ P 26(c). Courts may also impose limits in case management orders.

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§8.101 4. Format of Inspection Demands

Unlike the California Civil Discovery Act, Fed R Civ P 34 provides little guidance regarding the proper format of inspection demands, except to say that the request "must describe with reasonable particularity each item or category of items to be inspected." Fed R Civ P 34(b)(1)(A). Further, the request "must specify a reasonable time, place, and manner for the inspection and for performing the related acts." Fed R Civ P 34(b)(1)(B).

Local rules. A federal district court's local rules may provide more detail. For example, in the United States District Court of the Central District of California, inspection demands "shall be numbered sequentially without repeating the numbers used on any prior set of requests for production propounded by that party." CD Cal Local Civ R 34-1.

Judge's standing order. An individual judge's standing order may also provide more detail. As in some superior courts, cases in federal court are generally assigned for all purposes to a single district judge or to a magistrate judge with the parties' consent, and many judges issue standing orders governing various aspects of a case. Some judges also delegate discovery disputes to a magistrate judge and counsel should thus also be familiar with the magistrate judge's rules. A practitioner should check both sources before propounding inspection demands on a party.

Signature. Federal Rule of Civil Procedure 26(g)(1) mandates that all discovery requests be signed by at least one attorney of record or by an unrepresented party. The signature constitutes a certification that the request is (Fed R Civ P 26(g)(1)(A)-(B)):

- Consistent with the Federal Rules of Civil Procedure and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
- Not made for any improper purpose such as harassment or unnecessary delay; and
- Not unreasonably or unduly burdensome or expensive.

An unsigned inspection demand may be stricken promptly after the requesting party is informed of the lack of signature (Fed R Civ P 26(g)(2)), and if the certification requirement is violated in any way without substantial justification, the court, on its own initiative or on a motion by a party, will impose "an appropriate sanction," including an order to pay the reasonable costs and attorney fees incurred because of the violation. Fed R Civ P 26(g)(3).

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5. Scope of Inspection Demands

§8.102 a. Matters Relevant and Not Privileged

As under California law, the permissible scope of inspection demands in federal actions is broadly construed to include any non-privileged matter that is relevant to the claim or defense of any party. See Fed R Civ P 26(b)(1); *Cory v Aztec Steel Bldg., Inc.* (D Kan 2005) 225 FRD 667, 670 ("request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the claim or defense of any party"). Relevant matter need not be admissible at trial; it is discoverable if it appears reasonably calculated to lead to the discovery of admissible evidence. Fed R Civ P 26(b)(1).

Electronically stored information (ESI). A party need not provide discovery of ESI from sources that "the party identifies as not reasonably accessible because of undue burden or cost." Fed R Civ P 26(b)(2)(B). If, on a motion to compel or for a protective order, the party from whom discovery is sought shows that the "information is not reasonably accessible because of undue burden or cost," the court may "nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C)," and may specify the conditions for discovery. Fed R Civ P 26(b)(2)(B). See §8.104.

Court limitations on discovery. Under Fed R Civ P 26(b)(2)(C) the court must limit the scope of inspection demands if it determines that:

- The discovery is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- The party seeking discovery has already had ample opportunity to obtain the information; or
- The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the proposed discovery in resolving the issues.

JUDGE'S PERSPECTIVE: Too often, the parties ignore the important requirement of proportionality of the burden and expense of discovery to the needs of the case. In any dispute, the requesting party should be prepared to justify burdensome discovery based on its relevance and importance to resolving key issues in the case.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.103 b. Items Subject to Inspection

§8.103 b. Items Subject to Inspection

A party may request another party to produce, or allow the inspection and copying of, any "designated documents," which includes writings, drawings, graphs, charts, photographs, sound recordings, and other data or data compilations. Fed R Civ P 34(a)(1).

A party may also inspect, copy, test, or sample any tangible things that constitute or contain matter discoverable under Fed R Civ P 26 and that are in the possession, custody, or control the responding party. Fed R Civ P 34(a)(1).

Finally, a party may request "entry upon designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it." Fed R Civ P 34(a)(2).

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§8.104 c. Electronically Stored Information

Because so much of life now takes place within the digital realm, it is almost inevitable that at least some of the information that a party will seek from another party during federal court discovery will be in an electronic form. On possible sources of electronically stored information (ESI), see §§4.14-4.15, 4.40, and 8.19-8.27. Discussed below are some of the unique issues relating to the discovery of ESI in federal court.

The Federal Rules of Civil Procedure that relate to ESI do the following:

- Provide a process for the parties and the court to address early issues about the disclosure and discovery of ESI (Fed R Civ P 16(b)(3)(B)(iii)). On California case management rules relating to discovery of ESI, see Cal Rules of Ct 3.724(8), §§2.25, 5.44.
- Require the parties, during the initial disclosures, to provide information about ESI (Rule 26(a)(1)(A)(ii)); to discuss during the discovery planning conference issues about ESI, including the preservation of discoverable information and the format in which it will be produced (Rule 26(f)(3)(C)); and to provide a sample for reporting on these matters in Form 35 (Report of Parties' Planning Meeting). On California case management rules relating to discovery of ESI, see Cal Rules of Ct 3.724, §§2.25, 5.44.
- Require that the parties should provide discovery of ESI, with the limitation that a party need not provide discovery of ESI from sources that are "not reasonably accessible because of undue burden or cost." The amendments also state the burdens on a motion to compel or for a protective order brought on this issue (Rule 26(b)(2)(B)). On burdens on motion to compel or for protective order under California state law, see §§5.138, 5.140, 8.87A, 8.93A.
- Provide that when a party opts to respond to an interrogatory by producing business records, those records can include ESI (Rule 33(d)).
- Distinguish between ESI and "documents" (Rule 34(a)(1)(A)) and permit the requesting party to specify the format in which electronically stored evidence should be produced, subject to the responding party's objection (Rule 34(b)(1)(C)). If the responding party objects "to a requested form for producing electronically stored information" or if the request did not specify the form, the responding party must "state the form or forms it intends to use" (Rule 34(b)(2)(D)). The party submitting the request may then move for an order compelling production. See Rule 37(a). The amendments also provide that if an inspection demand does not specify the form of production of ESI, the responding party must produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable (Rule 34(b)(2)(E)(ii)); the responding party need not produce the same ESI in more than one form (Rule 34(b)(2)(E)(iii)). On California state law provisions that define ESI and address form in which it is to be produced, see §§5.3, 5.89, 8.14A, 8.48-8.49, 8.51.
- Create a "safe harbor" that protects a party from sanctions for failing to provide ESI lost because of the routine, good-faith operation of an electronic information system (Rule 37(e)). On safe harbor provisions under California state law, see §§4.7, 8.87, 8.87A, 8.91, 8.93A.
- Make technical amendments in the deposition subpoena to conform to the other amendments (Rule 45). On subpoenas requiring production of ESI under California state law, see chap 5.

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§8.105 (1) What Electronically Stored Information Is Discoverable?

Federal Rules of Civil Procedure 34(a) allows a party to request that another party produce, or allow the inspection and copying of, any "electronically stored information," which includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations."

NOTE: Even before Rule 34 was amended to expressly allow the discovery of electronically stored information (ESI) (see §8.104), courts had interpreted the rule to allow such discovery. See, *e.g., Playboy Enters., Inc. v Welles* (SD Cal 1999) 60 F Supp 2d 1050, 1053, aff'd in part and rev'd in part on other grounds in *Playboy Enters., Inc. v Welles* (9th Cir 2002) 279 F3d 796 ("information stored in computer format is discoverable" under Fed R Civ P 34); *Rowe Entertainment, Inc. v The William Morris Agency, Inc.* (SD NY 2002) 205 FRD 421, 428, aff'd (2d Cir, Dec. 30, 2005) (electronic documents "are no less subject to disclosure than paper records"); *Crown Life Ins. Co. v Craig* (7th Cir 1993) 995 F2d 1376, 1383 ("computer data is included in Rule 34's description of documents"); 1970 Advisory Committee Note to Rule 34 ("The inclusive description of 'documents' is revised to accord with changing technology").

ESI that has been transferred to backup tapes or other media for storage has generally been held discoverable, although there may well be issues relating to the allocation of the costs of producing such materials. See *Zubulake v UBS Warburg LLC* (SD NY 2003) 217 FRD 309, 316; *McPeek v Ashcroft* (D DC 2003) 212 FRD 33. There may also be issues about whether such materials are "not reasonably accessible because of undue burden or cost" and thus not discoverable under Fed R Civ P 26(b)(2)(B). See §§8.102, 8.104. On the allocation of the costs of producing ESI, see §8.116.

Additionally, because "deleting" an electronic file does not necessarily mean that it has been irretrievably erased, deleted files and e-mails, to the extent they remain retrievable, may be discoverable. See *Playboy Enters., Inc. v Welles* (SD Cal 1999) 60 F Supp 2d 1050, aff'd in part and rev'd on other grounds in *Playboy Enters., Inc. v Welles* (9th Cir 2002) 279 F3d 796, in which the court allowed plaintiff access to defendant's hard drive to attempt to recover deleted files. See also *Thompson v HUD* (D Md 2003) 219 FRD 93, 97; *Simon Prop. Group v mySimon, Inc.* (SD Ind 2000) 194 FRD 639, 640. But again, issues may arise about the proper allocation of the costs of retrieving and producing such materials and about whether they are undiscoverable due to "undue burden or cost."

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§8.106 (2) Considerations Before Service of Demand for Inspection of Electronically Stored Information

As a strictly formal matter, electronically stored information (ESI) is requested from another party in the same manner as any other type of evidence, *i.e.*, through an inspection demand. But before serving an inspection demand that seeks ESI, a federal practitioner should be aware of several preliminary considerations.

Preservation letter. First, counsel should consider sending the responding party a preservation-of-evidence letter at an early stage of the litigation (and perhaps even before litigation commences). See §8.17. For sample letter, see §4.41. Ideally, the letter should be as specific and detailed as possible regarding the issues in the litigation, the types of ESI that the party believes should be preserved, and the manner in which it should be preserved. See *In re FirstEnergy Corp. Secs. Litig.* (ND Ohio 2004) 229 FRD 541, 543, in which plaintiffs detailed the precise steps and methods by which defendants were to preserve specified ESI.

Such letters, particularly if sent before litigation formally commences, help protect the sending party against another party's destroying evidence and later attempting to claim that it was unaware that the evidence was relevant to the litigation. On the spoliation of ESI, see §8.108.

Preservation order. Second, in certain unusual circumstances, court intervention at an early stage in the litigation may be appropriate. See §8.16. In *Antioch Co. v Scrapbook Borders, Inc.* (D Minn 2002) 210 FRD 645, 650, before the parties had fulfilled their Fed R Civ P 26(f) meet-and-confer obligations, the court granted plaintiff's motions for an order for the preservation of records and to expedite discovery because it was concerned that ESI was in imminent danger of being destroyed by defendants. The court also granted plaintiff's motions to compel discovery and to appoint a neutral expert in computer forensics because computer data that had been deleted remained on defendants' hard drive, but might be irretrievably overwritten. *Antioch Co. v Scrapbook Borders, Inc.*, *supra*. See also *Treppel v Biovail Corp.* (SD NY 2006) 233 FRD 363, 371 (request for preservation order premature in absence of showing that defendant's tardy steps to preserve electronic evidence were inadequate).

Parties' agreement. Third, at the mandatory Fed R Civ P 26 meet-and-confer conference the parties must discuss any issues relating to the discovery of ESI. Additionally, other discovery devices, particularly interrogatories and depositions, can be useful in clarifying the scope and location of the ESI in a case. See discussion in §§8.28-8.31.

JUDGE'S PERSPECTIVE: At the initial discovery conference, the parties should take full advantage of the mandatory duty to discuss any and all issues regarding ESI, including, *e.g.,* the types of systems they have, their document retention policies, how they want to handle inadvertent disclosure, and the format in which ESI will be produced (on format, see §§4.33-4.35). The parties might, *e.g.,* agree to first search data that is easily located and retrieved. Then if it is necessary to search less accessible data (*e.g.,* disaster backup tapes), they might agree to use sampling to see if fuller restoration and searching is likely to be worthwhile in light of the expense. The parties should propose that the court enter their agreements into its case management order.

Detailed inspection demands. Fourth, inspection demands themselves should be as detailed and specific as possible, with precise definitions given for all technical terms and a specification of the form or forms in which ESI is to be produced. Because many attorneys lack expertise in this area, counsel should consider consulting an information technology expert. A practitioner should consider using the services of either the client's information technology experts or hiring a forensic technology consultant to assist in the preparation of inspection demands. On where ESI may be stored, and what to request, see §§8.19-8.27.

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§8.107 (3) Retention of Electronically Stored Information

Duty to preserve. In federal courts, it has been stated that the obligation to preserve evidence "arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Zubulake v UBS Warburg LLC* (SD NY 2003) 220 FRD 212, 216. On the duty to preserve evidence, see §§4.6-4.8.

The filing of a lawsuit, of course, puts a party on notice of litigation, but this is not always the crucial date. Anything reasonably indicative that litigation is in a party's future may be sufficient to obligate that party to begin preserving evidence. Examples include the filing of a charge with an administrative agency (see 220 FRD at 216 (EEOC)) or the receipt of a preservation-of-evidence letter.

Litigation hold. In the most general terms, a party must not destroy "unique, relevant evidence that might be useful to an adversary." *Zubulake v UBS Warburg*, 220 FRD at 217. More specifically, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." 220 FRD at 218. On ensuring that a hold is placed on the destruction of documents, see §§4.11-4.12. For sample "legal hold" letter, see §4.38.

Unless backup tapes are actively used for information retrieval, in which case they would be subject to the litigation hold, the litigation hold generally would not apply to backup tapes or other media maintained solely for disaster recovery, which may continue to be recycled as before. One exception is when a party can identify where a particular employee's documents are stored on its backup tapes, in which case those containing the documents of "key players" would be subject to the litigation hold. 220 FRD at 218.

In *Zubulake*, the court noted that because there are many ways to manage electronically stored information (ESI), "litigants are free to choose how the task is accomplished," such as by retaining all backup tapes for the relevant personnel and cataloging any later-created documents in a separate file. This, along with a "mirror-image" of the computer system taken at the time the duty to preserve attaches, "creates a complete set of relevant documents." 220 FRD at 218. On obtaining a mirror or forensic image, see §§4.19, 8.26.

JUDGE'S PERSPECTIVE: The scope of the duty to preserve raises difficult questions. Courts will look for evidence that the party took all reasonable steps to preserve relevant information, and acted in good faith, as opposed to manipulating the operation of its systems to delete relevant data and hide the ball. Opposing parties whose exposure to ESI is roughly equal have a strong incentive to agree to limits on what they must preserve. More difficult issues arise when one side has most or all of the ESI.

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§8.108 (4) Spoliation of Electronically Stored Information

Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. There are four ways in which courts may sanction parties responsible for spoliation:

- Instruct the jury that it may draw an inference adverse to the party or witness responsible for destroying the evidence (*i.e.,* that the destroyed evidence would have been unfavorable to the party responsible for its destruction);
- Exclude witness testimony offered by the party responsible for destroying the evidence and based on the destroyed evidence;
- Determine that an issue is resolved against the party; and
- Dismiss the claim of the party destroying the evidence or enter its default.

In re Napster, Inc. Copyright Litig. (ND Cal 2006) 462 F Supp 2d 1060, 1066. On spoliation sanctions in state court, see §15.100.

The imposition of sanctions for spoliation does not necessarily require a finding that the evidence was destroyed in "bad faith"—although such a finding would certainly suffice, "so will simple notice of potential relevance to the litigation." *Glover v BIC Corp.* (9th Cir 1993) 6 F3d 1318, 1329, quoting *Akiona v U.S.* (9th Cir 1991) 938 F2d 158, 161 (adverse inference instruction drawn from destruction or spoliation of evidence). As the Ninth Circuit explained in *Akiona,* quoting *Nation-Wide Check Corp. v Forest Hills Distribs., Inc.* (1st Cir 1982) 692 F2d 214, 218, the adverse inference is based on two rationales, one evidentiary and one not. "The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document […]The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial."

A party's motive or degree of fault will be considered by the court in making a sanctions decision, however. *In re Napster, Inc. Copyright Litig.* (ND Cal 2006) 462 F Supp 2d 1060, 1066. See *Cecconi v Cecconi (In re Cecconi)* (Bankr ND Cal 2007) 366 BR 83, 111 (adverse inference sanction unwarranted when although party used liquid white-out to alter documents, she did not do so because they were relevant to the litigation or threatening to her, and when use of white-out did not prevent parties from reading the documents).

On additional sanctions, see §§15.85-15.116.

NOTE: Under the federal rules, a "safe-harbor" provision can protect a party (absent exceptional circumstances) from sanctions for failing to provide electronically stored information (ESI) lost because of the "routine, good-faith operation of an electronic information system." Fed R Civ P 37(e). However, this provision does not permit a party to "exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve." Advisory Committee Note to Rule 37(f) [now Rule 37(e)]. On safe harbor provisions relating to ESI under California state law, see §§4.7, 8.87, 8.91, 8.93A.

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§8.109 d. Possession, Custody, or Control

A demand for inspection can only be made for items in the possession, custody, or control of the responding party. Fed R Civ P 34(a). "Control" is defined as "the legal right, authority, or ability to obtain upon demand documents in the possession of another." *American Rock Salt Co. LLC v Norfolk S. Corp.* (WD NY 2005) 228 FRD 426, 460. A party may thus be obliged to produce documents in the possession of a nonparty if the party has the legal right to obtain the document or has control over the nonparty. *Soto v City of Concord* (ND Cal 1995) 162 FRD 603, 619.

Difficulties can arise when the party and nonparty are related in some fashion but the degree of control that one has over the other is unclear. For example, in a parent-subsidiary situation, "the determination of control turns upon whether the intracorporate relationship establishes some legal right, authority or ability to obtain the requested documents on demand." *Camden Iron & Metal, Inc. v Marubeni Am. Corp.* (D NJ 1991) 138 FRD 438, 442. See also *Afros S.P.A. v Kraus-Maffei Corp.* (D Del 1986) 113 FRD 127, 131 ("the particular *form* of the corporate relationship does not govern whether a party controls documents. Whether a subsidiary is wholly or partially owned by the parent, the overlap of directors, officers, and employees, or the financial relationship between the corporations all aid in the analysis of control"); *Alimenta (USA), Inc. v Anheuser-Busch Cos.* (ND Ga 1983) 99 FRD 309, 312 (party-corporation had control over documents in possession of nonparty sister corporation).

JUDGE'S PERSPECTIVE: Control may exist among related entities for some things, but not for others, *e.g.*, companies may share a common Human Resources Department.

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6. Demands for Inspection

§8.110 a. Reasonable Particularity

Demands for inspection "must describe with reasonable particularity each item or category of items to be inspected." Fed R Civ P 34(b)(1)(A). California law contains a similar requirement. CCP §2031.030(c)(1). On the reasonable-particularity requirement in state court, see §§8.48-8.51.

What constitutes a "reasonably particular" description of an item or category must of necessity be judged on a case-by-case basis. Nevertheless, at the very least, "reasonable particularity" means a request that "places the [responding] party upon reasonable notice of what is called for and what is not. Therefore, the party requesting the production of documents must provide sufficient information to enable [the party to whom the request is directed] to identify responsive documents." *Kidwiler v Progressive Paloverde Ins. Co.* (ND W Va 2000) 192 FRD 193, 202. See also *Bruggeman v Blagojevich* (ND Ill 2004) 219 FRD 430, 436 (inspection demand requesting all documents reflecting "in any manner" noncompliance with Americans with Disabilities Act or Rehabilitation Act did not satisfy "reasonable particularity" requirement).

NOTE: To be reasonably particular, the demand need not necessarily identify specific documents by title, author, recipient, and date, but the party must know what is requested, *e.g.*, a demand for "all audited financial statements" for a specified time period is likely reasonably particular, but "all financial documents" likely is not. "All notes of conversations between Adverse Party and Y" is probably reasonably particular, but "all documents related to Y" probably is not.

JUDGE'S PERSPECTIVE: Courts will not look kindly on sweeping, overly general requests (*e.g.,* "all documents relating in any manner at any time or place to xyz"), especially if the demand is not narrowed during the meet-and-confer process. Particularity is especially important in discovery of electronically stored information (ESI) because broad requests might require the search of a huge volume of information. Whenever possible, a party seeking discovery, *e.g.,* of e-mail, should specify the names of individuals whose e-mail should be searched, the relevant key word search terms, and/or any date restrictions.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.111 b. Time, Place, and Manner of Inspection

§8.111 b. Time, Place, and Manner of Inspection

As under California law (CCP §2031.030(c)(2)-(4)), a demand for inspection "must specify a reasonable time, place, and manner for the inspection and for performing the related acts." Fed R Civ P 34(b)(1)(B).

Usually, the propounding party sets the time, place, and manner of production in the demand, but these are sometimes changed following discussions between counsel. Even before the demand is served, counsel may consult with the responding party to set a mutually agreeable time, place, and manner for production. The mandatory meet-and-confer session may also provide an opportunity to discuss these issues.

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B. Responding to Inspection Demands in Federal Court

§8.112 1. Time to Respond

A party must serve a response within 30 days after service of the inspection demand. Fed R Civ P 34(b)(2)(A). A shorter or longer time period may be ordered by the court or agreed to by the parties in writing subject to Fed R Civ P 29. Fed R Civ P 34(b)(2)(A). The calculation of time limits, *i.e.,* how to calculate what "30 days after service" actually means, is governed by Fed R Civ P 6 and by local rule.

There is a continuing duty to supplement responses to inspection demands. See Fed R Civ P 26(e)(1)-(2).

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§8.113 2. Format of Responses

As with the format of inspection demands (see §8.101), Fed R Civ P 34 provides little assistance regarding the format of responses. District court local rules and individual judges' standing orders, however, may offer further guidance, and the practitioner should check both before responding. See, *e.g.*, ED Cal Civ Local R 34-250 and ND Cal Civ Local R 34-1, which state that responses must set forth each request in full before each response. In general, best practice is to set out each request before each response so that they can be read together.

The response must be signed by at least one attorney of record or by an unrepresented party. Fed R Civ P 26(g)(1). The signature acts as a certification that the response is (Fed R Civ P 26(g)(1)(A)-(B)):

- Consistent with the Federal Rules of Civil Procedure "and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law";
- Not made for any improper purpose such as harassment or unnecessary delay; and
- Not unreasonably burdensome or unduly expensive.

An unsigned response may be stricken (Fed R Civ P 26(g)(2)). If the certification requirement is violated in any way, the court, on its own initiative or on a motion by a party, must impose "an appropriate sanction," including an order to pay the reasonable costs and attorney fees incurred because of the violation, unless the response is signed promptly after the responding party is informed of the lack of signature. Fed R Civ P 26(g)(3).

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§8.114 3. Responding to Demands

Federal Rules of Civil Procedure 34(b)(2)(B) provides that the response "must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." "An objection to part of a request must specify the part and permit inspection of the rest." Fed R Civ P 34(b)(2)(B).

In practical terms, this means that with respect to each item or category, a party may respond in one of several ways, *e.g.:* (1) the item or category will be produced; (2) no item or category of the type designated exists; (3) the item or category is not in the responding party's possession, custody, or control; or (4) the designated item or category is for some reason objectionable. If the responding party objects to the requested form for producing electronically stored information (ESI), or if the request did not specify the form, the responding party must "state the form or forms it intends to use." Fed R Civ P 34(b)(2)(D). For the responding party, the only remaining possibilities are to move for a protective order or to ignore the request altogether. On motions for protective orders, see §§8.119, 15.59-15.84.

As to the time, place, and manner of production or inspection, the responding party can assent to what the requesting party specified in the demand, but more often than not this becomes a matter of discussion and negotiation between the parties.

As under California law (CCP §2031.280(a)), a party who produces documents for inspection must produce them "as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." Fed R Civ P 34(b)(2)(E)(i). A party is not under an obligation to create new documents solely for the purpose of producing them in response to an inspection demand. *Alexander v F.B.I.* (D DC 2000) 194 FRD 305, 310. ESI must be produced in the form or forms specified in the request; however, if the request does not so specify, the responding party "must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." Fed R Civ P 34(b)(2)(E)(ii). The responding party need not produce the same ESI in more than one form (Rule 34(b)(2)(E)(iii)).

Attorneys must "take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search" in response to production demands. *Qualcomm Inc. v Broadcom Corp*. (SD Cal, Jan. 7, 2008; No. 05 CV 1958-B (BLM)) 2008 US Dist Lexis 911, aff'd and remanded (9th Cir) 548 F3d 1004 (Magistrate Court imposed sanctions of $8,568,633.23 on Qualcomm, which withheld over 46,000 critical electronic documents). The *Qualcomm* Magistrate Court also referred certain of Qualcomm's counsel to the California State Bar for investigation of possible ethical violations; this aspect of the sanction order was vacated and remanded by the District Court, which held that because Qualcomm employees in their declarations had introduced "accusatory adversity" into the proceedings, the federal common law self-defense exception to the attorney-client privilege applied and the attorneys could defend themselves in the sanctions hearing. See *Qualcomm Inc. v Broadcom Corp*. (SD Cal, Mar. 5, 2008; No. 05 CV 1958-RMB (BLM)) (Order Remanding in Part Order of Magistrate Court Re Motion for Sanctions Dated 1/07/08).

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§8.115 4. Objections

If a party objects to an item or category, the response must state the reasons for the objection or it is waived. Fed R Civ P 34(b)(2)(B); *Krewson v City of Quincy* (D Mass 1988) 120 FRD 6, 7. If an objection is made only to part of an item or category, that part objected to must be specified and inspection permitted of the remaining part. Fed R Civ P 34(b)(2)(C). If an objection is made to the requested form of producing electronically stored information (ESI) (or if no form was specified in the request), the responding party must state the form (or forms) that it intends to use. Fed R Civ P 34(b)(2)(D).

Federal Rules of Civil Procedure 26(g)(1)'s certification requirement applies to objections. See §8.101.

JUDGE'S PERSPECTIVE: Courts frown on boilerplate objections, which provide no real protection if the parties bring their discovery dispute to court, but instead provide support for sanctions against the responding party. To the extent that an objection is based on privilege, the party should promptly produce an adequate privilege log that allows the other side to assess whether the privilege claim is legitimate. On privilege logs, see Note in §8.75.

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§8.116 C. Costs of Production

The presumption is that the responding party bears the expense of complying with discovery requests. *Oppenheimer Fund, Inc. v Sanders* (1978) 437 US 340, 358, 57 L Ed 2d 253, 98 S Ct 2380. Under Fed R Civ P 26(c)(1), however, federal courts may protect a party from "undue burden or expense" by shifting some or all of the costs of production to the requesting party. *Oppenheimer Fund, Inc. v Sanders, supra*. See 1970 Advisory Committee Note to Fed R Civ P 34 ("The burden thus placed on [the responding party] will vary from case to case, and the courts have ample power under Rule 26(c) to protect [the responding party] against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs"). On state law regarding costs of discovery, see §§8.33, 8.51.

The burden or expense of discovery is "undue" when it "outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed R Civ P 26(b)(2)(C)(iii).

***Zubulake*.** One of the leading federal cases on the issue of the proper allocation of costs in the context of discovery of electronically stored information (ESI) is *Zubulake v UBS Warburg LLC* (SD NY 2003) 217 FRD 309. In *Zubulake*, the plaintiff, in support of her gender-discrimination action, requested from the defendant the production of various e-mail exchanges among its employees. But the majority of the e-mails existed only on backup tapes, and defendant estimated that the costs of production and review would be exorbitant. In response to plaintiff's motion to compel, the court noted that whether plaintiff's discovery request placed an undue burden or expense on defendant "turns primarily on whether [the materials] [are] kept in an accessible or inaccessible format," a determination that itself turns on the type of media on which the information is stored. At the accessible end of the spectrum, there is "active, online data" such as a computer's hard drive; at the inaccessible end, there are backup tapes and, even worse, erased, fragmented, or damaged data. 217 FRD at 318.

To evaluate whether a discovery request seeking electronic materials is unduly burdensome or expensive, the court devised a seven-factor test, in descending order of importance (217 FRD at 322):

- The extent to which the request is specifically tailored to discover relevant information;
- The availability of such information from other sources;
- The total cost of production, compared to the amount in controversy and the resources available to each party;
- The relative ability of each party to control costs and its incentive to do so;
- The importance of the issues at stake in the litigation; and
- The relative benefits to the parties of obtaining the information.

See also *Quinby v WestLB AG* (SD NY 2006) 245 FRD 94 (with respect to e-mails that defendant could not reasonably have anticipated having to produce, court applied *Zubulake* cost-sharing test and shifted 30 percent of cost of restoring and searching e-mails to plaintiff); *OpenTV v Liberate Technols.* (ND Cal 2003) 219 FRD 474 (applies *Zubulake* cost-sharing test); *Rowe Entertainment, Inc. v The William Morris Agency, Inc.* (SD NY 2002) 205 FRD 421, 428, aff'd (2d Cir, Dec. 30, 2005) (fashioning its own eight-factor test to determine undue burden or expense); *McPeek v Ashcroft* (D DC 2001) 202 FRD 31, 34 ("The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense.").

The *Zubulake* court did not have the facts necessary to weigh these factors and thus it ordered that a test sample be produced from designated portions of defendant's backup tapes. *Zubulake v UBS Warburg LLC* (SD NY 2003) 217 FRD 309, 323. Ultimately, the court found that defendant should bear most of the costs associated with plaintiff's inspection demand. *Zubulake v UBS Warburg LLC* (SD NY 2003) 216 FRD 280.

JUDGE'S PERSPECTIVE: The parties should confer about the cost and, if possible, agree to ways to reduce the burden and expense. If they cannot agree, the parties should usually be prepared to offer reasonable compromise solutions to the court and explore whether cost sharing is appropriate, rather than insist on "all or nothing." Compromises may include staggered discovery, with production, including preliminary sampling and testing, taking place in phases so that the parties may find out whether further, more difficult, or expensive discovery is needed.

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§8.117 D. Motion to Compel

A party unhappy with another party's response may make a motion to compel. See Fed R Civ P 37(a). As in California practice, the parties must meet and confer in a good faith effort to resolve the discovery dispute before filing any motion to compel. Fed R Civ P 37(a)(1).

Among the possible grounds for a motion to compel are the responding party's failure to make any response or to permit discovery as requested; the requesting party's belief that the responding party is falsely asserting that no responsive item or category of items exists or that the responsive item is not in its possession, custody, or control; or the requesting party's belief that the objections are unwarranted.

If a motion to compel is granted or if the requested discovery is provided only after a motion to compel has been filed, the losing party will be required to pay the reasonable expenses of the moving party, including attorney fees, unless the court finds either that the moving party did not first make a good faith effort to meet and confer or that the nondisclosure was substantially justified or other circumstances exist that would make a fee award unjust. Fed R Civ P 37(a)(5)(A).

If a motion to compel is denied, the court may enter any protective order that it deems necessary under the circumstances to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed R Civ P 26(c)(1), 37(a)(5)(B). Additionally, the court will require the moving party or the attorney or both to pay the reasonable expenses of the party opposing the motion, including attorney fees, unless the motion was substantially justified or other circumstances exist that would make a fee award unjust. Fed R Civ P 37(a)(5)(B).

If a motion to compel is granted in part and denied in part, the court may enter any appropriate protective order and "apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." Fed R Civ P 37(a)(5)(C).

JUDGE'S PERSPECTIVE: In a case involving electronically stored information (ESI), the court is more likely to allow the inspection of the responding party's computer system on a showing that the responding party has not been forthcoming about its system's capabilities, has not produced the type of information that would be expected to be available, and/or has engaged in spoliation.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.118 E. Sanctions for Failure to Respond to Inspection Demands

§8.118 E. Sanctions for Failure to Respond to Inspection Demands

If a party has failed to respond to an inspection demand, the requesting party may move for sanctions under Fed R Civ P 37(d). If the party failed to obey an order compelling the inspection, the court may impose sanctions under Fed R Civ P 37(b), for failure to obey discovery orders. The court may issue "further just orders," including (Fed R Civ P 37(b)(2), (d)):

- An order that the matters embraced in the order or other designated facts be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; and
- An order striking out pleadings in whole or part, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding in whole or part, or rendering a judgment by default against the disobedient party.

JUDGE'S PERSPECTIVE: Counsel should not ask for sanctions routinely, but should seek them in the case of an egregious or repeated failure to respond. Some courts require a separate motion for sanctions in addition to the motion to compel or for a protective order. For example, ND Cal Civ Local R 37-3 requires a party seeking fees or other sanctions under Rule 37 to file a separate motion together with a declaration showing the supporting facts, the efforts counsel made to get compliance before filing the motion, and itemizing and justifying the attorney fees and costs.

"Safe harbor" for electronically stored information. Unless there are exceptional circumstances, a court may not impose sanctions on a party "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Fed R Civ P 37(e). See §8.104.

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§8.119 F. Motion for Protective Order

A party may move for a protective order to protect it against "annoyance, embarrassment, oppression, or undue burden or expense." Fed R Civ P 26(c)(1). For further discussion, see §15.83. The motion may request that (Fed R Civ P 26(c)):

- The disclosure or discovery not be had;
- The disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- The discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- Certain matters not be inquired into, or the scope of the disclosure or discovery be limited to certain matters; and
- A trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.

The party making or opposing a motion for a protective order may be ordered to pay the reasonable fees, including attorney fees, of the opposing party. Fed R Civ P 26(c)(3), 37(a)(5).

Before a motion for a protective order is filed, the parties must meet and confer in a good faith effort to resolve the dispute without court intervention. Fed R Civ P 26(c)(1).

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.120 VIII. CHECKLIST: PROCEDURES FOR INSPECTION OF DOCUMENTS, THINGS, AND PLACES

§8.120 VIII. CHECKLIST: PROCEDURES FOR INSPECTION OF DOCUMENTS, THINGS, AND PLACES

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Demanding Party

- Serve written demand for inspection of designated items (documents, tangible things, land, or other property) (see §8.69)
- Describe items and categories specifically and particularly (see §§8.48-8.51)
- Specify reasonable time and place (see §§8.52-8.59)
- Specify activities that might alter or destroy an item (see §§8.60-8.62)
- Retain originals of demands and responses (see §8.69)

Party Served

If protective order is needed:

- Make reasonable, good faith attempt to resolve informally (see §15.70)
- Serve and file notice of motion for protective order (see §§8.86-8.89)

Party on Whom Demand Made

- Serve written, sworn response stating, for each item, that party:
- Will comply (stating any conditions) (see §8.77)
- Is unable to comply (stating reasons) (see §8.78)
- Objects (stating grounds and extent) (see §8.79)

If additional response time is needed:

- Move for order extending time or obtain stipulation (see §8.74)

If response is served late:

- Serve notice of motion for relief from waiver of objections (see §8.95)

Demanding Party

If timely response is not received:

- Move for order compelling response (see §8.92)

If response is incomplete, evasive, or inadequate (see §§8.93-8.96):

- Make reasonable, good faith attempt to resolve informally
- Serve notice of motion for order compelling response

If order is not obeyed:

- Move for sanctions (see §8.91)

If party filing response then fails to permit inspection:

- Move for order compelling compliance (see §8.96)

If compliance order is not obeyed:

- Move for sanctions (see §8.91)

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IX. FORMS FOR USE IN PURSUING DISCOVERY UNDER CCP §§2031.010-2031.510

§8.121 A. Sample Form: Stipulated Provisions Concerning Related Activities

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[*Add appropriate provisions such as the following*]

[*Stipulation permits testing and analysis*]

(1) as long as testing and analysis to be performed by defendant's expert will not materially modify or otherwise damage material to be analyzed.

[*Testing and analysis will destroy sample*]

(2) _ _[*Number*]_ _ days before performance of any test, defendant will notify plaintiff which tests will be performed on the material, and plaintiff may designate a person to observe these tests. All reports of the test results and any remnants of the material tested will be made available to plaintiff on reasonable request. Nothing contained in this document requires defendant or defendant's expert to disclose the reasons why certain tests are being undertaken or the sequence or significance of the tests.

[*Inspection or test will cause business interruption*]

(3) as long as plaintiff indemnifies defendant for the financial loss caused by the business interruption occurring during the operation and test of the object as follows: _ _[*State agreed method for calculating financial loss*]_ _.

[*Inspection or test may disclose trade secret*]

(4) as long as all notes, reports, and photographs pertaining to the operation and test of the object are delivered to the court clerk as soon as practical, to preserve the object's commercial secrecy, and thereafter sealed and filed in this action, with access to be limited to plaintiff's attorney on order of this Court after due notice to all parties.

[*When stipulation permits entry and survey of real property*]

(5) as long as entry on and surveying of the above-described property occurs only between the hours of _ _[*time*]_ _ and _ _[*time*]_ _, and plaintiff posts a bond with this Court in the amount of _ _[*dollar amount*]_ _ as security for, and to insure indemnification of, defendant for financial loss for business interruption, alteration of property, or other damage caused by the entry and survey.

Comment: These clauses could be incorporated into an inspection stipulation that includes tests or other related activities that could permanently alter or destroy the inspected item. See CCP §2031.030(c)(4). For sample form of stipulation, see §8.122.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.122 B. Form: Stipulation for Inspection

§8.122 B. Form: Stipulation for Inspection

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**STIPULATION FOR**
vs	)	**INSPECTION**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

Through _ _[*name*]_ _, attorney for plaintiff, and _ _[*name*]_ _, attorney for defendant, the parties stipulate that:

[*Option 1: Only nonprivileged documents or things must be produced*]

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, **will produce for** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _, **the following items, none of which are privileged:** _ _[*Identify specific documents or things*]_ _**.**

[*Option 2: Both privileged and nonprivileged documents or things must be produced*]

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, **will produce all nonprivileged items within the following categories:** _ _[*Describe categories*]_ _**.** _ _[*Plaintiff/Defendant*]_ _ **will describe any item within one or more of the categories that** _ _[*plaintiff/defendant*]_ _ **claims to be privileged with sufficient particularity to permit the claim of privilege to be tested by motion, including the date on which it was written, the identity of the person who wrote it, the identity of the person or persons who received it, the purpose of its preparation, and the persons who have seen or had access to it or a copy of it since its preparation.**

[*Continue*]

The above-described items will be produced for inspection and _ _[*copying/photographing/testing/sampling*]_ _ **by** _ _[*name and capacity*]_ _ **on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, at** _ _[*e.g., the office of plaintiff's attorney*]_ _**, located at** _ _[*address*]_ _**, California.**

[*Add if items must be tested or sampled*]

The _ _[*specify items*]_ _ **will be** _ _[*tested/sampled*]_ _ **by** _ _[*describe manner in which tests or samples will be conducted*]_ _**. This activity** _ _[*will/will not*]_ _ **permanently alter or destroy the** _ _[*specify items*]_ _**.**

[*Add if land must be inspected*]

_ _[*Plaintiff/Defendant*]_ _ **will permit** _ _[*defendant/plaintiff/agent*]_ _, _ _[*name; if agent, state name and capacity*]_ _, **to enter the land and premises described as** _ _[*describe specifically*]_ _ **for the following purposes:** _ _[*Describe manner in which inspection will be conducted and, in particular, any measuring, surveying, photographing, testing, or sampling that will be done to, e.g., inspect and test the operation of harvesting machine #1234-A by use of the following tests:* _ _[*List tests*]_ _*/to permit photographs fairly representing the land and premises to be taken under the following conditions:* _ _[*List conditions*]_ _]_ _.

The above-described entry will take place on _ _[*date*]_ _, **at** _ _[*time*]_ _.

[*Continue*]

The above-described _ _[*e.g., production, inspection, entry*]_ _ **may be** _ _[*monitored/supervised*]_ _ **by** _ _[*designate representative of producing party or give name of specific person designated*]_ _.

The above-described _ _[*documents/things/land*]_ _ _ _[*is/are*]_ _ **currently in the possession, custody, or control of** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _. **The matter to be inspected is relevant to the subject matter of this action and is itself admissible in evidence or is calculated to lead to discovery of admissible evidence.**

Counsel for _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _, **will file this stipulation with the Court and request that an order incorporating its terms be issued without further notice or hearing.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for plaintiff, _ _[*name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for defendant, _ _[*name*]_ _

Copies: Original with proof of service attached (retained by counsel for demanding party); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: CCP §§2031.010-2031.510 do not require the responding party to identify items produced. The elimination of this step requires the demanding party to conduct further discovery to determine which documents were withheld from production on the grounds of privilege. This stipulation allows the production and this further discovery to be accomplished at the same time.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.123 C. Form: Demand for Inspection

§8.123 C. Form: Demand for Inspection

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DEMAND FOR INSPECTION**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

Demanding Party: _ _[*Name*]_ _

Responding Party: _ _[*Name*]_ _

Set Number: _ _[*Number*]_ _

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, **demands under CCP §§2031.010-2031.510 that** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _,

[*Option 1: Documents or things must be produced*]

produce the items described below, for inspection and _ _[*copying/photographing/testing/sampling*]_ _ **by** _ _[*name and capacity*]_ _, **on** _ _[*date*]_ _, **at** _ _[*time*]_ _, **at** _ _[*e.g., the office of plaintiff's attorney*]_ _, **located at** _ _[*address*]_ _, **California. The items to be produced are:** _ _[*Separately list and number each item or category of items to be produced; describe categories of items with sufficient particularity to allow party to easily discern what is to be produced*]_ _.

[*Option 2: Land must be inspected*]

permit _ _[*plaintiff/defendant/agent*]_ _, _ _[*name; if agent, state name and capacity*]_ _, **to enter the land and premises described as** _ _[*specifically describe land and premises; if legal description is used, set out in separate paragraph*]_ _ **for the purpose of inspecting and** _ _[*photographing/measuring/surveying/testing/sampling*]_ _ **the** _ _[*specifically describe property or operation to be tested, e.g., the operation of harvesting machine #1234-A*]_ _. **This entry and inspection will take place on** _ _[*date*]_ _, **at** _ _[*time*]_ _.

[*Continue*]

[*Add if activities other than inspection or copying must take place*]

This _ _[*specify item, real property, or object or operation to be inspected*]_ _ **will be** _ _[*photographed/tested/sampled/measured/surveyed*]_ _ **by** _ _[*state manner in which activity will be performed*]_ _.

This activity _ _[*will/will not*]_ _ permanently alter or destroy the _ _[*specify item to be inspected*]_ _.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original with proof of service attached (retained by counsel for demanding party); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: For discussion of "reasonably particularizing" any designated category of items, see §§8.48-8.51.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.124 D. Form: Response to Demand for Inspection

§8.124 D. Form: Response to Demand for Inspection

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
vs	)	**RESPONSE TO DEMAND FOR INSPECTION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

Demanding Party: _ _[*Name*]_ _

Responding Party: _ _[*Name*]_ _

Set Number: _ _[*Number*]_ _

_ _[*Identify responding party, e.g., _ _[Defendant/Plaintiff]_ _]_ _, _ _[name]_ _, **responds under CCP §§2031.210-2031.250 to** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _**'s** _ _[*set number, e.g., First*]_ _ **Demand for Inspection, served at** _ _[*time*]_ _**, as follows:**

[*Respond separately for each item or category, using same numbers and sequence as used in demand*]

[*Option 1: Party will comply fully with demand*]

1. _ _[*Defendant/Plaintiff*]_ _ **will comply with the demand and permit the inspection and** _ _[*specify other demanded activities*]_ _**.**

[*Add if demand for inspection is for documents or tangible things*]

All _ _[*documents/items*]_ _ **in** _ _[*defendant/plaintiff*]_ _**'s possession, custody, or control will be produced for inspection.**

[*Option 2: Party is unable to comply with demand*]

1. _ _[*Defendant/Plaintiff*]_ _ **has made a diligent search and a reasonable inquiry for the** _ _[*documents/items*]_ _ **but is unable to comply with the demand because** _ _[*e.g., the documents or items have never existed, have been lost or destroyed, or have never been in the responding party's possession, custody, or control*]_ _**.**

[*Add if person or organization having possession, custody, or control is known or believed to be known*]

To the best of _ _[*defendant/plaintiff*]_ _'s knowledge, the _ _[*documents/items*]_ _ are in the possession, custody, or control of _ _[*name and address*]_ _.

[*Option 3: Party objects to inspection*]

1. _ _[*Defendant/Plaintiff*]_ _ objects to the demand for inspection of _ _[*specify exact extent of objection; if objection is to part of demand, state what part*]_ _ on the ground(s) that _ _[*specify exact ground including specific privilege invoked or work product protection asserted*]_ _.

[*Add if objection is only to part of inspection*]

_ _[*Defendant/Plaintiff*]_ _ will comply with the demand, except for that portion objected to, and will permit the inspection. All _ _[*documents/items*]_ _ in _ _[*defendant/plaintiff*]_ _'s possession, custody, or control, to which no objection is made, will be produced for inspection.

[*Combine with above as appropriate*]

_ _[*Defendant/Plaintiff*]_ _ has made a diligent search and a reasonable inquiry but is unable to comply with the remainder of this demand because _ _[*e.g., the documents or items have never existed, have been lost or destroyed, or have never been in the responding party's possession, custody, or control*]_ _.

[*Add if person or organization having possession, custody, or control is known or believed to be known*]

To the best of _ _[*defendant/plaintiff*]_ _'s knowledge, the _ _[*documents/items*]_ _ are in the possession, custody, or control of _ _[*name and address*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original with proof of service (to be served on demanding party); copies for service (one for each attorney of record or unrepresented party); office copies.

Comment: If the response contains any objections, the attorney must also sign it. Note, however, that an attorney who signs the response itself as an officer or agent on behalf of an organization waives any attorney-client privilege or work product protection.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.125 E. Form: Stipulation for Protective Order (Confidential Information); Order

§8.125 E. Form: Stipulation for Protective Order (Confidential Information); Order

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**STIPULATION FOR**
vs	)	**PROTECTIVE ORDER; ORDER**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

In the course of discovery in this proceeding, _ _[*name of demanding party*]_ _ and _ _[*name of responding party*]_ _, hereafter referred to as the "designated parties," will produce or receive certain valuable confidential and proprietary information. The designated parties intend that this information be kept confidential and not be used for any purpose other than in this action. The designated parties therefore agree, through their respective attorneys, as follows:

1. This Stipulated Protective Order will apply to all confidential information. Confidential information is testimony, written or recorded materials, and information in any other form, produced or disclosed by any designated party in connection with discovery proceedings in this case, in which the following is discussed or in any way referred to: _ _[*Specify*]_ _.

2. Confidential information will be used by the party to whom it is disclosed only in this action. A designated party will not use any confidential information for any business or competitive purposes.

3. Confidential information will be produced only to counsel for the designated party seeking discovery of it and will not be exhibited or disclosed to any person other than _ _[*specify*]_ _ without the written consent of counsel for the party producing it. No person to whom this confidential information is disclosed will discuss the information or disclose it to any person other than those described in this paragraph or for any purpose other than that specified in paragraph 2.

4. Counsel to whom confidential information is disclosed or produced will be responsible for ensuring that parties and other persons are informed of the terms of this Stipulated Protective Order, but that no one, other than the persons specified in paragraph 3, is informed of the substance of any confidential information disclosed or produced. Before disclosing confidential information to any other person, counsel will _ _[*state conditions, e.g., seek a modification of this agreement, as provided for in paragraph 9, to add the name of that person to paragraph 3 or obtain from that person a written agreement to be bound by the terms of this Stipulated Protective Order*]_ _.

5. Any document or tangible thing designated as confidential information that is identified as an exhibit in connection with testimony given in these proceedings will be marked with the label "Confidential Information,"

and any testimony concerning the document or thing will also be considered confidential information and will be subject to the terms of this Stipulated Protective Order.

6. Counsel who seeks to file with the court clerk confidential information in the form of a document, interrogatory answer, deposition transcript, pleading, or other record or tangible item will ask the Court to direct that this confidential information be filed under seal, specifically marked as confidential information subject to this Stipulated Protective Order, and kept in a safe and secure place and not in files open to public inspection.

7. On final disposition of this action, counsel for any party having possession, custody, or control of confidential information produced in the course of discovery in this action will promptly return all original documents and tangible items covered by this Order to counsel for the designated party who produced them and will destroy all copies, transcripts, notes, and extracts containing confidential information except those marked as exhibits during trial.

8. Nothing in this Stipulated Protective Order (a) affects, in any way, the admissibility of any documents, testimony, or other evidence at trial or (b) restricts the use of information obtained from sources other than discovery conducted under the terms of this Stipulated Protective Order.

9. This Stipulated Protective Order may be modified by agreement of the parties, subject to approval of the Court.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

ORDER

It is so ordered.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (present to judge for signature, then file with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: For discussion of protective orders, see §§8.86-8.89. To help implement paragraph 7, counsel for the producing party might want to prepare a list of documents and other items that later must be returned or destroyed and send it to opposing counsel, asking for written assurance that the necessary actions will be taken.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/ F. Motion to Compel Response/§8.126 1. Form: Notice of Motion and Motion for Order Compelling Response to Demand for Inspection and for Sanction

F. Motion to Compel Response

§8.126 1. Form: Notice of Motion and Motion for Order Compelling Response to Demand for Inspection and for Sanction

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR ORDER**
	)	**COMPELLING RESPONSE TO**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**DEMAND FOR INSPECTION**
	)	**AND FOR SANCTION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
_____	)	**Hearing judge:** _ _[*if known*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, moves the Court under CCP §2031.300(b) for an order compelling _ _[*name*]_ _ to respond to the _ _[*set number, e.g., First*]_ _ Demand for Inspection, served on _ _[*date*]_ _, and for an order for a monetary sanction against _ _[*name*]_ _ on the ground that _ _[*name*]_ _ was required by CCP §2031.260 to serve a response to the demand no later than 30 days after the date on which it was served and that _ _[*name*]_ _ has failed and continues to fail to serve the required response.

This motion is based on this notice; all pleadings, papers, and records in this action; the attached supporting memorandum; the declaration of _ _[*name*]_ _; _ _[*and any evidence presented at the hearing*]_ _.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copy for service (one for each attorney of record and unrepresented party); office copies.

Comment: For discussion, see §§8.90-8.96. The original demand should be attached to the moving papers. A supporting memorandum and declaration must accompany the motion. A separate statement is not required when no

response has been provided. Cal Rules of Ct 3.1020(b).

Unlawful detainer. In unlawful detainer actions, the time for response to the demand is different from that in other actions. See CCP §2031.260.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.127 2. Form: Declaration Supporting Motion for Order Compelling Response and for Sanction

§8.127 2. Form: Declaration Supporting Motion for Order Compelling Response and for Sanction

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION TO**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**COMPEL RESPONSE AND FOR SANCTION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
_____	)	**Hearing judge:** _ _[*if known*]_ _

I, _ _[*name*]_ _, declare:

1. I am the attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, in this action.

2. On _ _[*date*]_ _, I caused to be served on _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _, _ _[*plaintiff/defendant*]_ _'s _ _[*set number, e.g., First*]_ _ Demand for Inspection. The original of this demand and proof of its service are attached to this motion.

3. _ _[*Defendant/Plaintiff*]_ _ has failed and continues to fail to respond to this demand.

4. I request that a monetary sanction be imposed in the sum of $_ _[*amount*]_ _. I have spent _ _[*number*]_ _ hours preparing this motion. This work has included _ _[*describe tasks performed*]_ _. I expect to spend an additional _ _[*number*]_ _ hours completing work on the motion, including time spent in court. My customary billing rate per hour is _ _[*specify rate or specify rate actually charged client*]_ _. My staff, consisting of _ _[*specify associates, legal assistants, secretaries, and others*]_ _ have spent additional hours on this motion performing the following tasks: _ _[*Specify*]_ _. They are billed at $_ _[*amount*]_ _ per hour.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and

unrepresented party); office copies.

Comment: When the responding party has failed to provide any response, counsel for the demanding party is not required to show an informal attempt to obtain a response before filing a motion to compel response. See CCP §2031.300.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.128 G. Form: Notice of Motion and Motion to Compel Further Response

§8.128 G. Form: Notice of Motion and Motion to Compel Further Response

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION TO COMPEL**
	)	**FURTHER RESPONSE TO**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**DEMAND FOR INSPECTION**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
_____	)	**Hearing judge:** _ _[*if known*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, moves the Court for an order under CCP §2031.310 compelling** _ _[*name*]_ _ **to provide further responses to** _ _[*plaintiff/defendant*]_ _**'s** _ _[*set number, e.g., First*]_ _ **Demand for Inspection, served on** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _**, on** _ _[*date*]_ _**, and for a monetary sanction on the ground that** _ _[*e.g., the response was incomplete, inadequate, evasive, or without merit*]_ _**.**

This motion is based on this notice; all pleadings, papers, and records in this action; the attached supporting memorandum; the declaration of _ _[*name*]_ _**;** _ _[*and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copy for service (one for each attorney of record and unrepresented party); office copies.

Comment: A supporting memorandum, declaration, and separate statement listing each demand and the response in issue, and the factual and legal reasons for compelling further response, must accompany the motion. Cal Rules of Ct 3.1020. See §§8.93-8.95.

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Source: Civil Litigation/California Civil Discovery Practice/8 Demands for Inspection or Production/§8.129 H. Form: Notice of Motion and Motion to Compel Compliance in Accordance With Prior Response

§8.129 H. Form: Notice of Motion and Motion to Compel Compliance in Accordance With Prior Response

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION TO COMPEL**
	)	**COMPLIANCE IN**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**ACCORDANCE WITH PRIOR**
	)	**RESPONSE TO DEMAND FOR**
	)	**INSPECTION AND FOR**
	)	**SANCTION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
_____	)	**Hearing judge:** _ _[*if known*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, moves the Court for an order under CCP §2031.320 compelling compliance with** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _**'s** _ _[*set number, e.g., First*]_ _ **Response to Demand for Inspection, served on** _ _[*defendant/plaintiff*]_ _ **on** _ _[*date on which response was served*]_ _ **and for a monetary sanction against** _ _[*name*]_ _ **on the ground that** _ _[*defendant/plaintiff*]_ _ **has failed and continues to fail to permit the inspection in accordance with** _ _[*his/her/its*]_ _ **statement of compliance responding to** _ _[*identify specific demand or demands for which compliance is sought; state whether compliance is sought for entire demand*]_ _**.**

This motion is based on this notice; all pleadings, papers, and records in this action; the attached supporting memorandum; the declaration of _ _[*name*]_ _**;** _ _[*and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: A supporting memorandum and a declaration must accompany the motion. Counsel should also attach the original demand and response with which the moving party seeks compliance. Although Cal Rules of Ct 3.1020

does not require a separate statement to be filed with a motion to compel compliance in accordance with a prior response, it may be helpful to the court when the motion seeks compliance with various individual demands. For discussion, see §8.96.

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9

Requests for Admission

Kyle Kveton

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§9.1 I. SCOPE OF CHAPTER

This chapter focuses on the procedures for requesting admissions under CCP §§2033.010-2033.740, including the following topics:

- Deciding to make requests for admissions (RFAs) (see §§9.2-9.3);
- Numerical and timing limitations on RFAs (see §§9.4-9.12);
- Strategic considerations in using RFAs (see §§9.14-9.15);
- Benefits and drawbacks of using RFAs (see §§9.16-9.21);
- Format and content of RFAs (see §§9.22-9.36);
- Procedures for serving RFAs (see §§9.37-9.42);
- Procedures for preparing and serving responses to RFAs (see §§9.43-9.65);
- Motions for protective orders (see §§9.66-9.71);
- Motions that requests be deemed admitted (see §§9.72-9.77);
- Motions to compel further responses (see §§9.78-9.81);
- Motions to withdraw or amend admissions (see §§9.82-9.84);
- Using admissions in motions and at trial (see §§9.85-9.86);
- Moving to recover the expenses of proving unadmitted matters (see §§9.87-9.91); and
- RFAs in federal court cases (see §§9.92-9.96).

For a procedural checklist see §9.97, and for forms for RFAs see §§9.98-9.124.

On motion practice in discovery matters in general, see chap 15.

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II. DECIDING TO MAKE REQUESTS FOR ADMISSION

§9.2 A. What Requests for Admission Are

A request for admission (RFA) under CCP §2033.010 is a written request that another party admit the:

- Genuineness of a document;
- Truth of a fact;
- Truth of an opinion relating to fact; or
- Truth of an application of law to fact.

Several such requests can be served on the other party in a single document entitled "Requests for Admission." See forms in §§9.98-9.100. This document is a "set" of RFAs.

The RFA procedure is one of the six "methods" listed in CCP §2019.010 for obtaining discovery. It is a "vehicle of discovery" that a litigant may use as a matter of right without first obtaining a court order. See *Cembrook v Superior Court* (1961) 56 C2d 423, 427, 15 CR 127; *Demyer v Costa Mesa Mobile Home Estates* (1995) 36 CA4th 393, 42 CR2d 260, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260. On the right to discovery, see chap 1.

When not allowed. Because RFAs are unique among the various discovery devices in that they seek to eliminate the need for proof rather than uncover information (see §9.3), there are some civil proceedings in which their use is not allowed. For example, RFAs cannot be used in civil commitment proceedings under the Sexually Violent Predator Act (Welf & I C §6600-6609.3) because they would adversely affect a defendant's due process rights of proof beyond a reasonable doubt, jury trial, and unanimous verdict. *Murillo v Superior Court* (2006) 143 CA4th 730, 738, 49 CR3d 511.

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§9.3 B. How Requests for Admission Are Used

As a general rule, RFAs are not used to discover facts but to establish the existence or nonexistence of facts. RFAs may also be used to authenticate documents. Any matter admitted in response to a request for admission is conclusively established against the admitting party for purposes of the case, although it is possible that even at trial, a responding party might seek relief from the admission based on CCP §2033.300 (see §§9.82-9.84). CCP §2033.410(a); *Valerio v Andrew Younquist Constr.* (2002) 103 CA4th 1264, 1272, 127 CR2d 436. See also *Scalf v D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1522, 27 CR3d 826. An admission in response to an RFA is different from other discovery responses, which may constitute admissible evidence but do not preclude a party from giving a different answer at a subsequent date. The court in *Scalf v D.B. Log Homes, Inc., supra*, explained that an admission made during a deposition (a lay opponent's "glib, easily misunderstood answer" to a question) is not equal to a response to an RFA, which is "a studied response" made under counsel's direction and subject to sanctions; in *Scalf*, the trial court erred in granting summary judgment based on a party's inculpatory statements during his deposition and without considering the other evidence.

EXAMPLE: If a defendant responds to a contention interrogatory by stating that there is no evidence the plaintiff was comparatively at fault, the defendant would be free to raise comparative fault at trial based on evidence acquired after responding to that interrogatory. If, on the other hand, the defendant admits that plaintiff was not at fault in response to a request for admission, the defendant may be precluded from raising that issue at trial, even if a witness surfaces with testimony establishing that plaintiff was at fault.

Because most attorneys do not want to be locked into a position, RFAs work better for discrete issues within the knowledge of the responding party. For example, a corporate party will usually admit that a given person was an employee and may even admit that the employee was acting in the course and scope of that employment. Requests going to the ultimate issues, however, *e.g.,* negligence, causation, or damages, will probably be denied.

PRACTICE TIP: RFAs should be served in conjunction with Judicial Council Form DISC-001, which requires a party who fails to admit something to set forth the facts, witnesses, and documents supporting that denial. On interrogatories, see chap 7.

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C. Numerical Limitations on Requests for Admission

§9.4 1. Unlimited If on Genuineness of Documents

There is no limitation on the number of requests for admissions of the genuineness of documents that one party can serve on another party in an unlimited superior court action except, as justice requires, "to protect the responding party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense." CCP §2033.030(c). On protective orders, see §§9.66-9.71, 15.59-15.84.

PRACTICE TIP: A party that feels annoyed or oppressed by receiving numerous "sets" of RFAs can move for a protective order. Similarly, a responding party that objects to the number of RFAs of the genuineness of documents should move for a protective order promptly after the requests have been received. See CCP §§2019.030(a)(2) (protection against unduly burdensome or expensive discovery), 2033.080. On protective order procedures, see §9.71. See also §§15.59-15.84.

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§9.5 2. Limit of 35 If Other Than Genuineness of Documents

The number of individual requests that relate to matters other than the genuineness of documents that may be made as a matter of right may not exceed 35. CCP §2033.030(a). "If the initial set of admission requests does not exhaust this limit, the balance may be requested in subsequent sets." CCP §2033.030(a).

NOTE: Unlike Judicial Council form interrogatories (see §§7.8-7.9), Judicial Council form RFAs (for other than the genuineness of documents) count against the 35 limit; if they did not, the number of RFAs would be limitless. Unlike form interrogatories that address particular topics, the Judicial Council form Request for Admissions is completely open-ended. For a sample Judicial Council form RFA, see §9.98.

Making more than 35 requests. A party may request that another party admit a greater number of facts (and opinions relating to fact and applications of law to fact) if the requesting party obtains a stipulation from the responding party, or attaches to the set of requests that contains the 36th request, and to any subsequent set that contains RFAs in excess of the original 35, a declaration in statutory form stating why the greater number is warranted by the complexity or the quantity of existing or potential issues in the case. CCP §2033.040. For the form of the declaration, see §9.101.

PRACTICE TIP: In weighing the decision to go beyond the 35 RFA limit, counsel should bear in mind that the complexity of the subject affects his or her ability to obtain a clear-cut, unequivocal admission. For example, an RFA that contains three facts or ideas should be broken into three separate RFAs even though this will affect the rule of 35. The better practice is to submit the declaration for excess RFAs and carefully craft simple RFAs that have a greater likelihood of getting a formal response rather than an objection. By breaking down an RFA into separate facts, its ambiguity is also eliminated. As long as the requests are directly related to the subject of the litigation and not designed to harass, a judge is unlikely to preclude the use of voluminous RFAs that are clear, simple, and precise.

Responding when more than 35 requests. Unless the requesting party has served a statutory declaration with the set stating the reasons that the additional requests are warranted and that the requests are not being made for an improper purpose (see CCP §2033.050), the responding party need only respond to the first 35 requests and may object to all remaining requests on the ground that the number of requests exceeds the 35 limit.

JUDGE'S PERSPECTIVE: Courts encourage counsel to meet and confer and agree to permit additional RFAs; however, if such cooperation is not forthcoming and the responding party files a protective order, the courts give little weight to nonspecific statements that the case is "complex." Facts showing why 35 requests are not sufficient must be presented.

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§9.6 3. Limited Civil Cases

In limited civil cases, one party can serve on an adverse party no more than a combined total of 35 RFAs (relating to either facts or documents), interrogatories, and requests to identify or produce documents or things (CCP §94(a)), unless the party, on noticed motion and a showing that prosecution or defense of the action would otherwise not be effective, obtains an order authorizing additional discovery (CCP §95). On discovery in limited civil cases, see chap 14.

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D. Timing Limitations on Request for Admissions

§9.7 1. First Opportunity to Serve

A plaintiff may serve an RFA on another party without leave of court at any time that is 10 days after the other party was served with summons or appeared. CCP §2033.020(b).

PRACTICE TIP: A cross-defendant served with an RFA by a defendant could argue that the 10-day delay required of a plaintiff should also be required of the cross-complaining defendant. Unlike some sections of the Code of Civil Procedure (see, *e.g.*, §§425.11(a)(2), 425.115(a)(2)), §2033.020 does not define "plaintiff" to include "cross-complainant." Thus, on its face, §2033.020(b) contemplates a hold only on a plaintiff. There is no case law directly on point. However, the 10-day hold would make sense if the cross-defendant were a new party to the action.

A defendant may serve an RFA without leave of court "at any time." CCP §2033.020(a).

Unlawful detainer action. In an unlawful detainer action, the plaintiff can serve an RFA on the defendant without leave of court 5 days after the service of the summons or appearance by the defendant, whichever occurs first. CCP §2033.020(c).

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§9.8 a. Premature Service

It is not clear what the effect of premature service of requests by the plaintiff would be. See CCP §2033.020(b)-(d). Presumably, a defendant may simply ignore a set of RFAs that is served before the defendant has been served with summons or has appeared in the action unless the plaintiff serves the requests again after the prescribed delay. A defendant that has been served with summons when the requests are served may, however, wish to treat any prematurely served RFAs as only postponing the response date (to 30 days after the first day that service would have been proper) and to respond to the requests within that extended time.

PRACTICE TIP: Unless the defendant is contesting jurisdiction of the court, opposing counsel should be contacted and an agreement reached with regard to an appropriate due date for the responses to a premature set of RFAs. In the absence of the ability to agree, a defendant served with a premature set of RFAs would have a valid ground for objecting to the entire set as being in violation of CCP §2033.020(b).

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§9.9 b. Application to Serve Requests Early

A plaintiff may ensure the effectiveness of an RFA served either before, or immediately after, the defendant has been served with summons or has appeared by (CCP §2033.020(b)-(d)):

- Obtaining the defendant's agreement to answer the requests; or
- Applying to the court for an order permitting the requests to be served early.

An application for leave to serve requests early must show good cause, although notice of the application need not be given to the party to be served. CCP §2033.020(d). The application may be made ex parte by presenting to the appropriate judge a declaration for order shortening time to serve an RFA (with supporting declarations and documents as needed), stating facts that show how the interests of justice would be served by early service of the requests. See Cal Rules of Ct 3.1200-3.1207. On a request for an order shortening time, see §§15.11-15.29.

The application should be accompanied by a copy of the requests to be served and by a form of order for the judge to sign. For a description of the procedure with basic forms, see California Civil Procedure Before Trial §§13.3-13.14 (4th ed Cal CEB 2004). The moving party's declarations should also show how the other party was notified that the ex parte application would be made, or the reasons why notice was not given. See Cal Rules of Ct 3.1200-3.1207 for additional requirements. A conformed copy of the order, if the judge signs it, should then be served on the responding party along with the RFA.

PRACTICE TIP: In practice, the expense of making a motion or application to serve RFAs early is rarely justified. There would be no advantage to immediately serving RFAs and a judge would be unlikely to grant a motion for leave to do so.

Unlawful detainer action. On a showing of good cause, the court may grant leave to a plaintiff in an unlawful detainer action to make RFAs earlier than 5 days after the service of the summons or the defendant's appearance. CCP §2033.020(c).

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§9.10 2. Deadline to Serve

There are practical limits on how close to the trial date an RFA can be served. The party served with requests need not respond until the 30th day after the requests are served unless the time to respond has been shortened by stipulation or by court order. The requesting party has a right to "complete discovery proceedings" (*i.e.*, to receive a response to an RFA) no later than the 30th day before the date initially set for trial and to have a motion for an order compelling further response, or for an order that matters be deemed admitted, heard after the 15th day before the trial date. CCP §2024.020(a). On when discovery closes, see §2.21. On timing limitations on discovery, see in §§2.20-2.28.

Attorneys should give themselves plenty of time before the discovery cutoff when serving RFAs. The responding party has 30 days after the requests are served to mail a response. CCP §2033.250(a). After a response is received, if the attorney wants to move to compel further responses (CCP §2033.290; see §§9.78-9.81), the attorney must first engage in the meet-and-confer process with opposing counsel. See CCP §2033.290(b). If the meet-and-confer process is unsuccessful, the attorney may then file the motion for an order to compel further responses. The motion must be served at least 16 court days before the hearing date (plus 5 days for service by mail; CCP §1005(b)), and must be set for hearing at least 15 days before the initial trial date (CCP §2024.020(a)). On timing for motions, see §2.23.

PRACTICE TIP: To accomplish all this (without the need for ex parte orders shortening time), it is advisable to serve RFAs at least 90 days before trial. This is not the absolute minimum, but allows some leeway for each stage of the procedure, which may be necessary when key time periods end on a Sunday or holiday. Even if a court were to grant an order shortening time for the hearing on a motion to compel responses, an overly compressed time frame on the eve of trial could interfere with a meaningful meet-and-confer process required under the Civil Discovery Act. The same time frames would apply (without the pre-filing meet-and-confer requirement) if the opposing party served no responses, and the attorney then contemplated a motion to have matters deemed admitted. On timing for discovery motions, see §2.23. On moving to compel, see §§15.30-15.58.

JUDGE'S PERSPECTIVE: Some attorneys knowingly provide useless and irrelevant objections and stall the meet-and-confer process in an effort to destroy the utility of the RFA as a discovery tool. This is another reason to serve simple, straightforward RFAs and proceed rapidly to motion practice if the other side appears to be stalling.

Of course, an RFA can be served even if fewer than 90 days remain before the initial trial date. For example, time can be saved by delivering, rather than mailing, the RFA. The attorney serving the requests may also seek an order shortening time for the response (see §§9.36-9.38) or shortening time for a hearing on the motion to compel further response or that matters be deemed admitted. On orders shortening time, see §§15.11-15.29. Finally, the court might be prevailed on in some circumstances to modify the time requirements in CCP §2024.020(a).

JUDGE'S PERSPECTIVE: Do not assume that a request to shorten time on any discovery motion will be granted just because trial is imminent. Shortening time is an exception to rules that are designed to ensure notice and fairness. Motions to shorten time should explain why the discovery could not have been served earlier.

Motion for summary judgment or adjudication. If admissions will be used for the purpose of summary adjudication or summary judgment motions, they must be served very early in order to have sufficient time under the lengthy notice requirements for those motions. A summary judgment motion must be filed a minimum of 105 days before trial. CCP §§437(c), 2024.020(a). See California Civil Procedure Before Trial §§36.76-36.79 (4th ed Cal CEB 2004).

JUDGE'S PERSPECTIVE: Because courts have the goal of trying most cases within a year of filing (see §§2.25-2.27) and because the notice period for summary judgment motions is so long, RFAs are often not useful for summary judgment unless they are served at the commencement of the case.

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§9.11 3. Deadline to Respond

The responding party must serve a response to the RFA within 30 days. CCP §2033.250(a). On responding to RFAs, see §§9.43-9.65. The response time may be extended depending on how the RFAs are served, *e.g.*, mail service would extend the response time by 5 calendar days, while fax service or delivery by overnight mail would extend the time by 2 court days. See CCP §1013(a), (c), or (e); for discussion of extension of time for mailing, see §2.22.

Unlawful detainer action. In an unlawful detainer action, the deadline for the responding party to serve a response is 5 days. CCP §2033.250(b).

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§9.12 4. Tactical Considerations on When to Serve

It is sometimes useful to serve an RFA early in a case. Such requests may elicit admissions that greatly narrow the extent of discovery and investigation that must be undertaken. In other cases, counsel may find it more convenient to wait until issues have been narrowed by other discovery methods before using an RFA to eliminate some of the issues that apparently remain.

PRACTICE TIP: Often, the early service of an RFA results in no information of any real use being exchanged. This is because the early service of an RFA comes at a time when investigation and other forms of discovery have not yet yielded fruitful information. The early service of an RFA may be more effective from a plaintiff to a defendant than the reverse. The use of RFAs at this early stage of litigation (before interrogatories or depositions) may be appropriate if the responding party is viewed as having a superior body of information that may permit it to respond in a meaningful way.

As with interrogatories (see chap 7), there is no continuing duty to respond to an RFA. Thus, if a party responds truthfully to an RFA, but later learns otherwise, the party has no duty to amend or withdraw the response. *Burch v Gombos* (2000) 82 CA4th 352, 360, 98 CR2d 119. See also *Biles v Exxon Mobil Corp.* (2004) 124 CA4th 1315, 22 CR3d 282 (no duty to supplement discovery responses under California law).

JUDGE'S PERSPECTIVE: If, after serving the response to an RFA, counsel learns information that renders the previous response incorrect, counsel should move promptly to amend or withdraw the admission under CCP §2033.300 so that the client is not prejudiced by the inappropriate admission. A judge will look more favorably on a motion to withdraw when it is made promptly after discovery of the fact that renders the previous admission incorrect, when prejudice to the adversary can be minimized. On the other hand, if the previous response failed to admit a fact which counsel now knows should have been admitted, counsel should move to amend the response and admit the fact so that the client does not risk paying for the adversary's costs of proving the fact under CCP §2033.420. On motion to amend or withdraw admission, see §§9.92-9.84. On cost of proof sanctions, see §§9.87-9.91.

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§9.13 E. Who Can Be Served With Requests for Admission

All parties in an action are entitled to be kept abreast of each other's discovery activities. The party requesting admissions must serve a copy of them on the party to whom they are directed and on all other parties that have appeared in the action. CCP §2033.070. Counsel may serve a copy on parties who have not yet appeared, but the statute does not require it.

PRACTICE TIP: After making a first appearance in a case, a party should always request copies of any discovery that was previously served by other parties.

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F. Strategic Considerations

§9.14 1. Persons Bound

An admission made by a party under CCP §§2033.010-2033.740 is binding only on that party. CCP §2033.410(b). Any party to the proceeding (even if not the requesting party) can use the admission against the responding party.

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§9.15 2. When and Where Admissions Binding

An admission in response to an RFA is binding on the admitting party only in the action in which it is made and cannot be used in any manner against the admitting party in any other proceeding. CCP §2033.410(b). For example, a defendant's admission in a lawsuit does not bar the defendant from taking an inconsistent position in a cross-action for indemnity. See *Shepard & Morgan v Lee & Daniel, Inc.* (1982) 31 C3d 256, 261, 182 CR 351 (cross-action is equivalent to separate, independent action).

NOTE: Counsel should be careful, however, in relying on *Shepard*. In that case, as the court notes, the admission related to a *contention*, not an underlying *fact* common to both the complaint and the cross-complaint. In the case of a common fact, it could be argued that a party who made an admission in a judicial proceeding, and benefited from it, may be judicially estopped from asserting a different factual position in another litigation (or in connection with a related cross-complaint). Moreover, once the judgment in the case is final, the judgment may be binding in subsequent cases under the doctrines of res judicata or collateral estoppel. At best, a party that tries to contradict a prior admission under oath will have some explaining to do.

Admissions seeking evidence of a party's knowledge at a particular point in time may not be binding at trial if the party subsequently learns contrary evidence. *Burch v Gombos* (2000) 82 CA4th 352, 360, 98 CR2d 119 (admission that party had no evidence of disputed fact before certain date was not binding when party learned contrary evidence subsequent to responding to request for admission because admission was true when made).

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G. Benefits and Drawbacks of Using Requests for Admissions

§9.16 1. Purpose of RFAs

The primary purpose of the RFA procedure is to narrow the scope of the issues to be litigated "and spare the parties the burden and expense of litigating undisputed issues." *Brigante v Huang* (1993) 20 CA4th 1569, 1576, 25 CR2d 354, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260. RFAs can be effective in removing from trial an issue that is all but admitted but that may be costly to prove. They can also be useful in finding out what counsel's opponent is prepared to admit or deny or which issues the opponent thinks are worthy of trial.

PRACTICE TIP: Sometimes, asking the other party to stipulate that certain factual matters are true and that specified documents are genuine is easier, faster, and less expensive than preparing, serving, and enforcing written RFAs.

In contrast to other discovery procedures, RFAs do not normally seek new information; rather, they "discover" and verify what information is not in dispute. The aim of requesting admissions is to facilitate trial preparation by reducing the number of factual or legal issues that counsel will need to prove at trial, thus permitting concentration on the facts and issues that remain in dispute. See *Lieb v Superior Court* (1962) 199 CA2d 364, 18 CR 705.

PRACTICE TIP: Particularly when served in conjunction with Form Interrogatory 17.1, an RFA requires opposing counsel to focus on what proof exists, which may assist in reaching stipulations beyond the responses to the RFA, and in settlement discussions. This may also point out to the opposing party, however, precisely what evidence needs to be gathered to support its case.

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§9.17 2. Information Established by Admissions

Any matter admitted in response to an RFA and not amended or withdrawn under noticed motion is conclusively established in the action "against the party making the admission" (unlike answers to interrogatories and deposition testimony, which can always be changed or explained). CCP §2033.410(a).

PRACTICE TIP: At trial, a party charged with an admission can argue that the admission should be narrowly construed or given only limited effect. See *Milton v Montgomery Ward & Co*. (1973) 33 CA3d 133, 138, 108 CR 726 (court has broad discretion in determining admissibility and relevance of evidence and scope and effect of an admission). For this reason, RFAs must be clear, concise, and unambiguous. See *Fredericks v Kontos Indus., Inc.* (1987) 189 CA3d 272, 277, 234 CR 395 (if admission is susceptible to more than one meaning, trial court must exercise its discretion to determine scope and effect of admission "so that it accurately reflects what facts are admitted in the light of other evidence"). Trial courts may consider parol evidence that explains an admission but cannot use parol evidence to contradict the plain meaning of a response to an RFA; if a response to an RFA is unambiguous, the matter admitted is conclusively established. *Monroy v City of Los Angeles* (2008) 164 CA4th 248, 260, 78 CR3d 738.

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§9.18 a. Admission of Fact

A fact that is admitted by a party under the procedure in CCP §§2033.010-2033.740 is eliminated as an issue. The fact cannot be contested by the admitting party at a later point in the case except following an order permitting amendment or withdrawal of the admission. In effect, an admission is a stipulation that binds the admitting party in that action. However, a party may present evidence at trial that is directly contrary to the party's previous admission if the admission was true at the time and the party later discovered evidence that refuted the admission. *Burch v Gombos* (2000) 82 CA4th 352, 355, 98 CR2d 119. In *Burch,* because the request for admission required the defendant to admit that it had no evidence at that point in time, the defendant was able to reply with an unqualified admission. Although CCP §2033.300(a) requires a noticed motion when a party seeks to amend or withdraw an admission, the party is under no duty to supplement prior RFAs if the party obtains new information that refutes the prior admission. 82 CA4th at 360. Because the request for admission asked for the defendant's knowledge at the time the question was posed, the response given by the defendant was true at the time and remained true at the time of trial.

A request that a matter in controversy be admitted is usually made with little or no expectation that an admission will be made. Rather, its purpose is to set the stage for the cost-of-proof sanction that is a unique feature of CCP §2033.420 (on cost-of-proof sanctions, see §§9.87-9.91) or to provide a predicate for an interrogatory requesting the evidence supporting the denial. On interrogatories, see chap 7. For example, in a legal malpractice case, counsel could draft an RFA seeking an admission that defendant did not file a complaint on plaintiff's behalf before a particular date (*i.e.*, the date on which the applicable statute of limitations expired).

JUDGE'S PERSPECTIVE: Because admissions of facts crucial to a cause of action or defense can have such a significant impact on the litigation, ambiguities will usually be construed by the court against the party making the request.

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§9.18A b. Opinions Relating to Fact

Under CCP §2033.010(b), a party can be required to admit an opinion relating to a fact. See, *e.g., Chodos v Superior Court* (1963) 215 CA2d 318, 322, 30 CR 303 (RFAs relating to minimum requirements for stability of filled slope were not objectionable because requests called for expert opinions). See §§9.34-9.35.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.18B c. Application of Law to Fact

§9.18B c. Application of Law to Fact

Under CCP §2033.010(b), a party can be required to admit the application of law to fact. See §§9.34-9.35.

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§9.19 d. Genuineness of Document

An admission of the genuineness of a document is an admission of its authenticity. It precludes objection to the admission of the document into evidence on the ground that it is not what the proponent claims it to be. On authentication of writings, see Evid C §1400.

PRACTICE TIP: The use of RFAs to establish the genuineness of documents is most important in document-intensive cases. The witnesses necessary to authenticate documents can be numerous. They may not be available, and, even if available, getting their testimony may involve multiple depositions, travel, and other expenses. A single deposition of a custodian of records may cost much more than a carefully crafted set of requests.

A party that has admitted the genuineness of a document may object to its admission in evidence on hearsay or other grounds for exclusion such as relevancy. See discussion of admissions of genuineness of documents in §9.36.

JUDGE'S PERSPECTIVE: Courts encourage counsel to cooperate on procedural issues such as determination of genuineness of documents without resorting to discovery procedures. Counsel should readily agree on documents unless there is a true dispute over authenticity, and in that case use of the admission procedure would probably not be useful.

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§9.20 e. Facts About Electronically Prepared Documents

RFAs can also be extremely helpful when dealing with electronic information. Unlike a traditional handwritten paper document, a document prepared electronically can undergo multiple revisions and edits, often by more than one author. Information embedded in or otherwise associated with the document but not visible in a printed version (*i.e.*, metadata, or "data about data"; see Microsoft Computer Dictionary (4th ed 2002)), can be important because it may indicate when a document was first prepared, how many versions were generated, when the last revisions were made, and who worked on the document. See §4.5. If counsel can obtain electronic versions of documents together with the metadata, counsel can use RFAs to obtain admissions as to, *e.g.*, the number of individuals who edited the document and their identities, how many times the document was edited, who had access to the document, and when the document was first prepared. On importance of metadata, see §§4.5, 4.34, 8.22.

NOTE: To facilitate proof of the source of an electronically transmitted document (such as an e-mail), consider asking the adverse party to authenticate its individual e-mail identity, originating domain name, and IP address. These admissions will enable you to "tie" a particular document to an author, an organization, or an individual's unique computer work station.

In a more traditional authentication context, RFAs can be used to establish that a printed version of a document is a true and correct text version of a document that was transmitted (such as an e-mail) or stored (such as a memo) electronically. Because appellate courts have yet to confront many of these issues, there is a shortage of citable guidance, including in the federal courts under Fed R Civ P 36.

NOTE: When dealing with electronically produced documents, counsel should keep in mind that RFAs about the origin of the document, or about its chain of custody, may not be considered RFAs about the document's genuineness, and thus may be included in the "rule of 35" limitation (see §§9.4-9.5).

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§9.21 3. Strategy Considerations

Counsel should use RFAs to do the following (see *Miller v Marina Mercy Hosp.* (1984) 157 CA3d 765, 769, 204 CR 62):

- Narrow the factual issues that need to be tried; and
- Save the time and expense of preparing, producing, and introducing evidence on points that are not seriously contested.

PRACTICE TIP: A plaintiff can use an RFA, along with appropriate interrogatories, to weed out defenses asserted by the opponent and determine which have evidentiary support. Similarly, a defendant can use an RFA to determine which of the plaintiff's causes of action in the complaint will actually be the focus of the litigation. RFAs on affirmative defenses can form the grounds for summary judgment or summary adjudication.

Admissions may lead to settlements, summary judgments, and dismissals as well as to reduction of trial time. Additional reasons for using the RFA procedure include the following:

- Saving time and money by reducing deposition and trial costs;
- Establishing conclusively facts about which there should be no dispute, thus narrowing the factual and legal issues in dispute;
- Establishing facts that justify partial or complete summary judgments;
- Eliminating surprise at the trial; and
- Eliminating the need to call a trial witness (who might be vulnerable to cross-examination or make a poor appearance on the stand).

See *Cembrook v Superior Court* (1961) 56 C2d 423, 429, 15 CR 127; *Brigante v Huang* (1993) 20 CA4th 1569, 1576, 25 CR2d 354, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260. Compare the nature and purpose of RFAs with contention interrogatories, discussed in §§7.39-7.43.

NOTE: A request that a matter in controversy be admitted is usually made with little or no expectation that an admission will be made, but with the purpose of setting the stage for the cost-of-proof sanction that is a unique feature of CCP §2033.420. On cost-of-proof sanctions, see §§9.87-9.91.

RFA on motion for summary judgment. On a motion for summary judgment, the legal effect of an RFA can be far greater than the legal effect of an admission by a deponent in a deposition. Admissions that are made after there has been time to conduct a reasonable inquiry and that are drafted (usually) with the assistance of counsel can be given more weight than an on-the-spot statement in a deposition. This is particularly so because RFAs serve a different purpose than other discovery devices, namely the elimination of the need for proof, as opposed to the uncovering of information. See *Brigante v Huang, supra*.

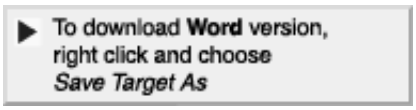
Use in class actions. There are some practical limitations on the use of RFAs in class actions. Many judges are reluctant to grant cost-of-proof sanctions against the class, class representative, or class attorney. As a result, in class actions, defense counsel tend to use RFAs for a conclusive proof effect, rather than in anticipation of recovering cost-of-proof sanctions. On cost-of-proof sanctions (*i.e.*, to recover expense of proving unadmitted matters), see §§9.87-9.91.

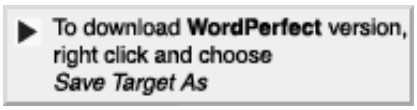
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III. DRAFTING REQUESTS FOR ADMISSION

A. Format and Content

§9.22 1. Using Judicial Council Forms





The Judicial Council has approved official form RFAs for use in state court lawsuits based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. See CCP §§2033.710-2033.740. The printed "blank" form (designated Judicial Council Form DISC-020) is available from the clerk of each trial court. CCP §2033.740(b). The form is reproduced in §9.98. A full-size reproduction, which may be photocopied, filled in, and served on the responding party, is included in California Judicial Council Forms Manual (Cal CEB 1981). The form is also available on the California Courts Web site at http://www.courtinfo.ca.gov/forms. Use of this Judicial Council-approved form is optional.

JUDGE'S PERSPECTIVE: The forms should be used only if they are the most effective means of making the request. The courts generally prefer a specially prepared request for admission if it reduces ambiguity and does not undermine the request. Unless the issues are simple, use of the form may not be advisable.

An attorney who uses the Judicial Council printed form may use attachment pages for more than the three or four requests that will fit in the spaces provided on the form. The form may be used as the first page of a long set of individual requests. Attached pages should be labeled to minimize the possibility of loss or confusion. For example:

_ _[*Short title of case*]_ _ **No.** _ _ _ _ _ _

Requests for Admission, Set No. _ _ _ _ _ _

From _ _[*name*]_ _ **to** _ _[*name*]_ _

Attachment A: Additional Requests

The requesting party should keep the filled-in original of the printed form and the original proof of service form and make one copy for each other party in the case, along with as many office copies as needed. CCP §§2033.070, 2033.270. On service, filing, and preservation of originals, see §9.38.

NOTE: Counsel should be aware that the use of Judicial Council-approved RFAs is included in the "rule of 35" calculation for RFAs that do not relate to the genuineness of documents. (Unlike CCP §2030.030(a)(2), which excludes Judicial Council form interrogatories from its 35-interrogatory limit, CCP §2033.030 does not exclude Judicial Council form RFAs from the 35-RFA limit.) This may limit practical use of these form RFAs. Another limitation is that a lengthy set of RFAs with attachment pages may be more confusing than useful in proving a case.

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2. Using Attorney-Drafted Sets

§9.23 a. Combining With Other Methods of Discovery

No party can combine RFAs with any other method of discovery in a single document. CCP §2033.060(h). They may, however, be *served* simultaneously with other methods of discovery, particularly with the form interrogatory 17.1.

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§9.24 b. Format for Caption

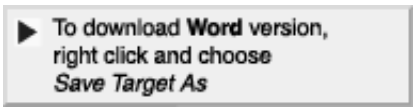
A set of RFAs that does not use Judicial Council Form DISC-020 as a first page must comply with the format requirements of Cal Rules of Ct 2.111. In the upper left corner of the first page of the RFA, the name, State Bar membership number, address, and telephone number of the attorney should appear. The name of the court and the short title and number of the case should also appear in the caption. See sample forms in §§9.98-9.100.

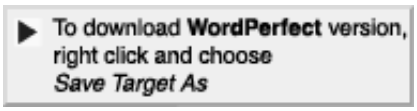
The name of the paper, REQUESTS FOR ADMISSION, should be typed in all capital letters or printed below the case number. Under CCP §2033.060(b), the first paragraph immediately below the caption must show the following:

- Identity of the requesting party;
- Set number; and
- Identity of the responding party.

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§9.25 c. Response Date





The paper need not state the date on which a response is due. If, however, the parties have agreed in advance that the responding party may have more than the 30 days specified in CCP §2033.250(a), or if the requesting party has obtained an order shortening time for the response, it is helpful to include a final response date in the introductory line. Such a line might read:

First Set of Requests for Admission from _ _[*name of requesting party*]_ _ **to** _ _[*name of responding party*]_ _**;**
Response due on or before _ _[*date*]_ _**.**

NOTE: Including a response date helps counter procrastination by the opposing party and the "excuse" that the response was late because of an office calendaring mistake. To avoid any confusion, some attorneys place the due date in boldface on the face page of the document. Others consider that it is not their responsibility to help opposing counsel by providing the due date.

Whether or not a response due date is specified, counsel should include in the calculation of when the response is due any additional time allowed, based on the method of service of the RFAs. See CCP §1013. On calculating discovery response due dates, see §2.22.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.26 d. No Separate Preface or Instructions

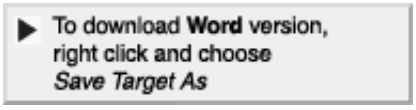
§9.26 d. No Separate Preface or Instructions

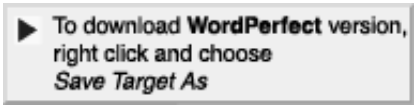
No preface or instructions may be included in a set of RFAs. Each individual request must be full and complete in itself. CCP §2033.060(d). Although the Judicial Council may approve a preface or instructions, it has not done so yet.

PRACTICE TIP: An introduction as part of the responses to a set of RFAs is not specifically prohibited. An introduction indicating that the responses are based on the information available at the time the response is given and that the party reserves the right to seek leave to amend them on the discovery of additional information might be useful in persuading a judge to allow a subsequent amendment or withdrawal of an admission.

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§9.27 e. Format for Definitions Used





Any term that is "specially defined" in a set of RFAs must be typed in capital letters whenever it appears. CCP §2033.060(e). The statute appears to permit a series of specially defined terms to be typed immediately below the identity of the party requesting the admissions, the set number, and the identity of the responding party, as in the following example:

DEFINITIONS:

SCENE OF THE ACCIDENT means the intersection of Main Street and First Avenue in Centerville, California.

CHEVROLET means that passenger automobile with the California license number AAA 19.

Alternatively, the statute appears to permit a term defined in one individual RFA to be used without definition in further requests, as in the following example:

1. On April 10, 2005, John Smith was an owner of the CHEVROLET automobile, California license number AAA 19.

2. At about 10:15 a.m. on that date, William Jones was driving that CHEVROLET in a generally westerly direction on Central Street near Main Street in Centerville, California.

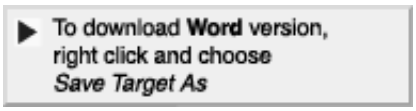
3. At about that time, the CHEVROLET collided with a Ford automobile.

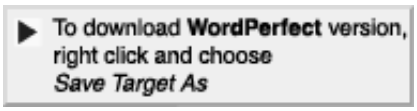
4. At the time of the collision, all or part of the CHEVROLET was north of the center of the paved portion of Center Street.

Phrases such as "on that date" and "at that time," which clearly refer to a date or time specified in a previous request, should be acceptable (*i.e.*, not violate the rule that each request must be full and complete in itself), but it is better practice to repeat the date or time to avoid an objection under CCP §2033.060(d). See §9.29. Repeating the date or time will also make the RFA more useful as evidence. If the date or time is included, the fact admitted will be complete without additional information or explanation.

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§9.28 f. Numbering





Each individual request in a set of RFAs must be separately set forth and identified by letter or number. CCP §2033.060(c). The numbering of individual requests in each subsequent set of requests should be consecutive to the numbering of the preceding set. Section 2033.060 does not address numbering schemes that distinguish an RFA seeking the truth of factual matters from an RFA seeking the genuineness of documents.

PRACTICE TIP: Because there is a numerical limit on requests relating to facts but not, generally, on requests relating to documents, it can be useful to number "fact" requests (*e.g.*, "1," "2") and to number requests relating to documents (*e.g.,* "D-1," "D-2"). The second set of requests directed to the same party would continue with sequential "fact" request numbers and separate "document" request numbers. Additionally, counsel should consider separating Requests for Admissions of the Genuineness of Documents and Requests for Admissions of Facts into different sets in order to avoid confusion on counting requirements under the "rule of 35."

Each group of individual RFAs may be prefaced with a general "request" line, followed by numbered statements, as in the following example:

You are requested to admit the truth of each of the following:

1. John Smith and William Jones entered into a contract on January 12, 2005.

2. On January 12, 2005, William Jones was competent to contract.

You are requested to admit that the original of each of the following documents, a copy of which is attached, is genuine:

D-1. "Agreement" signed by John Smith.

D-2. Medical bill from Dr. Jones dated May 4, 2005.

PRACTICE TIP: If the requests regarding documents are voluminous, the better practice is to serve a separate set of RFAs, including only the requests relating to documents. This enables the use of the responses and documents with greater ease at the time of trial.

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§9.29 g. Requests Must Be Complete With No Subparts

Each request must be "full and complete in and of itself," must contain no subparts, and must not be "compound, conjunctive, or disjunctive." CCP §2033.060(d), (f). The purpose of CCP §2033.060(d) and (f) is to prevent evasion of the 35-request limit.

PRACTICE TIP: Clarity in drafting is important when considering trial use and the potential impact of RFAs. If the RFAs are simple and straightforward, they can be effectively used at trial either when read by counsel or used as part of a graphic (for example, presented in a split screen projection showing the RFA responses on one side and the contradictory video deposition excerpt on the other). If the RFAs are complex, compound, or otherwise not easily understood by either a jury or a judge seeing the statement for the first time, their power is diminished (and they are more likely to be subject to objection or challenge).

Statements that consist of several parts, refer to other requests within the set or in an earlier set, or are otherwise confusing or ambiguous may be objected to at trial or eliminated from consideration by the court. See *Cembrook v Superior Court* (1961) 56 C2d 423, 428, 15 CR 127. The Judicial Council may approve individual requests that contain subparts or that are compound, conjunctive, or disjunctive, however. CCP §2033.060(f).

JUDGE'S PERSPECTIVE: Requests should be simple and precise and not use words subject to various interpretations. A court will generally apply a common sense approach to whether a request is ambiguous or not.

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§9.30 3. Signing and Dating

Although there appears to be no requirement that a set of RFAs be signed or dated, the attorney who has prepared the set and who wants to be contacted concerning them should conclude the set with his or her typed name and signature, particularly when not identified elsewhere on the paper.

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§9.31 4. Attaching Documents

The requesting party must attach a copy of each document for which an admission of genuineness is requested to the set of RFAs and must have the original document available for on-demand inspection by the responding party. CCP §2033.060(g). The copy must be attached to the set even when the requesting party believes that the responding party already has a copy. It is helpful to label each copy attached to a set of requests with the number of the request to which it relates.

PRACTICE TIP: Even if the corresponding documents are lengthy, they should be attached to the RFAs to have a full set of documents easily referenced at trial. This will also eliminate disputes over the contents of the document that was admitted to be genuine. Counsel should be sure to attach the version he or she wishes to have authenticated.

Electronic documents. In discovery involving electronically produced documents, the requesting party may not have an original document in its possession. It will have to attach a printed version of the document and seek an admission that the attached printed version document is a genuine (or true and correct) text version of the electronic document. The requesting party may also refer to files contained in an accompanying floppy disk or CD-ROM. On where electronic documents may be stored, see §§8.19-8.27, 4.14-4.15, 4.40. In some more complex or document-intensive cases, the parties may agree to upload electronically stored documents to a website and those documents can then be referred to in RFAs. On electronic discovery in general, see chap 4. On "hosting" electronic documents, see §4.25.

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§9.32 5. Preserving Original Documents for Inspection

A party requesting admission of the genuineness of documents must preserve the originals of those documents and make them available to the responding party on demand. CCP §2033.060(g). This of course assumes that the propounding party has custody of the original; however, lack of possession of the original would not preclude an RFA for genuineness of a document in the possession of a third party, if the propounding party can arrange for inspection of the original on demand of the responding party. Indeed, the requesting party has an obligation to subpoena the original document if it is in the possession of a third party (under CCP §2033.060(g), the propounding party shall make the original available for inspection on demand). On third party document subpoenas, see chap 5.

A responding party might want to inspect an original document because:

- The copy of the document attached to the set of RFAs was so illegible that its contents could not be read or its genuineness determined; or
- There is some doubt about its genuineness that might be resolved by inspecting the original.

Furnishing clear copies may forestall some demands to inspect.

Code of Civil Procedure §2033.060(g) does not specify who may make the inspection, nor whether the inspection may include tests of paper or ink or microscopic viewing by a questioned documents examiner. When anything other than ordinary visual inspection by the responding party's attorney is demanded, counsel should serve a demand for inspection under CCP §2031.030.

On the duty to preserve electronic evidence (documents stored electronically), see §§4.6-4.8, 8.16-8.17, 8.106-8.107.

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B. Permissible Requests

§9.33 1. Truth of Facts

The requesting party may ask the responding party to admit the truth of any specified fact that is within the scope of discovery fixed by CCP §§2017.010 and 2017.320, subject to the restrictions on discovery in CCP §2019.030(a). CCP §2033.010. On limitations on the scope of discovery, see chap 1. A party can obtain discovery regarding any matter that is relevant to the "subject matter" involved in the pending action "if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." CCP §2017.010.

Thus, the "fact" about which an individual RFA is directed needs to be relevant only to the subject matter of the case —not to the issues. See CCP §2017.010. A request for admission may relate to a matter that is in controversy between the parties. CCP §2033.010.

PRACTICE TIP: The requesting party may ask the other party to admit the truth of just about any fact, leaving the other party to decide whether to object (see §§9.54-9.60) or to move for a protective order (see §§9.66-9.71). The objecting party has the burden of showing that a request falls outside the purview of the discovery law. See *Cembrook v Superior Court* (1961) 56 C2d 423, 427, 15 CR 127. A responding party that prevails on a motion for a protective order may, however, be entitled to a monetary sanction. On sanctions, see chap 15.

RFAs are sometimes used to establish facts necessary to lay the foundation for the admission of relevant evidence. See Evid C §§403 (determination of foundational facts when relevancy in dispute), 1220 (admissions of a party admissible as evidence).

EXAMPLE 1: Admit that on January 12, 2005, at the scene of the accident, you told plaintiff you were intoxicated.

EXAMPLE 2: Admit that you typed the e-mail of January 12, 2005 sent by you to John Jones@abc.com.

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§9.34 2. Opinions Relating to Fact

A party may request that another party admit the truth of an opinion relating to fact. CCP §2033.010. Such requests are governed by the same subject matter limitation as RFAs of the truth of facts, and these two types of request both count in determining the numerical limit on requests. CCP §2033.030.

The difference between an RFA of the truth of an "opinion relating to fact" and a request that calls for "application of law to fact" is illustrated in §9.35.

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§9.35 3. Application of Law to Fact

Requesting admissions that require the application of law to fact is specifically permitted. CCP §2033.010. See *Burke v Superior Court* (1969) 71 C2d 276, 282, 78 CR 481. These requests might be characterized as asking the responding party to admit a conclusion of law. Requests that the truth of an application of law to fact be admitted are governed by the subject matter limitations discussed in §9.33, and they are counted with requests for the admission of the truth of facts and opinions in determining the numerical limit on requests discussed in §§9.4-9.5.

The difference between types of requests for truth of an application of law to fact is illustrated by the following examples that an automobile accident victim might serve on a defendant:

EXAMPLE 1: John Jones's car crossed the center line of the road just before the collision occurred. (Note—This request asks for the defendant's perception of what happened (*i.e.*, for admission of the truth of a fact).)

EXAMPLE 2: John Jones was intoxicated at the time his car crossed the center line. (Note—This request calls for an opinion that the driver was intoxicated based on facts: the defendant's observation of the driver's conduct and appearance.)

EXAMPLE 3: John Jones drove negligently. (Note—This request requires the application of a legal criterion to a set of facts, calling for a conclusion of law.)

Use of this type of RFA is the functional substitute for obtaining a ruling from the court or a stipulation of counsel on a particular legal and factual issue. Often, these types of RFAs can resolve issues of agency and employment and ownership of property issues. The responding party is placed in the difficult position of having to decide whether it is prepared to in effect stipulate to the legal finding the requesting party seeks. A denial may expose the responding party to sanctions. If a response is given that the responding party is unable to truthfully admit or deny, coupled with an explanation of why the party is unable to admit or deny the request, the chances of a cost-of-proof sanction diminish.

JUDGE'S PERSPECTIVE: It is unlikely that a party would admit negligence as in Example 3 unless it was clear-cut. The better way to deal with this issue, if it appears that the conduct was negligent, would be to request a stipulation as to liability from the defendant.

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§9.36 4. Genuineness of Documents

The requesting party may ask the responding party to admit the genuineness of a specified document that is within the scope of discovery fixed by CCP §2017.010-2017.320, subject to restrictions on discovery in CCP §2019.030(a). CCP §2033.010. Thus, the document for which the request is made need be relevant only to the subject matter of the case and not to the issues. See CCP §2017.010. On scope of discovery, see chap 1. On privileges and other protections, see chap 3.

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§9.37 C. Methods of Service

The set of RFAs may be served by mail, by personal delivery to the other party or to the party's attorney, or as otherwise provided in CCP §§1010-1020. Note that service by mail extends the time for response by the time periods listed in CCP §1013. See CCP §2016.050. On extension of response time, see §2.22. On service of papers in actions, see California Civil Procedure Before Trial §§18.1-18.24 (4th ed Cal CEB 2004).

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§9.38 D. Requesting Party's Custody of Originals; Filing

Neither the original nor a copy of a set of RFAs should be filed with the court (CCP §2033.270(a)), except when a copy is presented to a judge who is asked to take judicial notice of matters that have been admitted.

NOTE: If a motion to compel a response or further response to RFAs is brought, Cal Rules of Ct 3.1020(c)-(d) requires that the RFA and any response be reproduced in the separate statement. See §15.48.

Consistent with custody and preservation requirements for most other discovery tools, the requesting party must retain the original requests, with the original proof of service affixed to them, and the original of the sworn response for at least 6 months after final disposition of the action, although at that time any party may move, showing good cause, for an order that the originals be preserved for a longer period. CCP §2033.270(b).

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E. Procedure for Shortening Time to Respond

§9.39 1. Noticed Motion

A party who wants to receive responses to RFAs in less than 30 days from the date the requests are served (or as extended according to the method of service) may move the court for an order shortening the time to respond. CCP §2033.250(a).

PRACTICE TIP: Only in rare circumstances will a court be willing to shorten time on the full responses to RFAs. A strong showing would be required on the reason the RFAs could not be earlier served. Evidence showing the desirability of receiving admissions or denials in time to complete discovery before trial might be sufficient, as might a showing that issues can be narrowed before the date of a hearing or the start of trial. Because admissions tend to promote settlements as well as shorter trials, counsel may be able to show other circumstances in the case that would convince a judge to sign an order requiring early responses.

Application for order shortening time to hear motion. Because the time needed to serve and hear a fully noticed motion could consume much of the 30-day response period, the requesting party may apply ex parte for an order shortening time for the hearing on the motion. The application may be in the form of a declaration under penalty of perjury by the attorney who seeks the order stating:

- The reasons the order is sought; and
- The nature of the notice given to the other party or the reasons notice was not given.

JUDGE'S PERSPECTIVE: In considering an ex parte application, some courts will consider the degree of cooperation which the applicant has shown in prior discovery procedures. It is important that counsel meet all of the requirements of Cal Rules of Ct 3.1200-3.1207 when making an ex parte application for an order shortening time.

On moving or making an application for an order shortening time for the hearing on the motion, see §§15.11-15.29.

Unlawful detainer action. In unlawful detainer actions, the court may shorten the normal 5-day time for response on motion of the requesting party. CCP §2033.250(b).

On ex parte procedure, see California Civil Procedure Before Trial §§13.3-13.14 (4th ed Cal CEB 2004).

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§9.40 2. Ex Parte Application

It appears that a motion is required to receive an early response to RFAs and that an ex parte application should not be used. Courts have generally been reluctant to approve ex parte relief when dealing with RFA issues because an admission or an order deeming certain matter admitted can have such dire consequences. See *Demyer v Costa Mesa Mobile Home Estates* (1995) 36 CA4th 393, 42 CR2d 260, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260 (time to cure failure to serve response to RFAs could not be shortened by motion to deem matters admitted). Moreover, the language of CCP §2033.250(a) stating that RFA responses are due within 30 days of the service of the RFAS "unless on motion of the requesting party the court has shortened the time for response" lends support to the view that a motion is required. Compare CCP §2033.250(a) with CCP §2025.270(d), which permits the court to shorten or extend the time for scheduling a deposition "[o]n motion or ex parte application of any party or deponent." See also 6 Witkin, California Procedure, *Proceedings Without Trial* §§58-59 (5th ed 2008) (in general, an ex parte application for relief is permitted only in limited circumstances).

On requesting an order shortening time for the hearing on the motion, see §9.39, above. On orders shortening time in general, see §§15.11-15.29.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.41 3. Stipulations Shortening Time

§9.41 3. Stipulations Shortening Time

Although CCP §§2033.010-2033.740 do not mention stipulations shortening time to respond to RFAs, the requesting party may simply ask the responding party to agree to respond by a specified date. See CCP §2016.030 (by written stipulation, parties may modify procedures (including timing requirements) for any statutory discovery method). If the other attorney agrees, counsel should obtain that attorney's signature on a stipulation.

PRACTICE TIP: It is better practice to confirm any agreement to extend or shorten time for response to RFAs by stipulation rather than confirming letter because the consequences of failure to respond on time are dire—the matter will be deemed admitted.

JUDGE'S PERSPECTIVE: A court is unlikely to grant a motion to deem matters admitted if the motion is supported only by a confirming letter, rather than a stipulation.

A written stipulation that shortens the time to respond should specify the date on or before which the response must be served and may specify that service must be by personal delivery rather than by mail and that failure to serve on that date will have the effects of a failure to serve a timely response (see CCP §2033.280(a)).

PRACTICE TIP: As a practical matter, opposing counsel is unlikely to agree to shorten time for his or her own response to RFAs. If such a high level of cooperation exists between counsel, it may be more practical simply to reach a stipulation concerning the matters that are not in controversy. See §9.42.

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§9.42 F. Stipulated Admissions

Attorneys can often accomplish by stipulation or agreement the same objectives that are served by the formal RFA procedures in CCP §§2033.010-2033.740. The opposing party and attorney may be willing to sign a written stipulation admitting the truth of factual matters and the genuineness of documents in words agreed on by the requesting and responding attorneys.

Although attorneys have general authority to bind the parties they represent on procedural matters, it is wise to ask both the party and the attorney to sign any stipulation that admits the truth of a fact or the genuineness of a document. See generally California Civil Procedure Before Trial (4th ed Cal CEB 2004).

Any matter admitted under the RFA procedure is conclusively established against the party making the admission unless the court permits withdrawal or amendment of the admission under CCP §2033.300. Matters admitted by stipulation should similarly be deemed conclusively established against the admitting party.

PRACTICE TIP: When counsel stipulates to matters that could be adverse to the client, it may be a good idea to include a paragraph in the written stipulation that provides for a means of withdrawing or amending the stipulated admission, perhaps by reference to CCP §2033.300. When seeking a stipulation from opposing counsel on matters adverse to that party, counsel may not wish to include specific language on how that party can be relieved from stipulation, instead leaving it to opposing counsel to apply to the court for relief.

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IV. PREPARING AND SERVING RESPONSES

§9.43 A. Responding Party's Duty to Respond

The response to a request for admission must be "as complete and straightforward as the information reasonably available to the responding party permits." CCP §2033.220(a). The section also imposes a duty of "reasonable inquiry." CCP §2033.220(c). This means that the responding party must seek information beyond his or her personal knowledge and inquire of sources of information within his or her reach, custody, or control. At a minimum, the response should reflect all the information reasonably available to a party, including that in the possession of the party's attorney or designated expert (unless privileged). See *Chodos v Superior Court* (1963) 215 CA2d 318, 322, 30 CR 303.

If the responding party gives lack of information or knowledge as a reason for failing to admit all or part of a request for admission, the party must state in the answer that "a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter." CCP §2033.220(c).

JUDGE'S PERSPECTIVE: The obligation to make a good faith effort to obtain information by inquiry to others within the party's control is often overlooked by counsel. Responding with only that information that is directly in possession of the party is often insufficient for a full and complete response. The scope and extent of the "reasonable inquiry" may also become a factor if a motion is brought to recover the costs of proving matters which were not admitted under CCP §2033.420(b)(4) ("other good reason for the failure to admit"). On moving for cost-of-proof sanctions, see §§9.87-9.91.

The duty to investigate requires that information known or available to a party's attorney must be disclosed, if not otherwise privileged. See *Smith v Superior Court* (1961) 189 CA2d 6, 12, 11 CR 165.

No duty to supplement or update. A responding party is not required to supplement or update responses to RFAs if the party subsequently discovers new evidence that changes its prior responses. *Burch v Gombos* (2000) 82 CA4th 352, 355, 98 CR2d 119. See also *Biles v Exxon Mobil Corp.* (2004) 124 CA4th 1315, 22 CR3d 282 (no duty to supplement discovery responses under California law).

JUDGE'S PERSPECTIVE: If, after serving the response to an RFA, counsel learns information that renders the previous response incorrect, counsel should move promptly to amend or withdraw the admission under CCP §2033.300 so that the client is not prejudiced by the inappropriate admission. Similarly, if the previous response failed to admit a fact which counsel now knows should have been admitted, counsel should move to amend the response and admit the fact so that the client does not risk paying for the adversary's costs of proving the fact under to CCP §2033.420. On cost of proof sanctions see §§9.87-9.91.

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§9.44 B. Alternatives Available to Responding Party

The party to whom RFAs have been directed must "respond in writing under oath separately to each request." CCP §2033.210(a). To comply with the statutory duty to respond, a party to whom RFAs are directed (the responding party) may take several courses of action:

- Serve a timely, written, "verified" response that contains numbered statements:
- Admitting matters either as expressed in requests or as reasonably and clearly qualified;
- Denying matter in requests in whole or in part;
- Specifying the matter in requests regarding the truth of which the party lacks sufficient information or knowledge even after reasonable inquiry; and
- Objecting to requests or matter in requests that are irrelevant, privileged, or otherwise improper;
- Seek an extension of time to respond (see §§9.64-9.65); or
- Move for a protective order (see §§9.66-9.71).

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C. Time to Respond

§9.45 1. Statutory Limits

Respond within 30 days after service. The party responding to RFAs must serve the original written response on the requesting party and on all other parties within 30 days after the set was served unless that time has been shortened or extended by court order (CCP §2033.250(a)), or by stipulation (see §§9.64-9.65).

If the set of RFAs was served on the responding party by mail or other method other than personal service, the responses may be served within the extensions provided in CCP §1013(a), depending on the method of service. CCP §2016.050. See §§2.22, 9.37

Unlawful detainer actions. In unlawful detainer actions, responses to RFAs must be served on the requesting party within 5 days after service on the respondent. The responding party must have at least 5 days after the date of service to respond, unless the court has shortened the time for response on motion of the requesting party. CCP §2033.250(b).

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§9.46 2. Effect of Failure to Serve Timely Response

Waives objections to requests. A responding party who fails to serve a timely response waives any objection to the requests, including an objection based on privilege or on the CCP §§2018.010-2018.080 protection for work product. The court may, however, relieve the responding party from this waiver on motion and a determination that the party has subsequently served a response that substantially complies with CCP §§2033.210-2033.230 and that the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect. CCP §2033.280(a). See forms in §§9.107-9.108.

PRACTICE TIP: A responding party who has neglected to serve a timely response may seek to avoid waiver of objections, privileges, and work product protection by serving, as soon as the error is discovered, a notice of motion for relief from mistake, inadvertence, surprise, or excusable neglect; and attaching a sworn, written response that asserts the claimed objections to individual requests and answers the other requests.

Enables requesting party to move for order that matters be deemed admitted. Failure to file a timely, sworn, written response does not result in the matters stated in the requests automatically being deemed admitted. Such a failure, however, enables the requesting party, immediately on learning that a response was not mailed or served by the due date, to move for an order under CCP §2033.280(b) that:

- The matters specified in the set of requests (the genuineness of documents and the truth of facts and opinions relating to fact) be deemed admitted; and
- The responding party pay a monetary sanction.

For full discussion of a motion for an order deeming matters admitted, see §§9.72-9.77.

When possible to withdraw or amend admission. Under CCP §2033.300, with leave of court on noticed motion a party may withdraw or amend an admission or a deemed admission in response to an RFA if the court finds that that the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect and that the party that obtained the admission will not be substantially prejudiced by the withdrawal or amendment. *Wilcox v Birtwhistle* (1999) 21 C4th 973, 90 CR2d 260 (former CCP §2033(m), now CCP §2033.300, should be construed to permit withdrawal or amendment of deemed admissions). For full discussion of motion to withdraw or amend deemed admission, see §§9.82-9.84.

Sanctions mandatory. The court must impose a monetary sanction under CCP §2023.030(a) on the responding party, on the attorney, or on both, whose failure to serve a timely response necessitated the requesting party's motion. CCP §2033.280(c). If a party fails to respond to RFAs and the proponent moves for and obtains an order under CCP §2033.280(c) that requests be deemed admitted, the court has no discretion to deny sanctions under CCP §2023.030(b). *Appleton v Superior Court* (1988) 206 CA3d 632, 253 CR 762. On motion that matters be deemed admitted and response, see discussion in §§9.72-9.77.

Failing provide a response to each request, even those the responding party intends to admit (see CCP §2033.220) may result in sanctions under CCP §2033.280 for failing to respond on time or at all.

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D. Drafting Written Responses

§9.47 1. Form: Caption; Introduction; Instructions; Definitions

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The response to RFAs must comply with the format requirements of Cal Rules of Ct 2.111. The name, address, State Bar number and telephone number of the attorney; the name of the court; and the short title and number of the case must be set out on the first page in the usual manner. See sample form in §9.103.

The first paragraph, immediately below the title of the case, must show the identities of the requesting and responding parties and the number of the set of RFAs being answered. For example:

_ _[*Name of responding party*]_ _ **responds to the** _ _[*set number*]_ _ **Set of Requests for Admission served on** _ _[*him/her/it*]_ _ **by** _ _[*name of requesting party*]_ _ **on** _ _[*date of service*]_ _ **as follows:**

Although the use of instructions and other introductory matter in responses is not prohibited by CCP §§2033.210-2033.230—unlike CCP §2033.060(d), which prohibits a "preface or instruction" in a set of requests—there appears to be little need for general matter in a response.

A responding party may wish to type terms that are specially defined in a response in capital letters, as may be done in requests, sparing the need to redefine the capitalized term in a later response. For sample form of response to RFAs, see §9.103.

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§9.48 2. Numbering Individual Answers and Objections

The response to a set of RFAs under CCP §2033.210(b) must contain a series of individual responses, each of which must either:

- Answer the substance of a comparably numbered individual request (by admission, denial, or statement of lack of information); or
- State an objection to it.

The responding party must respond individually to each individual RFA. Each answer or objection must bear the same number as the corresponding request, and the individual responses must be in the same sequence as the requests. CCP §2033.210(d). Although an answer or objection to an individual RFA need not repeat the text of the request, it is better practice to do so. Repeating the text is a means for the responding party to ensure that he or she "admits" the right request and makes the RFA easier to use at trial.

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3. Admissions

§9.49 a. Form: Completeness; Restating Request

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An admission must be "as complete and straightforward as the information reasonably available to the responding party permits." CCP §2033.220(a). There appear to be several acceptable ways to make a complete and straightforward admission of a fact or an opinion relating to fact, including the following examples:

3. Admitted.

3. Admits Request No. 3.

3. Admits that John Smith and William Jones entered into a written contract on January 12, 2005.

Although the text of the request need not be repeated, doing so ensures that the admission is stated exactly as the responding party wants it to be. On making a partial or qualified response, see §9.50. Further, the admission is now conveniently stated in one paper: the response.

If the RFA is not clear and direct, a denial or a response that the responding party is unable to admit or deny with a statement of reasons is appropriate. Any ambiguity should be pointed out in the response to prevent the jury from reaching a different conclusion than that intended by either counsel in the litigation. The RFA should not be rewritten by the responding party, although sometimes the party may make a "reasonable and clearly qualified" response. See §9.50. It is also possible that restating an RFA may lead to law and discovery disputes over, *e.g.,* why the change was made and its meaning. Also, the responding party gains little by admitting an RFA and thus should not enhance the position of the propounding party by assisting it with a rewrite of the RFA.

JUDGE'S PERSPECTIVE: In reviewing responses to RFAs, courts can recognize answers that are deliberately evasive or that claim ambiguities that do not exist to avoid giving an honest answer. They should be avoided. Attempts to be clever may well be a reason why sanctions are granted in a situation in which they are not mandatory.

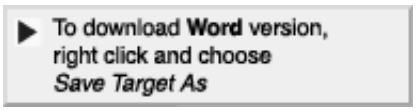
Admissions of the genuineness of documents can also take several forms such as the following examples:

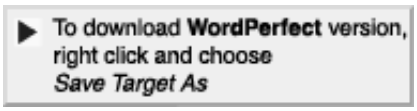
D-5. Admitted

D-5. Admits that the document specified in this request, titled "Contract," is genuine.

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§9.50 b. Form: Partial or Qualified





The answer to an individual RFA may admit the part of it that the responding party concedes is true, while denying the rest, or may admit the truth "as reasonably and clearly qualified." CCP §2033.220(b)(1). For example:

3. Admits that John Smith and William Jones entered into a written contract, but _ _[*e.g., denies that the contract was entered into on January 12, 2005, or at any time before March 23, 2005/asserts that the contract was entered into on March 23, 2005/does not know when the contract was entered into and on that basis denies the request*]**_ _.**

An admission of the genuineness of a document may also be coupled with qualifications or a partial denial, as in the following examples:

D-5. Admits that the document called Exhibit E is a contract between John Smith and William Jones, but denies that it was signed on January 12, 2005, the date that now appears on its last page.

D-5. Admits that John Smith and William Jones both signed the original of Exhibit E, but denies that this document is a contract or agreement between them _ _[*e.g., because William Jones was not competent to enter into a contract at the time he signed it*]**_ _.**

JUDGE'S PERSPECTIVE: From a strategic and tactical standpoint, it is better practice to admit that which can and should be admitted, leaving for denial or the inability to respond only portions that are clearly in dispute. This approach also helps in the event of any motion. If the court concludes that a good faith effort to respond has been made, the chances of a sanction order are significantly reduced. A good faith, straightforward approach to such requests that can and should be admitted is also beneficial to building credibility with the court, especially when a motion to compel further responses may be made and sanctions may be requested.

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§9.51 c. Form: Based on Information and Belief

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Nothing in CCP §§2033.210-2033.230 explicitly either approves or forbids basing an admission on information and belief and sometimes parties respond in the following fashion, *e.g.:*

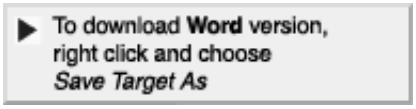
3. I am informed and believe that _ _[*the matter stated in Request No. 3 is true/the document described in Request No. 3 is genuine*]**_ _.**

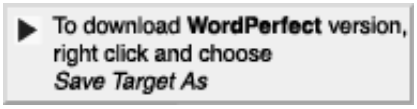
Making an admission based on information and belief is the same as an unqualified admission. Section 2033.220(b) requires the responding party either to admit or deny; if the party lacks sufficient information to admit or deny, then it must make a reasonable inquiry and "specify so much of the matter… as to the truth of which the responding party lacks sufficient information or knowledge." See §9.52, below. Basing an admission on information and belief does not appear to have any effect on a later motion under CCP §2033.300 to amend or withdraw the admission. See §9.53.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.52 4. Form: Lack of Information or Knowledge; Duty to Investigate

§9.52 4. Form: Lack of Information or Knowledge; Duty to Investigate





A responding party may answer all or part of an RFA by stating that the party has made a reasonable inquiry concerning the fact (or opinion) stated in the request, or concerning the document specified in the request, and that the information known or readily obtainable is insufficient to enable the party to admit the request. CCP §2033.220(c). On what is a "reasonable duty," see §9.43.

JUDGE'S PERSPECTIVE: Giving reasons that the responding party does not have sufficient information to admit a matter may also be useful in resisting a motion to compel further responses accompanied by a request for sanctions.

A statement "setting forth in detail the reasons why the party cannot truthfully admit or deny" the requested admission is not required. CCP §§2033.210-2033.230. Unless future court decisions hold that words in the first and second paragraphs of CCP §§2033.210(b), 2033.220(a) (that a response "shall answer the substance of the requested admission" and "shall be as complete and straightforward as the information reasonably available to the responding party permits") should be read as conditions on CCP §2033.220(c), the latter appears to permit a responding party to answer with a conclusory statement such as:

3. I lack sufficient information or knowledge to admit that John Smith and William Jones entered into a contract. I have made a reasonable inquiry concerning this matter, and the information known to me or readily obtainable is insufficient to enable me to admit the matter.

A responding party who wanted to be sure to answer in what might be called "the spirit of CCP §§2033.210(b), 2033.220(a)," and to avoid the need to respond to a motion for an order compelling further response, may wish to state reasons why a matter cannot be admitted, as in the following examples:

3. I lack sufficient information or knowledge to admit that John Smith and William Jones entered into a contract. I have looked at the files of Black Company under their names and found no document that purports to be an agreement between them. I have never heard them exchange words that might amount to a contract.

D-5. I lack sufficient information or knowledge to admit that Exhibit 5 is genuine. I am not familiar with the signatures of either John Smith or William Jones and do not know whether either of them signed the original of Exhibit E.

PRACTICE TIP: A response to a request for admission need not include an explanation of the nature and extent of the investigation undertaken to formulate the response. In practice, explanation should be offered only when required, such as in response to a meet-and-confer letter. Counsel can also provide additional information regarding investigation in a declaration accompanying an opposition to a motion to compel or for costs of proof. See §§9.87-9.91.

A party who arbitrarily denies a request and forces the proponent to prove a fact or the genuineness of a document faces the risk of sanctions following trial. CCP §2033.420(a). See *Smith v Circle P Ranch Co.* (1978) 87 CA3d 267, 275, 150 CR 828 (denial when information available as ground for sanctions). See also *Holguin v Superior Court* (1972) 22 CA3d 812, 820, 99 CR 653 (unjustified denial risks perjury prosecution or financial sanction). Although the responding party must go beyond direct personal knowledge and respond based on reasonably available information, the requesting party may not compel the responding party to hire investigators or bear the expense of preparing the requesting party's case. See *Lindgren v Superior Court* (1965) 237 CA2d 743, 748, 47 CR 298. The courts usually grant the responding party a reasonable period of time to make the investigation necessary to prepare a response. On extending time, see §§9.64-9.65.

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§9.53 5. Form: Denials

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When to deny. The answer to an RFA may be phrased as a denial of the entire request or of the part of the request that is untrue. See CCP §2033.220(b)(2). Like an admission, a denial must be as complete and straightforward as the information available to the responding party permits. CCP §2033.220(a).

If the party knows that the fact that it is requested to admit is true, a denial should not be made. The requesting party may later recover the expense, including attorney fees, incurred in proving the denied fact (or the denied genuineness of a document) if the denial is later found by the court to have been unjustified. Counsel should be aware that the cost-of-proof sanction is not usually sought. Nevertheless, a court can award sanctions under CCP §2033.420 even after granting a summary judgment motion, if the court determines that the legal issues were "proved" as part of the summary judgment motion. *Barnett v Penske Truck Leasing Co.* (2001) 90 CA4th 494, 498, 108 CR2d 821. On cost-of-proof sanctions, see §§9.87-9.91.

Denying a matter that should have been admitted in a sworn response might also subject the responding party to a perjury prosecution. See *Holguin v Superior Court* (1972) 22 CA3d 812, 820, 99 CR 653. An attorney that counseled an unjustified denial might be subject to discipline. See Cal Rules of Prof Cond 3-210 (duty not to advise violation of law). See also Pen C §127. Note also that the denial of a factual allegation in a pleading does not serve as a denial of a later RFA of the same fact. See *Bank of America Nat'l Trust & Sav. Ass'n v Baker* (1965) 238 CA2d 778, 48 CR 165. A responding party should avoid denials that are made solely to inconvenience the requesting party or to spare the responding party from having to consider or to investigate whether the matter stated in the request is true.

JUDGE'S PERSPECTIVE: Denials should be straightforward and precise. Elaborate attempts to avoid responding directly or providing an evasive answer will not be well received by the court.

Ways to state denial. Even when all of an individual request is being denied, there appear to be several acceptable ways to state the denial. For example, the answer to the RFA, "3. John Smith and William Jones entered into a written contract on January 12, 2005," might be made in either of the following ways:

3. Denied.

3. Denies that John Smith and William Jones entered into a contract of any kind on any date.

PRACTICE TIP: Just as it is important to propound RFAs that are limited to a single fact so that a denial of the request is not ambiguous, the response should also be as unequivocal and clear as the request. For this reason, a simple "denied," "admitted," or "inability to…" is preferred to a response coupled with a restatement of the request.

"Denied" could be used by a responding party that wants to deny any contract between Smith and Jones, but it should not be used by a party who ought to be willing to admit part of the request (*e.g.*, that there was a contract, but not that it was in writing or not that it was signed on the specified date). In the latter case, a bare "Denied" would not be as complete or straightforward an answer as the information available to the party permits.

Repetition of the text of the request in a denial is not necessary, but it can sometimes be helpful to repeat part of the request (as in the second example above) to clarify the scope of the denial.

A verbatim repetition, such as "3. Denies that John Smith and William Jones entered into a written contract on January 12, 2005," creates a "negative pregnant," which suggests that the parties may have entered into an oral contract or entered into a contract on some date other than January 12, 2005. Such a response may trigger a motion for a further response.

Admit part, deny part, lack of information as to part. The answer to an individual RFA can admit part of the request, deny part, and state a lack of information regarding another part. CCP §2033.220. See, *e.g., Valerio v Andrew Younquist Constr.* (2002) 103 CA4th 1264, 1273, 127 CR2d 436. It does matter whether the order is "Admits …, but

denies …," or vice versa.

As is true of admissions (see §9.51, Form: Based on Information and Belief), little appears to be gained by attempting to base a denial on information and belief or on a lack of information and belief. Section 2033.220(b) requires that if the responding party cannot admit or deny because the party lacks sufficient information, then the party must make a reasonable inquiry and "specify so much of the matter… as to the truth of which the responding party lacks sufficient information or knowledge." See §9.52.

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§9.54 6. Objections

A party may respond to an individual RFA by clearly setting forth the specific ground for objecting to all or part of the request; any part not objected to must be answered by an admission, denial, or statement of lack of information to admit or deny. CCP §2033.230.

The right to object to an individual request is waived by failure to state the objection in a timely response. See §9.46. Permissible objections are discussed in §§9.55-9.60. No verification is needed for objections; they are preserved as long as they are timely asserted and the response is signed by counsel. CCP §2033.240(a), (c). See §9.61.

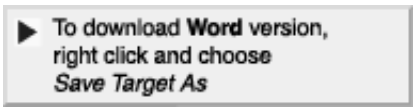
PRACTICE TIP: Objections to individual requests must be included in the same paper (the response) as are the verified admissions, denials, and statements of lack of information.

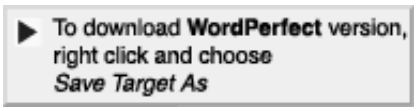
A responding party that wants to object to an entire set of RFAs, or on a ground common to all individual requests in a set, may do so by motion for a protective order. See §§9.66-9.71. A motion for a protective order may also be appropriate in the case of an individual RFA. CCP §2033.080(b)(1). It would be more usual and cost-effective, however, to object to either the set of RFAs or to the individual RFA and let the propounding party pursue a motion to compel. On moving for a protective order, and factors to be considered in choosing between an objection and a motion for protective order, see §9.70.

For a complete list of evidentiary objections, see Checklist of Objections (Cal CEB 2006), the laminated card included with this book.

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§9.55 a. Form: Relevance





A responding party may object to a request on the ground that it (*i.e.*, the admission it seeks) is irrelevant. Discovery by RFAs may be made within the scope fixed by CCP §2017.010, which permits a party to obtain discovery regarding any matter relevant to the subject matter involved in the pending action "if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." Thus, a relevancy objection will not be upheld if the admission sought would tend to prove or to disprove a matter that is of consequence to the determination of the action (see Evid C §210) or is reasonably calculated to lead to admissible evidence. See *Cembrook v Superior Court* (1961) 56 C2d 423, 429, 15 CR 127, which notes that RFAs that are relevant "to the subject matter involved" in the lawsuit are proper even if not relevant to the "issues." On permissible subject matter of requests, see §9.28.

There appear to be several ways in which a relevancy objection may be stated in a written response to RFAs. For example:

7. Objection: Irrelevant.

7. Request No. 7 is irrelevant.

7. The admission sought by Request No. 7 is irrelevant.

Sometimes, adding a brief explanation of the reason for objecting can forestall a motion by the requesting party for an order requiring further response. For example:

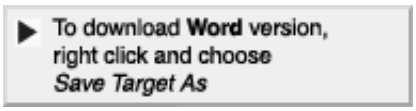
7. Request No. 7 is irrelevant because I have _ _[*admitted/denied*]_ _ the statement in Request No. 2.

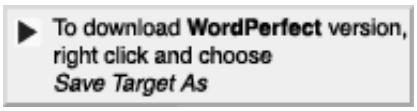
D-7. The admission sought by Request D-7 is irrelevant in that the document described in it has no relation to the subject of this lawsuit.

JUDGE'S PERSPECTIVE: As with all other relevance objections to discovery, relevance objections to RFAs are rarely upheld and will only be a successful tactic if there is no reasonable way in which the sought information relates to the issues in the case at hand, or if the request is of extremely marginal relevancy and is an attempt to harass the opposing party. Counsel should support relevance objections with a clear explanation of why the requests are irrelevant.

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§9.56 b. Form: Privilege





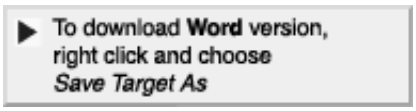
An objection based on privilege must clearly state the particular privilege invoked. CCP §2033.230(b). "Privilege" in CCP §2033.230(b) appears to refer to the same evidentiary privileges that can be raised to block disclosure at trial. On privileges in discovery, see chap 3. On the evidentiary privileges, see California Trial Objections, chaps 33-51 (Cal CEB Annual). For a complete list of evidentiary objections, see Checklist of Objections (Cal CEB 2006), the laminated card included with this book. An objection in a response based on a privilege must clearly identify the privilege being claimed and may indicate the basis for its applicability. For example:

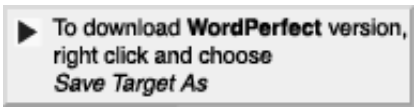
8. Objection: Lawyer-client privilege. Admitting or denying this request would require me to disclose the content of a conversation with my former attorney.

9. Objection: Request No. 9 calls for disclosure of a confidential marital communication.

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§9.57 c. Work Product



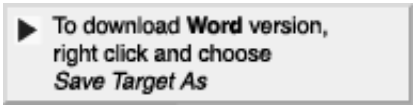


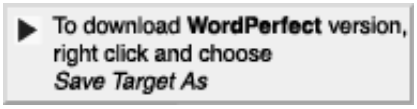
An objection to an individual RFA may expressly assert that the matter on which the admission is requested is protected work product under CCP §§2018.010-2018.080. CCP §2033.230(b). For example:

10. Objection: This request calls for the disclosure of the protected work product of my attorney.

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§9.58 d. Form: Request Exceeds Numerical Limit





Unless the requesting party has attached the declaration described in CCP §2033.050, a responding party may object to all but the first 35 requests that do not relate to the genuineness of documents by simply stating that the requesting party has exceeded the numerical limit. CCP §2033.030(b). This objection may be made to the requesting party's 36th request for the admission of the truth of a fact (including opinions relating to fact) and to each request that follows it. For example:

36. Objection: The requesting party has exceeded the numerical limit imposed by CCP §2033.030(b).

It is not necessary to keep repeating this line for all subsequent requests, although it may be useful to indicate the numbers of the requests covered by the objection. For example:

36 through 45. Objection: The requesting party has exceeded the numerical limit imposed by CCP §2033.030(b).

The responding party must respond to the first 35 numbered requests served by the requesting party. CCP §2033.030(b). There is no authority for the proposition that the responding party can choose from among the requests the 35 that are most convenient to answer.

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§9.59 e. Burdensome and Oppressive

Unrelated to the number of requests, a request or some number of requests in a set may be objectionable on the ground that to respond fully and completely would impose an unfair and unreasonable burden on the responding party. See generally *Cembrook v Superior Court* (1961) 56 C2d 423, 15 CR 127. For example, a request that asks the responding party to admit the genuineness of a large number of documents may be burdensome if, to respond, the responding party must perform a large amount of work, *e.g.,* interview a number of people to establish the genuineness of the documents.

JUDGE'S PERSPECTIVE: Discovery is inherently burdensome, and in general "burdensome and oppressive" is an overused objection that rarely justifies a nonresponse. Nevertheless, there are times when the objection will be appropriate.

Increasing odds of having objection sustained. To increase the odds of having the objection sustained, counsel should explain the reasons why it would be *unduly* burdensome to respond, *e.g.*, the request relates to a document so old that extensive archival research will be required to respond. An explanation facilitates the meet-and-confer process and, if a motion is made, shows the court that the objecting party had a specific factual basis for the objection which it communicated from the outset.

Counsel can also make a reasonable compromise during the meet-and-confer process, *e.g.,* if the requests are oppressive in number, counsel may offer to respond to more than 35 but less than all.

Considering a motion for protective order. Rather than defending a motion to compel, counsel should consider moving for a protective order if the objection is well taken and the propounding party has not been reasonable in meet-and-confer. The moving party submits the first brief (framing the issue from its perspective) and the last brief. Because most discovery matters are decided on the papers in a tentative ruling system, the opportunity to file two briefs is significant. A motion for a protective order is also advisable when the moving party has a specific suggestion as to allocation of costs to reduce the burden of complying with the discovery demand.

NOTE: In practice, however, most attorneys make the relevant objections and let the other party bring a motion to compel.

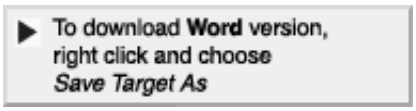
JUDGE'S PERSPECTIVE: When a party seeks a protective order challenging a declaration of necessity when more than 35 requests have been served, the usual burden of proof on a protective order motion is reversed and the non-moving party (who made the declaration of necessity) has the burden of proof to show that a protective order should not issue.

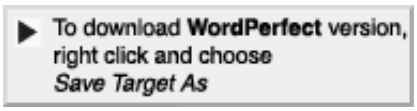
On whether to object or to move for a protective order, see §9.70. On issues raised when there are numerous electronically stored documents, see §9.20. See also chap 4, §§8.16-8.31. On motions for a protective order, see §§9.66-9.71.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.60 f. Form: Other Objections

§9.60 f. Form: Other Objections





Nothing in CCP §2033.210(a) forbids the responding party from responding to individual RFAs with other objections of the kind that are directed to pleadings or testimony. For example:

12. Objection: Request No. 12 is unintelligible.

The objection should state the basis of the claimed impropriety. For example:

5. Objection: This request is improper because it would require a person to read more than 20,000 pages of records now available only on microfilm, page by page and line by line, in order to admit or deny that these records contain no reference to _ _[*specify subject of request*]_ _.

PRACTICE TIP: This type of objection may forestall a motion to compel and, if such a motion is made, may help to convince the court that a good faith effort was made to respond to the request.

An objection may also be directed to a request that:

- Attempts to cover a variety of matters in a single subdivided question;
- Requires the party to refer back to other requests to learn its meaning or impact; or
- Is repetitive of other requests.

See *Cembrook v Superior Court* (1961) 56 C2d 423, 428, 15 CR 127. A court that sustains objections to such requests may, however, order the requests to be rephrased rather than totally deny the right to this form of discovery. 56 C2d at 430.

Sometimes an RFA can be objected to as improper even though no traditional evidentiary objection appears to apply. See, *e.g., International Harvester Co. v Superior Court* (1969) 273 CA2d 652, 655, 78 CR 515 (request used to uncover evidence was objectionable). Many trial objections (*e.g.,* to a compound question) to questioning that assumes a fact not in issue (*i.e.,* to inadmissible opinion) are of dubious value as objections to RFAs. The responding party can often respond to such requests by admitting parts and denying other parts of the request or by stating qualified admissions or denials.

JUDGE'S PERSPECTIVE: Objections should be made only when they can be fairly raised. A court may conclude that unmeritorious objections are merely attempts to avoid answering the request. A motion to compel further responses may be granted and the court may then impose sanctions.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.61 7. Form: Signature; Verification

§9.61 7. Form: Signature; Verification

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The response to an RFA must be signed, under oath, by the party to whom the requests were directed, unless the response contains only objections. CCP §2033.240(a). The responding party's attorney must sign any response that contains an objection. CCP §2033.240(c). Thus, both the party and the attorney must sign a response that contains both answers and objections. An officer or agent must sign and verify the response on behalf of a party that is a corporation (public or private), partnership, association, or government agency. CCP §2033.240(b).

PRACTICE TIP: Unlike pleadings, which may be executed by counsel when a party is absent from the county in which the action is pending (CCP §446(a)), an RFA must be verified by the party, either an individual or someone who is authorized to do so for the party-entity. Verification of discovery responses by counsel may also operate as a waiver of either the attorney-client privilege or the work product rule, or both. See also the Caution, below.

It appears that the "oath" requirement is adequately met by typing, at the end of the response, the lines:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of party*]__
_ _[*Title if officer or agent*]_ _

Some attorneys prefer to put the oath in the form of a verification under penalty of perjury of the kind used to verify pleadings, as in the following examples:

VERIFICATION

I declare under penalty of perjury under the laws of the State of California that I am the party served with the set of requests for admission to which the foregoing is my response. The statements in this response are true of my own knowledge_ _[*except for the matters stated on my information and belief, and as to those matters I believe them to be true*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of party*]__
_ _[*Typed name*]_ _

VERIFICATION

I declare under penalty of perjury under the laws of the State of California that I prepared the foregoing Response to Requests for Admission as the _ _[*agent/or state officer's title*]_ _ **of** _ _[*name of party*]_ _**. Statements in this response are true of my own knowledge** _ _[*except for the matters stated on my information and belief, and as to those matters I believe them to be true*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

PRACTICE TIP: If one of the preceding two forms of verification are used, counsel should remember that an admission based on "information and belief" is equivalent to an unqualified admission.

If the officer or agent who signs the response on behalf of a party that is a corporation or other organization is an attorney, that attorney is subject to subsequent discovery related to the sources of the information in the response, and the party cannot limit that discovery by claiming the attorney-client privilege or protection for work product. CCP §2033.240(b). Given the difficulties of gathering information in a large corporation, it may be appropriate to include the

following language:

The information necessary to prepare the responses of _ _[*name*]_ _ to plaintiff's Request for Admission, Set One, was obtained from numerous sources within _ _[*name of company/corporation*]_ _ and elsewhere, and the responses were prepared with the advice and assistance of legal counsel.

Accordingly, I rely on these individuals for the accuracy of the information stated in the responses. On that basis, I am informed and believe that the matters stated in them are true, correct, and complete.

Although the admission would nevertheless be binding, the court might take this format into consideration on any motion to amend.

Code of Civil Procedure §2033.240 differs from CCP §446, which permits an attorney of record to sign and verify pleadings. There is no provision in CCP §2033.240(b) for a party's attorney to sign and verify a response to RFAs on behalf of the party except when:

- The attorney signs as the officer or agent of a corporation or other organization; or
- The response contains an objection, in which case the attorney must sign but need not verify.

CAUTION: The requesting party might treat a response with denials signed only by an attorney as no response at all and move immediately for an order that the requests be deemed admitted. See §§9.72-9.77. Additionally, the requesting party might argue that admissions made in a response signed by an attorney be treated as a stipulation.

Under CCP §2033.240(a), a party must verify responses, as opposed to mere objections. Oddly, the court in *Appleton v Superior Court* (1988) 206 CA3d 632, 253 CR 762, treated a party's unverified response, consisting solely of objections, as tantamount to no response and therefore subject to mandatory sanctions under former CCP §2033(k) (now CCP §2033.280(c)) when the proponent obtained an order that all requests be deemed admitted. The court's opinion contained no discussion or reference to former CCP §2033(g), now CCP §2033.240.

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§9.62 E. Service: Parties and Methods

The original of a response to RFAs must be served on the requesting party, and a copy must be served on each other party that has appeared in the action. CCP §2033.250(a). On time limits on service of the response, see §9.45. On the effect of failure to serve on time, see §9.46.

The response to RFAs may be served by mail, by personal delivery to the other party or to the party's attorney, or as otherwise provided in CCP §§1010-1020. See California Civil Procedure Before Trial, chap 18 (4th ed Cal CEB 2004). Note that service by mail and other methods extends the time for the requesting party to serve a notice of motion for an order compelling further response according to the method of service. CCP §1013(a). See §2.22.

When service of original responses is timely, the fact of service is not nullified because service is accompanied by an erroneous service declaration. Code of Civil Procedure §1013, which establishes methods of proving service, does not apply when service is admitted by the receiving party. *Tobin v Oris* (1992) 3 CA4th 814, 825, 4 CR2d 736, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260.

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§9.63 F. Filing

Neither the original nor a copy of responses to RFAs should be filed with the court (CCP §2033.270(a)), except when a copy is presented to a judge who is asked to take judicial notice of matters that have been admitted or when a copy of the RFAs and the responses need to be filed as an exhibit to a motion to compel a response or further response to the RFAs. On when RFAs and responses might be filed, see §9.38.

The requesting party must retain the originals of both requests and responses, with original proof of service forms, for at least 6 months after final disposition of the lawsuit. CCP §2033.270(b). See §9.38.

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G. Procedure for Extending Time to Respond

§9.64 1. Stipulation

A party served with RFAs may ask the requesting party to stipulate to an extension of time to respond (CCP §2033.260) or apply to the court for an order allowing a longer time to respond (CCP §2033.250(a)). See stipulation and motion forms in §§9.104-9.106.

An agreement between the responding party and the requesting party extending time to respond must be confirmed in a writing that specifies the new response date, but it need not be in any particular form. CCP §2033.260(b). No formal stipulation is required. The party that obtains the agreement may send a letter reciting its terms, with copies to all other parties, but a writing of some kind is required. CCP §2033.260(b), (d).

The agreement may extend time to respond to an entire set of RFAs or only to specified requests in the set, and it may set limits on how the responding party may respond to individual requests or to the set (stating, for example, that certain objections may not be made). Some local rules, however, caution against attaching unfair or extraneous conditions to the granting of extensions. See, *e.g.,* Los Angeles Ct R 7.12(a)(5). Unless the writing expressly states otherwise, the responding party that has obtained an extension of time retains the right to respond to each request in all the ways permitted by CCP §§2033.210(a)-(b), 2033.220, and 2033.230. CCP §2033.260(c).

The responding party that obtains an agreement extending time to respond must give notice of it to all parties that were served with the requests. CCP §2033.260(d).

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§9.65 2. Motion or Ex Parte Application

The requirement in CCP §2033.250(a) that the response be served within 30 days after service of the RFA "unless on motion of the responding party the court has extended the time for response," suggests that a motion is required to extend the time for response to RFAs, absent a stipulation between the parties. See §9.40. On making motions, see chap 15. A responding party's ex parte request for *additional* time to respond to RFAs does not involve the same considerations as a requesting party's ex parte request to *shorten* the available response time, however, and an ex parte application may be appropriate.

If the parties do not stipulate to an extension of time to respond (see §9.64), the responding party should ascertain whether opposing counsel will agree that an application for an order extending time may be made ex parte, without further notice, at a specified place and time.

JUDGE'S PERSPECTIVE: Although requests for ex parte extensions of time may be considered routine in some courts, practices differ from court to court. A detailed declaration as to the need for the extension will be very useful. If the other party has not agreed to the extension, this should be disclosed and any reason given should be provided to the court. Normally both parties will be expected to participate in the ex parte proceeding. Many courts would be inclined to sanction a party that unreasonably failed to agree to an extension.

How to proceed. If agreement to extend time is not obtained, counsel should either:

- Present an ex parte application for an order extending time to respond to an RFA (see form in §9.105) to a judge (together with an order for the judge to sign), obtain the judge's signature, and serve copies on the requesting party and all other parties that have appeared; or
- Serve (on the requesting party and all other parties that have appeared) and file a notice of motion for an order extending time to respond to RFAs with supporting papers (see form in §9.106), attend the hearing on the motion, obtain the signed order, and serve conformed copies of the order on all parties.

On notice requirements for ex parte applications, see Cal Rules of Ct 3.1200-3.1207. If the reasons for asking for more time relate to the RFAs, a copy of them should be attached to the application. Service of the order extending time on parties other than the requesting party is not addressed in CCP §2033.250(a), although CCP §2033.260(d) requires that all parties be served with notice of agreement extending time. It is good practice, however, to serve all parties and most attorneys do so routinely.

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§9.66 V. MOTIONS FOR PROTECTIVE ORDERS

A party served with RFAs may promptly (*i.e.,* before the initial response date) move for a protective order. CCP §2033.080(a). The motion must be accompanied by a meet-and-confer declaration pursuant to CCP §2016.040. CCP §2033.080(a). See §15.70. The responding party may also ask for a monetary sanction under CCP §2033.080(d).

On procedures for filing a motion for a protective order, see §9.71. See also §§15.59-15.84. On whether to object to RFAs or file a motion for a protective order, see §9.70.

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§9.67 A. Purpose of Protective Order

The purpose of a protective order is to protect the responding party or another party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. CCP §2033.080(b). On protective orders, see §§15.59-15.84. Protective orders sought and granted under CCP §2033.080 may include, but are not limited to, one or more of the following directions:

- The set of requests, or particular requests in the set, need not be answered at all;
- More than a certain number (*e.g.*, 35) of individual requests need not be answered because the requesting party's CCP §2033.050 declaration is faulty or does not support a greater number;
- The time to respond to the set or to particular requests be extended;
- A trade secret or other confidential research, development, or commercial information not be admitted or be admitted only in a certain way; or
- Some or all of the answers to requests be sealed and thereafter opened only on court order.

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§9.68 1. When Responding Party Unavailable

A trial court has discretion to issue a protective order for RFAs when the defendant is unavailable to admit or deny the requests. *Brigante v Huang* (1993) 20 CA4th 1569, 25 CR2d 354, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260. In such circumstances, a protective order is appropriate if (20 CA4th at 1583):

- The court is satisfied that the defendant is not evading the lawsuit or the discovery demand and is unaware of their pendency; and that
- Reasonable efforts have been made and are ongoing to find the defendant and apprise him or her of the litigation and the discovery obligations it entails.

The court in *Brigante* also discussed other remedies that a court can fashion because of the defendant's unavailability. For example, it can:

- Order that only some matters be deemed admitted;
- Relieve the defense from admitting or denying RFAs on the condition that it demonstrate a continuing and vigorous effort to locate the defendant; or
- Grant a specific extension of time within which to find the defendant.

In short, the trial court has discretion to fashion a protective order "appropriate" to a case in which the defendant's whereabouts are unknown. 20 CA4th at 1583. The court in *Brigante* indicated that counsel representing such a defendant does not necessarily need to move for a protective order. Counsel can also file a response that explains the impossibility of admitting or denying the requests. On a motion to have requests deemed admitted, the court would exercise discretion under the same principles that govern a motion for protective order filed by the defendant's attorney.

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§9.69 2. Trade Secrets or Other Proprietary Information

A protective order may be particularly useful to spell out the terms under which confidential information or trade secrets are to be revealed or when a bare objection to an RFA seems inadequate. Normally, however, when a series of individual requests can be met with objections, these should be made in the response—not in a motion for a protective order. On deciding whether to object or move for a protective order, see §9.70.

In the area of trade secrets or other proprietary information, before propounding discovery, counsel should attempt to work out an appropriate stipulation that will apply to all discovery matters, including RFAs. Greater flexibility can be maintained and greater protection accomplished if the stipulation regarding secret information takes place in the context of the lawsuit in general rather than regarding a particular topic pointed to by a particular RFA.

PRACTICE TIP: From the perspective of the requesting party, agreeing to a protective order still allows the use of the protected information in the litigation (which should be the first goal of any discovery device), even if it limits dissemination outside the lawsuit or confines dissemination of the secret to particular persons, *e.g.,* experts and consultants. From the perspective of both sides, agreeing to a protective order significantly reduces fees and costs. As a practical matter, protective orders should require that information designated as confidential will not be used at trial without a court order and should set out the procedures for a party to challenge confidentiality designations before trial. Counsel should consult Cal Rules of Ct 2.551 before filing or using at trial any records produced in discovery that are subject to a confidentiality agreement or protective order. See Cal Rules of Ct 2.551(b)(3)(A) (unredacted records should be lodged, not filed with court, until after written notice to other party).

JUDGE'S PERSPECTIVE: Protective orders relating to confidential information or trade secrets are normally agreed to by stipulation by the parties. If complete agreement cannot be reached, the remaining limited issues can be presented to the court, which usually expects the parties to attempt to resolve these matters. Sometimes, if the issues are very complex, a referee may be appointed by the court. On sealed records, see Cal Rules of Ct 2.550-2.551, 2.580, and 2.585.

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§9.70 B. Deciding Whether to Object or Move for a Protective Order

When deciding whether to object or to move for a protective order, the following issues are important for counsel to consider:

Burdens of proof. First, the burdens of proof may differ. In the case of a protective order, the burden is usually on the moving party to demonstrate that a protective order is necessary and competent evidence showing good cause is required. (The moving party does not bear the burden of proof when the protective order is sought to avoid having to respond to more than 35 "truth" RFAs; on this motion, the burden is on the requesting party to justify the number of RFAs served. CCP §2033.040(b).) In the case of a motion to compel, the burden is on the party seeking the order to compel further responses to show why the response is insufficient or the objection(s) not well taken.

Timing. Second, timing is an issue. A motion for protective order must be made "promptly" before the expiration of the time to respond, and must be accompanied by a declaration showing a good faith effort to meet and confer before filing. CCP §2033.080(a).

Briefing. Third, a party seeking a protective order has the first and last word in briefing. When a protective order is sought on grounds of harassment or burdensomeness or to safeguard privacy rights or trade secrets, a motion for protective order allows the responding party to create a better factual record at the outset than would mere objections.

Remedy. Fourth, a motion for a protective order allows a court more discretion to fashion a remedy (CCP §2033.080(b) permits "any order that justice requires"), whereas a motion to compel does not.

Cost. Counsel must weigh all of these considerations against the cost to the client of making a motion for a protective order and the likelihood that the requesting party will file a motion to compel in the face of objections. Counsel also has the opportunity to revisit and reconsider providing further responses or withdrawing objections during the meet-and-confer process which must take place before a motion to compel is filed.

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§9.71 C. Protective Order Procedure; Showing Good Faith and Good Cause

A party served with RFAs may promptly move for a protective order. CCP §2033.080(a).

PRACTICE TIP: To file the motion "promptly," counsel should file the motion as soon as the basis for it is apparent and must file it before the responses are due. The closer to the response date the motion is filed, the greater the likelihood that the court will find it a delaying tactic. In practice, most attorneys will object to the RFAs and put the burden on the other side to file a motion to compel. On whether to object to RFAs or file a motion for a protective order, see §9.70.

The motion must be accompanied by a meet-and-confer declaration pursuant to CCP §2016.040. CCP §2033.080(a). The responding party may also ask for a monetary sanction under CCP §2033.080(d). On procedural requirements for protective orders, see §§15.59-15.84.

Before serving or filing a notice of motion for a protective order, the responding party's attorney must contact the requesting party's attorney (or the party, if not represented) in person or by telephone or mail and make a good faith attempt to resolve the issues that would be raised by the motion. On good faith and meet-and-confer requirements, see §15.3. See CCP §2033.080(a). If a reasonable effort fails to resolve the issues, the responding party may file a notice of motion for a protective order, attaching the following to it:

- A declaration (usually by the responding party's attorney) stating facts that show a reasonable and good faith effort to resolve the issues informally (see CCP §2016.040);
- A declaration (which is usually combined with the above declaration) stating facts that show good cause for the granting of the orders sought;
- A copy of the set of RFAs for which protection is sought;
- A supporting memorandum (see Cal Rules of Ct 3.1113); and
- A proposed order.

Code of Civil Procedure §1005 and Cal Rules of Ct 2.111(4), 3.1110-3.1115, and 3.1300-3.1310 list requirements for motion papers. See generally California Civil Procedure Before Trial §§12.7-12.59 (4th ed Cal CEB 2004).

PRACTICE TIP: Code of Civil Procedure §2033.080(a) does not explicitly state that the responding party must proceed by noticed motion, but the need for formality is implicit in the section. Most jurisdictions would not issue such an order ex parte, although they may grant ex parte relief to extend time to respond to the discovery pending the filing of a protective order. See §9.40.

For good cause shown, the judge who rules on the motion for a protective order may make any order that justice requires. CCP §2033.080(b). A judge who denies all or part of the protection sought may nevertheless place "just" terms and conditions on the disclosure that the responding party must make. CCP §2033.080(c). The court must impose a monetary sanction on any party, person, or attorney who unsuccessfully makes or opposes the motion, unless the court finds that the person acted with substantial justification or that other circumstances make the imposition of the sanction unjust. CCP §2033.080(d). For forms of notice of motion for protective orders, see §§9.110-9.111.

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VI. MOTIONS THAT REQUESTS BE DEEMED ADMITTED

A. How and When Used

§9.72 1. Response Untimely

A requesting party who has not been served with a timely written response may move for an order that the truth of any matters, and the genuineness of any documents, specified in the requests be deemed admitted and that a monetary sanction be imposed on the party to whom the requests were directed. CCP §2033.280(b). The motion must be granted unless the responding party serves a response that substantially complies with CCP §2033.220 before the date set for hearing the motion. CCP §2033.280(c). The monetary sanction must be imposed in either case on the responding party, the attorney, or both, whose failure to serve a timely response to the RFA necessitated the motion. CCP §2033.280(c).

The court must order that the specified matters be deemed admitted unless the responding party serves a proper proposed response (one that substantially complies with the requirements of CCP §2033.220) before the hearing date on the requesting party's motion that matters be deemed admitted. The court must grant the motion unless the party failing to file a timely response either (a) files a response that complies with CCP §2033.220 *after* the motion to deem the specified matters admitted, but *before* the hearing on the motion as permitted under CCP §2033.280(c), or (b) seeks a protective order under CCP §2033.080. *Allen-Pacific, Ltd. v Superior Court* (1997) 57 CA4th 1546, 1556, 67 CR2d 804, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260.

NOTE: *Allen-Pacific* holds that a party faced with a motion for an order that matters be deemed admitted may either file a complying response or seek a protective order. It should be noted, however, that CCP §2033.280 does not authorize the filing of a protective order motion in response to a motion for an order that matters be deemed admitted. On its face, it contemplates only a response in substantial compliance with §2033.220. Further, §2033.080(a) states that a party may "promptly move" for a protective order. Waiting until after the time to respond has expired and after a motion to have matters deemed admitted is filed is not usually consistent with "promptly" moving for a protective order.

Counsel should keep in mind that failing to serve timely responses has two consequences:

- The risk that the court will deem the matters admitted; and
- The waiver of objections to the requests.

There are distinct procedures for addressing these two consequences and solving one of these problems does not necessarily solve the other. If, after having been served with a motion that matters be deemed admitted, a responding party serves an untimely response which is "in substantial compliance with" CCP §2033.220 but which addresses some of the requests with objections only, the requesting party may ask the court to strike the objections on the ground that such objections were waived when not made timely and the responding party has not moved for relief from the waiver. If the court strikes the objections, then the requesting party would be entitled to have the matters deemed admitted, there being no response at all to those individual requests. Thus, if a responding party serves a response after a motion to deem matters admitted has been served, that party ought not to rely solely on objections in that response but should also move for relief from waiver. See §9.77.

Under CCP §2033.280(c), a response served after service of the requesting party's notice of motion must be "in substantial compliance with" CCP §2033.220, which is the subsection that provides for admissions and denials—not the subsection that provides for objections (*i.e.,* CCP §2033.230).

PRACTICE TIP: A party opposing a motion to deem matters admitted may wish to point out particular RFAs that, because of their ambiguity, should not be "deemed admitted" as propounded because doing so will merely cause subsequent confusion in the litigation. Under *Brigante v Huang* (1993) 20 CA4th 1569, 1583, 25 CR2d 354, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260, the court

has some discretion to fashion a remedy when there has been a good faith attempt to comply with the discovery and an order deeming the matters admitted would be excessively punitive. Its discretion is not limited to issuing an order that requests be either deemed admitted or denied. *Brigante v Huang, supra*.

NOTE: Although RFAs are permitted in an arbitration proceeding, the arbitrator is not obligated to follow the procedures outlined in the discovery statutes even if a trial court would be required to do so. *Alexander v Blue Cross of Cal.* (2001) 88 CA4th 1082, 1089, 106 CR2d 431 (arbitrator was not obligated to deem admissions admitted even though defendant failed to respond to the discovery). On discovery in contractual arbitration, see §1.16.

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§9.73 2. Timely But Defective Response

A requesting party that is served with a response that is timely but unsworn, or that is signed by a person other than the party to whom it was directed, should consider moving for an order that all RFAs in the set be deemed admitted. Alternatively, the requesting party who receives a timely but defective response may prefer to ask the party to supply the proper signature or oath and, if specific responses are not straightforward, to give more complete answers. If that is not done, the party may move to compel further response under CCP §2033.290, or move that the matters be deemed admitted under CCP §2033.280(b). Responses to RFAs that were signed by counsel for the defendant and not under oath are not in compliance with CCP §2033.240. See *Allen-Pacific, Ltd. v Superior Court* (1997) 57 CA4th 1546, 1550, 67 CR2d 804, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260 (responses without party's proper verification amount to no response at all; requesting party may make motion to have RFAs deemed admitted).

If the requesting party who has received a timely but defective response waits until after expiration of the time to respond and then moves for an order that the requests be deemed admitted, the responding party may re-serve the same response—this time properly signed and sworn. Although the requesting party could argue that the responding party has waived objections (unless the responding party has also moved for and obtained relief from this waiver) and that a monetary sanction must be imposed, the requesting party would have to make a separate additional motion to compel further response if admissions and denials in the response are evasive or incomplete.

JUDGE'S PERSPECTIVE: In ruling on the motion, the court will consider both the clarity and straightforwardness of the request and the response.

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§9.74 3. Timely But Incomplete Response

A requesting party that receives no response or objection to a particular RFA (or RFAs) may move that the particular RFA be deemed admitted. See CCP §2033.280.

NOTE: The usual remedy for requests that are objected to or are evasively or incompletely answered is a motion to compel further response. See §§9.78-9.81.

A requesting party who has been served with a timely but incomplete response (as opposed to no response or objection at all) may wish to make three lists:

- First, a list of each request or part of a request that was:
- Expressly admitted;
- Admitted with some qualification; or
- Admitted as rephrased by the responding party.
- Second, a list of each request that was not answered or objected to at all; and
- Third, a list of each request or part of a request that was denied or objected to.

PRACTICE TIP: The responding party could be asked to stipulate the truth of the items on the first and second lists, putting into a single paper all the admitted matters, unencumbered by items that were properly denied or objected to. If the stipulation cannot be obtained, the requesting party's attorney may wish to move for an order that items on the second list be deemed admitted. A requesting party who plans to move for an order requiring a further response with respect to items on the first or third lists may prefer, however, to include second list items in that motion.

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§9.75 B. Timing

Notice of a CCP §2033.280(b) motion that RFAs be deemed admitted may be served and filed as early as the day after the date on which the response was due to be served. Although no time period within which the motion must be made is specified, counsel must be careful to avoid violating the rule that discovery motions cannot be heard within 15 days of the trial date. CCP §2024.020(a); *Brigante v Huang* (1993) 20 CA4th 1569, 25 CR2d 354, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260. On discovery limitations, see chap 1. On discovery timing considerations, see §§2.20-2.28.

JUDGE'S PERSPECTIVE: The requesting party who wants to act immediately should first determine whether the response was served by deposit in the mail on the due date, either by calling the other party's attorney or by waiting a reasonable time for mail delivery. The effect of serving the notice of motion before expiration of the statutory time for response is uncertain. (In *Kapitanski v Von's Grocery Co.* (1983) 146 CA3d 29, 32 n4, 193 CR 839, a premature notice that matters be deemed admitted was ignored.) It is possible that a court would not only deny the motion, but would also order sanctions against the prematurely filing party under CCP §2023.010.

The requesting party does not have to contact the other party, meet and confer, or make any effort to obtain a response before moving that matters be deemed admitted. CCP §2033.280(b); *Demyer v Costa Mesa Mobile Home Estates* (1995) 36 CA4th 393, 395 n4, 42 CR2d 260, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260. However, CCP §2033.300 permits the withdrawal or amendment of deemed admissions, even when the party on whom the RFAs were served failed to respond to them. *Wilcox v Birtwhistle* (1999) 21 C4th 973, 977, 90 CR2d 260. See discussion in §9.46.

The requesting party may be able to avoid the need to prepare and serve motion papers by asking the other party to sign a stipulation admitting the truth of the matters specified in the RFA. The other party's refusal to stipulate, thus forcing an unnecessary hearing, might even be cited to the court as a ground for a monetary sanction.

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§9.76 C. Procedure

The motion under CCP §2033.280(b) for an order that matters be deemed admitted is made by serving a notice of motion on the party to whom a set of RFAs was directed, accompanied by:

- A declaration (usually by the requesting party's attorney) showing when and how the RFAs were served and that no timely response was served (or that the response did not address certain individual requests), and requesting that specified matters be deemed admitted and that the court impose a monetary sanction (see forms in §§9.112-9.113);
- A copy of the set of RFAs;
- A copy of the proof of service of the RFAs;
- A supporting memorandum (see Cal Rules of Ct 3.1113) that cites CCP §2033.280 and any other authorities that may bear on the propriety of any requests to which the responding party might object in a counterdeclaration or at the hearing on the motion; and
- A proposed order (see form in §9.114).

On motion practice, see chap 15.

If the requesting party's attorney is content with the admissions made in a proposed response served by the other party before the hearing date, and the order is not needed, the court and all parties should be notified that the motion is taken off calendar.

PRACTICE TIP: Although CCP §2033.280 does not explicitly state that the requesting party must proceed by noticed motion, the court in *Demyer v Costa Mesa Mobile Home Estates* (1995) 36 CA4th 393, 42 CR2d 260, disapproved in part on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983 n11, 90 CR2d 260, held that former CCP §2033(k), now CCP §2033.280(c), requires a regularly noticed hearing and that matters cannot be deemed admitted on "shortened time" as the responding party is entitled to the regular notice time within which to prepare and file responses, which would preclude the granting of the motion. Note also that CCP §2033.300 permits the withdrawal or amendment of deemed admissions on court order. *Wilcox v Birtwhistle* (1999) 21 C4th 973, 977, 90 CR2d 260.

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§9.77 D. Responding Party's Reply; Relief From Waiver; Hearing

How to proceed. A responding party who is served with a notice of motion that RFAs be deemed admitted may proceed as follows:

- Serve and file, before the hearing date, a sworn, written proposed response that substantially complies with CCP §§2033.210, 2033.220, and 2033.230; and
- Either:
- Serve and file a notice of motion for an order relieving the party from waiver of objections with supporting papers (see §§9.108-9.109); or
- Serve and file a declaration and other papers in opposition to the motion; or
- Notify the court and the requesting party that the motion will not be opposed and that the requested order may be entered.

If the responding party does nothing, the court must order that the matters referred to in the motion are deemed admitted (CCP §2033.280(c)) and will impose a monetary sanction.

Relief from waiver. If the responding party serves a proposed response without seeking relief from waiver of objections to individual requests, the response must comply with CCP §2033.220 by answering (admitting, denying, or stating a lack of information about) each individual request. If relief from waiver is not obtained, it appears that the court may simply ignore any objections in the response when issuing an order that requests be deemed admitted.

PRACTICE TIP: If responses are received between the filing of the motion to have RFAs deemed admitted and the hearing on the motion, the service of such responses, if in proper form, may operate to deny the motion, but the issue of reasonable attorney fees and expenses remains unresolved. Counsel should consider contacting the attorney for the responding party with an offer to take the motion off calendar on payment of reasonable fees and costs that must be awarded under CCP §2033.280(c). If the responding party rejects that offer, it is more likely that the court will be amenable to awarding all fees and costs requested, including the fees incurred in attending the hearing itself. Counsel should be prepared to file a declaration outlining any attempts at resolving the matter without taking up the court's time on the motion.

Opposition to motion for RFAs. No provision is made in CCP §2033.280 for opposition to a motion that RFAs be deemed admitted. If no proposed response is served before the hearing date, the court "shall" make the order and impose a monetary sanction. CCP §2033.280(c). However, *Wilcox v Birtwhistle* (1999) 21 C4th 973, 977, 90 CR2d 260, held that former CCP §2033(m) (now CCP §2033.300) permits the withdrawal or amendment of deemed admissions.

Hearing. At least one court has held that the "hearing" contemplated by CCP §2033.280 does not apply to a hearing on shortened notice. Rather, the statute contemplates at least the standard notice a litigant would receive for a hearing. See *Wilcox v Birtwhistle, supra*, in which the court reversed summary judgment based on the discovery referee's earlier ruling to deem matters admitted after the hearing on less than 20 days' notice because the plaintiffs served responses to admissions within 20 days of the notice of motion to deem the matters admitted.

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VII. MOTIONS TO COMPEL FURTHER RESPONSE

§9.78 A. How and When Used

After receiving a response, the party who served RFAs may move for an order under CCP §2033.290 compelling further response to particular requests to which the answer is evasive or incomplete or the objection is without merit or too general. The motion must be accompanied by a meet-and-confer declaration under CCP §2016.040 and a separate statement under Cal Rules of Ct 3.1020. For form of separate statement, see §9.117. For motion requirements in general, see chap 15.

The motion to compel further response may sometimes be directed to an entire written response as well as to particular answers and objections within the response when, *e.g.,* the response is not signed by the party to whom it was directed or lacks an oath or verification.

PRACTICE TIP: When moving to compel further response after receipt of an untimely or unsworn response, the requesting party should argue that purported objections in the response have been waived and that the court may order that those requests be deemed admitted.

JUDGE'S PERSPECTIVE: All relief sought by the motion should be stated in the Notice of Motion and, if possible, identified in the title of the motion, not just argued in the supporting memorandum.

Sanction request. The moving party may also request a monetary sanction under CCP §2023.030(a), and the court must award it to the party that prevails on the motion, against the other party, person, or attorney, unless the court finds that the one subject to the sanction acted with substantial justification or that circumstances make imposition of a sanction unjust.

Likely targets for motion. Partial or qualified admissions and statements that the responding party lacks sufficient information and knowledge to admit are likely targets for orders compelling a further response. Similarly, an admission of part of a request without a denial of the rest, or denial of part without admission of the rest, may be a subject of the motion.

On using the motion for an order that RFAs be deemed admitted as an alternative to the motion to compel further response when the responding party has filed a timely, but defective, response, see §9.73.

JUDGE'S PERSPECTIVE: A motion to compel a further response cannot force a party to admit that which a party does not, for whatever reason, wish to admit. *Holguin v Superior Court* (1972) 22 CA3d 812, 820, 99 CR 653. Even the most obvious facts need not be admitted, and a court cannot force such a result on a motion of this kind. However, little is to be gained by refusing to admit obvious facts. Persistent conduct of this type is likely unethical, and often results in greater contentiousness in discovery and additional cost to the parties. It may also affect the credibility of the verifying witnesses at trial and of counsel with the court. Expenses incurred to prove obvious facts may also be awarded as sanctions.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.79 B. Timing of Motion

§9.79 B. Timing of Motion

The requesting party waives any right to compel further response to RFAs unless the notice of a motion for an order compelling further response is served and filed (CCP §2033.290(c)):

- Within 45 days of the date on which the original or a supplemental written response was served; or
- Before any specific later date that the requesting and responding parties have agreed to in writing.

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§9.80 C. Responding Party's Procedures

Evaluate appropriate response. The requesting party has a duty to seek further response by informal means before serving a notice of motion to compel further response to RFAs. On requirements for motion to compel, see §§15.30-15.58. A responding party's attorney who is contacted by a requesting party's attorney (by telephone, mail, in person, or otherwise) should, therefore, seriously consider whether to voluntarily provide further responses, insofar as such concessions could accomplish either of the following:

- Sparing the responding party the time and expense of replying to a motion for further response; or
- Serving as evidence of the responding party's reasonableness and good faith, which may be the basis for recovering a monetary sanction from the requesting party or of avoiding a sanction being awarded to the requesting party.

JUDGE'S PERSPECTIVE: If the lack of opposition is because the responding party concedes that the motion is meritorious, this should be conveyed to the other party so that the hearing can be canceled and a stipulation executed. Failure to cancel the hearing is a litigation practice frowned on by the courts. See also Cal Rules of Ct 3.1030 (sanctions awardable even if responding party provides responses to RFAs after motion was filed). In addition, the question can be asked, "Why wasn't this matter resolved in the meet and confer prior to filing the motion?" The responding party's attorney can often enhance the showing of reasonableness and good faith by sending the requesting party's attorney a letter or memorandum that details both the additional responses made to certain requests, and the reasons why additional responses cannot be given to other requests.

Opposition papers. A responding party served with a notice of motion for an order compelling further response may serve and file papers in opposition to the motion. See form in §9.119. These papers should include a declaration setting forth facts that show the attorney's (and/or the responding party's) reasonable and good faith efforts to resolve the issues informally and contradicting any false statements in the requesting party's declaration. See requesting party's declaration form in §9.116. The responding party's declaration may also provide the court with a factual basis for awarding a monetary sanction to the responding party if the responding party prevails. In addition, the responding party should serve and file a supporting memorandum showing why further response (to each individual request specified in the motion papers) should not be required.

Sanctions. A responding party that successfully opposes a motion to compel a further response is entitled to have the court impose a monetary sanction against the party, person, or attorney who made the motion unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust. CCP §2033.290(d). A responding party may oppose a motion to compel further response on the ground that the requesting party served the notice of motion without having attached a declaration showing an attempt at an informal resolution, or that, whatever is said in the requesting party's declaration, the attempts to reach an informal resolution were not reasonable or not made in good faith. The court is not required to impose a monetary sanction against the responding party if the motion to compel is not opposed. CCP §2033.290(d). But see Cal Rules of Ct 3.1030.

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§9.81 D. Procedure If Responding Party Fails to Obey Order Compelling Further Response

If the responding party fails to obey an order compelling further response, the requesting party may ask the court to make additional orders, including orders that (CCP §2033.290(e)):

- RFAs to which further response was not given be deemed admitted; and/or
- The responding party pay an additional monetary sanction.

The court can also impose the more stringent sanctions listed in CCP §2023.030. Failure to obey the order is a discovery misuse of the kind listed in CCP §2023.010. CCP §2023.010(d).

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VIII. MOTIONS TO WITHDRAW OR AMEND ADMISSION

§9.82 A. How and When Used

Required statutory showing. A party that serves a mistaken response to an RFA must move to amend or withdraw it or be bound by the admission at trial. *Valerio v Andrew Younquist Constr.* (2002) 103 CA4th 1264, 1273, 127 CR2d 436. A responding party who wants to withdraw or amend an admission previously made in a response to RFAs must obtain leave of court, after notice to all parties, on a showing that (CCP §2033.300):

- The admission was the result of mistake, inadvertence, or excusable neglect; and
- The party that obtained the admission (the requesting party) will not be substantially prejudiced in maintaining an action or defense on the merits by the amendment or withdrawal.

Any doubt in ruling on a motion to withdraw or amend an admission under CCP §2033.300 must be resolved in favor of the party seeking relief because of the policy favoring disposition on the merits. *New Albertsons, Inc. v Superior Court* (2008) 168 CA4th 1403, 1420, 86 CR3d 457 (court's discretion to deny motion under CCP §2033.300 limited to circumstances in which it is clear that mistake, inadvertence, or neglect was inexcusable or that withdrawal or amendment would substantially prejudice party who obtained admission in maintaining that party's action or defense on merits).

NOTE: Similarly, Fed R Civ P 36(b) provides that the court "may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits."

Possible conditions on grant of motion. The court that grants a motion to withdraw or amend an admission under CCP §2033.300(c) may impose conditions including, but not limited to, orders that:

- The party who obtained the admission be permitted to pursue additional discovery related to the matter involved in the withdrawn or amended admission; and/or
- Costs of any additional discovery be borne in whole or in part by the party amending or withdrawing the admission (the responding party).

PRACTICE TIP: The responding party, to avoid the time and expense of pursuing the noticed motion procedure and the conditions that the court may impose, should first seek the requesting party's agreement to the amendment or withdrawal—perhaps offering, in exchange, to allow certain limited discovery addressing the amended or withdrawn admission, even if the discovery deadline has passed.

Deemed admissions subject to withdrawal or amendment procedure. The procedures in CCP §2033.300 apply to a party who has made an admission in response to a request as well as to a party who has failed to respond. *Wilcox v Birtwhistle* (1999) 21 C4th 973, 977, 90 CR2d 260. In *Wilcox*, a medical malpractice action, the defendant physician served the plaintiff with several RFAs, including an admission that the doctor was not negligent and that the plaintiff had suffered no injuries from defendant's medical care. When there was no response, the defendant moved to have the RFAs admitted under CCP §2033.280(b). The plaintiff filed unverified responses to the RFAs before the hearing of the motion, but did not otherwise oppose it, and the motion was granted. Sixteen days later, plaintiff's new counsel filed verified responses and filed a motion for reconsideration and relief from the deemed admitted order. The motion was accompanied by a declaration from plaintiff's former counsel stating that the failure to serve timely responses was because of his own mistake or negligence. The trial court, while expressing its inclination to grant the motion in the interest of justice, ultimately denied it on the basis of *St. Paul Fire & Marine Ins. Co. v Superior Court* (1992) 2 CA4th 843, 3 CR2d 412. The supreme court, however, after analyzing former CCP §2033 (now CCP §§2033.010-2033.740), held that former CCP §2033(m) (now CCP §2033.300) should be construed to permit the withdrawal or amendment of deemed admissions. In doing so, the court overruled a line of court of appeal cases to the contrary, typified by *St. Paul*.

21 C4th at 979. *Wilcox* is also significant in its implicit holding that attorney mistake or negligence, if promptly rectified, is sufficient cause to excuse a nonresponse to RFAs.

PRACTICE TIP: In attempting to amend or withdraw responses, the moving party has a formidable burden, higher than the usual CCP §473 grounds of, *e.g.,* mistake or excusable neglect. Although CCP §§473 and 2033.300 allow for relief on similar grounds (mistake, inadvertence, or excusable neglect), counsel should be aware of substantial differences in the statutes. First, and most importantly, CCP §473 provides for mandatory relief once mistake, inadvertence, or excusable neglect is shown. CCP §2033.300(b), in contrast, provides that relief is discretionary ("may permit withdrawal or amendment"). Second, §2033.300 requires an additional showing, *i.e.*, that the party who obtained the admission not be substantially prejudiced with regard to the merits of a claim or defense by the granting of the motion. Under the express language of §2033.300, the court may consider exercising its discretion to grant the motion only if both preconditions are met. Because courts are prone to want resolved issues to remain resolved, the moving party will have to make a substantial showing in order to undo that which has previously been laid to rest.

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§9.83 B. Timing and Procedure

When to serve and file. The latest date on which a notice of motion for an order permitting amendment or withdrawal of an admission may be served and filed is not specified. See CCP §2033.300. It can be argued that these motions are subject to the CCP §2024.020(a) restrictions on motions relating to discovery and must be heard at least 15 days before the initial scheduled trial date. At least one court, however, has implied that a motion to withdraw or amend may be brought after the CCP §2024.020(a) cutoff, and perhaps even during trial. See *Valerio v Andrew Younquist Constr.* (2002) 103 CA4th 1264, 1273, 127 CR2d 436 (responding party bound by admissions in his answer and in RFAs, which he did not seek to amend or withdraw; court implied that he could have moved to amend or withdraw the mistaken admission any time before trial).

PRACTICE TIP: Counsel should make the motion as soon as the erroneous admission has been recognized. The longer the delay before a motion to amend or withdraw is made, the more likely the court is to conclude that other parties will be prejudiced. If the opposing party can make a legitimate argument that the trial would need to be continued to allow additional discovery on the issue, granting of relief is even more unlikely unless an extremely strong showing of good cause can be made.

Seek agreement to amendment or withdrawal. Although CCP §2033.300 does not expressly call for consultation between the responding party and the requesting party before the notice of motion is filed, the responding party may wish to seek the requesting party's agreement to the amendment or withdrawal of a previously made admission before incurring the time and expense of pursuing the noticed motion procedure.

PRACTICE TIP: To induce agreement, the responding party may even be able to offer terms to the requesting party that are less stringent than conditions that might be imposed by the court after hearing the motion. It is possible that other parties in the case, who did not also agree to an amendment or withdrawal, could continue to claim the benefit of the original admission. Thus, it is wise to seek their agreement as well.

What to serve and file. If the requesting party's agreement is not sought or not obtained, the responding party who wants to amend or withdraw an admission previously made must serve and file the following:

- A notice of motion for an order withdrawing or amending a response to a request for admission (see form in §9.120);
- A declaration, usually by the responding party's attorney, stating facts that show that mistake, inadvertence, or excusable neglect led to the original admission and that the requesting party will not be substantially prejudiced by the change (see form in §9.121);
- A supporting memorandum citing CCP §2033.300 and any other authorities that support the motion; and
- A proposed order (see form in §9.122).

On the requirements for discovery motions in general, see chap 15.

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§9.84 C. Requesting Party's Opposition

The attorney for a party that served RFAs, received a response, and was then served with a notice of motion for an order amending or withdrawing admissions, may file a declaration in opposition to the motion that states facts (CCP §2033.300(b)):

- Contradicting the facts stated in the responding party's declarations;
- Showing that the requesting party would be substantially prejudiced in maintaining an action or defense by any amendment or withdrawal of the original admissions; and
- Showing the justice of imposing conditions on any order that is made, such as being allowed to pursue additional discovery at the responding party's expense.

PRACTICE TIP: The most persuasive opposition to a motion to amend will show prejudice as a result of reliance on the admission, that the opposing party did not make a good faith effort to properly respond to the request, and that equity does not favor relief from the admission.

The requesting party's attorney may also file a supporting memorandum and may even solicit declarations in opposition from other parties in the case that would be affected by amendment or withdrawal of admissions.

In some cases, the requesting party can save the time and expense of opposing the motion and attending a hearing by contacting the responding party to ascertain whether the latter will make other admissions or concessions in return for the requesting party's agreement to some or all of the amendments and withdrawals proposed by the responding party.

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IX. USING ADMISSIONS IN MOTIONS AND AT TRIAL

§9.85 A. Establishing Facts and Genuineness of Documents

Any matter admitted in response to an RFA, and not amended or withdrawn pursuant to noticed motion, is conclusively established in the action "against the party making the admission." CCP §2033.410(a).

The party that originally requested an admission (and, presumably, any other party in the case; see *Swedberg v Christiana Community Builders* (1985) 175 CA3d 138, 143, 220 CR 544) can quote the response that admits a fact, or the genuineness of a document, to the judge hearing any motion in the action and can attach a copy of the request and response to any paper presented in the action. Most courts require that the entire set be attached or lodged with a motion. The better practice is to attach them as an exhibit to the motion rather than just quoting relevant portions. At trial, counsel should consider using requests and responses to the requests as trial exhibits (*e.g.,* as blow-ups) to assist the trier of fact.

JUDGE'S PERSPECTIVE: Admissions as to facts should be called to the judge's attention before trial, and counsel should explain when the facts are expected to be presented to the jury and in what context. It is a good practice to read the admissions at a logical place in the trial in much the same manner as stipulations are often presented. Because the purpose of admissions is to narrow issues, the court may not want to give this presentation of a fact excessive emphasis and thus may allow counsel to read it only once. Counsel may also want to include a reference to admitted facts in the opening statement. If admissions about the genuineness of documents are presented to the court before trial, the court can enter an order that no objection to genuineness can be made and it will not be necessary to read the admissions to the jury.

No procedure is prescribed for presenting admissions to the judge or jury at a trial. CCP §§2033.010-2033.740. A preamble to the reading of admissions to jurors is provided by CACI 210, but its inclusion among these standard jury instructions does not necessarily mean that admissions must be read for the first time at the close of the trial. See also BAJI 2.08.

PRACTICE TIP: An attorney also may find it helpful to select the admissions that favor the party's case, type them on a separate paper in a logical order (which may be different from the order in which the requests were made), and ask the judge if counsel may read the admissions to the jury at the point in the trial that seems most advantageous to the party. CACI 210 expresses the conclusive effect of the admission and that no further evidence is required to prove that fact or issue. See also BAJI 2.08.

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§9.86 B. Limiting Evidence and Issues

Counsel may find occasion to use admissions made by another party as a basis for objecting to evidence that the other party wants to introduce. Facts admitted through the RFA procedure are "conclusively established" against the admitting party in that action. CCP §2033.410(a). Thus, a party that is charged with having admitted such facts should not be permitted to present evidence to the contrary.

PRACTICE TIP: It is not clear whether a responding party's denial of an RFA, or a statement that the party lacks information and knowledge about it, precludes later introduction of evidence by the responding party to prove the fact. The party that requested the admission of truth, or another party, might argue that it is entitled to rely on the responding party's assertion that the fact was false or that it could not be proved. However, in light of the court's holding in *Burch v Gombos* (2000) 82 CA4th 352, 98 CR2d 119, that subsequently discovered evidence may allow a party to avoid the conclusive effect of certain RFA responses, it is questionable whether such an argument would carry the day.

In the event of a dispute about the meaning of an RFA, the court decides the issue, looking at the RFA in the context of all the evidence presented. RFAs should be drafted as simply and clearly as possible to avoid ambiguity that a trial judge will have to sort out later.

PRACTICE TIP: Admissions in response to RFAs are to be used against the party to whom the RFAs are propounded —not against the propounding party. See CCP §2033.410(a). The party requesting and obtaining an admission may also address at trial issues addressed by the admission, *e.g.*, by introducing additional corroborative evidence from third parties or by using the admission as part of a question to an expert witness. There is a risk, however, that opposing counsel would object to corroborating or similar evidence on the ground that it is irrelevant because it does not go to a disputed fact, or that it is cumulative and thus a waste of time. See Evid C §352. There is also the risk that, if introduced, cumulative corroborative evidence would diminish the impact of the admission.

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X. MOVING TO RECOVER EXPENSE OF PROVING UNADMITTED MATTERS

A. Requesting Party's Right to Recover Cost of Proof

§9.87 1. Required Statutory Showing

The party that served an RFA may move the court for an order under CCP §2033.420 requiring the responding party to pay the reasonable expense, including reasonable attorney fees, incurred in proving each fact, or the genuineness of each document, if:

- The responding party failed to admit the truth of the fact or the genuineness of the document when requested to do so; and
- The requesting party thereafter proves the truth of the fact or the genuineness of the document.

A party faced with a cost-of-proof sanction can limit the fees awarded to those incurred after receipt of the response to the RFA. Recovery is allowed only regarding actual proof of the fact or facts previously denied. CCP §2033.420(a). See *Garcia v Hyster Co.* (1994) 28 CA4th 724, 736, 34 CR2d 283.

PRACTICE TIP: The party seeking expenses must clearly set forth the fact that the fees requested were costs incurred after the receipt of the response to the RFA and are limited to the proof of the facts denied in that response. Specific evidence of the time spent in that proof is required. *Garcia v Hyster Co.* (1994) 28 CA4th 724, 34 CR2d 283.

The court must order the expenses paid unless it finds any of the following (CCP §2033.420(b)):

- The requesting party waived the right to obtain a response to the request by failing to move under CCP §2033.290(c) for a further response;
- The objection to the request was sustained in a CCP §2033.290 proceeding;
- The admission sought was of no substantial importance;
- The responding party that failed to make the admission had reasonable ground to believe that he or she would prevail on the matter (*i.e.*, would establish that the fact was not true or that the document was not genuine); or
- The responding party had other good reason for failing to admit.

In *American Fed'n of State, County & Mun. Employees, Local 1902 v Metropolitan Water Dist.* (2005) 126 CA4th 247, 268, 24 CR3d 285, the court held that the requesting party did not waive its right to cost-of-proof expenses by failing to bring a motion to compel because, after objecting to the requests, the responding party "went on to flatly 'Deny' each request at issue," leaving nothing for a motion to compel to address.

The requesting party may recover expenses of proof under CCP §2033.420(a) even though he or she was not the prevailing party in the case. See *Smith v Circle P Ranch Co.* (1978) 87 CA3d 267, 275, 150 CR 828.

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§9.88 2. When Recovery Granted

When issues of substantial importance, such as liability or causation, are disputed on RFAs, and the disputing party offers no evidence at trial to support its denials, recovery of expenses is appropriate. *Wimberly v Derby Cycle Corp.* (1997) 56 CA4th 618, 635, 65 CR2d 532. See *Laabs v City of Victorville* (2008) 163 CA4th 1242, 1276, 78 CR3d 372 (RFA has "substantial importance" when matter requested for admission is central to disposition of case). Such sanctions are not a penalty, but are to reimburse the opposing party for proving the disputed fact. *Stull v Sparrow* (2001) 92 CA4th 860, 865, 112 CR2d 239.

Sanctions are properly awarded when a party provides obviously false denials. *Rosales v Thermex-Thermatron, Inc.* (1998) 67 CA4th 187, 198, 78 CR2d 861 (corporate officer provided deceptive and false answers and did not investigate the truth of the matters in the RFAs before responding).

A party may recover cost-of-proof expenses and attorney fees under CCP §2033.420 after a motion for summary judgment is granted if the court determines that the moving party proved the matter that was previously denied in a request for admission. *Barnett v Penske Truck Leasing Co.* (2001) 90 CA4th 494, 498, 108 CR2d 821 (see case discussion in §9.90).

A party can also recover the cost of proving RFAs that were denied, even if the RFAs were used to establish opinions relating to fact or required an application of law to fact. *Garcia v Hyster Co.* (1994) 28 CA4th 724, 735, 34 CR2d 283.

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§9.89 3. When Recovery Denied

However, when a party has a good faith basis for believing its position to be correct, sanctions are inappropriate. *Denver D. Darling, Inc. v Control Env'ts Constr., Inc.* (2001) 89 CA4th 1221, 1239, 108 CR2d 213 (trial court's finding that party responding to request for admission in breach of contract case had good faith basis for its interpretation of contract precluded award of sanctions for refusing to admit that its work was not performed in accordance with contractual specifications).

Moreover, if a matter is subsequently admitted at trial, costs may not be awarded. See *Wagy v Brown* (1994) 24 CA4th 1, 6, 29 CR2d 48. In addition, matters that are admitted to before trial will not justify an award for costs under CCP §2033.420. *Stull v Sparrow* (2001) 92 CA4th 860, 112 CR2d 239.

A party cannot recover attorney fees merely for preparing to prove matters at trial that the defendant previously denied in response to the plaintiff's RFAs. CCP §2033.420(a). Only attorney fees actually incurred in proving denied matters may be awarded. *Wagy v Brown* (1994) 24 CA4th 1, 29 CR2d 48. The court in *Wagy* ruled that, when the defendants admitted for purposes of the arbitration that they were negligent despite their previous denial of the plaintiff's RFAs on the same subject, the plaintiff was not entitled to attorney fees for preparing to prove the defendants' negligence. The need to prove the defendants' negligence was obviated by the defendants' later admission. See also *Stull v Sparrow* (2001) 92 CA4th 860, 112 CR2d 239 (in personal injury negligence action, trial court followed *Wagy,* in which the defendant denied liability during discovery but admitted fault shortly before trial). However, if the facts are proved in a summary judgment context, the fee award is available. *Barnett v Penske Truck Leasing Co.* (2001) 90 CA4th 494, 498, 108 CR2d 821.

PRACTICE TIP: As a practical matter, the *Wagy* decision limits the ability to recover costs for the failure to admit an RFA because it allows a later admission to that fact to eliminate the cost sanction. A court may be able to award such sanctions, however, if it can be shown that there was an absence of good faith in the earlier responses.

JUDGE'S PERSPECTIVE: The possibility of recovering cost-of-proof sanctions should not enter into counsel's consideration when determining whether to request admissions.

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§9.90 B. Timing

In addition to making a motion at the conclusion of trial, a motion for expenses can also be made after a motion for summary judgment is granted. In *Barnett v Penske Truck Leasing Co.* (2001) 90 CA4th 494, 498, 108 CR2d 821, the plaintiff in a product liability action denied requests for admission that there was no defect in the product and that defendant did not cause the accident or plaintiff's injuries. Later, in response to a motion for summary judgment, plaintiff admitted that the accident in question had probably not occurred as he described it, but advanced a new theory without factual support. Defendant moved for expert witness fees and attorney fees for bringing the motion for summary judgment, which was granted by the trial court and affirmed on appeal.

There is no specification on when or how the motion for expenses of proof should be made. CCP §2033.420. To ensure that it can be established that the unadmitted matters were in fact proved, the requesting party may wish to notify the trial judge of any matters that should be included in the statement of decision and specification of controverted issues under CCP §632, or to propose special questions to the jury. If sanctions are requested against counsel as well as the party, this fact should be specifically stated in the notice of motion.

To recover reasonable expenses of proof, the party seeking such recovery must have proved the facts disputed in the request for admission. Thus, in *Stull v Sparrow* (2001) 92 CA4th 860, 112 CR2d 239, the trial court's refusal to grant expenses was upheld because the defendants admitted liability before the commencement of trial, and plaintiff was not required to prove liability.

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§9.91 C. Procedure

The attorney for the requesting party may be required to present evidence of the expense of proving each fact (and the genuineness of each document) that was not admitted and of the reasonableness of that expense (see *Garcia v Hyster Co.* (1994) 28 CA4th 724, 34 CR2d 283), and the attorney for the responding party will wish to present evidence showing that payment of expenses at least on some of those matters is neither required nor appropriate. The most efficient way to present these showings may be by declarations filed by the respective attorneys, perhaps at the same time as a memorandum of costs is presented. See forms in §§9.123-9.124.

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XI. RFAS IN FEDERAL COURT CASES

§9.92 A. Relationship of Fed R Civ P 36 to CCP §§2033.010-2033.740

The procedures in CCP §§2033.010-2033.740 are derived from Fed R Civ P 36, although the California statute now spells out the procedures for obtaining admissions in considerably greater detail. In both forums, the procedure is initiated by one party serving a set of written RFAs on another party.

Under federal law (see Fed R Civ P 36(a)), an admission is deemed to have been made for any RFA that, in a timely written and signed response, is not:

- Specifically denied, in whole or in part, in words that fairly meet the substance of the requested admission;
- Answered with a detailed statement of reasons why the answering party cannot truthfully admit or deny the matter; or
- Objected to, with reasons for the objection stated.

A matter admitted under Fed R Civ P 36 is "conclusively established" unless the court, on motion, permits withdrawal or amendment of the admission. Fed R Civ P 36(b). As in California, an admission by a party is made for the purpose of the pending action only and may not be used against the party for any other purpose or in any other proceeding. Fed R Civ P 36(b).

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§9.93 B. Procedures for Requesting RFAs in Federal Case

The federal rule does not impose a presumptive numerical limit on the number of RFAs that a party may direct to another party and thus there are no provisions for obtaining authorization to exceed such a limit.

In federal court, the plaintiff need not delay serving requests for 10 days after serving the summons and complaint, but the normal 30-day time for serving a response is extended so that no defendant need serve a response sooner than 45 days after being served with the summons and complaint. Note, however, that there is generally a hold on all forms of discovery under Fed R Civ P 26(d)(1) that lasts until the parties have conferred as required by Rule 26(f).

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§9.94 C. Procedures for Responding to RFAs in Federal Case

Just as under California law, a party in a federal case must make a reasonable inquiry before answering that the information known or readily available to the party is insufficient to enable the party to admit or deny the request. Either the responding party or the party's attorney may, however, sign the written response in a federal case.

One major difference between discovery practice in California and in the federal courts is the continuing duty in the federal system to supplement and augment discovery responses, including RFAs. See Fed R Civ P 26(e).

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§9.95 D. Modification or Amendment of Admissions in Federal Case

A second major difference between California and federal law concerns the amendment or withdrawal of admissions. Under Fed R Civ P 36(b), a party who has made an admission may amend or withdraw the admission if doing so would promote the presentation of the merits of the action and if the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party. Unlike CCP §2033.300, Rule 36 does not require a showing of mistake, inadvertence, or excusable neglect, and, importantly, it shifts the burden on showing prejudice to the party obtaining the admission.

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§9.96 E. Motions

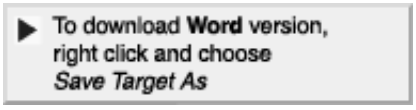
Although a party propounding RFAs in federal court need not move for an order that matters be deemed admitted, the party may move to determine the sufficiency of answers given and objections made. This motion is similar to a motion to compel further responses in state court under CCP §2033.290. It can challenge the legitimacy of objections posed or can seek a fuller answer to an RFA (for example, by requiring a recitation of the steps taken to satisfy the "reasonable inquiry" requirement, or by requiring more specificity as to what part of a request can, in good faith, be admitted). If the court determines that an answer is insufficient, it may order either that an amended answer be served or that the matter in the request be admitted. A court that determines that an objection to a request is unjustified must order that an answer be served. In federal court, the final determination of the extent of admissions may be made at a pretrial conference or at a designated time before trial.

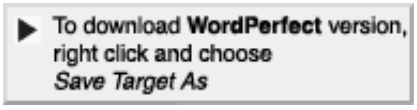
As under California law, the court may award reasonable expenses, including attorney fees, to the party that prevails on a motion that seeks a more complete answer or the overruling of an objection. Fed R Civ P 36(a). Similarly, under Fed R Civ P 37(c), a requesting party may recover the costs of proving a matter that, without justification, was not submitted.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.97 XII. CHECKLIST: PROCEDURES FOR SERVING REQUESTS FOR ADMISSION

§9.97 XII. CHECKLIST: PROCEDURES FOR SERVING REQUESTS FOR ADMISSION





Requesting Party

Serve set of written requests for admission of:

- Truth of specified matters of fact, opinion relating to fact, or application of law to fact (see §§9.33-9.35)
- Genuineness of documents (see §9.36)

If plaintiff wants to serve requests early:

- Move for leave to serve early (see §9.9)

If early response needed:

- Move for order shortening time to respond (see §§9.39-9.41)

If "truth" requests exceed 35:

- Attach declaration for additional discovery (see form in §9.101)
- Retain originals of requests and responses (see §9.38)

Responding Party

If protective order needed (see §§9.66-9.71):

- Make reasonable, good faith attempt to resolve informally
- Serve notice of motion for protective order

If serving response (see §§9.47-9.61):

- Serve written sworn response

If additional time needed:

- Move for additional time to respond or seek stipulation (see §§9.64-9.65)

If admission in served response must be changed:

- Serve notice of motion for leave to withdraw or to amend (see §§9.82-9.84)

If response is served late:

- Serve notice of motion for relief from waiver of objections (see §9.77 and forms in §§9.108-9.109)

Requesting Party

If no timely response received:

- Move for order that matters be deemed admitted (see §§9.72-9.76 and forms in §§9.112-9.114)

If response is evasive, incomplete, or defective:

- Make reasonable, good faith attempt to resolve informally (see §§9.72-9.74)
- Serve notice of motion for order compelling further response (see §§9.78-9.79)

If order not obeyed:

- Move for deemed admissions, and/or monetary sanction, and/or other more severe sanctions (see forms in §§9.112-9.114)

At trial:

- Apply for recovery of expense of proving unadmitted matters (see §§9.87-9.91)

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/ XIII. FORMS FOR REQUESTS FOR ADMISSION/ A. Requesting Admissions/§9.98 1. Form: Request for Admissions (Judicial Council Form DISC-020)

XIII. FORMS FOR REQUESTS FOR ADMISSION

A. Requesting Admissions

§9.98 1. Form: Request for Admissions (Judicial Council Form DISC-020)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
SHORT TITLE:	
REQUESTS FOR ADMISSION ☐ **Truth of Facts** ☐ **Genuineness of Documents** **Requesting Party:** **Answering Party:** **Set No.:**	CASE NUMBER:

INSTRUCTIONS

Requests for admission are written requests by a party to an action requiring that any other party to the action either admit or deny, under oath, the truth of certain facts or the genuineness of certain documents. For information on timing, the number of admissions a party may request from any other party, service of requests and responses, restrictions on the style, format, and scope of requests for admission and responses to requests, and other details, see Code of Civil Procedure sections 94–95, 1013, and 2033.010–2033.420 and the case law relating to those sections.

An answering party should consider carefully whether to admit or deny the truth of facts or the genuineness of documents. With limited exceptions, an answering party will not be allowed to change an answer to a request for admission. There may be penalties if an answering party fails to admit the truth of any fact or the genuineness of any document when requested to do so and the requesting party later proves that the fact is true or that the document is genuine. These penalties may include, among other things, payment of the requesting party's attorney's fees incurred in making that proof.

Unless there is an agreement or a court order providing otherwise, the answering party must respond in writing to requests for admission within 30 days after they are served, or within 5 days after service in an unlawful detainer action. There may be significant penalties if an answering party fails to provide a timely written response to each request for admission. These penalties may include, among other things, an order that the facts in issue are deemed true or that the documents in issue are deemed genuine for purposes of the case.

Answers to *Requests for Admission* must be given under oath. The answering party should use the following language at the end of the responses:

I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.

_____ _____
(DATE) *(SIGNATURE)*

These instructions are only a summary and are not intended to provide complete information about requests for admission. This *Requests for Admission* form does not change existing law relating to requests for admissions, nor does it affect an answering party's right to assert any privilege or to make any objection.

REQUESTS FOR ADMISSION

You are requested to admit within 30 days after service, or within 5 days after service in an unlawful detainer action, of this *Requests for Admission* that:

1. ☐ Each of the following facts is true *(if more than one, number each fact consecutively)*:

   ☐ Continued on Attachment 1

2. ☐ The original of each of the following documents, copies of which are attached, is genuine *(if more than one, number each document consecutively)*:

   ☐ Continued on Attachment 2

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
DISC-020 [Rev. January 1, 2008]

REQUESTS FOR ADMISSION

CEB

Code of Civil Procedure,
§§ 94–95, 2033.010–2033.420, 2033.710

Copies: Original (retain); copies for service (one for each other party); office copies.

Comment: This form may be used for requesting admissions. For an attorney-drafted set of sample requests for

admission, see §9.99-9.100. On using Judicial Council forms of admission request, see §9.22.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.99 2. Form: Sample Requests for Admissions

§9.99 2. Form: Sample Requests for Admissions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Marion B. Able, SBN 555555
1111 Main St.
Center, CA 99999
Telephone: (213) 456-7890
Attorney for plaintiff, John Henry Smith

Superior Court, County of Buena Vista

John Henry Smith,	)	**No. 012-3456**
Plaintiff	)	
	)	**REQUESTS FOR ADMISSION**
vs	)	
	)	
Walter Johnson, et al.,	)	
Defendants	)	
_____	)	

First Set of Requests for Admission From John Henry Smith to Walter Johnson

You are requested to admit the truth of each of the following:

1. Walter Johnson operates the business known as Big Train Enterprises as a sole proprietorship.

2. William Jones was acting within the scope of employment as an agent or employee of Walter Johnson while driving the CHEVROLET automobile, California license number ABC 123, at the time of the vehicle collision that is the subject of this lawsuit.

3. At the time of the vehicle collision, Walter Johnson knew that William Jones did not have a valid California driver's license.

4. The CHEVROLET was owned by Walter Johnson.

5. The CHEVROLET was not in compliance with California Vehicle Code §XYZ.123.

....

21. William Jones consumed more than five cans of regular beer during the hours of 1 pm to 4 pm on November 28, 2005.

22. When he left the office of Big Train Enterprises at about 4:30 pm on November 28, 2005, William Jones was impaired in the management of his person because of having consumed alcohol.

23. Walter Johnson negligently entrusted the CHEVROLET to William Jones on November 28, 2005.

24. On November 29, 2005, Walter Johnson sent William Jones an e-mail which stated: "I knew you were

drunk when you drove off."

You are requested to admit that the original of each of the following documents, a copy of which is attached, is genuine:

D-1. Medical bill dated December 1, 2004, from Dr. Kildare to John H. Smith.

D-2. Receipt dated December 30, 2004, from Medical Rentals, Inc. to John H. Smith for rental of one wheelchair for two months and one "hospital-type" bed for three months.

D-3. Department of Motor Vehicles report dated February 1, 2005, showing that William Jones does not have a valid California Driver's License.

D-4. Letter from Walter Johnson to William Jones, dated September 9, 2005.

D-5. Printed e-mail from Walter Johnson to William Jones dated November 29, 2004, is a true and correct text version of the electronically transmitted document.

You are required to serve your answers to the foregoing requests for admission no later than April 12, 2006, on Marion B. Able, Attorney at Law, 1111 Main Street, Center, CA 99999.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for plaintiff, John Henry Smith

Copies: Original (retain); copies for service (one for each other party); office copies.

Comment: See §§9.24-9.36. This sample illustrates the format of a first set of RFAs. The individual requests in the form are not necessarily permissible or useful in actual cases.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.100 3. Form: Sample Requests for Admissions (Electronic Documents)

§9.100 3. Form: Sample Requests for Admissions (Electronic Documents)

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110*.

Marion B. Able, SBN 555555
1111 Main St.
Center, CA 99999
Telephone: (213) 456-7890
Attorney for plaintiff, John Henry Smith

Superior Court, County of Buena Vista

Mary Jackson,	)	**No. 012-67890**
Plaintiff	)	
	)	**REQUESTS FOR ADMISSION**
vs	)	
	)	
Ralph Doe, et al.,	)	
Defendants	)	
_____	)	

First Set of Requests for Admission From Mary Jackson to Ralph Doe

You are requested to admit the truth of the following:

1. John Smith electronically created the first draft of the Sales Agreement that is the subject of this lawsuit on January 4, 2006.

2. Bernard Jones electronically revised the draft of the Sales Agreement on January 5, 2006.

3. Sally Jones electronically revised the draft of the Sales Agreement on January 9, 2006.

4. Before the Sales Agreement was transmitted electronically to requesting party, it was electronically revised seven times.

You are requested to admit the genuineness of the attached documents as follows:

D-1. The printed Sales Agreement is a true and correct text version of the first draft of the Sales Agreement created electronically by John Smith on January 4, 2006.

D-2. The printed e-mail dated January 12, 2006, is a true and correct text version of the document which was transmitted electronically to requesting party.

You are required to serve your answers to the foregoing requests for admission no later than April 14, 2006, on Marion B. Able, Attorney at Law, 1111 Main Street, Center, CA 99999.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for plaintiff, Mary Jackson

Copies: Original (retain); copies for service (one for each other party); office copies.

Comment: See §§9.24-9.36. This sample illustrates the format of a first set of RFAs in a case involving electronically stored documents. The individual requests in the form are not necessarily permissible or useful in actual cases.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.101 4. Form: Declaration for Additional Discovery

§9.101 4. Form: Declaration for Additional Discovery

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**DECLARATION FOR**
vs	)	**ADDITIONAL DISCOVERY**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Attachment to Set of Requests for Admission Number _ _[*number*]_ _ **From** _ _[*name of requesting party*]_ _ **to** _ _[*name of party served*]_ _

_ _[*Name*]_ _ **declares:**

1. I am _ _[*the attorney for* _ _[*name*]_ _**,** *a party to this* _ _[*action/proceeding*]_ _*/a party to this* _ _[*action/proceeding*]_ _ *appearing in propria persona*]_ _**.**

2. I am propounding the attached set of requests for admission to _ _[*name of responding party*]_ _**.**

3. This set of requests for admission will cause the total number of requests propounded to that party to exceed the number of requests permitted by CCP §2033.030.

4. I have previously propounded a total of _ _[*number*]_ _ **requests for admission not relating to the genuineness of documents to that party** _ _[*as well as* _ _[*number*]_ _ *requests relating to the genuineness of documents*]_ _**.**

5. This set of requests for admission contains a total of _ _[*number*]_ _ **requests.**

6. I am familiar with the issues and the previous discovery conducted by all parties in this case.

7. I have personally examined each of the requests in this set of requests for admission.

8. This number of requests for admission is warranted under CCP §2033.040 because _ _[*state reasons why complexity or quantity of issues warrant the number of requests*]_ _**.**

9. None of the requests in this set of requests for admission is being propounded for any improper purpose,

such as to harass the party to whom it is directed or the party's attorney or to cause unnecessary delay or needless increase in the cost of litigation.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (attach to original set of requests); copies for service (one for each other party); office copies.

Comment: This form is substantially in the words of CCP §2033.050. Such a declaration must be attached to the set of requests that contains the 36th request relating to the truth of a fact or an opinion relating to fact and to any subsequent set that contains such a request. See §9.5. Code of Civil Procedure §2033.050 seems to require the declaration to be attached to the requests even if the requesting party has obtained the responding party's written stipulation to the filing of additional requests.

PRACTICE TIP: If the requesting party has obtained a stipulation, that fact should be stated in the declaration so that there is no question about the propriety of propounding more than 35 RFAs.

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§9.102 5. Form: Stipulated Admissions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]
_ _[*Optional fax number; e-mail address*]_ _ _ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**STIPULATED ADMISSIONS**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

The undersigned agree that for the purposes of this action only:

A. The following facts are true:

1. _ _[*List admitted facts in separately numbered entries.*]_ _

B. The following documents, copies of which are attached, are genuine:

D-1. _ _[*List documents in separately numbered entries.*]_ _

The undersigned further agree that _ _[*name of admitting party*]_ _ **may amend or withdraw any of these admissions by following the procedure in CCP §2033.300.**

Date: _ _ _ _ _ _ __[*Signature of admitting party*]__
_ _[*Typed name*]_ _

Date: _ _ _ _ _ _	**Date:** _ _ _ _ _ _
__[*Signature*]__	__[*Signature*]__
_ _[*Typed name*]_ _	_ _[*Typed name*]_ _
Attorney for plaintiff	**Attorney for defendant**

Copies: Original (retained by party that prepares stipulation); copies (one or more for other stipulating party); copies for service (one for each other party); office copies.

Comment: CCP §§2033.010-2033.740 makes no explicit provision for stipulated admissions, nor does it explicitly forbid them. See §9.42.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/ B. Responding to Requests for Admission/§9.103 1. Form: Sample Response to Requests for Admission

B. Responding to Requests for Admission

§9.103 1. Form: Sample Response to Requests for Admission

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Shirley Ryan, SBN 555556
Ayles & Ryan
1000 Broadway
Suite 2100
Center, CA 99999
Telephone: (213) 987-6543
Attorney for defendant, Walter Johnson

Superior Court, County of Buena Vista

John Henry Smith,	)	**No. 012-3456**
Plaintiff	)	
	)	**RESPONSE TO REQUESTS**
vs	)	**FOR ADMISSION**
	)	
Walter Johnson, et al.,	)	
Defendants	)	
_____	)	

Walter Johnson responds to the first set of requests for admission served on him by defendant Horace Mann on March 7, 2005, as follows:

1. Admitted.

2. Admits that William Jones was Walter Johnson's employee at the time of the vehicle collision that is the subject of this lawsuit, but denies that William Jones was acting within the scope of employment by Walter Johnson on that date.

3. Denied.

4. Admitted.

5. Denies that the CHEVROLET was defective.

6. Objection. This request for admission is unintelligible.

7. I lack sufficient information or knowledge to admit that at the time of the collision William Jones was under treatment for…

….

33. Admitted.

34. Denies that Walter Johnson ever entered into a contract with Black and White Leasing Company.

35. I lack sufficient information or knowledge to admit that John Henry Smith and Horace Mann were parties to an indemnity agreement.

36. through 39. Objection. These requests exceed the numerical limit imposed by CCP §2033.030.

D-1. Admitted.

D-2. I lack sufficient information or knowledge to admit the genuineness of this document. The copy of the document attached to the requests for admission is too blurred to read.

D-3. I lack sufficient information or knowledge to admit that this document is genuine. I am not familiar with the signatures of either John H. Smith or Horace Mann and do not know whether either of them signed the original of this document.

D-4. through D-8. Admitted.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of defendant*]__
_ _[*Typed name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for defendant, Walter Johnson

Copies: Original (serve on requesting party); copies for service (one for each other party); office copies.

Comments: See §§9.43-9.63. This sample illustrates the format of a response to a set of RFAs. The individual items in the form are not necessarily adequate for actual cases.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.104 2. Form: Stipulation Extending Time to Respond

§9.104 2. Form: Stipulation Extending Time to Respond

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**STIPULATION EXTENDING**
vs	)	**TIME TO RESPOND**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

The undersigned attorneys agree, on behalf of _ _[*name of party*]_ _ **and** _ _[*name of other party*]_ _**, that** _ _[*name of responding party*]_ _ **may have until** _ _[*date*]_ _ **to respond to** _ _[*e.g., John Smith's third set/requests nos. 21, 22, and 31 in John Smith's third set*]_ _ **of requests for admission.**

_ _[*Specify further terms, if any, e.g., They further agree that Walter Jones must either admit or deny requests nos. 22, 23, and 30 and may not object to those requests on any grounds.*]_ _

Date: _ _ _ _ _ _	**Date: _ _ _ _ _ _**
__[*Signature*]__	__[*Signature*]__
_ _[*Typed name*]_ _	_ _[*Typed name*]_ _
Attorney for plaintiff	**Attorney for defendant**

Copies: Original (retained by responding party); copies for service (one for each other party); office copies.

Comment: CCP §2033.260(b) requires that the agreement be confirmed in writing, but it does not specify that the agreement must be a formal stipulation. See §9.64.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.105 3. Form: Application for Order Extending Time to Respond to Requests for Admission

§9.105 3. Form: Application for Order Extending Time to Respond to Requests for Admission

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**APPLICATION FOR ORDER**
vs	)	**EXTENDING TIME TO**
	)	**RESPOND TO REQUESTS**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FOR ADMISSION;** **DECLARATION OF**
	)	_ _[*NAME*]_ _; **ORDER**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name of attorney*]_ _ **declares:**

1. I am an attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, the responding party.**

2. _ _[*Name*]_ _**, the requesting party, served a** _ _[*number*]_ _ **set of requests for admission on the responding party on** _ _[*date*]_ _**.**

3. The responding party cannot answer _ _[*these requests/requests nos. _ _, _ _, and _ _*]_ _ **before** _ _[*date*]_ _ **because** _ _[*provide reasons*]_ _**.**

4. _ _[*Postponing responses to the latter date will not inconvenience the requesting party because _ _[e.g., no procedures to which such responses would be relevant are scheduled in this case until _ _[date]_ _]_ _]_ _.*

[*Option 1: Date of notification of application*]

[5.] I have notified _ _[*name*]_ _**, the attorney of record for the requesting party, of the time and place that this application will by made to this Court by** _ _[*e.g., telephone*]_ _ **on** _ _[*date*]_ _**.**

[*Option 2: Reasons why notice of application not made*]

[5.] _ _[*State reasons why notice of application could not, or should not, be given.*]_ _

[*Continue*]

[6.] _ _[*Name of requesting party's attorney*]_ _ _ _[*e.g., has declined to agree to this extension of time but has told*

me that _ _[he/she]_ _ does not object to the seeking of this order by ex parte application and _ _[will/will not]_ _ send the Court a declaration in opposition to it]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

AUTHORITY: CCP §2033.250(a)

[*Add other authority if appropriate*]

ORDER

Good cause appearing,

IT IS ORDERED that _ _[*name of responding party*]_ _ have until _ _[*date*]_ _ to serve on _ _[*name of requesting party*]_ _ a response to the set of requests for admission served _ _[*date*]_ _, a copy of which was attached to the application for this order.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature); copies for service (one for each other party); office copies.

Comment: See §9.65. The application is in declaration form so that the requesting party's attorney can state facts that support issuance of the order. Documents and other declarations can be attached as needed. For general information on ex parte application for orders, see California Civil Procedure Before Trial §§13.3-13.14 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.106 4. Form: Notice of Motion and Motion for Order Extending Time to Respond

§9.106 4. Form: Notice of Motion and Motion for Order Extending Time to Respond

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION FOR ORDER EXTENDING TIME TO RESPOND TO REQUESTS FOR ADMISSION (CCP §2033.250(a));**
_ _[*Name(s)*]_ _, **Defendant(s)**	**DECLARATION(S) OF** _ _[*NAME(S)*]_ _**;** **SUPPORTING MEMORANDUM; PROPOSED ORDER**
	Hearing: _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, moves the Court under CCP §2033.250(a) for an order extending to** _ _[*date*]_ _ **the time to respond to a set of requests for admission that were served on** _ _[*him/her/it*]_ _ **on** _ _[*date*]_ _**. This motion is made on the ground that the responding party needs additional time to** _ _[*e.g., gather the information needed to respond to those requests for admission*]_ _**.**

This motion is based on the attached documents and exhibits, including _ _[*specify, by title and date of execution, any documents not identified in caption, e.g., "the Declaration of John Smith executed July 2, 1998"*]_ _**;** _ _[*all pleadings, papers, and records filed in this action; and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each other party); office copies.

Comment: See §9.65. Requirements for motion papers are found in CCP §1005 and Cal Rules of Ct 2.111(4) and 3.1110-3.1115. See California Civil Procedure Before Trial §§12.7-12.59 (4th ed Cal CEB 2004).

The attorney may attach a declaration that provides a description of efforts made to obtain the responding party's agreement to extend time without the need for the motion, or the reasons why such efforts were not made. Although

CCP §2033.050 does not require a meet and confer before the motion is filed, the better practice is to do so, and to set out the results in the declaration.

An attached supporting memorandum (see Cal Rules of Ct 3.1113) should at least refer to CCP §2033.250(a) as authority for this motion.

In most cases, the moving party should attach a copy of the set of requests for which the extension of time is sought.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.107 5. Form: Order Extending Time to Respond

§9.107 5. Form: Order Extending Time to Respond

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**ORDER EXTENDING TIME TO**
vs	)	**RESPOND TO REQUESTS**
	)	**FOR ADMISSION**
_ _[*Name(s)*]_ _,	)	
Defendant(s)	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*name*]_ _ for an order extending time to respond to requests for admission was regularly heard at the above date and time. Appearing as attorneys were _ _[*list names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing:

IT IS ORDERED that:

1. _ _[*Name of responding party*]_ _ have until _ _[*date*]_ _ to respond to the _ _[*number*]_ _ set of requests for admission served by _ _[*name of responding party*]_ _.

2. _ _[*Set forth any conditions on the response such as limitations on the right to object to certain requests on certain grounds.*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: See Comment.

Comment: For general discussion of the format and contents of court orders, see California Civil Procedure Before Trial §12.107 (4th ed Cal CEB 2004).

The original of an order is normally presented to the judge for signature and then filed with proof of service. The responding party may wish to keep the original of this order, however, and serve it with the original responses. Conformed copies or photocopies of the order should be served on all parties as soon as the order has been signed.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/ C. Relief From Waiver of Objections/§9.108 1. Form: Notice of Motion and Motion for Order Relieving Responding Party From Waiver of Objections to Requests for Admission

C. Relief From Waiver of Objections

§9.108 1. Form: Notice of Motion and Motion for Order Relieving Responding Party From Waiver of Objections to Requests for Admission

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR ORDER**
	)	**RELIEVING RESPONDING**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**PARTY FROM WAIVER OF**
	)	**OBJECTIONS TO REQUESTS**
	)	**FOR ADMISSION;**
	)	**DECLARATION(S) OF**
	)	_ _[*NAME(S)*]_ _**;**
	)	**SUPPORTING**
	)	**MEMORANDUM; PROPOSED**
	)	**ORDER**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name of responding party*]_ _**, moves the Court under Code of Civil Procedure §2033.280(a) for an order relieving** _ _[*him/her/it*]_ _ **from waiver of objections to** _ _[*requests nos. _ _, _ _, and _ _/all the individual requests for admission*]_ _ **in the** _ _[*number of set*]_ _ **set of requests for admission served by** _ _[*name of requesting party*]_ _ **on** _ _[*date requests were served*]_ _**. This motion is made on the grounds that** _ _[*name of responding party*]_ _ **has now served a response that is in substantial compliance with CCP §§2033.210, 2033.220, and 2033.230, and that the failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.**

This motion is based on the attached documents and exhibits, including _ _[*specify, by title and date of execution, any papers not identified in caption or first paragraph*]_ _**;** _ _[*all pleadings, papers, and records filed in this action; and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.

Comment: Requirements for motion papers are found in CCP §1005 and Cal Rules of Ct 2.111(4) and 3.1110-3.1115. See California Civil Procedure Before Trial §§12.7-12.59 (4th ed Cal CEB 2004). Brief supporting memorandums may be appended to the notice of motion. A lengthier memorandum should accompany the motion.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.109 2. Form: Declaration Supporting Motion for Order Relieving Responding Party From Waiver of Objections to Requests for Admission

§9.109 2. Form: Declaration Supporting Motion for Order Relieving Responding Party From Waiver of Objections to Requests for Admission

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	**MOTION FOR ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**RELIEVING** _ _[*NAME*]_ _
	)	**FROM WAIVER OF**
	)	**OBJECTIONS TO REQUESTS**
	)	**FOR ADMISSION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name of attorney*]_ _ **declares:**

1. I am an attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, the responding party.**

2. _ _[*Name*]_ _**, the requesting party, served a** _ _[*number*]_ _ **set of requests for admission on the responding party on** _ _[*date*]_ _ **by** _ _[*mail/personal delivery to* _ _[*name*]_ _]_ _**.**

3. The responding party served a response to that set of requests on _ _[*date*]_ _**, which was not within the statutory time period for serving a response.**

4. That response complies with the requirements of Code of Civil Procedure §§2033.210, 2033.220, and 2033.230 and contains objections to request nos. _ _[*list individual numbers, in order*]_ _**.**

5. The responding party's failure to serve the response was the result of mistake, inadvertence, or excusable neglect in that _ _[*state facts showing why response was untimely*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.
Comment: See §9.77.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/ D. Protective Orders/§9.110 1. Form: Notice of Motion and Motion for Protective Order Concerning Requests for Admission

D. Protective Orders

§9.110 1. Form: Notice of Motion and Motion for Protective Order Concerning Requests for Admission

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER CONCERNING REQUESTS FOR ADMISSION (CCP §2033.080); DECLARATION(S) OF** _ _[*NAME*]_ _**; SUPPORTING MEMORANDUM; PROPOSED ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name of responding party*]_ _**, moves the Court under Code of Civil Procedure §2033.080 for a protective order that** _ _[*describe nature of protections sought*]_ _ **and, if this motion is opposed, for a monetary sanction under CCP §§2023.010-2023.040 and 2033.080(d). This motion is made on the grounds that** _ _[*e.g., requiring the moving party to answer requests nos. 12, 13, and 15 through 20 in the attached set of requests for admission would force the moving party to reveal trade secrets*]_ _ **and that opposition to this motion is unjustified.**

This motion is based on the attached documents and exhibits, including _ _[*specify, by title and date of execution, documents not identified in caption, e.g., "the Declaration of John Smith executed July 2, 1998*]_ _**;** _ _[*all pleadings, papers, and records filed in this action; and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.
Comment: See §§9.66-9.71. Requirements for motion papers are found in CCP §1005 and Cal Rules of Ct 2.111(4)

and 3.1110-3.1115. See California Civil Procedure Before Trial §§12.7-12.59 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.111 2. Form: Protective Order Concerning Requests for Admission

§9.111 2. Form: Protective Order Concerning Requests for Admission

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	
	)	**PROTECTIVE ORDER**
vs	)	**CONCERNING REQUESTS**
	)	**FOR ADMISSION**
_ _[*Name(s)*]_ _,	)	
Defendant(s)	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*name*]_ _ for a protective order was regularly heard at the above date and time. Appearing as attorneys were _ _[*list names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing:

IT IS ORDERED that:

1. _ _[*Set out individual orders.*]_ _

2. _ _[*Name of party*]_ _ **pay a monetary sanction of** _ _[*dollar amount*]_ _ **to** _ _[*name of party*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: See Comment.

Comment: For general discussion of the format and contents of court orders, see California Civil Procedure Before Trial §12.107 (4th ed Cal CEB 2004).

It is often helpful to attach a proposed order to the motion papers. The judge may, however, require that a new form be prepared when the order rendered differs from the order sought. CCP §2033.080(b), (d) gives the judge power to make any order that justice requires, to place terms and conditions on the disclosure that the responding party must make, and to impose a monetary sanction on the nonprevailing party.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/ E. Motion That Requests for Admission Be Deemed Admitted/§9.112 1. Form: Notice of Motion and Motion for Order That Requests for Admission Be Deemed Admitted

E. Motion That Requests for Admission Be Deemed Admitted

§9.112 1. Form: Notice of Motion and Motion for Order That Requests for Admission Be Deemed Admitted

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
vs	)	**NOTICE OF MOTION AND MOTION FOR ORDER THAT REQUESTS FOR ADMISSION BE DEEMED ADMITTED AND FOR MONETARY SANCTION (CCP §2033.280(b)); DECLARATION(S) OF** _ _[*NAME(S)*]_ _**; SUPPORTING MEMORANDUM; PROPOSED ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name of requesting party*]_ _**, moves the Court under Code of Civil Procedure §2033.280(b) for an order that the truth of the matters and the genuineness of documents specified in a set of requests for admission served on** _ _[*name of responding party*]_ _ **on** _ _[*date*]_ _**, be deemed admitted and that a monetary sanction under CCP §2023.030(c) be imposed on** _ _[*name of responding party*]_ _**. This motion is made on the ground that** _ _[*name of responding party*]_ _ **has not responded to the requests for admission within the time prescribed by law.**

This motion is based on the attached documents and exhibits, including the declaration of _ _[*name*]_ _**, dated** _ _[*date*]_ _**; a copy of the requests for admission and proof of service dated** _ _[*date*]_ _**;** _ _[*all pleadings, papers, and records filed in this action; and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.

Comment: See §§9.72-9.77. Requirements for motion papers are found in CCP §1005 and Cal Rules of Ct 2.111(4) and 3.1110-3.1115. See California Civil Procedure Before Trial §§12.7-12.59 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.113 2. Form: Declaration Supporting Motion That Requests for Admission Be Deemed Admitted

§9.113 2. Form: Declaration Supporting Motion That Requests for Admission Be Deemed Admitted

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	**MOTION THAT REQUESTS**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FOR ADMISSION BE DEEMED**
	)	**ADMITTED**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name of attorney*]_ _ **declares:**

1. I am an attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, the requesting party.**

2. The requesting party served _ _[*a set/*_ _[*number*]_ _ *sets*]_ _ **of requests for admission on** _ _[*name*]_ _**, the responding party, on** _ _[*date*]_ _**, by** _ _[*mail/personal delivery to* _ _[*name*]_ _]_ _**.**

3. The responding party did not serve a response to _ _[*that set of requests/requests nos.* _ _, _ _, *and* _ _]_ _ **by** _ _[*date*]_ _**, the date on which response is required by Code of Civil Procedure §2033.250(a).**

4. _ _[*State other pertinent facts, if any, e.g., On* _ _[*date*]_ _*, requesting party asked the responding party to stipulate to the truth of these requests, but the responding party refused to do so.*]_ _

5. As a result of the responding party's failure to serve a timely response, the requesting party has necessarily incurred reasonable expenses as follows: _ _[*Set forth details and amounts*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.

Comment: Optional Judicial Council Form MC-030 provides a preprinted format for the formal parts of declarations.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.114 3. Form: Order That Requests for Admission Be Deemed Admitted

§9.114 3. Form: Order That Requests for Admission Be Deemed Admitted

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	
	)	**ORDER THAT REQUESTS**
vs	)	**FOR ADMISSION BE DEEMED**
	)	**ADMITTED AND FOR**
_ _[*Name(s)*]_ _,	)	**MONETARY SANCTION**
Defendant(s)	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*name*]_ _ for an order that requests for admission be deemed admitted was regularly heard at the above date and time. Appearing as attorneys were _ _[*list names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing:

IT IS ORDERED that:

1. _ _[*E.g., All requests for admission/Requests nos. _ _, _ _, and _ _*]_ _ in the _ _[*number*]_ _ set of requests for admission served by _ _[*name of requesting party*]_ _ on _ _[*name of responding party*]_ _ be deemed admitted.

2. _ _[*Name of responding party*]_ _ pay a monetary sanction of _ _[*dollar amount*]_ _ to _ _[*name of requesting party*]_ _ by _ _[*date*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: See Comment.

Comment: For general discussion of the format and contents of court orders, see California Civil Procedure Before Trial §12.107 (4th ed Cal CEB 2004).

It is usually helpful to attach a proposed order to the motion papers. The judge may, however, require that a new form be prepared when the order rendered differs from the order sought.

Sometimes it is more convenient not to have the order refer to the set of RFAs, but either to list the matters admitted or to incorporate or refer to a separate list of admitted matters.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/ F. Compelling Further Response/ §9.115 1. Form: Notice of Motion and Motion for Order Compelling Further Response to Requests for Admission

F. Compelling Further Response

§9.115 1. Form: Notice of Motion and Motion for Order Compelling Further Response to Requests for Admission

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR ORDER**
	)	**COMPELLING FURTHER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**RESPONSE TO REQUESTS**
	)	**FOR ADMISSION AND FOR**
	)	**MONETARY SANCTION (CCP**
	)	**§2033.290); SUPPORTING**
	)	**MEMORANDUM; PROPOSED**
	)	**ORDER**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name of requesting party*]_ _, **moves the Court under Code of Civil Procedure §2033.290 for an order compelling further response to** _ _[*request nos. _ _, _ _, and _ _/all the individual requests for admission*]_ _ **in the** _ _[*number*]_ _ **set of requests for admission served by** _ _[*him/her/it*]_ _ **on** _ _[*name of responding party*]_ _ **on** _ _[*date requests were served*]_ _ **and, if this motion is unsuccessfully opposed, for a monetary sanction under CCP §2023.030(d) against** _ _[*name of responding party*]_ _**. This motion is made on the ground that the answers given to those requests for admission are evasive and incomplete and the objections to them are without merit and too general, as more particularly appears from the attached** _ _[*specify document, e.g., list of requests for admission and authorities*]_ _**.**

This motion is based on the attached documents and exhibits, including _ _[*specify, by title and date of execution, any papers attached to notice of motion not identified in caption or first paragraph*]_ _**;** _ _[*all pleadings, papers, and records filed in this action; and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.

Comment: See §§9.78-9.81. Requirements for motion papers are found in CCP §1005 and Cal Rules of Ct 2.111(4) and 3.1110-3.1115. See California Civil Procedure Before Trial §§12.7-12.59 (4th ed Cal CEB 2004).

Brief supporting memorandums may be appended to the notice of motion. A lengthier memorandum should be attached as a separate document. See Cal Rules of Ct 3.1113 on page limitations on supporting memorandums. See Cal Rules of Ct 3.1020(c) on the contents of the separate statement that must be filed and served with a motion to compel further responses to requests for admission. See form in §9.117.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.116 2. Form: Declaration Supporting Motion for Order Compelling Further Response to Requests for Admission

§9.116 2. Form: Declaration Supporting Motion for Order Compelling Further Response to Requests for Admission

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	**MOTION FOR ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**COMPELLING FURTHER** **RESPONSE TO REQUESTS**
	)	**FOR ADMISSION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name of attorney*]_ _ **declares:**

1. I am an attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, the requesting party.**

2. The requesting party served _ _[*a set/*_ _[*number*]_ _ *sets*]_ _ **of requests for admission on** _ _[*name*]_ _**, the responding party on** _ _[*date*]_ _**, by** _ _[*mail/personal delivery to* _ _[*name*]_ _]_ _**.**

3. The responding party served a purported response to that set of requests on _ _[*date*]_ _**.**

4. Answers in that purported response to requests nos. _ _[*list individual numbers, in order*]_ _ **were evasive and incomplete and the objections made to requests nos.** _ _[*list individual numbers, in order*]_ _ **were without merit and too broad, as more fully appears** _ _[*from the following/from the attached list of requests for admission and authorities*]_ _**.**

5. On _ _[*date*]_ _**, I** _ _[*met with/telephoned/wrote to*]_ _ _ _[*name*]_ _**, attorney for the responding party, and attempted to resolve disputes concerning the adequacy of the responses to each of the requests for admission listed in paragraph 4, above.**

6. _ _[*State facts showing reasonable and good faith attempt to resolve issues informally before making motion, e.g., For each of those requests, I presented the arguments and authorities supporting the propriety of further response set forth in* _ _[*paragraph 4/the attached list of requests for admission and authorities*]_ _*, and in each case the attorney for the responding party refused to change or add to the response previously given.*]_ _

7. As a result of the responding party's refusal or failure to properly respond to the requests and to agree to further respond to them, the requesting party has necessarily incurred reasonable expenses as follows: _ _[*Set forth details and amounts*]**_ _.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.

Comment: Optional Judicial Council Form MC-030 provides a preprinted format for the formal parts of declarations.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.117 3. Form: Separate Statement Listing Requests and Responses

§9.117 3. Form: Separate Statement Listing Requests and Responses

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]
_ _[*Optional fax number, e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**SEPARATE STATEMENT**
vs	)	**LISTING REQUESTS FOR**
	)	**ADMISSION REQUIRING**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FURTHER RESPONSE;**
	)	**AUTHORITIES (CAL RULES**
	)	**OF CT 3.1020)**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

In support of the requesting party's motion for an order compelling _ _[*name*]_ _, _ _[*the responding party/on behalf of the responding party*]_ _**, to make further response to certain requests for admission, the requesting party lists these requests for admission, the answer or objection to each given in the response dated** _ _[*date*]_ _**, and the reasons and authorities for compelling further response.**

[*List requests, responses, reasons, and authorities as in the following examples*]

Request 13. At that time, Walter Johnson appeared to be under the influence of alcohol or drugs.

Response 13. Objection: Calls for an opinion.

REASON FOR FURTHER RESPONSE:

Code of Civil Procedure §2033.010 expressly authorizes requests for admission of the truth of opinions relating to fact. That a request for admission calls for an opinion is not a proper objection. *Chodos v Superior Court* (1963) 215 CA2d 318, 323, 30 CR 303. The responding party saw Walter Johnson at the specified time, is a competent adult witness, and is capable of forming and expressing the requested opinion.

....

Request 22. Green Company has received more than 20 reports of falls with injury on the rear stairs of the building at 1234 Adams Street.

Response 22. I lack sufficient information or knowledge to admit this request.

REASON FOR FURTHER RESPONSE:

The response gives no indication of what inquiry, if any, was made to learn whether the fact is true. Specifically, _ _[*name*]_ _ should be required to examine appropriate Green Company records relating to accidents in the building and to count the number relating to the rear stairs. The requested information appears to be readily obtainable by _ _[*name*]_ _, who is answering the requests as the president of Green Company. The responding party has a duty to make a reasonable investigation. See *Chodos v Superior Court* (1963) 215 CA2d 318, 323, 30 CR 303.

....

[*Continue*]

Respectfully submitted,
__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.

Comment: On requirements for the separate statement, see Cal Rules of Ct 3.1020. For discussion, see §§9.78-9.80.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.118 4. Form: Order Compelling Further Response to Requests for Admission

§9.118 4. Form: Order Compelling Further Response to Requests for Admission

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	
	)	**ORDER COMPELLING**
vs	)	**FURTHER RESPONSE TO**
	)	**REQUESTS FOR ADMISSION**
_ _[*Name(s)*]_ _,	)	**AND FOR MONETARY**
Defendant(s)	)	**SANCTION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*name*]_ _ for an order compelling further response to requests for admission was regularly heard at the above date and time. Appearing as attorneys were _ _[*list names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing:

IT IS ORDERED that:

1. _ _[*Name*]_ _ make further response as follows:

[*List requests, responses, reasons, and authorities as in the following examples*]

Request 13. Answer this request by admitting, denying, or stating basis for inability to admit or deny.

....

Response 23. Obtain copy of accident report records from Albany, New York; review them; and answer this request.

[*Continue*]

2. _ _[*Name of responding party*]_ _ pay a monetary sanction of _ _[*dollar amount*]_ _ to _ _[*name of requesting party*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: See Comment.

Comment: For general discussion of the format and contents of court orders, see California Civil Procedure Before Trial §12.107 (4th ed Cal CEB 2004). It is usually helpful to attach a proposed order to the motion papers. The judge

may, however, require that a new form be prepared when the order rendered differs from the order sought.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.119 5. Form: Declaration Opposing Motion for Order Compelling Further Response to Requests for Admission

§9.119 5. Form: Declaration Opposing Motion for Order Compelling Further Response to Requests for Admission

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **OPPOSING**
	)	**MOTION TO COMPEL**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FURTHER RESPONSE TO REQUESTS FOR ADMISSION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name of attorney*]_ _ **declares:**

1. I am an attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, the responding party.**

2. _ _[*Name*]_ _**, the requesting party, served** _ _[*a set/*_ _[*number*]_ _ *sets*]_ _ **of requests for admission on the responding party on** _ _[*date*]_ _**.**

3. The responding party served a response to that set of requests on _ _[*date*]_ _**.**

4. The requesting party now seeks further response to individual requests nos. _ _, _ _**, and** _ _ **in that set. The responding party asserts that the answers given in that response were as complete and straightforward as information available to the responding party permits, and the objections made were proper, as more fully appears** _ _[*from the following/from the attached list of requests for admission and authorities*]_ _**.**

5. On _ _[*date*]_ _**, I** _ _[*met with/telephoned/wrote to*]_ _ _ _[*name*]_ _**, attorney for the requesting party, and attempted to resolve disputes concerning the adequacy of the responses to each of the requests for admission listed in paragraph 4, above.**

6. _ _[*State facts showing a reasonable and good faith attempt to resolve issues informally, e.g., For each of those requests, I made the additional responses and presented the arguments and authorities shown in* _ _[*paragraph 4/the attached list of requests for admission and authorities*]_ _.]_ _

7. As a result of the insistence of the requesting party in pursuing this motion, the responding party has necessarily incurred reasonable expenses as follows: _ _[*Set forth details and amounts*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.

Comment: See §9.80. Optional Judicial Council Form MC-030 provides a preprinted format for the formal parts of declarations.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/ G. Withdrawing or Amending Admissions/§9.120 1. Form: Notice of Motion and Motion for Order Withdrawing or Amending Admissions

G. Withdrawing or Amending Admissions

§9.120 1. Form: Notice of Motion and Motion for Order Withdrawing or Amending Admissions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR ORDER**
	)	_ _[*WITHDRAWING/*
_ _[*Name(s)*]_ _,	)	*AMENDING/WITHDRAWING*
Defendant(s)	)	*AND AMENDING*]_ _
	)	**ADMISSION(S) (CCP**
	)	**§2033.300); DECLARATION(S)**
	)	**OF** _ _[*NAME(S)*]_ _**;**
	)	**SUPPORTING**
	)	**MEMORANDUM; PROPOSED**
	)	**ORDER**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name of responding party*]_ _**, moves the Court under Code of Civil Procedure §2033.300 for an order** _ _[*withdrawing/amending/withdrawing and amending*]_ _ **certain admissions previously made in response to requests for admission. The grounds for issuance of this order are that the admissions that are the subject of this motion were the result of** _ _[*name*]_ _**'s mistake, inadvertence, or excusable neglect and that the order will not substantially prejudice** _ _[*name of requesting party*]_ _ **in maintaining that party's** _ _[*action/defense*]_ _ **on the merits.**

This motion is based on the attached documents and exhibits including _ _[*specify, by title and date of execution, documents not identified in caption, e.g., "the Declaration of John Smith executed July 2, 1998"*]_ _**;** _ _[*all pleadings, papers, and records filed in this action; and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.

Comment: See §§9.82-9.84. Requirements for motion papers are found in CCP §1005 and Cal Rules of Ct 2.111(4) and 3.1110-3.1115. See California Civil Procedure Before Trial §§12.7-12.59 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.121 2. Form: Declaration Supporting Motion for Order Amending or Withdrawing Admissions

§9.121 2. Form: Declaration Supporting Motion for Order Amending or Withdrawing Admissions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	**MOTION FOR ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*WITHDRAWING/ AMENDING/WITHDRAWING AND AMENDING*]_ _
	)	**ADMISSION(S) (CCP §2033.300)**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name of attorney*]_ _ **declares:**

1. I am an attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, the responding party.**

2. _ _[*Name*]_ _**, the requesting party, served** _ _[*a set/*_ _[*number*]_ _ *sets*]_ _ **of requests for admission on the responding party on** _ _[*date*]_ _**. A copy of that set is attached to this declaration, marked Exhibit A.**

3. The responding party served a response to that set of requests on _ _[*date*]_ _**. A copy of that response is attached to this declaration, marked Exhibit B.**

4. The responding party now asks the Court to _ _[*withdraw/amend/withdraw and amend*]_ _ **certain admissions made in that response as follows:**

[*List here, or in an attached paper, each admission to be amended or withdrawn, using a format such as the following*]

Request No. _ _: _ _[*Text of request*]_ _

Original Response: _ _[*Original answer*]_ _

Amended Response: _ _[*Proposed amended answer*]_ _

Basis for Amendment: _ _[*State facts showing that original admission resulted from party's or attorney's mistake,*

inadvertence, or excusable neglect.]_ _

The requesting party is not prejudiced in that: _ _[*State facts showing that proposed change will not substantially prejudice requesting party in pursuing his, her, or its action or defense.*]_ _

Request No. _ _: _ _[*Text of request*]_ _

Original Response: _ _[*Original answer*]_ _

This response should be ordered withdrawn.

Basis for Withdrawal: _ _[*State facts showing that original admission resulted from party's or attorney's mistake, inadvertence, or excusable neglect.*]_ _

The requesting party is not prejudiced in that: _ _[*State facts showing that withdrawal will not substantially prejudice requesting party in pursuing his, her, or its action or defense.*]_ _

[*State facts showing that court should not attach conditions to order amending or withdrawing admissions, or state matters (e.g., other admissions or agreement to other discovery) to which responding party is willing to agree to obtain amendments or withdrawals or to avoid other conditions*]

[*Continue*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copies for service (one for each party); office copies.

Comment: Optional Judicial Council Form MC-030 provides a preprinted format for the formal parts of declarations.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.122 3. Form: Order Withdrawing or Amending Admissions

§9.122 3. Form: Order Withdrawing or Amending Admissions

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	
	)	**ORDER _ _**[*WITHDRAWING/*
vs	)	*AMENDING/WITHDRAWING*
	)	*AND AMENDING*]_ _
_ _[*Name(s)*]_ _,	)	**ADMISSIONS**
Defendant(s)	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*name*]_ _ for the following orders was regularly heard at the above date and time. Appearing as attorneys were _ _[*list names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. Certain admissions in _ _[*name of responding party*]_ _'s _ _[*date*]_ _ response to requests for admission served by _ _[*name of requesting party*]_ _ are amended and withdrawn as follows:

[*List here, or in an attached paper, each admission to be amended or withdrawn, using a format such as the following*]

Request No. _ _. The admission originally made is changed to "_ _[*text of amended admission*]_ _."

Request No. _ _. The admission originally made is withdrawn, and the responding party is deemed to have denied the truth of the matters stated in that request.

[*Continue*]

2. _ _[*Specify conditions, e.g., The requesting party is entitled to take the deposition of _ _[name]_ _ on _ _[date]_ _, on the subject of _ _[specify matter involved in an amended or withdrawn admission]_ _, and the responding party will pay the costs of taking, recording, and transcribing that deposition, not to exceed _ _[dollar amount]_ _.]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: See Comment.

Comment: For general discussion of the format and contents of court orders, see California Civil Procedure Before Trial §12.107 (4th ed Cal CEB 2004).

It is usually helpful to attach a proposed order to the motion papers. Under CCP §2033.300(c), however, the judge has the power to impose just conditions on the granting of the motion, and the judge may require that a new order be

prepared when the order rendered differs from the order sought.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/ H. Motion to Recover Expenses of Proof/§9.123 1. Form: Application for Order Requiring Payment of Expenses of Proof

H. Motion to Recover Expenses of Proof

§9.123 1. Form: Application for Order Requiring Payment of Expenses of Proof

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**APPLICATION FOR ORDER**
vs	)	**REQUIRING PAYMENT OF**
	)	**EXPENSES OF PROOF**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**UNDER CCP §2033.420;**
	)	**DECLARATION OF**
	)	_ _[*NAME*]_ _**; PROPOSED**
	)	**ORDER**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name of attorney*]_ _ **declares:**

1. I am an attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, the requesting party.**

2. On _ _[*date*]_ _**, the requesting party served a set of requests for admission, a copy of which is attached, on** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _**, the responding party.**

3. On _ _[*date*]_ _**, the responding party served a response, a copy of which is attached.**

4. In that response, the responding party _ _[*e.g., denied request nos.* _ _ *and* _ _*, stated that he lacked information and knowledge concerning nos.* _ _ *and* _ _*, objected to nos.* _ _ *and* _ _*, and failed to make adequate response to nos.* _ _ *and* _ _]_ _**.**

5. _ _[*If the cost of proving matters that were objected to or inadequately answered is sought, state facts showing that a motion to compel further response was made and that further response was ordered.*]_ _

[6.] On _ _[*date*]_ _**, a** _ _[*verdict/statement of decision*]_ _ **was entered in this case showing that the following facts are true and the following documents are genuine:** _ _[*List requests for admission, stating for each the finding showing it to have been proved true*]_ _**.**

[7.] The expense of proving the matter in each of these requests for admission is as follows: _ _[*List requests for admission, itemizing for each the cost of proving the matter it covered, including time in hours expended by attorneys and their hourly rates, fees paid to experts and other witnesses, fees paid to obtain and present documents and exhibits*]_ _**. Total: $**_ _[*amount*]_ _**.**

[8.] The responding party's failure to admit the matters in these requests was unjustified in that: _ _[*List requests for admission, stating for each facts or reasons why responding party should have admitted the matter, including statements about information available to responding party*]_ _**.**

[9.] _ _[*State any facts showing that responding party had notice of this application that do not appear on proof of service form attached to application or in previous order of court, setting time and place of hearing on motion.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

AUTHORITY: CCP §2033.420

[*Add other authority if appropriate*]

ORDER

Good cause appearing,

IT IS ORDERED that _ _[*name of responding party*]_ _ **pay** _ _[*dollar amount*]_ _ **to** _ _[*name of requesting party*]_ _ **on or before** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature); one copy to serve on responding party; office copies.

Comment: See §§9.87-9.91. See California Civil Procedure Before Trial §§13.3-13.14 (4th ed Cal CEB 2004) for general information on ex parte application for orders.

If the expense of proving numerous matters is claimed, it may be more convenient to attach to the declaration a separate paper listing, for each individual RFA:

- The request;
- The response;
- The finding that establishes the truth of the matter in the request;
- The items of expense in proving it; and
- Facts showing that the failure to admit was unjustified.

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Source: Civil Litigation/California Civil Discovery Practice/9 Requests for Admission/§9.124 2. Form: Declaration Opposing Motion for Order Requiring Payment of Expenses of Proof

§9.124 2. Form: Declaration Opposing Motion for Order Requiring Payment of Expenses of Proof

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **OPPOSING**
	)	**MOTION FOR ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**REQUIRING PAYMENT OF EXPENSES OF PROOF**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name of attorney*]_ _ **declares:**

1. I am an attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, the responding party.**

2. _ _[*Name*]_ _**, the requesting party, served** _ _[*a set/*_ _[*number*]_ _ *sets*]_ _ **of requests for admission on the responding party on** _ _[*date*]_ _**.**

3. The responding party served a response to that set of requests on _ _[*date*]_ _**.**

4. The requesting party now seeks an order requiring the responding party to pay the expenses incurred by the requesting party in proving certain matters at the trial of this action.

5. The responding party should not be required to pay the requested sum or any sum for the following reasons: _ _[*List each request mentioned in requesting party's application showing the request, the response originally made (or made following an order for further response), and the facts and reasons showing that failure to admit matter in request was justified; see §9.74 for a list of situations in which court should order expenses to be paid*]_ _**.**

6. The amount given by the requesting party as the expense of proving the matter in request no. _ _ is unreasonable in that _ _[*state facts and reasons*]_ _**. A reasonable amount would be** _ _[*dollar amount*]_ _**.**

7. As a result of the insistence of the requesting party in pursuing this motion, the responding party has necessarily incurred reasonable expenses as follows: _ _[*Set forth details and amounts*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and

correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court with proof of service); copy (serve on requesting party); office copies.
Comment: Optional Judicial Council Form MC-030 provides a preprinted format for the formal parts of declarations.

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10

Physical and Mental Examinations

Arthur J. Casey
Hon. Mary E. Wiss

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.1 I. SCOPE OF CHAPTER

§10.1 I. SCOPE OF CHAPTER

This chapter covers the rules and procedures for obtaining a physical or mental examination of a party or other person under CCP §§2032.010-2032.650. In general, a defendant in a personal injury case may demand one physical examination of the plaintiff (see CCP §2032.220(a)) and a party seeking a mental examination or a physical examination other than that permitted in a personal injury case must obtain a court order, unless the parties agree to an examination by written stipulation. See CCP §§2032.310-2032.320. The three procedures for obtaining a physical or mental examination under CCP §§2032.010-2032.650 are:

- Demand for physical examination in personal injury cases (see §§10.31-10.39);
- Stipulation for physical or mental examination (see §§10.40-10.42); and
- Court order for physical or mental examination (see §§10.43-10.49).

This chapter also covers:

- Deciding whether to use the physical or mental examination discovery method (see §§10.5-10.29);
- Conduct of the examination (see §§10.50-10.57);
- Exchange of examination reports, including waiver of certain privileges and protections (see §§10.58-10.67); and
- Sanctions for failure to comply with the statutory examination provisions (see §§10.68-10.71).

In addition, this chapter also discusses medical examinations authorized under other California statutes (see §§10.72-10.77) and under the federal rules (see §10.78). Forms are found in §§10.79-10.90.

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II. DECIDING TO OBTAIN PHYSICAL OR MENTAL EXAMINATION

§10.2 A. Advantages and Disadvantages of Examination

A defendant in a personal injury case may demand one physical examination of the plaintiff. CCP §2032.220(a). On making a demand for physical examination, see §§10.31-10.39. A party seeking a mental or physical examination other than that which can be demanded in personal injury cases may move for a court order. See CCP §§2032.310-2032.320. See, *e.g.,* §§10.16, 10.22, 10.45. The parties may also obtain physical and/or mental examinations by written stipulation. CCP §2016.030. A physical or mental examination has both advantages and disadvantages for the parties who use it as a method of discovery.

NOTE: In most cases, it is the plaintiff who submits to an examination, but in certain circumstances an examination may be sought of a defendant. See §10.18.

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§10.3 1. Advantages and Disadvantages for Plaintiff

Additional information. From the plaintiff's point of view, the advantages of a mental or physical examination include verification of the plaintiff's injuries by the defendant's expert, discovery of the defense expert's name, and receipt of the expert's report and conclusions.

Basis for cross-examining expert. If the report contains even minor errors or omissions, it can be the basis of effective cross-examination of the expert. On experts reports, see §§10.55-10.64.

Minimizing injury and possible impeachment. There are several disadvantages for the plaintiff. A defense expert's testimony may dispute or minimize a legitimate injury. The plaintiff may make misstatements during the examination about prior or current conditions or symptoms that might lead to impeachment at trial. A plaintiff may identify new or different symptoms that are inconsistent with the treating doctor's diagnosis.

To minimize these dangers, plaintiff's counsel should schedule an appointment with the client to prepare the client for the examination. See §10.51.

Considering whether to demand report of exam. The examining expert must prepare a report and provide it to the plaintiff. See §10.61. By demanding and receiving the examiner's report, however, the party who submitted to or produced another for the examination waives any privilege and protection for work product under CCP §§2018.010-2018.080 for any other reports or expert testimony about the same physical or mental condition. CCP §2032.630. See §§10.58-10.60.

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§10.4 2. Advantages and Disadvantages for Defendant

Additional information. The advantages of a mental or physical examination for defendant include the opportunity to select a physician to examine the plaintiff and evaluate claimed injuries, as well as to obtain information about relevant prior and subsequent injuries. The defendant also obtains potential access to written medical reports about the plaintiff that would otherwise be protected as work product (see §§10.58-10.60).

Improved credibility of defense expert. An examination can improve the credibility of the defense medical expert, whose opinion will be better received if he or she has actually examined the plaintiff.

High cost. Among the disadvantages for the defendant is the high cost of medical exams and reports, which may not be justified in a minor case. At trial, the defendant can often effectively counter the plaintiff's experts by simply offering testimony of the defendant's medical experts who reviewed the plaintiff's medical records and through cross-examination of the plaintiff's expert.

PRACTICE TIP: Defense counsel will typically conduct medical examinations of a plaintiff to obtain an opinion favorable to the defendant's case. These examinations, however, may not be worth the time and expense because they allow the plaintiff to argue that the defense bought a favorable medical opinion by conducting its own examination.

Disclosure of information. Other disadvantages include the potential damage to the defendant's case if the examining physician discovers more injuries than the plaintiff's own physician discovers. The defendant's work product protection under CCP §§2018.010-2018.080 is also considered to be waived for the physician's writings and reports and the taking of the physician's testimony. CCP §2032.610(c). On work product protection, see §§3.52-3.68. If the plaintiff requests, the defendant must turn over the examiner's medical report, disclosing opinions that may reveal defense strategy or arguments. See CCP §2032.610.

PRACTICE TIP: Defense counsel should consider the strategy of using the plaintiff's own physician to establish limitations on injuries or damages rather than requesting an examination under CCP §§2032.010-2032.650. Counsel should conduct depositions of the plaintiff's treating physicians before deciding whether to notice a medical examination.

Timing. Because only one examination is permitted, if the examination is performed too late or too early in the litigation, it may not be possible to properly evaluate the plaintiff's condition. An examination too early in the litigation may put the examining physician at a disadvantage at trial because the examining physician's conclusions will not reflect the patient's current medical condition. See §10.32.

PRACTICE TIP: A late examination may be useful in evaluating symptoms for prognosis, but less useful for determining the causes of the injury or evaluating alternative causation. The parties can stipulate to more than one examination.

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B. Scope and Limits of Examination

§10.5 1. Scope of Examination Determined by Condition in Controversy

A party's right to a physical or mental examination is determined by the condition in controversy. Thus, for example, a general physical examination is permissible when the complaint alleges injury to the entire body. See *Bittle v Superior Court* (1976) 55 CA3d 489, 495, 127 CR 574. When the facts indicate that a party's vision is questionable and at issue, an eye examination is in order. *Harabedian v Superior Court* (1961) 195 CA2d 26, 31, 15 CR 420. A claim of psychiatric injury may subject a plaintiff to a mental examination, although the court may limit the scope of the exam. *Vinson v Superior Court* (1987) 43 C3d 833, 239 CR 292. On how a condition is placed in controversy, see §§10.7-10.11.

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§10.6 a. Definition of "In Controversy"

An examination under CCP §§2032.010-2032.650 is limited to the person's physical or mental condition that is in controversy. CCP §2032.020(a). See, *e.g., Schlagenhauf v Holder* (1964) 379 US 104, 118, 13 L Ed 2d 152, 164, 85 S Ct 234 (Supreme Court construed identical provision in Fed R Civ P 35 to require moving party to make affirmative showing that each condition for which examination is sought is "really and genuinely in controversy").

Whether a person's mental or physical condition is in controversy depends on the individual circumstances of the case. A physical examination may be obtained, *e.g.,* if the complaint alleges physical injury or if such injury is revealed and placed into controversy during discovery. On demand for physical examination, see §§10.31-10.39. In personal injury cases, a mental examination may be obtained if the plaintiff claims a mental injury beyond that normally resulting from physical harm, although a claim of pain and suffering ordinarily does not open the door to discovery of plaintiff's mental condition. See CCP §2032.320(b)-(c). On the other hand, if the suit is based entirely on emotional distress or the plaintiff alleges severe emotional distress beyond the usual pain and suffering attendant on an injury, the defendant may be entitled to discovery of the plaintiff's mental condition and a mental examination. See *Acuna v Regents of Univ. of Cal.* (1997) 56 CA4th 639, 653, 65 CR2d 388 (order for mental exam proper because damages for ongoing emotional distress sought).

EXAMPLE: If plaintiff suffers a neck injury in a rear-end collision and claims that a phobia precludes him or her from driving, with resultant loss of earnings, the phobia is not the kind of damage that would ordinarily be expected from this physical injury. Thus, discovery of psychiatric records and a mental examination would be appropriate. See *Vinson v Superior Court* (1987) 43 C3d 833, 839, 239 CR 292 (for purposes of former CCP §2032(a) (now CCP §2032.020(a)), a matter is "in controversy" if plaintiff alleges continuing mental, emotional, or physical injury). See also *Roberts v Superior Court* (1973) 9 C3d 330, 337, 107 CR 309, for discussion of when plaintiff's mental condition is placed in controversy.

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§10.7 b. How Condition Is Placed in Controversy

The party seeking the examination has the burden of proving that the examinee's condition is in controversy. A condition may be placed in controversy by the nature of the case, the pleadings, or relevant facts as shown by discovery responses or deposition testimony. See §§10.8-10.9.

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§10.8 (1) Using Pleadings

Complaint. A party places a condition in controversy by alleging the condition in a pleading. For example, a plaintiff in a personal injury action voluntarily places his or her physical and mental condition in controversy by pleading physical and emotional injury. See *Schlagenhauf v Holder* (1964) 379 US 104, 118, 13 L Ed 2d 152, 164, 85 S Ct 234 (applying identical federal provision).

The specific allegations of the pleadings may thus limit the extent to which the plaintiff's condition is in controversy. For example, a plaintiff's "mental condition" is not in controversy when it is alleged that mental distress occurred in the past and is not ongoing. See, *e.g., Doyle v Superior Court* (1996) 50 CA4th 1878, 1885, 58 CR2d 476 (mental examination of plaintiff in sexual harassment case not justified under former CCP §2032(a) (now CCP §§2032.010-2032.650) because plaintiff did not allege ongoing emotional distress, only that she suffered past emotional distress); *Coca-Cola Bottling Co. v Negron Torres* (1st Cir 1958) 255 F2d 149, 153 (motion for physical examination of plaintiff properly denied in case in which plaintiff claimed damages only for past physical injury and "emotional disturbance").

Affirmative defense. When a defendant alleges his or her condition as an affirmative defense, the defendant generally has placed that condition in controversy. In most cases, however, a defendant does not place his or her condition in controversy in the pleadings, and the issue must be determined by facts outside the pleadings.

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§10.9 (2) Using Specific Facts

In cases in which a condition is not placed in controversy by the party's own pleadings, specific facts establishing the controversy must be shown—usually through discovery devices such as interrogatories or depositions. The defendant's physical or mental condition may be placed in controversy, but facts supporting those allegations must be specifically shown. Conclusory allegations by another party are insufficient.

In the following cases, specific facts placed the condition in controversy:

- *Whitfield v Superior Court* (1966) 246 CA2d 81, 83, 54 CR 505 (plaintiff who alleged only physical injury placed her mental condition in controversy by relying on evidence of trauma associated with physical injuries);
- *Harabedian v Superior Court* (1961) 195 CA2d 26, 31, 15 CR 420 (defendant placed his own physical condition in controversy by admitting his vision problem in deposition; facts outside the pleadings can be used to draw party's condition into controversy).

In the following cases, specific facts did not place the condition in controversy:

- *Schlagenhauf v Holder* (1964) 379 US 104, 120, 13 L Ed 2d 152, 164, 85 S Ct 234 (Supreme Court refused to permit examination of defendant bus driver alleged, in another party's pleading, to be "not mentally or physically capable" of driving bus; facts supporting those allegations must be specifically shown).
- *Reuter v Superior Court* (1979) 93 CA3d 332, 340, 155 CR 525 (court defined some limits for determining when a person's condition may be drawn into controversy; although a mother who sued on behalf of her child for wrongful death of her husband was party to litigation, she did not put her own mental condition in controversy by allegations that her son suffered mental pain and suffering).

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§10.10 c. Sexual Harassment Cases in Which Condition May Be in Controversy

A sexual harassment plaintiff who makes specific allegations of mental and emotional distress places her or his mental state "in controversy," as that phrase is used in CCP §2032.020(a). *Vinson v Superior Court* (1987) 43 C3d 833, 839, 239 CR 292 (former CCP §2032(a)). See also *Doyle v Superior Court* (1996) 50 CA4th 1878, 58 CR2d 476 (plaintiff's mental condition not "in controversy" because she alleged past, but not continuing, emotional distress).

A sexual harassment claim that does not allege emotional or mental damages and seeks compensation only for the plaintiff's having to endure an oppressive work environment or wages lost following dismissal does not, however, normally bring the plaintiff's mental state into controversy. Even when a general allegation of severe emotional distress places the plaintiff's mental state in controversy, the opposing party may not require psychiatric testing or examination on the basis of speculation that something relevant might be found. Psychiatric examination is justified by more specific complaints, such as diminished self-esteem, reduced motivation, sleeplessness, loss of appetite, fear, lessened ability to help others, loss of social contacts, anxiety, mental anguish, and loss of reputation. See *Vinson v Superior Court* (1987) 43 C3d 833, 840, 239 CR 292 (good cause shown because plaintiff asserted that she continued to suffer a variety of particular emotional ailments). Such allegations constitute a showing of good cause necessary to support an order for mental examination under CCP §§2032.310-2032.320. See §§10.43-10.49.

PRACTICE TIP: If there is any question about the extent of the plaintiff's claims, defense counsel should consider requesting a specific stipulation under CCP §2032.320(b)-(c) that waives the plaintiff's claims of psychological injury above those generally associated with the physical injury claims and states that no expert testimony regarding any mental and emotional distress will be presented at trial in support of the claim for damages. This stipulation will help eliminate any miscommunication about what will be claimed at trial.

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§10.11 d. Cases, Other Than Personal Injury, in Which Condition May Be in Controversy

Most of the cases construing the application of former CCP §2032 (now CCP §§2032.010-2032.650) involve claims for personal injury. It is not clear in what other types of cases the courts will regard the condition of a person as in controversy:

- **Father's mental condition in custody case.** In *Simek v Superior Court* (1981) 117 CA3d 169, 177, 172 CR 564, the court suggested, but did not hold, that a father's mental condition could be in controversy in a proceeding to obtain visitation with his minor children.
- **Child's mental condition in custody case.** In *Marriage of Halpern* (1982) 133 CA3d 297, 316, 184 CR 740, the court considered, but denied on the grounds of burden and probable irrelevance, a motion to submit a child less than age two to a mental examination to determine the effect of separation from an alleged de facto father.
- **Parent in juvenile dependency hearing.** In *Laurie S. v Superior Court* (1994) 26 CA4th 195, 31 CR2d 506, the court held that a parent in a juvenile dependency hearing does not put his or her mental state into issue merely by denying an allegation that he or she is mentally ill.

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2. Limitations on Scope of Examination

§10.12 a. Painful, Protracted, or Intrusive Tests

Under the demand procedure in personal injury actions (see §§10.31-10.39), a defendant is entitled only to a physical examination of the plaintiff, not a mental examination. CCP §2032.220(a). Painful, protracted, or intrusive diagnostic tests or procedures are not allowed. CCP §2032.220(a)(1). A court might authorize such tests, however, if (1) they are requested under a motion and (2) good cause is shown. CCP §§2032.310-2032.320. See §§10.43-10.49. An example of such an examination is found in *Abex Corp. v Superior Court* (1989) 209 CA3d 755, 257 CR 498 (asbestos personal injury case in which appellate court ordered biopsy of lesions on plaintiff's hands to determine whether they were caused by asbestos exposure). Such a motion should describe the requested diagnostic tests in detail. Although not required, the motion should also include a physician's declaration explaining the necessity for such intrusive procedures, including the unavailability of alternatives, and the degree of pain or danger involved.

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§10.13 b. X-rays

An examinee can avoid submitting to X-rays if the examinee gives the examiner access to existing X-rays of the same part of the examinee's body. If this occurs, no additional X-rays of that area may be taken without the examinee's consent or a court order for good cause shown. CCP §2032.520. The fact that the proposed examination entails some risk does not, alone, limit its scope. An examinee will be expected to undergo the risk entailed by normal procedures, regardless of the individual's fear of the procedure. See *Ghanooni v Super Shuttle* (1993) 20 CA4th 256, 260, 24 CR2d 501; *Bittle v Superior Court* (1976) 55 CA3d 489, 496, 127 CR 574 (examinee's fear of exposure to X-rays is insufficient objection).

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.14 c. Inquiry Into Prior Sexual Conduct in Actions Alleging Sexual Harassment, Assault, or Battery

§10.14 c. Inquiry Into Prior Sexual Conduct in Actions Alleging Sexual Harassment, Assault, or Battery

When setting a mental examination in sexual harassment, assault, or battery cases, counsel should consider (1) Evid C §1106, which limits the extent of inquiry into a plaintiff's prior sexual conduct in such cases, and (2) whether the examining psychiatrist or psychologist will be allowed to inquire into the plaintiff's prior sexual conduct. Before prior sexual conduct can be the subject matter of inquiry, evidence will probably have to be introduced showing that the plaintiff is suffering from some type of sexual dysfunction. See *Vinson v Superior Court* (1987) 43 C3d 833, 842, 239 CR 292 (in sexual harassment action alleging infliction of severe emotional distress, court prohibited probing into plaintiff's sexual history and practices during mental examination). See also *Barrenda L. v Superior Court* (1998) 65 CA4th 794, 803, 76 CR2d 727 (in case alleging sexual abuse, good cause not shown when party seeking exam did not offer declaration of mental health practitioner "to establish relevance of other sexual conduct, whether before the incidents alleged or after").

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3. Multiple Examinations

§10.15 a. Examination by Demand Limited to One Physical Examination Without Court Order

One physical exam as of right. Under the self-executing demand procedure in personal injury actions, each defendant is allowed only one physical examination of the plaintiff. CCP §2032.220(a). See §§10.31-10.39. Additional examinations require a court order under CCP §§2032.310-2032.320.

Even if the plaintiff has suffered separate injuries, the defendant is not entitled to more than one examination as a matter of right under the demand procedure. For example, a plaintiff with both eye and head injuries is not required to submit to separate examinations by an ophthalmologist and a neurologist without a court order. In such a situation, defense counsel should try to obtain a stipulation for a second examination from opposing counsel or request a court order. In practice, most courts will permit examinations by different specialists if injuries are separate, distinct, nonoverlapping, and fall within the domain of expertise of different specialties. *Shapira v Superior Court* (1990) 224 CA3d 1249, 274 CR 516.

Multiple defendant case. In a multiple defendant case, plaintiff's counsel should ask defense counsel to stipulate to the use of one physician by all defendants to protect the plaintiff from multiple physical examinations. A plaintiff should not be required to undergo multiple examinations by different physicians of the same specialty. On motions for protective orders generally, see §§15.59-15.84.

If multiple defendants seek separate physical examinations of the plaintiff, defense counsel should meet and discuss the following issues that may divide defendants:

- Each defendant may want a physician of his or her choice to examine the plaintiff;
- Each defendant may want a specific expert to testify at trial;
- Codefendants may not agree on one physician;
- Multiple physicians for the defense may open the door to disagreement among the defendants; and
- A codefendant may settle before trial, leaving the remaining defendants without an expert.

If a codefendant settles, the examining physician can be called by any party once the plaintiff has been examined. In this way, no party will be left without an expert merely because the party hiring the examiner has settled before trial. A persuasive argument can be made that because each defendant does not know whether his or her codefendant will be at trial, each defendant should be allowed to select its own expert witness. In cases with multiple defendants, co-defendants should try to jointly select their examining physician, however. As a practical matter, the trial court is likely to grant a protective order limiting the number of experts that can be called in the same field of expertise. See CCP §2034.250(5)-(6). Moreover, if defendants wait to jointly designate an expert until after the exam takes place, the plaintiff may choose to call any of the nondesignated examiners as a trial witness. If the witness is favorable to the plaintiff, it may appear that the defendants tried to hide opinions unfavorable to them, while if the witness is unfavorable to the plaintiff, it may appear that all the defense experts were paid to form opinions favorable to the defense.

PRACTICE TIP: When more than one examination is sought of the plaintiff, either by stipulation or by court order, defense counsel should offer to coordinate the examinations so that they occur at the same location with both physicians present. This will reduce the inconvenience to the plaintiff and make it more likely that the plaintiff will agree or that the court will order the requested examination.

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§10.16 b. Additional Court-Ordered Mental Examination If Good Cause Shown

Unlike a physical examination, which can be obtained by proper demand in a personal injury case, a mental examination of a plaintiff may be obtained only on motion and a showing of good cause. CCP §§2032.310-2032.320. More than one mental examination may be ordered under CCP §§2032.310-2032.320, as long as a showing of good cause is made. *Shapira v Superior Court* (1990) 224 CA3d 1249, 274 CR 516 (defendant permitted to compel plaintiff's mental examination by both psychologist and psychiatrist when defendant was able to show good cause for more than one examination).

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.17 C. Who Can Be Examined

§10.17 C. Who Can Be Examined

A physical examination may be had of the following persons (CCP §2032.020(a)):

- A party, including both the plaintiff and the defendant (see §10.18);
- An agent of a party (see §10.19); and
- A natural person in the custody or under the legal control of a party (see §10.20).

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§10.18 1. Party

A plaintiff who voluntarily places his or her condition in controversy may be examined. This most often occurs in a personal injury action in which the plaintiff claims physical or mental injuries. See, *e.g.,* CCP §2032.220, which authorizes a self-executing demand for physical examination of a personal injury plaintiff. See §§10.31-10.34. The statutory authority of CCP §§2032.010-2032.650 goes beyond personal injury actions, however, and authorizes an examination of any type of plaintiff whose medical condition is in controversy (*e.g.,* a mother may be directed to undergo a genetic test in a paternity case). CCP §2032.020(a). See also Fam C §7551, discussed in §§10.73-10.77.

A defendant may also be required to submit to an examination if the defendant's condition is in controversy and good cause is shown for the examination. CCP §§2032.020(a), 2032.310-2032.320; *Schlagenhauf v Holder* (1964) 379 US 104, 113, 13 L Ed 2d 152, 160, 85 S Ct 234 (compelling defendant to undergo otherwise proper examination does not violate United States Constitution); *Harabedian v Superior Court* (1961) 195 CA2d 26, 31, 15 CR 420 (defendant driver ordered to undergo eye examination). On genetic tests to determine paternity, see Fam C §§7550-7558, discussed in §§10.73-10.77.

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§10.19 2. Agent of Party

An agent of a party may be examined under CCP §2032.020(a). For example, in an action against a defendant corporation for its employee's alleged negligence, a court could order the corporation to produce that employee for a compulsory medical examination if the employee's mental or physical condition is the subject of controversy in the case, even if the employee is not a party to the action. The court may not, however, order a nonparty witness who is neither an agent nor in the custody or control of a party to submit to an examination.

In a medical malpractice action alleging birth injuries and raising bona fide issues concerning whether the genetic condition of a child and his mother caused or contributed to the child's injuries, the trial court has discretion to order a blood test of the mother under CCP §2032.020(a). *Cruz v Superior Court* (2004) 121 CA4th 646, 651, 17 CR3d 368 (discussing former CCP §2032(a), now CCP §2032.020(a)). Although "[p]arents make decisions on behalf of their minor children which bind the children and, by virtue of their exercise of parental rights, they act as if they were their children's agents," the *Cruz* court stated explicitly that it was not holding that a parent is always to be treated as a child's agent for discovery purposes. 121 CA4th at 652.

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§10.20 3. Any Person Under Custody or Control of Party

Any person in the custody or under the legal control of a party can be examined under CCP §2032.020(a). Such an order might raise constitutional issues. See *Schlagenhauf v Holder* (1964) 379 US 104, 115 n12, 13 L Ed 2d 152, 162 n12, 85 S Ct 234. In *Holm v Superior Court* (1986) 187 CA3d 1241, 1248, 232 CR 432, the court held that former CCP §2032 (now CCP §§2032.010-2032.650) applied to living persons and that the court had no authority under the discovery statutes to order exhumation of a body for testing.

PRACTICE TIP: When an examination of an agent or person under the custody or control of a party is desired, counsel should consider naming as a party the person for whom an examination is desired.

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D. Who Can Be Examiner

1. Qualifications of Examiner

§10.21 a. For Physical Examination

A physical examination must be conducted by a licensed physician or "other appropriate *licensed* health care practitioner" (emphasis added). CCP §2032.020(b). This statute authorizes examinations by dentists, physical therapists, chiropractors, and other similar practitioners who are required to hold a license. A vocational rehabilitation counselor is not a licensed health care practitioner under former CCP §2032(b) (now CCP §2032.020(b)) and cannot conduct a court-ordered physical examination. See *Browne v Superior Court* (1979) 98 CA3d 610, 159 CR 669. See also Fed R Civ P 35, discussed in §10.78.

NOTE: Genetic tests for determining someone's blood type, generally in paternity cases, must be "performed by a laboratory approved by any accreditation body that has been approved by the United States Secretary of Health and Human Services." Fam C §7552. See §§10.73-10.77.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.22 b. For Mental Examination

§10.22 b. For Mental Examination

A party must bring a motion, on a showing of good cause, to obtain a mental examination of another party. CCP §§2032.310-2032.320. Mental examinations may be conducted only by a licensed physician or by a licensed clinical psychologist who has a doctoral degree in psychology and at least 5 years of postgraduate experience in the diagnosis of emotional and mental disorders. CCP §2032.020(c).

PRACTICE TIP: When selecting a psychiatrist or psychologist for a mental examination, counsel should consider the examiner's specific training and experience. Many mental health therapists specialize in particular mental conditions and disorders. Counsel should inquire about the practitioner's specialty in order to select the most appropriate expert for the case. At a minimum, the examiner should be trained and familiar with use of the current edition of Diagnostic and Statistical Manual of the American Psychiatric Association and have sufficient training and experience in the administration, scoring, and interpretation of standard psychological tests.

In head-injury cases, counsel should consider whether a psychiatrist should work in conjunction with a psychologist or neuropsychologist for purposes of administering psychological tests to assess the effects of head injuries or psychological damages. On multiple exams, see §§10.15-10.16. In seeking a court order for a psychiatrist and a psychologist to interview and test an examinee, counsel should obtain a declaration from the psychiatrist and psychologist stating that it is common practice for a psychiatrist to use the services of a psychologist or neuropsychologist in the evaluation of a patient.

PRACTICE TIP: Counsel should provide the examiner with the examinee's complete medical records as well as other discoverable materials relevant to the issue of damages before the examination. Once materials have been given to the examiner, they are subject to discovery. Counsel should be mindful about providing any information such as statements, investigation reports, or other materials that counsel would not want disclosed in discovery. It may be helpful to meet with the examiner before the examination to discuss the case. The examiner may discover something in records, reports, or diagnostic films that would cause defense counsel to refrain from an examination.

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2. Choice of Examiner

§10.23 a. Selection of Examiner by Party Requesting Examination

The party requesting the examination ordinarily chooses the person to conduct the examination. If the request for a medical examination is made under a court order, the order must specify "the identity and the specialty, if any" of the examiner. CCP §2032.310(b). See form of order in §10.87. The same requirement exists when a request is made in a demand for a physical examination of a personal injury plaintiff under CCP §2032.220(c). See form of demand in §10.79.

The trial court may exercise its discretion to reject the requesting party's choice if good cause exists to do so. *Edwards v Superior Court* (1976) 16 C3d 905, 912, 130 CR 14. Most courts, however, will ordinarily appoint the examiner requested by the moving party.

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§10.24 b. Objection to Selected Examiner

A person opposing the moving party's choice of an examiner may object to the prospective examiner's qualifications in the following manner:

In response to demand for physical examination. On a demand for a physical examination under CCP §2032.220, the plaintiff must set forth his or her objection to the examiner in the response to the demand. For form of response, see §10.80. The defendant must then bring a motion to compel if, after complying with the meet-and-confer requirement, no agreement can be reached.

In opposition to motion requesting physical or mental examination. In a CCP §§2032.310-2032.320 motion for a physical or mental examination, the objection must be stated in the opposition to the motion requesting a physical or mental examination. See §10.48.

Considerations in ruling on motion. In ruling on the objection to the choice of examiner, the trial court may properly ignore the personal preference of the person to be examined. See *Edwards v Superior Court* (1976) 16 C3d 905, 912, 130 CR 14. The examinee's dislike and fear of a particular physician will probably not be enough to prevent the examinee's appointment for a physical examination. *Edwards v Superior Court, supra*.

PRACTICE TIP: Defense counsel requesting the examination should check the qualifications of any examiner, including whether that examiner is board-certified and whether the board certification is awarded by an examining board after testing or simply as a benefit of membership to a particular organization. Board certification is probably preferred in most situations.

The examiner is retained to represent the interests of the retaining party and need not be unbiased in the case. The examiner cannot be disqualified as an examiner simply because he or she is defense-minded or has a reputation for always writing opinions favoring the defense. Such partiality affects only the weight and credibility of the examiner's testimony during deposition or at trial. *Mercury Cas. Co. v Superior Court* (1986) 179 CA3d 1027, 1034, 225 CR 100.

PRACTICE TIP: Some attorneys believe that defense counsel should avoid using physicians who have been retained repeatedly and whose reports consistently support a defense position, because the examiner's objectivity will be questioned, thereby reducing the effectiveness of an otherwise valid examination. This is especially true of defense examiners who are no longer in private practice and derive their income almost exclusively from defense medical examinations.

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E. Who Can Observe and Record Examination

1. Physical Examinations

§10.25 a. Observation by Examinee's Attorney or Attorney's Representative

The examinee's attorney may attend and observe the physical examination, but must not participate in or disrupt it. CCP §2032.510(a)-(b). The attorney may also designate a third person to act as the observer. If an attorney's representative serves as the observer under CCP §2032.510, the representative must be authorized to act as an observer by a writing, signed by the attorney, that identifies the representative. CCP §2032.510(c). An attorney should not serve as an observer because the observer may need to testify at trial. On the undesirability of attorneys as witnesses, see §§3.40, 3.43, 5.38.

PRACTICE TIP: Some physicians are uncomfortable with the presence of an observer during an exam. Plaintiff's counsel should have a signed authorization available for the examiner in case the examiner requires it before permitting the representative to observe the examination. In the alternative, plaintiff's counsel can forward the authorization to opposing counsel with a request that it be provided to the examiner before the exam. Defense counsel should ask plaintiff's counsel about any plan to have an observer present (or to record the exam; see §10.26) and discuss those plans in advance with the examining physician.

The observer may make note of pertinent facts about the examination, such as length of the exam, how much time was spent on the medical history, and how much time on the physical exam, a description of the exam, what tests were performed, and the attitude of the doctor. The observer's notes are protected as attorney work product. On attorney work product, see §§3.52-3.68. On preparing the examinee for the exam, see §10.51.

PRACTICE TIP: The examinee's attorney may want to consider choosing a nurse or nurse practitioner to act as observer during the exam, as a nurse or nurse practitioner will be able to observe and confirm that proper medical procedure is followed.

The observer may suspend an examination so that that the party being examined or producing the examinee can seek a protective order if the observer determines that the examiner is abusive to the examinee or is engaging in unauthorized diagnostic tests or procedures. CCP §2032.510(d). See also *Sharff v Superior Court* (1955) 44 C2d 508, 510, 282 P2d 896 (doctor should not be permitted to make inquiries into matters not legitimately related to scope of exam).

Similarly, if the examiner believes that the observer is attempting to participate or is becoming disruptive during the examination, the examiner may suspend the examination to allow the party who sought the examination to move for a protective order. CCP §2032.510(e).

PRACTICE TIP: The observer should avoid any unwarranted interference with the exam; opposing counsel will highlight any such interference at trial. Defense counsel should be readily accessible for the examining physician to call during the examination in case of disruption or irregularities. This may help avoid having to reschedule the exam for another time.

A party who unsuccessfully makes or opposes a motion for a protective order must pay a monetary sanction to the prevailing party, unless the court finds that the party subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust. CCP §2032.510(f). On monetary sanctions, see §§10.68-10.71. On procedures for protective orders generally, see §§15.59-15.84.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.26 b. Audio or Stenographic Recording Permitted; Video Prohibited

§10.26 b. Audio or Stenographic Recording Permitted; Video Prohibited

During a physical examination, the examinee's attorney or designated representative may record stenographically or by audio technology the words spoken to or by the examinee during the physical examination. CCP §2032.510(a). Defense counsel is not authorized to record a physical examination. (In the case of a mental examination, both examiner and examinee have the right to record the examination by audio technology. CCP §2032.530(a). See §10.28.)

Video recording of medical examinations is not authorized, even if the video is requested by the plaintiff. CCP §2032.510(a). See *Ramirez v MacAdam* (1993) 13 CA4th 1638, 16 CR2d 911.

PRACTICE TIP: As noted in §10.25, some physicians are uncomfortable with the presence of observers or the recording of an exam. Defense counsel should request notice in writing from plaintiff's counsel concerning the specifics of what will be done to record the exam and should discuss the plans with the examining physician to avoid any surprises. After the exam, counsel should request a copy of any recording.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.27 c. Attendance of Certified Interpreter If Examinee Requires Language Assistance

§10.27 c. Attendance of Certified Interpreter If Examinee Requires Language Assistance

If the examinee does not proficiently speak or understand English, Evid C §755.5 requires an interpreter to be present to interpret the examination in a language that the person understands. The interpreter must be certified under Govt C §§11435.05-11435.65, and the fees for the interpreter must be paid by the party or insurance carrier requesting the medical examination. Govt C §11435.25(a). If a certified interpreter cannot be present at the medical examination, the physician provisionally may use another interpreter if that fact is noted in the record of the examination. Govt C §11435.55(b).

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2. Mental Examinations

§10.28 a. Observation Prohibited Except by Court Order

Courts have consistently refused to allow observers, including an attorney or attorney's representative, at mental examinations on the ground that the presence of third persons might impair the effectiveness of the examination. See *Edwards v Superior Court* (1976) 16 C3d 905, 909, 130 CR 14; *Golfland Entertainment Ctrs. v Superior Court* (2003) 108 CA4th 739, 746, 133 CR2d 828; *Board of Trustees v Superior Court* (1969) 274 CA2d 377, 79 CR 58; *Whitfield v Superior Court* (1966) 246 CA2d 81, 54 CR 505. See also *People v Burns* (2005) 128 CA4th 794, 804, 27 CR3d 352 (analogizing updated mental evaluation of allegedly sexually violent predator to mental exam proceedings under former CCP §2032 (now CCP §§2032.010-2032.650)). Trial courts retain the power, however, to permit the presence of counsel at a mental examination or to take other prophylactic measures when needed.

Motion to allow presence of plaintiff's counsel. A plaintiff's attorney who brings a motion to allow an attorney's attendance at a mental examination should obtain a declaration from the plaintiff's treating mental health professionals, showing how it will be in the plaintiff's best interests and how it will assist in an accurate and unbiased mental examination if the plaintiff has someone present observing the examination. If in attendance, the attorney would be able to protect the plaintiff from being "misquoted" and to ensure the defense medical practitioner's accuracy by audio-recording the examination.

Opposition to motion. Similarly, if the plaintiff brings a motion to attend the examination, defense counsel should obtain a declaration from the examining or testing practitioner, showing how the presence of a third party will hinder the examiner's ability to examine or test the examinee. The examiner's declaration should also state the nature and scope of the examination so that the plaintiff's counsel cannot claim that he or she does not know what will happen at the examination. This declaration should be broad enough that the examiner is not later precluded from relying on information obtained in the examination because the examination was not sufficiently described in the declaration.

On discovery motions, see chap 15.

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§10.29 b. Audio Recording Permitted; Video and Stenographic Recording Prohibited

Both the examiner *and* examinee may make an audio recording of the mental examination. Video recording is not permitted. See CCP §2032.530(a); *Vinson v Superior Court* (1987) 43 C3d 833, 846, 239 CR 292. Nor are court reporters allowed to be present at the mental examination of a party. See *Golfland Entertainment Ctrs. v Superior Court* (2003) 108 CA4th 739, 750, 133 CR2d 828. In *Golfland,* the court vacated an order permitting counsel and a court reporter to be present at the plaintiff's mental examination, limiting the record to the plaintiff's oral responses and preventing narrative responses, as an abuse of discretion. 108 CA4th at 745. The court ordered the doctor conducting the examination, however, not to ask questions about facts and circumstances of the accident to the extent the plaintiff had previously answered those questions and provided that information during his deposition or in his interview with another doctor. 108 CA4th at 746.

PRACTICE TIP: Opposing counsel should make a demand for a copy of any recording made at the mental examination.

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§10.30 III. PROCEDURES FOR OBTAINING PHYSICAL OR MENTAL EXAMINATION

There are three methods for obtaining a medical examination under CCP §§2032.010-2032.650:

- By a proper written demand for a physical examination served by a defendant (or cross-defendant) on the plaintiff (or cross-complainant) in a personal injury case. CCP §2032.220. See §§10.31-10.39.
- By a written stipulation of the parties. CCP §2016.030. See §§10.40-10.42.
- By court order under CCP §§2032.310-2032.320, on a showing of good cause, for any mental examination or for a physical examination not otherwise provided for under CCP §§2032.210-2032.650. See §§10.43-10.49.

NOTE: Physical and mental examinations are permitted in limited civil cases; they must comply with the notice and format requirements of CCP §§2032.010-2032.650. CCP §94(d). See chap 14.

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A. Demand for Physical Examination in Personal Injury Cases

§10.31 1. Who May Make Demand for Physical Examination

In a personal injury case, any defendant has the right to one physical examination of the plaintiff, without leave of court, by serving a written demand on the plaintiff under CCP §2032.220. The term "plaintiff" includes a cross-complainant, and the term "defendant" includes a cross-defendant. CCP §2032.210.

Because the statute provides that each defendant has a right to demand a physical examination, the plaintiff theoretically may be compelled to submit to as many examinations as there are defendants. In practice, however, defense counsel usually coordinate and agree on a single examination. If no agreement is reached, the plaintiff should seek a protective order to prevent the unfairness of multiple examinations. See §10.15.

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§10.32 2. When Demand for Physical Examination May Be Made

The demand for physical examination may be made any time after the defendant making the demand has been served or has appeared in the action. CCP §2032.220(b).

Strategically, however, defense counsel should subpoena medical records and ascertain through discovery whether the plaintiff is still in treatment or his or her condition is stable. If the demand is made too early in the proceedings, defense counsel may be faced with the need to request or move for a second examination, which may not be allowed. In any event, demand for an examination should be made at least 35 days before the discovery cutoff at the latest to allow the required 30 days' notice, plus 5 days for service by mail. CCP §§1013, 2032.220. Counsel should consider making the demand for examination earlier than 35 days before the discovery cutoff to allow time for resolution of any disputes that might arise. On timing considerations, see §§2.20-2.28.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.33 3. Contents of Demand for Physical Examination

§10.33 3. Contents of Demand for Physical Examination

The defendant's demand for physical examination in a personal injury case must specify the following:

- **Date and time of examination.** The examination must take place at least 30 days after service of the demand (CCP §2032.220(d)), plus 5 days for service by mail (CCP §1013(a)). On extensions of time for different methods of service, see §2.22. The time may be shortened by court order.
- **Place of examination.** The examination must be conducted within 75 miles of the plaintiff's residence. CCP §2032.220(a)(2). (If the examination is by court order, the plaintiff may be compelled to travel more than 75 miles for examination. CCP §2032.320(e). See §10.46.)
- **Nature and scope of examination.** The demand must also include the manner, conditions, scope, and nature of the examination. CCP §2032.220(c). See §§10.5-10.16.
- **Identity and specialty of examiner.** The demand must include the identity and specialty of the examiner who will perform the examination. CCP §2032.220(c). See §10.21.

For a form of demand for physical examination, see §10.79.

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§10.34 4. Service of Demand for Physical Examination

A copy of the demand for physical examination must be served on the plaintiff and all other parties who have appeared in the action. CCP §2032.220(e). The original is not filed with the court. CCP §2032.260(a). The demanding party retains the original demand and receives the original response and must keep the originals until 6 months after final disposition of the case, unless the court on motion and for good cause orders that the originals be kept longer. CCP §2032.260(b).

Court rules for reducing trial court delay may require an early decision on whether the defense examination is necessary. In addition, if a case is ordered to judicial arbitration, except for expert witness discovery, discovery must be completed no later than 15 days before the arbitration date (Cal Rules of Ct 3.822), and no discovery is permitted after an arbitration award is issued unless the court grants leave or on a showing of good cause. CCP §1141.24. On judicial arbitration, see A Litigator's Guide to Effective Use of ADR in California, chap 11 (Cal CEB 2005). Thus, counsel should consider stipulating with the plaintiff that discovery will remain open so that an examination can be held after the judicial arbitration. This stipulation should be made in writing, and sufficient time should be allowed before the discovery cutoff to resolve objections to the examination or problems with scheduling. In addition, counsel should determine whether the examiner can generate a report within the time constraints of CCP §2032.610(b) (30 days after service of demand or within 15 days of trial, whichever is earlier). On discovery timing issues, see §§2.20-2.28.

PRACTICE TIP: If the examiner has a cancellation or no-show fee, defense counsel should notify the plaintiff's counsel, when the demand is made, of the policy and that the plaintiff will be responsible for the cost of cancellation (*e.g.,* if less than 48 hours' notification) or no-show. Plaintiff's counsel should immediately notify the plaintiff of the examination date and time, advise the client of any cancellation fee, and ask the client to contact counsel if the appointment needs to be rescheduled. Counsel should schedule an appointment with the client to prepare for the examination. Ideally, the policy regarding a cancellation fee will be set forth in the demand. Defense counsel should make sure that the examiner's cancellation policy allows for refunds at least through the date that plaintiff must respond to the demand under CCP §2032.230.

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5. Plaintiff's Response to Demand for Physical Examination

§10.35 a. Time to Respond; Waiver

The plaintiff must serve a written response within 20 days after service of the demand for physical examination in a personal injury action (this time is extended for service by mail, overnight delivery, or fax (CCP §1013)). CCP §2032.230. See §2.22. The original response must be served on the defendant who made the demand, and copies are served on other parties who have appeared. The demand and response are not filed with the court. The defendant must maintain the original demand and response until 6 months after final disposition of the action, unless on a motion and after a showing of good cause, the court orders the original kept longer. CCP §2032.260(b).

If the plaintiff fails to file a timely response, the plaintiff waives any objection to the demand. CCP §2032.240(a). The court may, however, relieve the plaintiff from waiver if it determines under motion that (CCP §2032.240(a)):

- The plaintiff subsequently served a response that is in substantial compliance with CCP §2032.230; and
- The plaintiff's failure to respond was because of mistake, inadvertence, or excusable neglect.

Because CCP §2032.240(a) provides specific conditions for relief from waiver, relief cannot be obtained under CCP §473.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.36 b. Plaintiff's Other Options

§10.36 b. Plaintiff's Other Options

The plaintiff has three options in responding to the demand for physical examination in a personal injury case (CCP §2032.230(a)):

- Agree to comply with the demand;
- Agree to comply, subject to modifications specified by the plaintiff;
- Refuse to comply and state the reasons.

PRACTICE TIP: Common objections to a demand for a physical examination include that it is set for an inconvenient date; that the demand does not specify the type of exam; or that the plaintiff's medical history has already been provided through documents and deposition testimony.

For form of response to demand for physical examination, see §10.79.

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6. Defendant's Motion to Compel Response to Demand for Physical Examination

§10.37 a. Procedures; Declaration

If the plaintiff fails to respond to the demand for physical examination in a personal injury case, the defendant may file a motion for an order compelling a response and compliance with the demand. CCP §2032.240(b). A plaintiff who fails to file a timely response will be prevented from raising objections to the demand unless the plaintiff first makes a motion for relief from waiver. See §10.35.

If the plaintiff responds to the demand, but the defendant believes that the plaintiff's suggested modification or refusal to submit to the physical examination is unwarranted, the defendant may move for an order compelling compliance with the demand. CCP §2032.250(a). For form of motion to compel compliance with demand for physical examination, see §10.81. The motion must include a meet-and-confer declaration stating facts showing a reasonable, good faith attempt to resolve each issue presented by the motion. CCP §2032.250(a). For form of declaration supporting motion to compel compliance, see §10.82. The motion must include a separate statement as required by Cal Rules of Ct 3.1020 (see §10.38). On meet-and-confer requirement, see §§15.3, 15.42.

PRACTICE TIP: If the ground for the plaintiff's objection is that the proposed examination includes painful, protracted, or intrusive diagnostic procedures, the defendant's motion should include the examiner's declaration stating in detail the scope of and need for the diagnostic procedures. See §10.12.

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§10.38 b. Separate Statement

A separate statement setting forth all the information the court needs to understand the issues, with no material incorporated by reference, must accompany a motion to compel a medical examination over objection. Cal Rules of Ct 3.1020(a)(6).

A separate statement is not required if no response or objection to the discovery demand was provided. Cal Rules of Ct 3.1020(b).

The separate statement must set forth (1) the text of the defendant's demand for the physical examination, (2) the text of the plaintiff's response and objection, and (3) a statement of the factual and legal reasons for compelling the examination over objection. Cal Rules of Ct 3.1020(c). In addition, any information including definitions, instructions, or other discovery requests or documents that the defendant is relying on, or that is necessary for the court to understand all the issues in dispute, must be fully set forth or summarized in the separate statement. Cal Rules of Ct 3.1020(c). Incorporation by reference of material into the separate statement is prohibited. Cal Rules of Ct 3.1020(c). For form of motion to compel compliance with demand for physical examination, see §10.81; for declaration supporting the motion, see §10.82.

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§10.39 c. Sanctions

The court must impose monetary sanctions against a party who unsuccessfully makes or opposes a motion to compel, unless the party acted with substantial justification or the sanctions would be unjust. CCP §2032.250(b).

Thereafter, if the plaintiff fails to comply with a court-ordered examination, the court may make all orders "that are just" (CCP §2032.240(d)), including one or more of the following:

- Issue sanctions;
- Evidence sanctions;
- A terminating sanction under CCP §2023.030(d); or
- A monetary sanction under CCP §2023.030(a).

On sanctions, see §§15.85-15.116.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.40 B. Stipulation for Physical or Mental Examination; Writing Required

§10.40 B. Stipulation for Physical or Mental Examination; Writing Required

Instead of making a demand or seeking a court order, the parties may stipulate in writing under CCP §2016.030 for a physical or mental examination on whatever terms and conditions to which they agree. Under CCP §2032.320(b)-(c), a party moving for an order for examination must show a reasonable, good faith effort to arrange the examination by agreement. It is common for medical examinations to be arranged by stipulation between counsel.

PRACTICE TIP: Many judicial officers apply CCP §2032.320(b)-(c) to all cases involving claims of emotional distress and do not limit it solely to the traditional personal injury case. The provision is designed to avoid subjecting plaintiffs to intrusive examinations when the claim will be supported by lay testimony only.

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§10.41 1. Contents of Written Stipulation

In general. Stipulations may vary the procedures for physical or mental examinations established in CCP §2032.010-2032.650. If the stipulation is silent on an issue, the court will likely follow the statute.

Stipulations should address the following points:

- Parties to the stipulation;
- Time of examination;
- Place of examination;
- Scope of the examination, including each test and procedure to be performed and the conditions of the examination;
- Identity and specialty of the examiner;
- Who may attend;
- Whether the examination will be audio- or stenographically recorded; and
- A provision for exchange of reports under CCP §§2032.610-2032.650. See §§10.58-10.67.

Stipulation in place of demand for physical examination. To protect the plaintiff against multiple examinations, a stipulation in place of a demand for physical examination in a personal injury case (CCP §§2032.210-2032.260) should contain language that the stipulation is being used in lieu of that demand. See Practice Tips in §10.15.

Forms. For form of stipulation for physical examination, see §10.83. For form of stipulation for mental examination, see §10.84.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.42 2. Enforcement of Stipulated Examination

§10.42 2. Enforcement of Stipulated Examination

A party who stipulates to an examination can request the same sanctions for noncompliance as one who makes a demand or seeks an order. CCP §§2032.410-2032.420. See §§10.68-10.71. The following sanctions may be imposed by the court on motion of the party entitled to the examination:

- Issue sanctions;
- Evidence sanctions;
- A terminating sanction under CCP §2023.030(d); or
- A monetary sanction under CCP §2023.030(a).

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.43 C. Court Order for Physical or Mental Examination

§10.43 C. Court Order for Physical or Mental Examination

Unless the examination qualifies for the physical examination demand procedure under CCP §§2032.210-2032.260 or the parties stipulate as provided in CCP §2016.030, all physical and mental exams must be ordered by the court on motion on a showing of good cause. CCP §§2032.310-2032.320.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.44 1. Good Faith Attempt to Resolve Required

§10.44 1. Good Faith Attempt to Resolve Required

Before moving for an order, the party seeking the physical or mental examination must attempt, in good faith, to arrange the examination by agreement under CCP §2016.040. CCP §2023.310(b).

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§10.45 2. Good Cause Required

The requirement of "good cause" appears, in part, to duplicate the requirement that the condition be in controversy. See §10.6. In *Schlagenhauf v Holder* (1964) 379 US 104, 119, 13 L Ed 2d 152, 164, 85 S Ct 234, the Supreme Court noted that the two are necessarily related. The two requirements are not identical, however; the court might find that the condition is in controversy but that the examination is objectionable on other grounds. See, *e.g., Marriage of Halpern* (1982) 133 CA3d 297, 316, 184 CR 740 (in custody proceeding, appellate court held that trial court may properly consider burden and inconvenience, probable irrelevance, and doubtful benefit of subjecting child under age two to mental examination).

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§10.46 3. Content of Motion; Supporting Declaration

Content of motion. The motion for a physical or mental examination must specify the following (CCP §2032.310(b)):

- The time of the examination.
- The place of examination. If it is more than 75 miles from the examinee's residence, good cause must be shown and the travel will be conditioned on advancement by the moving party of reasonable expenses and costs of the examinee's travel to the place of examination. CCP §2032.320(e).
- The manner and conditions of the examination.
- The scope and nature of the examination.
- The identity and specialty, if any, of the examiner.
- A declaration of counsel demonstrating a reasonable, good faith attempt to stipulate to an examination under CCP §2016.030.

Content of counsel's declaration. Counsel's supporting declaration should specify facts supporting the allegation that the condition is in controversy. This is particularly important when the proposed examinee's condition was not voluntarily placed in controversy. The declaration should identify any previous examinations and state facts demonstrating good cause for an additional examination. Check local rules. Some jurisdictions require that the moving papers include a declaration stating whether there has been a previous examination and, if so, why another examination should be ordered. For form of notice of motion and motion for physical or mental examination, and supporting declaration, see §§10.85-10.86.

Motion for mental examination. A motion for a mental examination poses additional considerations. Defendants should include the declaration of the person performing the examination and should set forth (see CCP §§2032.020(c), 2032.320(d)):

- The tests to be administered;
- The examination to be performed;
- The anticipated length of the examination; and
- The reasons why the particular examination is necessary.

Motions applying to the court order for a mental examination may be avoided by seeking a stipulation under CCP §2032.320(b)-(c) that the plaintiff makes no claim for mental and emotional distress over and above that usually associated with the physical injuries and no expert testimony will be presented at trial in support of mental or emotional injuries.

PRACTICE TIP: Motions for mental examinations may also be avoided by entering into a stipulation with opposing counsel. See §10.40.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.47 4. Service of Motion

§10.47 4. Service of Motion

The motion must be served on the person to be examined and on all parties who have appeared in the action. CCP §2032.310(c).

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§10.48 5. Response to Motion

A party may oppose the motion entirely or seek to limit it. The following arguments could be made:

- The facts are insufficient to demonstrate that the condition is in controversy, or facts other than those relied on by the moving party show that the condition is not in controversy;
- Good cause is not proved, because the examination would not provide the necessary information or because the information is available from another source;
- Exceptional circumstances have not been shown to require a mental examination of a personal injury plaintiff (see CCP §2032.320(b)-(c));
- The scope of the examination is unreasonable (*e.g.,* painful, dangerous, intrusive);
- The conditions for the examination are too onerous (*e.g.,* time-consuming; see *Edwards v Superior Court* (1976) 16 C3d 905, 913, 130 CR 14 (4-hour examination approved)); or
- The proposed examiner is not qualified.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.49 6. Court Order

§10.49 6. Court Order

The order granting an examination must specify the following (CCP §2032.320(d)):

- The name of the examiner(s);
- The time and place of examination;
- The nature and manner of the examination;
- Diagnostic tests and procedures;
- Conditions and scope of the examination; and
- Whether expenses and costs will be advanced to the examinee.

NOTE: In ordering a mental examination, the court must describe *by name* the "diagnostic tests and procedures" to be used. *Carpenter v Superior Court* (2006) 141 CA4th 249, 253, 45 CR3d 821 (trial court order providing for administration of "standardized written psychological tests" was insufficient under CCP §2032.320).

For form of order for physical or mental examination, see §10.87.

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IV. CONDUCT OF EXAMINATION

§10.50 A. Medical History

The examiner is entitled to take a history from the examinee. See CCP §2032.610(a)(1) (party at whose instance examination was made must deliver "a detailed written report setting out the history…"). It is permissible for the examiner to elicit information regarding facts relevant to a medical evaluation (*e.g.,* in a motor vehicle accident, the direction of force and the nature of the impact to assess causation).

The examiner may not, however, cross-examine the plaintiff regarding liability issues (*e.g.,* the color of the traffic light) or inquire into areas outside the scope of the medical examination (*e.g.,* gynecological questions are not pertinent in an orthopedic exam) or ask questions that the examinee has already answered. See, *e.g., Golfland Entertainment Ctrs. v Superior Court* (2003) 108 CA4th 739, 746, 133 CR2d 828 (court ordered doctor conducting examination not to ask questions about facts and circumstances of accident to extent plaintiff had previously answered those questions and provided that information during his deposition or in his interview with another doctor). See §10.29.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.51 B. Examinee's Participation

§10.51 B. Examinee's Participation

Counsel for the examinee should meet with the examinee before the examination to explain the nature and extent of the examination and to review the medical records. Counsel should explain to the examinee how to articulate complaints and prioritize injuries. The examinee should understand that his or her statements and a description of his or her behavior during the examination may be introduced at trial. The examinee should be cooperative and be prepared to give:

- A general statement of how the accident or injury occurred;
- A concise chronological history of the treatment to date;
- A description of the injuries;
- A description of any prior injuries relating to the same areas of the body; and
- A complete statement of the present complaints.

PRACTICE TIP: Counsel for the examinee should ask the examinee to make a mental note of events that transpire during the examination and to call counsel after the examination to give a report. The examinee should note items such as:

- How much time was spent taking a history;
- Who took the history (*i.e.,* the physician or a member of the staff);
- How much time was spent on the physical examination;
- What tests were performed;
- What comments the examiner made during the examination;
- Whether any suggestions for additional treatment or tests were made; and
- The examinee's impression of the physician.

PRACTICE TIP: Some counsel advise that all examinations should be taped and that counsel or counsel's representative should attend.

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§10.52 C. Examiner's Duty of Care

Generally a physician in a physician-patient relationship owes a duty of care to the patient and thus may be liable to the patient for negligence. When an examiner is hired by a third party to examine the individual and report the results, no physician-patient relationship exists. However, even absent the physician-patient relationship, an examiner may be liable to the examinee for negligence or professional malpractice for injuries incurred during the examination itself. *Mero v Sadoff* (1995) 31 CA4th 1466, 1477, 37 CR2d 769. In addition, an examiner may incur liability for disclosing confidential information irrelevant to the purpose of the examination, if there are special circumstances indicating the information was given in a confidential communication between the examiner and examinee. *Urbaniak v Newton* (1991) 226 CA3d 1128, 1135, 277 CR 354.

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D. Protective Orders

§10.53 1. For Conduct of Examiner

If, in the judgment of an observer, the examiner becomes abusive to the examinee or engages in unauthorized diagnostic tests and procedures, the observer may suspend the examination to allow the examinee or the party producing the examinee to make a motion for a protective order. CCP §2032.510(d). On who can observe and record examination, see §§10.25-10.27.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.54 2. For Conduct of Observer

§10.54 2. For Conduct of Observer

If the observer participates in or disrupts the examination, the person conducting the examination may suspend the examination to allow the examining party to seek a protective order. CCP §2032.510(e). See §§10.25-10.27.

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§10.55 3. Sanctions

The court will impose monetary sanctions against a party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, absent substantial justification or other circumstances making such sanctions unjust. CCP §2032.510(f).

On sanctions, see §§15.85-15.116.

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§10.56 E. Remedies for Party's Failure to Appear

If a party required by stipulation or court order to appear for examination fails to do so, CCP §2032.410 provides that the court, on motion of the examining party, may make any orders that are "just," including one or more of the following:

- Issue sanctions;
- Evidence sanctions;
- A terminating sanction under CCP §2023.030(d); or
- Monetary sanctions under CCP §2023.030(a).

Under the procedure for demanding a physical examination in a personal injury case, these secondary sanctions may be imposed only after the defendant first secures a court order compelling the plaintiff to appear at the examination and the plaintiff subsequently refuses to comply with the court order. CCP §2032.240(d). See §10.68.

On sanctions, see §§15.85-15.116.

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§10.57 F. Remedies for Nonparty's Failure to Appear

If a party required by demand, stipulation, or court order to produce a nonparty for examination fails to do so, CCP §2032.420 provides that the court, on motion of the examining party, may issue the same type of sanctions required when a party fails to appear. See §10.56 for list of sanctions.

On sanctions, see §§15.85-15.116.

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V. EXCHANGE OF EXAMINATION REPORTS

§10.58 A. Examinee Entitled to Examination Report

Right to demand report. The party who submits to or produces another for examination under CCP §2032.220, §§2032.310-2032.320, or §2016.030 has the option of making a written demand to the party at whose instance the examination was made, and that party must deliver (CCP §2032.610(a)):

- The examiner's detailed written report setting out the history, examinations, findings (including the results of all tests), diagnoses, prognoses, and conclusions; and
- Written reports of all earlier examinations of the same condition of the examinee made by that or any other examiner.

One court has held that in addition to the examination report, an examinee may be entitled to a copy of copyrighted test questions and answers, subject to a protective order limiting their use and further disclosure. *Carpenter v Superior Court* (2006) 141 CA4th 249, 271, 45 CR3d 821.

For form of demand for copy of report of physical or mental examination, see §10.88.

PRACTICE TIP: The request for written reports should include all reports to counsel, including electronic records, notes of telephone conversations, and e-mails.

If a party submits to an examination under CCP §§2032.010-2032.650 and makes a request for an examination report under CCP §2032.610(a), the examining expert must prepare and deliver a report containing the information specified in CCP §2032.610(a). This report must be prepared for the party who submitted to the examination, even if the party who retained the expert requested him or her not to produce a report and later designates the expert as a consultant rather than a trial witness. *Kennedy v Superior Court* (1998) 64 CA4th 674, 75 CR2d 373. See §10.61.

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B. Privileges Waived by Demand of Examination Report

§10.59 1. Waiver by Examinee

A party who demands and receives a report under CCP §2032.610(a) *or* who takes the deposition of the examiner other than under CCP §§2034.410-2034.470 (expert witness) waives any privilege that the party has regarding reports, writings, and testimony of every other physician, psychologist, or licensed health care practitioner who has examined or who may thereafter examine the examinee regarding the same condition. CCP §2032.630.

On expert witness discovery, see chap 11.

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§10.60 2. Waiver by Examining Party

There is no work product protection under CCP §§2018.010-2018.080 for the examiner's writings and reports or for the examiner's testimony. CCP §2032.610(c). On work product protection, see §§3.52-3.68.

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C. Examining Party's Response to Demand for Examination Report

§10.61 1. Time for Examining Party to Produce Examination Report

The examining party must deliver a copy of the examination reports demanded under CCP §2032.610(a) "within 30 days after service of the demand or within 15 days of trial, whichever is earlier." CCP §2032.610(b). The examining party is required only to produce reports of health care professionals who have actually examined the examinee. Thus, reports by consultants who have not performed an examination are not discoverable unless consultants are disclosed as experts under CCP §§2034.210-2034.310. See CCP §2032.610(a). However, a report must be produced if requested by the party who submitted to the examination, even if the expert is later designated as a consultant and instructed to not produce a report for the party who retained him or her. *Kennedy v Superior Court* (1998) 64 CA4th 674, 75 CR2d 373. See §10.58.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.62 2. Motion to Compel Delivery of Examination Report

§10.62 2. Motion to Compel Delivery of Examination Report

If the examining party fails to timely deliver examination reports demanded, the demanding party may move for an order to compel delivery. CCP §2032.620(a). The motion to compel must be accompanied by a declaration stating facts showing a reasonable, good faith attempt to resolve the dispute informally. CCP §2032.620(a).

PRACTICE TIP: If the report provided is not complete, counsel should consider moving to compel on the theory that providing an incomplete report is equivalent to failing to produce a report under CCP §2032.620(a).

On motions to compel, see §§15.30-15.58.

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3. Sanctions Arising From Motion to Compel Delivery of Examination Report

§10.63 a. Monetary Sanctions

The court must impose a monetary sanction under CCP §§2023.010-2023.040 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of an examination report, unless the court finds either that (CCP §2032.620(b)):

- The one subject to the sanction acted with substantial justification; or
- The sanction would be unjust.

On sanctions, see §§15.85-15.116.

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§10.64 b. Issue, Evidence, or Termination Sanctions

Once a court has ordered a party to deliver an examination report and that party fails to obey this court order, the court may order a much wider range of sanctions. CCP §2032.620(c). For a list of sanctions, see §10.56.

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§10.65 c. Examiner's Testimony Barred If Examination Report Not Provided

The court must exclude at trial the testimony of any examiner whose report was demanded under CCP §2032.610(a) but was not provided. CCP §2032.620(c). This exclusion may leave the examining party without a qualified expert to testify.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.66 D. Examinee Has Reciprocal Duties to Exchange Reports

§10.66 D. Examinee Has Reciprocal Duties to Exchange Reports

Provide existing or later written reports. A party who submits to or produces another for examination and makes a demand for an examination report must exchange a copy of (CCP §2032.640):

- Any existing written report of any examination by any other physician, psychologist, or licensed health care practitioner of the same condition; and
- Any later report of a previous or subsequent examination of the same condition by any other physician, psychologist, or licensed health care practitioner.

The reciprocal duty of the party demanding the report is limited to written reports. CCP §2032.640. There is no duty to disclose writings or even names of health care providers unless there is a written report.

PRACTICE TIP: The plaintiff rarely asks health care providers to make a written report because unfavorable reports damaging to the plaintiff might have to be turned over. Before requesting a report, plaintiff's counsel should meet with the health care provider to ascertain his or her opinions and then decide whether to request a written report.

Exchange at time demanded report is received. The party demanding the report must provide other written reports "at the time of compliance" with the demand for the report under CCP §2032.610. CCP §2032.640. On time for compliance under CCP §2032.610, see §10.61.

PRACTICE TIP: Only rarely will plaintiff's expert have created any other written report.

Extent of privilege and work product waiver. The party who demands and receives an examination report under CCP §2032.610 or deposes the examiner other than under CCP §§2034.410-2034.470 (expert witness provisions) waives any privilege and work product protection regarding reports and writings of other health care professionals who have examined the examinee for the same physical or mental condition. CCP §2032.630.

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§10.67 E. Failure to Make Reciprocal Exchange of Reports

Motion for order to compel delivery. If the party demanding an examination report fails to deliver reports required by reciprocal exchange within the time required, the examining party may move for an order to compel delivery. CCP §2032.650(a). Under CCP §2030.650(a), the examining party must include with the motion papers a "meet and confer" declaration (see CCP §2016.040) showing a reasonable, good faith attempt to resolve the dispute.

Sanctions. The court must impose a monetary sanction against the party, person, or attorney who unsuccessfully contests the motion, unless the party, person, or attorney acted with substantial justification or the sanction would be unjust. CCP §2032.650(b).

Failure to comply with court order. If the party making the demand for an examination report and receiving it fails to obey a court order to deliver other reports, the court may make any just orders. CCP §2032.650(c). See §10.56 for a list of sanctions.

The court will exclude at trial testimony of any examiner whose report has not been provided as ordered by the court. CCP §2032.650(c).

On motions to compel and sanctions, see chap 15.

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VI. SANCTIONS FOR FAILURE TO COMPLY WITH CCP §§2032.010-2032.650

§10.68 A. Sanctions Generally Under CCP §§2032.010-2032.650

In addition to sanctions under CCP §§2032.010-2032.650, a party who fails to comply with discovery may be sanctioned under CCP §§2023.010-2023.040 for misuse of the discovery process. For discussion of sanctions generally, see §§15.85-15.116. For sanctions specifically authorized for a party's refusal to submit to genetic testing to establish paternity, see §10.77.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.69 B. Monetary Sanctions

§10.69 B. Monetary Sanctions

Unless circumstances would render monetary sanctions unjust, sanctions under CCP §2032.620(b) are mandatory against a party, person, or attorney who without substantial justification unsuccessfully makes or opposes:

- A motion to compel response to or compliance with a CCP §§2032.210-2032.260 demand for physical examination (CCP §2032.250(b)) (see §10.39);
- A motion for a protective order based on conduct during a physical examination (CCP §2032.510(f)) (see §§10.53-10.55); or
- A motion to compel delivery of demanded examination reports and other reports (CCP §§2032.620(b), 2032.650(b)) (see §§10.63-10.65).

Monetary sanctions are also mandatory, regardless of the outcome of a motion, if a party required to meet and confer before making a discovery motion fails to do so. CCP §2023.010(i).

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§10.70 C. When Sanctions Are Available Against Examiner

The provisions for exchange of reports distinguish between examiners conducting adverse examinations under CCP §§2032.010-2032.650 (*i.e.*, examinations of an opposing party, party's agent, or natural person in the party's custody or under the party's legal control (see §10.17)) and other examiners.

An examiner conducting an adverse examination under CCP §§2032.010-2032.650 is under an obligation to prepare and deliver a written report if one is requested by the party submitting to or producing another for examination. An examiner who fails to obey an order compelling delivery of a report might be subjected to monetary sanctions, and the examiner's testimony will be excluded at trial. CCP §2032.620(b)-(c). See also CCP §2023.030(a), (e) (sanctions, including contempt, may be imposed after notice to "any affected party, person, or attorney" and after hearing). On sanctions or contempt against a nonparty in general, see §§15.102, 15.105.

Other examiners, *e.g.,* those hired by the plaintiff to conduct a medical examination of plaintiff, are not under a similar duty to prepare a report, and the court may not impose sanctions on them personally. Their testimony will be excluded at trial, however, if a party under a court order to deliver copies of their existing reports fails to do so. CCP §2032.650(c).

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§10.71 D. When Sanctions Are Available Against Attorney

Monetary sanctions are available against a party's attorney, but they can be issued only if there is a finding that the attorney advised a party to misuse the discovery process. CCP §2023.030(a). See *Ghanooni v Super Shuttle* (1993) 20 CA4th 256, 261, 24 CR2d 501, a personal injury case in which the plaintiff was subject to monetary sanctions for refusing to comply with a request for a physical examination. Plaintiff's counsel was not subject to monetary sanctions for opposing the defendant's motion to compel when unrebutted declarations of plaintiff's counsel and documentary evidence showed that counsel had tried to convince the plaintiff to submit to the defendant's request.

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VII. PHYSICAL AND MENTAL EXAMINATIONS AUTHORIZED BY OTHER STATUTES

§10.72 A. Physical and Mental Examination by Court-Appointed Experts Under Evid C §730

At any time before or during trial on an action, the court may appoint experts to investigate, render a report, or testify if it appears that expert testimony is or may be required by the court or any party. Evid C §730. Mental and physical examinations may be ordered under the authority of Evid C §730. *Durst v Superior Court* (1963) 222 CA2d 447, 35 CR 143 (former CCP §1871, now Evid C §730). See *Mercury Cas. Co. v Superior Court* (1986) 179 CA3d 1027, 225 CR 100.

Although it is rarely used in civil cases, Evid C §730 provides a procedure by which the court and any party to the action may move for appointment of experts. The statute does not, however, set forth a procedure for making the motion under Evid C §730. Therefore, it is probably best to follow the guidelines set forth in this chapter for making a motion under CCP §§2032.010-2032.650. Because an examination under Evid C §730 is not considered adversarial, the examinee is not entitled to have an attorney or a reporter present. *Durst v Superior Court, supra*.

PRACTICE TIP: Because appointment of an expert under Evid C §730 is generally regarded as a tool to assist a court in resolving factual disputes, a party should not rely on the statute as a means of discovery when the CCP §§2032.010-2032.650 procedure is available. Because it may be exercised at any time before or during trial, Evid C §730 may be useful if an issue of physical or mental condition arises after the time limits for ordinary discovery have expired.

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B. Genetic Test to Determine Paternity

§10.73 1. Paternity Must Be Relevant Fact

A court is authorized to order genetic tests in any civil action in which paternity is a relevant fact. Uniform Act on Blood Tests to Determine Paternity (Fam C §§7550-7558 (former Evid C §§890-897)). Only the mother, child, and alleged father can be compelled to submit to the genetic tests in a civil action involving paternity. Fam C §7551; CCP §2032.010(a). See *William M. v Superior Court* (1990) 225 CA3d 447, 275 CR 103 (parents of deceased putative father held not to be proper parties to paternity action, thus could not be compelled to submit to blood tests).

The requirement that paternity is a relevant fact does not apply to cases in which paternity has previously been established and that prior finding is entitled to res judicata. *Brown v Superior Court* (1979) 98 CA3d 633, 159 CR 604. Courts have specifically refused to reopen earlier paternity determinations to permit retesting by newer and more accurate methods. See, *e.g., De Weese v Unick* (1980) 102 CA3d 100, 162 CR 259.

If the results of a genetic test are positive and meet the requirements of Fam C §7555, there is a rebuttable presumption of paternity. Fam C §7555. Even if the test results do not create a presumption of paternity, the results may still be admissible to prove paternity affirmatively. See *Cramer v Morrison* (1979) 88 CA3d 873, 153 CR 865 (interpreting former Evid C §895; now Fam C §7554).

Occasionally, paternity may be a relevant fact to be determined in a wrongful death action. In *Cheyanna M. v A.C. Nielsen Co.* (1998) 66 CA4th 855, 78 CR2d 335, a minor whose alleged biological father died in a traffic accident before she was born brought a wrongful death action against the driver and others involved in the accident. Reversing summary judgment for defendants, the court held that the minor was entitled to attempt to prove paternity by clear and convincing evidence. The plaintiff argued that paternity should be determined in accordance with the Uniform Act on Blood Tests to Determine Paternity rather than by the laws of intestate succession. The court held that the plaintiff's status as an heir must be determined under the laws of intestate succession. It did not specifically authorize using blood tests in this context to determine paternity, but it did note that its conclusion "does not render superfluous the Uniform Act on Blood Tests to Determine Paternity." 66 CA4th at 865 n12.

On genetic testing, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§8A.18-8A.22 (Cal CEB Annual).

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§10.74 2. Genetic Test Not Required in Certain Types of Cases

The statute does not apply to probate proceedings when the alleged illegitimate child is seeking genetic tests of the surviving mother, who is not a party to the action. See *Estate of Sanders* (1992) 2 CA4th 462, 468, 3 CR2d 536. The court in *Sanders* also rejected the argument that Prob C §1000 requires application of CCP §§2032.010-2032.650. Thus, DNA testing will not be required of the children of the deceased in a probate proceeding to determine parentage of a child who claims that the deceased was the natural father. 2 CA4th at 474.

Parents, as representatives of their son's estate, cannot be compelled to submit to a blood test to determine whether their deceased son was the father of the child in a paternity suit. *William M. v Superior Court* (1990) 225 CA3d 447, 275 CR 103 (discovery properly denied because son's blood type, rather than parent's physical condition or blood group, was in dispute).

NOTE: Probate Code §1000 states that the rules of practice applicable to civil actions, including discovery proceedings, also apply to proceedings under the Probate Code, unless that code specifies otherwise.

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§10.75 3. Procedure for Testimony of Examiners

A court may order a genetic test under Family Code §7551 "upon its own initiative or upon suggestion made by or on behalf of any person who is involved…." Fam C §7551. If a motion is made by a party to the action, paternity is a relevant fact and the motion is timely made so as not to delay the proceedings unduly, the court *must* order genetic tests of the mother, child, and alleged father; it does not have discretion to deny the motion. See Fam C §7551; *County of Fresno v Superior Court* (1979) 92 CA3d 133, 154 CR 660; *Michael B. v Superior Court* (1978) 86 CA3d 1006, 150 CR 586 (interpreting former Evid C §892; now Fam C §7551). There is no additional requirement that the moving party show good cause.

The party or person at whose suggestion the tests have been ordered may demand that additional qualified experts perform independent tests under order of court. Fam C §7552. In addition, any party may produce other expert evidence on paternity. Experts called by a party must be compensated by that party, and only ordinary witness fees may be taxed as costs for their services. Fam C §7557.

Experts appointed to conduct genetic tests must be called by the court as witnesses to testify to their findings and are subject to cross-examination by the parties. Fam C §7552.5(b). It is unclear whether this requirement also applies to additional experts appointed at the demand of a party or other affected person. The test results of these additional experts may, however, be offered in evidence. Fam C §7552.

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§10.76 4. Appointment of Examiner; Compensation

The court ordering the tests will name the examiners, determine the number and qualifications of any additional examiners demanded by a party or other affected person, and set the rate of compensation. Fam C §§7552-7553 (former Evid C §§893-894). The court must perform these functions; it cannot simply rely on a party to arrange the examination. See *Michael B. v Superior Court* (1978) 86 CA3d 1006, 150 CR 586.

NOTE: The qualifications for examiners set forth in CCP §2032.020(b) do *not* apply to tests performed under Fam C §§7550-7557. See §10.21.

The compensation of each expert ordered by the court must be fixed at a reasonable amount and paid as the court orders. The court may apportion compensation between the parties or between the parties and the county and may order any portion or all of the compensation taxed as costs in the action. Fam C §7553. Because the test results may be key to the defense in a paternity action, the court cannot condition the examination on an indigent's advance payment of examination expenses. *Michael B. v Superior Court, supra*.

Experts who have not conducted a genetic examination under order of the court but who have been called by a party to the proceedings must be compensated by the party calling them. Fam C §7557.

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§10.77 5. Sanctions for Noncompliance

The Uniform Act on Blood Tests to Determine Paternity (Fam C §§7550-7557) contains its own sanctions for noncompliance. If a party refuses to submit to a test, the court may either resolve the issue of paternity against the person who refuses or "enforce its order if the rights of others and interests of justice so require." A party's refusal is itself admissible in evidence in a proceeding to determine paternity. Fam C §7551.

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§10.78 VIII. MENTAL AND PHYSICAL EXAMS IN FEDERAL COURT

By stipulation or court order only. Federal Rules of Civil Procedure 35 authorizes physical or mental examinations by a suitably licensed or certified examiner, but the self-executing procedure for physical exams under CCP §§2032.010-2032.650 is not found in this rule. A stipulation or court order is required in federal court for physical or mental examinations. Fed R Civ P 35(a), (b)(6).

Who may be examined. Any party to an action or any person in the "custody or of under the legal control" of a party (*e.g.,* minor children) may be examined. Fed R Civ P 35(a).

History. Former CCP §2032 (now CCP §§2032.010-2032.650) was patterned after Fed R Civ P 35. Because of this common history, California courts have used federal decisions in interpreting former CCP §2032. See *Reuter v Superior Court* (1979) 93 CA3d 332, 337, 155 CR 525. Substantial rewording of former CCP §2032 (now CCP §§2032.010-2032.650) means that even those sections derived from the federal rule may now be significantly different in language. Before relying on federal case law as authority, counsel should exercise caution and compare all relevant points between the two statutes. Some federal cases are extremely important—particularly those discussing cases for which an examination order is appropriate. See, *e.g., Schlagenhauf v Holder* (1964) 379 US 104, 13 L Ed 2d 152, 85 S Ct 234, discussed in §10.6.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/ IX. FORMS/§10.79 A. Form: Demand for Physical Examination of Plaintiff

IX. FORMS

§10.79 A. Form: Demand for Physical Examination of Plaintiff

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DEMAND FOR PHYSICAL**
vs	)	**EXAMINATION OF PLAINTIFF**
	)	**(CCP §2032.220(a))**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

To each party and attorney of record:

Defendant, _ _[*name*]_ _**, demands that plaintiff submit to a physical examination under Code of Civil Procedure §2032.220(a):**

1. The examination will be conducted by _ _[*name*]_ _**, whose specialty is** _ _[*specify*]_ _**.**

2. The examination will take place at this address, on this date, and at this time: _ _[*Specify*]_ _**.**

3. The examination will consist of _ _[*describe nature and scope of examination*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for defendant, _ _[*name*]_ _

PRACTICE TIP: Some examiners have a 48-hour cancellation policy or a fee will be charged. The defendant should notify plaintiff's counsel of this policy. Plaintiff's counsel should be careful to inform the client of the policy to avoid a later dispute over the charges.

Comment: This form may be used only for personal injury plaintiffs. See §§10.31-10.34.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.80 B. Form: Response to Demand for Physical Examination of Plaintiff

§10.80 B. Form: Response to Demand for Physical Examination of Plaintiff

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**PLAINTIFF'S RESPONSE TO**
vs	)	**DEFENDANT'S DEMAND FOR**
	)	**PHYSICAL EXAMINATION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**(CCP §2032.220(a))**
	)	

To each party and attorney of record:

[*Option 1: Compliance with demand*]

Plaintiff, _ _[*name*]_ _, will comply with defendant's demand for physical examination, dated _ _[*date*]_ _, and will appear for examination at the time and place stated in the demand.

[*Option 2: Compliance with modified demand*]

Plaintiff, _ _[*name*]_ _, will comply with defendant's demand for physical examination, dated _ _[*date*]_ _, with the following modifications: _ _[*State modifications, e.g., time, place, limit on scope of examination*]_ _.

[*Option 3: Noncompliance with demand*]

Plaintiff will not comply with defendant's demand for physical examination for the following reasons:
_ _[*State reasons, e.g., the condition for which the examination is sought is not in controversy/the examiner is not qualified*]_ _.

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for plaintiff, _ _[*name*]_ _

PRACTICE TIP: If the plaintiff refuses to agree to new X rays, it is recommended that the plaintiff state this in the response.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.81 C. Form: Notice of Motion and Motion to Compel Compliance With Demand for Physical Examination of Plaintiff

§10.81 C. Form: Notice of Motion and Motion to Compel Compliance With Demand for Physical Examination of Plaintiff

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION TO COMPEL**
	)	**COMPLIANCE WITH**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**DEFENDANT'S DEMAND FOR**
	)	**PHYSICAL EXAMINATION**
	)	**(CCP §2032.220);**
	)	**SUPPORTING**
	)	**MEMORANDUM;**
	)	**DECLARATION OF _ _[*NAME* *OF DEFENDANT'S* *ATTORNEY*]_ _ SUPPORTING**
	)	**DEFENDANT'S MOTION FOR**
	)	**PHYSICAL EXAMINATION OF**
	)	**PLAINTIFF; _ _[*SEPARATE* *STATEMENT*]_ _**
	)	
	)	**Hearing: _ _[*date; time*]_ _**
	)	**Dep't: _ _[*number*]_ _**
	)	**Hearing judge: _ _[*if known*]_ _**
	)	**Action filed: _ _[*date*]_ _**
_____	)	**Trial date: _ _[*if set*]_ _**

To each party and attorney of record:

PLEASE TAKE NOTICE that defendant, _ _[*name*]_ _, moves the Court, located at _ _[*address*]_ _, for an order compelling plaintiff to submit to a physical examination by _ _[*name, title, and specialty of examiner*]_ _, to be conducted on _ _[*date*]_ _, at _ _[*time*]_ _, or at another date and time directed by the Court, at _ _[*address*]_ _. This motion is made on the ground that plaintiff's physical condition is in controversy in this action and that defendant has a right, under Code of Civil Procedure §2032.220, to demand one physical examination of plaintiff.

[*Add if motion made under CCP §2032.250(a)*]

This motion is made on the further ground that plaintiff's response, _ _[*e.g., refusing to submit to the examination/modifying the terms of the examination*]_ _, as specified in the separate statement, is unwarranted.

[*Continue*]

This motion is based on this notice; all pleadings, papers, and records in this action; the attached supporting memorandum; the declaration of _ _[*name*]_ _; _ _[*the attached separate statement setting forth the matters in dispute*]_ _; _ _[*and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for defendant, _ _[*name*]_ _

[*Attach point and authorities supporting motion*]

Respectfully submitted,

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for defendant, _ _[*name*]_ _

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.82 D. Form: Declaration Supporting Motion to Compel Compliance With Demand for Physical Examination of Plaintiff

§10.82 D. Form: Declaration Supporting Motion to Compel Compliance With Demand for Physical Examination of Plaintiff

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF _ _[*NAME* OF DEFENDANT'S *ATTORNEY*]_ _ SUPPORTING DEFENDANT'S MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	
	)	**Hearing: _ _[*date; time*]_ _**
	)	**Dep't: _ _[*number*]_ _**
	)	**Hearing judge: _ _[*if known*]_ _**
	)	**Action filed: _ _[*date*]_ _**
_____	)	**Trial date: _ _[*if set*]_ _**

_ _[*Name*]_ _ **declares:**

1. I am the attorney for defendant, _ _[*name*]_ _, in this action.

2. On _ _[*date*]_ _, I served a demand for physical examination under Code of Civil Procedure §2032.220(a) on plaintiff, _ _[*name*]_ _. A copy of the demand is attached as Exhibit A to this motion.

[*Option 1: Plaintiff failed to respond to demand*]

3. Plaintiff failed to respond to the demand.

[*Option 2: Plaintiff responded to demand*]

3. On _ _[*date*]_ _, plaintiff responded to the demand. That response is set forth verbatim in the separate statement that accompanies this motion.

4. I have made the following efforts to resolve the dispute with plaintiff: _ _[*State specific facts*]_ _.

[*Continue*]

[5.] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[*If plaintiff responded to demand, attach separate statement*]

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Comment: A separate statement is not required when no response was provided to the discovery demand. Cal Rules of Ct 3.1020(b). See §10.37.

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.83 E. Form: Stipulation for Physical Examination

§10.83 E. Form: Stipulation for Physical Examination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**STIPULATION FOR PHYSICAL**
vs	)	**EXAMINATION (CCP**
	)	**§2016.030)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

_ _[*Name*]_ _**, attorney for plaintiff;** _ _[*name*]_ _**, attorney for defendant; and** _ _[*name*]_ _**, attorney for** _ _[*name of proposed examinee if a nonparty*]_ _ **stipulate that:**

1. _ _[*Name*]_ _ **will** _ _[*appear/produce*]_ _ _ _[*name of examinee*]_ _ **for a physical examination at the request of** _ _[*defendant/plaintiff*]_ _ **on** _ _[*date*]_ _ **at** _ _[*time*]_ _**.**

2. The examination will be conducted by _ _[*name of examiner*]_ _**,** _ _[*add title and specialty, if any*]_ _ **at** _ _[*address*]_ _**.**

3. The examination will be conducted to determine _ _[*specify scope of examination, including any laboratory or other tests agreed to*]_ _**.**

[*Add if appropriate*]

4. Examinee may be accompanied during the course of examination by _ _[*an attorney/an interpreter/a reporter*]_ _**.**

5. Examinee may audio record the examination.

6. The examination may be recorded stenographically.

[*Continue*]

[7.] Good cause for the examination exists in that _ _[*state facts demonstrating that examinee's physical condition is in controversy and that good cause exists for the examination*]_ _**.**

[*Add if appropriate*]

[8.] This stipulation is made in lieu of a demand and response under Code of Civil Procedure §§2032.210-2032.260, and no further examinations will be allowed without a stipulation or court order.

[*Continue*]

[9.] The parties agree to comply with Code of Civil Procedure §§2032.620(b), 2032.630, and 2032.640 regarding exchange of reports of examining physicians, psychologists, or licensed health care practitioners.

Date: _ _ _ _ _ _	**Date:** _ _ _ _ _ _
__[*Signature*]__	__[*Signature*]__
_ _[*Typed name*]_ _	_ _[*Typed name*]_ _
Attorney for plaintiff	**Attorney for defendant**

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.84 F. Form: Stipulation for Mental Examination

§10.84 F. Form: Stipulation for Mental Examination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**STIPULATION FOR MENTAL**
vs	)	**EXAMINATION (CCP**
	)	**§2016.030)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

_ _[*Name*]_ _**, attorney for plaintiff;** _ _[*name*]_ _**, attorney for defendant; and** _ _[*name*]_ _**, attorney for** _ _[*name of proposed examinee if a nonparty*]_ _ **stipulate that:**

1. _ _[*Name*]_ _ **will** _ _[*appear/produce*]_ _ _ _[*name of examinee*]_ _ **for a mental examination at the request of** _ _[*defendant/plaintiff*]_ _ **on** _ _[*date*]_ _**, at** _ _[*time*]_ _**.**

2. The examination will be conducted by _ _[*name of examiner*]_ _**,** _ _[*add title and specialty, if any*]_ _ **at** _ _[*address*]_ _**.**

3. The examination will be limited to _ _[*describe issues, specify scope, or specify restrictions on examination*]_ _**.**

4. The length of the examination, including any tests to be administered, will not exceed _ _[*state time limits*]_ _**.**

5. The examiner or _ _[*his/her*]_ _ **assistant will be permitted to administer psychological testing consisting of the following:** _ _[*Specify tests that may be administered*]_ _**.**

6. The parties agree that defendant shall preserve the right to obtain a physical exam under Code of Civil Procedure §§2032.210-2032.260 in addition to this mental exam.

7. Examinee may be accompanied during the course of examination by _ _[*an attorney/an interpreter/a reporter*]_ _**.**

8. Examinee may audio record the examination.

9. The examination may be recorded stenographically.

10. Good cause for the examination exists in that _ _[*state facts demonstrating that examinee's mental condition is in controversy and that good cause exists for the examination*]_ _**.**

11. The parties agree to comply with Code of Civil Procedure §§2032.620(b), 2032.630, and 2032.640 regarding exchange of reports of examining physicians, psychologists, or licensed health care practitioners.

Date: _ _ _ _ _ _	**Date:** _ _ _ _ _ _
__[*Signature*]__	__[*Signature*]__
_ _[*Typed name*]_ _	_ _[*Typed name*]_ _
Attorney for plaintiff	**Attorney for defendant**

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.85 G. Form: Notice of Motion and Motion for Physical or Mental Examination of Plaintiff

§10.85 G. Form: Notice of Motion and Motion for Physical or Mental Examination of Plaintiff

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number, email address*]_ _
Attorney for defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR _ _[*PHYSICAL/***
	)	***MENTAL*]_ _ EXAMINATION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**(CCP §§2032.310-2032.320); SUPPORTING MEMORANDUM; DECLARATION OF _ _[*NAME OF DEFENDANT'S ATTORNEY*]_ _ SUPPORTING DEFENDANT'S MOTION FOR _ _[*PHYSICAL/MENTAL*]_ _ EXAMINATION OF PLAINTIFF**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that defendant, _ _[*name*]_ _, moves the Court, located at _ _[*address*]_ _, for an order requiring plaintiff, _ _[*name*]_ _, to submit to a _ _[*physical/mental*]_ _ examination by _ _[*name, title, and specialty of examiner*]_ _, to be conducted on _ _[*date*]_ _, at _ _[*time*]_ _, or at any other date and time directed by the Court, at _ _[*address*]_ _. This motion is made on the ground that the plaintiff's _ _[*physical/mental*]_ _ condition is in controversy in this action and that good cause exists for the examination under Code of Civil Procedure §§2032.310-2032.320.

This motion is based on this notice; all pleadings, papers, and records in this action; the attached supporting memorandum; the declaration of _ _[*name*]_ _; _ _[*and any oral or documentary evidence that may be presented at the hearing*]_ _.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for defendant, _ _[*name*]_ _

[*Attach memorandum supporting motion*]

Respectfully submitted,

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for defendant, _ _[*name*]_ _

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.86 H. Form: Declaration Supporting Motion for Physical or Mental Examination

§10.86 H. Form: Declaration Supporting Motion for Physical or Mental Examination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF _ _[*NAME OF DEFENDANT'S ATTORNEY*]_ _ SUPPORTING DEFENDANT'S MOTION FOR _ _[*PHYSICAL/MENTAL*]_ _ EXAMINATION OF PLAINTIFF**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the attorney for defendant, _ _[*name*]_ _, in this action.

2. Good cause exists for this examination in that _ _[*state facts demonstrating that plaintiff's physical or mental condition is in controversy and that good cause exists for the examination*]_ _.

3. _ _[*Name*]_ _ is duly licensed to practice _ _[*state occupation*]_ _ in California and is fully qualified to conduct the requested examination.

4. The examination will consist of _ _[*describe nature and extent of examination and specify procedures and tests that may be included*]_ _.

[*Add if appropriate*]

5. This is the first examination that _ _[*defendant*]_ _ has conducted of plaintiff in this action.

_ _[*Or identify any previous examination and state facts constituting good cause for an additional examination.*]_ _

[*Add if appropriate*]

[6.] This examination must be conducted more than 75 miles from examinee's home because _ _[*state facts showing good cause for travel*]_ _.

[*Continue*]

[7.] On _ _[*date*]_ _, I made a reasonable, good faith attempt to arrange an examination under Code of Civil Procedure §2016.030 by _ _[*state facts*]_ _. This attempt was unsuccessful because _ _[*state reasons*]_ _.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.87 I. Form: Order for Physical or Mental Examination

§10.87 I. Form: Order for Physical or Mental Examination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**ORDER FOR** _ _[*PHYSICAL/*
vs	)	*MENTAL*]_ _ **EXAMINATION**
	)	**(CCP §§2032.310-2032.320)**
_ _[*Name(s)*]_ _,	)	
Defendant(s)	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of defendant for an order that plaintiff submit to a _ _[*physical/mental*]_ _ **examination was regularly heard on the above date and time. Appearing as attorneys were** _ _[*list names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*Name of plaintiff*]_ _ **submit to a** _ _[*physical/mental*]_ _ **examination by** _ _[*name of examiner*]_ _ **on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, at** _ _[*name of city*]_ _**, California.**

2. This examination include _ _[*state scope of examination, including part or parts of the body to be examined and specific tests to be conducted*]_ _**.**

3. The examination be conducted under the following conditions: _ _[*Specify*]_ _**.**

[*Add if appropriate*]

4. _ _[*Name of examining party*]_ _ **advance to** _ _[*name of examinee*]_ _ **the sum of $**_ _[*amount*]_ _ **as reasonable expenses and costs of travel.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.88 J. Form: Demand for Copy of Report of Physical or Mental Examination

§10.88 J. Form: Demand for Copy of Report of Physical or Mental Examination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DEMAND FOR COPY OF**
vs	)	**REPORT OF**
	)	_ _[*PHYSICAL/MENTAL*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**EXAMINATION (CCP §2032.620(a))**

To _ _[*name of examining party*]_ _ **and each party and attorney of record:**

_ _[*Name of party*]_ _ **demands that you deliver to** _ _[*his/her*]_ _ **attorney the following:**

1. A copy of all written reports of _ _[*name of examiner*]_ _**, including any reports in electronic form or e-mails, that set forth the history, examinations, findings of all tests made, diagnoses, prognoses, and conclusions related to the examination of** _ _[*name of examinee*]_ _**.**

2. Copies of all reports of all earlier examinations related to the same condition for which _ _[*name of examinee*]_ _ **was examined by** _ _[*name of examiner*]_ _ **or by any other examiner.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.89 K. Form: Notice of Motion and Motion for Order for Genetic Tests

§10.89 K. Form: Notice of Motion and Motion for Order for Genetic Tests

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR ORDER FOR**
	)	**GENETIC TESTS;**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**SUPPORTING MEMORANDUM;**
	)	**DECLARATION OF**
	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'s MOTION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

To _ _[*name of person to be tested*]_ _ **and each party and attorney of record:**

PLEASE TAKE NOTICE that _ _[*name of moving party*]_ _ **moves the Court, located at** _ _[*address*]_ _**, for an order requiring** _ _[*name of person to be tested*]_ _ **to submit to genetic testing by** _ _[*name of examiner*]_ _ **or an examiner to be appointed by the Court. The test, to be conducted on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, or at another date and time directed by the Court, at** _ _[*address*]_ _**, is to determine the paternity of** _ _[*name of child*]_ _**. This motion is made under Family Code §7551 on the ground that the paternity of** _ _[*name of child*]_ _ **is a relevant issue in this** _ _[*action/proceeding*]_ _**.**

This motion is based on this notice; all pleadings, papers, and records in this action; the attached supporting memorandum; the declaration of _ _[*name*]_ _**;** _ _[*and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Attach memorandum supporting motion*]

Respectfully submitted,

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _

Attorney for _ _[*name*]_ _

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Source: Civil Litigation/California Civil Discovery Practice/10 Physical and Mental Examinations/§10.90 L. Form: Declaration Supporting Motion for Genetic Tests

§10.90 L. Form: Declaration Supporting Motion for Genetic Tests

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'s MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**GENETIC TESTS**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, in this** _ _[*action/proceeding*]_ _**.**

[*Option 1: Paternity is relevant fact in action or proceeding*]

2. The paternity of _ _[*name of child*]_ _ **is a relevant fact in this** _ _[*action/proceeding*]_ _ **in that** _ _[*state facts*]_ _**.**

[*Option 2: Nature of proceeding*]

2. This proceeding was brought to establish the paternity of _ _[*name of child*]_ _**.**

[*Continue*]

3. _ _[*Name of examiner*]_ _ **is qualified to conduct genetic tests in that** _ _[*state qualifications*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

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11

Exchange of Expert Information

James C. Martin
Janet H. Kwuon

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§11.1 I. SCOPE OF CHAPTER

This chapter focuses on the discovery of expert witness information in civil cases before trial. Topics discussed include:

- Methods for identifying witnesses retained to offer expert opinion at trial (see §§11.3-11.5);
- Methods for obtaining other information, such as the experts' background, opinions, and written reports (see §§11.7, 11.22);
- Statutory procedures for exchanging expert information (see §§11.9-11.21);
- Methods for seeking protective orders (see §§11.28-11.30);
- Depositions of listed experts (see §§11.31-11.40);
- Modification of expert witness designation and information (see §§11.51-11.56);
- Exclusion of an expert's testimony because of shortcomings in the course of discovery (see §§11.61-11.66);
- Federal procedures (see §11.67).

A checklist of expert witness procedures is contained in §11.68. For a discussion of expert discovery limitations in limited civil cases, see §14.19. For a more detailed discussion of expert witnesses and the use of expert witness testimony generally, see California Expert Witness Guide (2d ed Cal CEB 1991).

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II. DECIDING TO MAKE DEMAND FOR EXPERT WITNESS INFORMATION

§11.2 A. Experts' Role in Litigation

Expert testimony often is essential. It is impossible to overstate the critical role that expert witnesses play in the resolution of litigation. It is well documented that experts hold great sway with juries. Expert testimony often is essential to meet a party's burden of proof. Given the realities, discovery of the identity and proposed testimony of every expert witness who may be used by an adversary at trial should be high on every pretrial checklist. Most critical to this discovery process is the timely noticing of the depositions of the opposing parties' experts. During the course of a deposition, all of the expert's opinions, as well as all of the bases for those opinions, must be obtained.

Making tactical decisions. Counsel can accomplish these objectives only by a thorough understanding of the discovery procedures related to expert witnesses (as set forth in CCP §§2034.010-2034.730) and, thereafter, the timely and proper utilization of these procedures during the course of the litigation. In any lawsuit in which expert opinions are called for or required, the parties' exchange of expert witness information and the process of obtaining discoverable reports, writings, and testimony of an opposing expert will be a paramount strategic consideration.

Other tactical decisions will have to be confronted as well, including determining who is a "retained" expert, fashioning discovery requests that will obtain the testifying expert's entire file in advance of a deposition, and deciding whether to videotape the deposition. Tactical issues also can arise concerning scheduling and timing, depending on the number of experts who will be deposed, the manner in which the examination will be conducted, and the number of sides in the litigation. Further tactical decisions also may arise depending on the nature of the expert disclosures made (or not made) during discovery or by the testimony or conduct of the expert during his or her deposition. These decisions could include, when appropriate, motions to exclude a proposed expert's testimony in whole or in part.

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§11.3 B. Who Are Discoverable "Experts"

Code of Civil Procedure §2034.210(b) refers to experts who are parties, who are employees of parties, or who have been retained by a party to form and express an opinion in anticipation of the litigation or in preparation for trial. Counsel should thus be aware that a demand for production under CCP §2034.210(c) may not yield discoverable reports and writings of (1) percipient witnesses or (2) other persons who might be expected to give expert opinion testimony but who are neither parties nor employed or retained by a party. See *Province v Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 1684, 25 CR2d 667. See §11.15.

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§11.4 1. Percipient Witnesses Distinguished

Percipient witnesses. It is important to distinguish between a percipient witness, *i.e.,* a witness who is asked to recount something that he or she perceived, and an expert witness, *i.e.,* a witness who is retained to express an opinion in the case. Percipient witnesses may need to be disclosed as part of ordinary pretrial procedures, but they need not be disclosed as part of the CCP §§2034.010-2034.730 procedures.

Expert percipient witnesses. Percipient witnesses may also include "expert" percipient witnesses, such as the police officer who investigates or reconstructs a traffic accident that results in a civil lawsuit, the industrial hygienist employed by an industrial accident victim's employer, and the regular outside accountant for a company that is making a claim for economic loss. An expert percipient witness's testimony may cross over from strict observation to opinion, as long as that opinion was not formed in anticipation of litigation or in preparation for trial.

A treating physician, for example, typically acquires personal knowledge of relevant facts independently of the litigation. Because the physician is neither a party nor an employee of a party, nor "retained" to form an opinion in the case, he or she is not an expert as defined in CCP §2034.210(b), but can be a percipient witness under CCP §2034.210(a) (*i.e.,* a person whose "testimony in the form of an expert opinion any party expects to offer in evidence at the trial"). See *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 91 CR2d 293 (treating physician's testimony is not limited to personal observations but may include both fact and opinion testimony on diagnosis, prognosis, causation, and standard of care). Counsel intending to use a treating physician as an expert is not required to prepare an expert declaration under CCP §2034.260(c), but must specifically list the treating physician by name and address on the designation of experts. *Kalaba v Gray* (2002) 95 CA4th 1416, 116 CR2d 570 (treating physicians designated by plaintiff as "all past or present examining and/or treating physicians" did not comply with letter or spirit of former CCP §2034 (now §§2034.010-2034.730) and such experts were precluded from testifying at trial). On treating physician designations, see §11.20.

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§11.5 2. Attorney Advisors and Consultants Distinguished

Need for expert consultants. Counsel often need to discuss the strengths and weaknesses of their cases with an expert (or experts) in confidence and without the threat of disclosure in discovery. An expert advisor, who is retained as a nontestifying consultant, can fulfill this role. A consultant can share opinions, conduct experiments, or develop information (through reports or investigation) that likely will remain confidential as long as the expert is not disclosed to testify.

PRACTICE TIP: Counsel should obtain necessary experts for their own use as soon as possible, perhaps even before filing suit, independently of the disclosure requirements in CCP §§2034.010-2034.730 regarding the exchange of expert witness information. This is critical when experts control the outcome in complex cases, *e.g.*, construction defects or medical malpractice cases, which depend almost entirely on experts. These expert advisors can provide input on duty, liability, and causation issues and help shape the pleadings and defenses.

If expert consultant will testify. When an expert's status changes from a confidential consultant to a testifying expert, the expert's opinions and information developed in his or her role as a consultant are a potential subject of pretrial discovery. The scope of this discovery should be limited depending on the issues on which the expert is retained to testify. Work product protection should remain for those opinions or information that fall outside the scope of the proposed trial testimony. Counsel needs to recognize, however, that California case law is not terribly precise on this waiver of work product issue, and the extent to which the consultant's prior work might still be subject to work product protection will be difficult to determine.

NOTE: The work product rule protects the opinions of an expert, hired as a consultant or advisor to an attorney, who will not be testifying at trial. Even the identity of such an expert is not discoverable. *Scotsman Mfg. Co. v Superior Court* (1966) 242 CA2d 527, 51 CR 511; *Swartzman v Superior Court* (1964) 231 CA2d 195, 41 CR 721. Once a consultant is designated as a trial witness and actually deposed, the extent to which the work product rule protects the expert's work is governed by the three-step test enumerated in *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 210 CR 535 (see §11.50; chap 3). On the work product rule, see chap 3.

The safest course is to keep the expert's status as a consultant intact from the start of the retention and throughout the litigation. In contemplating whether to change that status, counsel must make a candid evaluation of what information about the expert's prior work as a consultant is likely to be disclosed given the scope of the expert's proposed testimony. If that disclosure will unduly compromise the value of the expert's opinion on the relevant issue or issues, another testifying expert should be found.

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§11.6 C. Demand for Production of Discoverable Reports and Writings May Be Included

In a demand for expert witness information, a party may also demand the mutual and simultaneous production for inspection and copying of all discoverable reports and writings made in the course of preparing the expert's opinion by any expert described in CCP §2034.210(b). CCP §2034.210(c). Note that when the party initiating the exchange of expert witness information under CCP §2034.210(a) seeks the production of these documents, the party must state this additional demand in writing in the original demand. CCP §2034.230(b).

PRACTICE TIP: Unless cost is an overriding consideration, counsel should demand production of all discoverable reports and writings. These documents will shed light on the expert's reasoning process and often can provide possible avenues for valuable cross-examination.

The timetable for this additional demand corresponds with the timetable for the demand for exchange of lists of experts. The requirements for serving an additional demand for discoverable reports and writings are the same as for serving the initial demand for exchange of expert witnesses lists.

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§11.7 1. "Discoverable Reports" and "Writings"

There is no definition of what is "discoverable" in CCP §§2034.010-2034.730. Although no case has yet interpreted the word "discoverable" as used in CCP §2034.210(c), whether an expert's reports, writings, or other materials in the expert's file are discoverable presumably is subject to the standards under the work product doctrine enunciated in *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 489, 210 CR 535 (decided under former CCP §2037). For discussion of these standards, see §§3.59-3.61. See also CCP §§2016.050, 2017.010-2019.210.

What is a "writing"? "Reports" are not expressly defined in the discovery statute. "Writing" means a writing as defined in Evid C §250. CCP §2016.020(c). Evidence Code §250 defines "writing" as

> handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

Using subpoena duces tecum to obtain *all* discoverable material in expert's file. Although CCP §2034.270 refers to "all discoverable reports and writings," the demand procedure in CCP §2034.210(c) is expressly limited to the production of discoverable reports and writings made by any CCP §2034.210(b) expert "in the course of preparing that expert's opinion." Counsel should not assume that a demand for production under §2034.210(c) will yield production of all materials in the expert's file that might otherwise be discoverable. For example, it would not yield reports of the expert that were not prepared for the particular case at issue, any correspondence by the retaining party to the expert containing "background" information for the expert's consideration, articles or other writings of the expert on related issues that might provide useful material for cross-examination, or preliminary drafts of the expert's reports. Counsel should use a subpoena duces tecum (*i.e.*, a deposition subpoena that includes request to produce documents) to obtain the expert's file before deposing the expert.

Discovery of such materials, including the billings the expert submitted to the party that retained the expert, can be pursued by use of deposition subpoenas under CCP §§2020.010-2020.510, 2025.010-2025.620, and 2028.010-2028.080 (see chaps 5-6) and by demands for inspection under CCP §2031.010 (see chap 8).

JUDGE'S PERSPECTIVE: Counsel who use a deposition subpoena to obtain from the expert materials that may not be available under CCP §2034.210(c) must comply with the requirements of CCP §§2025.210-2025.280, *e.g.,* the materials sought should be described with "reasonable particularity" (CCP §2025.220(a)(4)) and the appropriate notice should be given. See §§5.52-5.54. On timing issues that may arise, see §§11.35-11.38.

Electronic documents. Electronic documents and data management have invaded all aspects of litigation, including expert discovery. Many experts communicate with counsel via e-mail, voice-mail, and instant messaging. In addition, their reports and drafts are often maintained electronically and the basis of their opinions are often obtained and manipulated electronically. Thus, counsel must consider the type of expert electronic documents and data that are discoverable, the potential methods of production (*e.g.,* electronic or hardcopy), and the cost, burden, and need for the electronic data and documents. On electronic discovery strategies, see chaps 4, 8.

A subpoena duces tecum (*i.e.,* a deposition subpoena for personal appearance and production of documents; see §§5.42-5.43) to obtain the expert's file should include a specific and clear request for copies of e-mails and all drafts and versions of documents. See §8.19. Depending on the complexity and magnitude of the case and its expert issues, counsel should consider the type of electronic data and materials that the opposing expert may have created and relied on. This could include spreadsheets, databases, scientific tables, and websites. Counsel should be prepared to discuss the appropriate method of production of electronic data.

However, as with all discovery, the burden, expense, and intrusiveness of the discovery should be weighed against the likelihood that information sought will lead to the discovery of admissible evidence. CCP §2017.020(a).

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§11.8 2. Scope and Application of CCP §§2034.010-2034.730

Discovery of the identity of expert witnesses, the exchange of information about them, including their reports and writings, and the right to depose them are primarily governed by CCP §§2034.010-2034.730, which resulted from the renumbering and division of former CCP §2034, effective July 1, 2005. The renumbering and division did not substantively alter CCP §2034, which was enacted originally as part of the Civil Discovery Act of 1986 (former CCP §§2016-2036, now CCP §§2016.010-2036.050).

Although CCP §§2034.010-2034.730 do not state whether these sections are the exclusive method for discovery of experts, the sections are closely patterned after their predecessor statutes, former CCP §§2037-2037.9, which were generally regarded as having preempted case law decided before their enactment in 1978. See, *e.g., St. Vincent Med. Ctr. v Superior Court* (1984) 160 CA3d 1030, 206 CR 840 (no deviation permitted from time limits of former CCP §2037(a)).

The procedures for identifying and deposing experts under CCP §§2034.010-2034.730 are available in any civil action or special proceeding of a civil nature, except in eminent domain proceedings under CCP §§1258.010-1258.300. In eminent domain proceedings, the exchange of valuation data is governed by CCP §§1258.210-1258.300. See *Padre Dam Mun. Water Dist. v Burkhardt* (1995) 38 CA4th 988, 45 CR2d 506. On what is a "special proceeding of a civil nature," see §§1.6-1.12.

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III. EXCHANGING EXPERT WITNESS INFORMATION

A. Making Demand for Exchange of Expert Witness Information

§11.9 1. Making Demand Triggers Exchange Procedure

Code of Civil Procedure §§2034.010-2034.730 provide a procedure by which the parties exchange information about expert witnesses. The exchange procedure is triggered by a party's timely demand "that all parties simultaneously exchange information concerning each other's expert trial witnesses." CCP §2034.210. All parties must then participate in a mutual and simultaneous exchange of lists containing the names and addresses of every natural person, including any party, whose oral or deposition testimony a party expects to offer as expert opinion in evidence at trial. CCP §2034.210(a). Until a party serves a timely demand under §2034.210(a), the statutory procedure for exchange is optional. *Hirano v Hirano* (2007) 158 CA4th 1, 6, 69 CR3d 646 ("where no demand is made by any party, no party is required to comply with the statutory exchange requirements"). After any party has served such a demand, the procedure is mandatory.

Any party may also include a demand for mutual and simultaneous production, for inspection and copying, of all discoverable reports and writings made by any expert of the category described in CCP §2034.210(b) in the course of preparing that expert's opinion. CCP §2034.210(c). See §11.6.

Once the parties have received the expert witness list, any party may take a deposition of any person on the list. See §11.31.

JUDGE'S PERSPECTIVE: Counsel should be aware of local rules that may authorize the court to propose specific dates for the exchange of expert witnesses. In such jurisdictions, counsel may be invited at the case management conference to stipulate to dispense with the demand requirements of CCP §§2034.010-2034.730. The parties are always free to stipulate to the timing of expert exchanges and discovery that differs from that in the Code of Civil Procedure, and the stipulations may be incorporated into a case management order under Cal Rules of Ct 3.728. Counsel should be aware, however, that absent an agreement, a case management order cannot conflict with procedures specified by statute. *Hernandez v Superior Court* (2003) 112 CA4th 285, 299, 4 CR3d 883 (not within court's power to order unilateral disclosure of identity of each party's medical expert witnesses).

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§11.10 2. When Demand May Be Made

The demand for simultaneous exchange of expert witness information may be made after the setting of the initial trial date. CCP §2034.210. The demand may be made without leave of court. CCP §2034.220. It must be served no later than 10 days after the initial trial date has been set, or no later than 70 days before the trial date, whichever is closer to the trial date. CCP §2034.220. When the date for expert witness demands provided by the statutes falls on a Saturday, Sunday, or holiday, the time limit is extended until the next court day closer to the trial date. CCP §2016.060.

EXAMPLE 1: On July 1, 2005, a trial date is set for September 30, 2005. The 10th day after the trial date has been set is July 11; 70 days before the trial date is July 22. Thus the parties have until July 22, the date closer to the trial date, to make a demand to exchange expert witness information and may do so any time during the period from July 1 to July 22.

EXAMPLE 2: On July 1, 2005, a trial date is set for August 15, 2005. The tenth day after the trial has been set is July 11; 70 days before the trial date was June 6. Thus the parties have only until July 11, the date closer to the trial date, to make a demand.

EXAMPLE 3: On June 24, 2005, a trial date is set for September 12, 2005. The tenth day after the trial date has been set is July 4; 70 days before the trial date is July 4. Because both dates fall on a holiday, the time limit is extended until the next court day closer to the trial date—July 5. Thus the parties have until July 5 to make a demand.

On motion for good cause. Under CCP §2034.230(b), the court may now order an earlier or later date for the exchange of expert information on motion for good cause. For good cause shown and in the interests of justice, a party may apply to the court to establish the sequence and timing of discovery for the convenience of parties and witnesses under CCP §2019.020(b).

If a new trial date has been set, counsel can ask the trial court to change discovery cutoff dates or reopen discovery. CCP §2024.050(a). See Corless, The Case for Early Expert Disclosure, California Litigation, vol 18, No. 2, p 4 (2005). Without such a request, a new trial date does not extend the time to make a demand for the exchange of expert witness information. See §1.73.

When case involves multiple experts. Because of the required time limitations, there are additional considerations in cases involving multiple experts. For example, in cases in which many experts must be deposed before trial, counsel should seriously consider seeking a stipulation with the attorneys for other parties to establish an expert discovery schedule starting before the statutory disclosure period of CCP §2034.220 and to permit discovery to continue after the dates established under CCP §2024.030.

If opposing counsel are unwilling to enter into a stipulation to solve the problem, counsel should promptly make use of CCP §2034.250(b)(2), which allows a party to move the court for a protective order, and permits the court, on a motion and a showing of good cause, to order an exchange date that is earlier or later than specified. See §11.29. On motions for protective orders and motion practice in general, see chap 15.

To prevent a client's interests from being prejudiced, or to protect a party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense, counsel may move for a protective order under CCP §2034.250(6) (*e.g.,* asking the court to reduce the list of designated experts).

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§11.11 a. "New" Initial Trial Date

Each time an action is tried, an "initial trial date" is set. Under CCP §§2034.210-2034.220, there is a new discovery deadline whenever a trial date is set after a mistrial, order granting a new trial, or reversal on appeal. *Hirano v Hirano* (2007) 158 CA4th 1, 6, 69 CR3d 646; *Beverly Hosp. v Superior Court* (1993) 19 CA4th 1289, 24 CR2d 238. See §1.73.

NOTE: Allowing additional discovery following a mistrial, an order granting new trial, or a reversal on appeal (as opposed to a postponement or continuance of trial) may be consistent with the overall purposes of the discovery rules. Discovery following a previous trial is likely to be "more focused, intelligent, and efficient." When a jury has deadlocked and a mistrial has been declared, it is likely that the evidence presented by both sides has weaknesses that may be remedied by designation of new experts. 19 CA4th at 1295. See *Guzman v Superior Court* (1993) 19 CA4th 705, 23 CR2d 585 (plaintiff permitted to designate new experts after trial court granted order for new trial on issue of damages).

PRACTICE TIP: After a new trial date is set, the parties should not rely on a demand for exchange of expert witness information that was served in connection with the old trial date. If neither party makes a demand under CCP §2034.210 after the new trial date is set, then neither party is required to comply with §2034.260. *Hirano v Hirano* (2007) 158 CA4th 1, 6, 69 CR3d 646 (appellant excused from failure to make timely exchange of expert witness information when adversary failed to make demand for exchange of expert witness information after new trial date set).

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§11.12 b. Relief From Premature Demand; Objection to Untimely Demand

A court can grant relief under CCP §473 from a party's mistake in serving a premature request for the exchange of expert witness lists. *Zellerino v Brown* (1991) 235 CA3d 1097, 1 CR2d 222. The court in *Zellerino* was careful to note that relief under CCP §473 is not available when the Discovery Act (CCP §§2016.010-2036.050) provides analogous, if more limited, relief. 235 CA3d at 1107. The court also held that a motion for protective order is the only proper method for objecting to an untimely demand for exchange of expert witness information. 235 CA3d at 1109. On motion for protective order, see §§15.59-15.84.

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§11.13 3. Contents of Demand

The demand for exchange of expert witness information must conform to the following requirements specified in CCP §2034.230(b):

- It must be made in writing.
- It must identify, below the title of the case, the party making the demand and state that it is being made under CCP §§2034.010-2034.730.
- The demand must set forth the date for the exchange of lists of expert trial witnesses and expert witness declarations. (On date of exchange, see §11.15.)
- If production of writings is required, the demand must so specify.

See sample form in §11.69.

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§11.14 4. Service of Demand

The party initiating a demand for exchange of expert trial witness information under CCP §2034.210(a) must serve a copy of the written demand on all parties who have appeared in the action. CCP §2034.240.

At the time of service, the party must complete a proof of service and affix a copy of the proof of service to each service copy of the demand. The demand is not filed with the court. CCP §2034.290(a). The original demand is lodged with the court when its contents become relevant to an issue in any pending matter in the action. CCP §2034.290(c).

On the requirement that the party initiating the demand retain the original of the demand, see §11.27.

For service on parties by serving counsel of record, service by mail, and extension of time for response after service by mail, see CCP §§1011-1013, 1015; §2.22.

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B. Exchange of Expert Witness Information

§11.15 1. Date and Place of Exchange

Once a demand for exchange under CCP §§2034.010-2034.730 has been served, all parties, including the party initiating the demand, must participate in a mutual and simultaneous exchange of written materials that set forth specific information about expert trial witnesses. If any party has demanded production and exchange of reports and writings of any employed expert under CCP §2034.210(c), the parties must produce and exchange all discoverable reports and writings at the place and on the date specified in the demand. CCP §2034.270.

PRACTICE TIP: Code of Civil Procedure §2034.210(a) provides that the identity of any natural person, including a party or an employee of a party whose oral or deposition testimony is expected to be offered at trial as an expert opinion, must be disclosed in response to a proper demand. Counsel should take care to comply. In *Province v Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 25 CR2d 667, the court found reversible error supporting the grant of a new trial when the trial court failed to exclude the expert testimony of a percipient witness who was not designated in an exchange of expert witness information. All parties must disclose any percipient witness who will be called to give expert opinions based on his or her personal observations. See §11.4.

Witnesses designated under CCP §2034.210(a) are sometimes referred to as "nonretained experts."

Date. This exchange must take place on or before the date of exchange specified in the demand. CCP §2034.260. The date of exchange specified in the demand must be 50 days before the initial trial date or 20 days after service of the demand, whichever is closer to the trial date, unless the court, on motion for good cause shown, orders an earlier or later date of exchange. CCP §2034.230(b). (When the date for exchange of expert witnesses provided by the statutes falls on a Saturday, Sunday, or holiday, the time limit is extended until the next court day closer to the trial date. CCP §2016.060.)

Although the court may order that the exchange occur at an earlier date than that specified in the demand, it may not require one side to exchange before the other. To do so would create a hybrid discovery device. *Hernandez v Superior Court* (2003) 112 CA4th 285, 299, 4 CR3d 883.

A party's failure to turn over an expert's reports on the date specified in the demand does not constitute a violation of CCP §2034.270 if the reports were not in existence on the date of the exchange and the producing party's conduct was not unreasonable. *Boston v Penny Lane Ctrs., Inc.* (2009) 170 CA4th 936, 953, 88 CR3d 707.

Place. "The exchange of information may occur at a meeting of the attorneys for the parties" or be accomplished by "a mailing on or before the date of exchange." CCP §2034.260(a).

Simultaneous exchange. One appellate court has stated that former CCP §2034 (now see CCP §2034.210) "required a 'simultaneous' exchange of information, in which each side must either identify any expert witnesses it expects to call at trial, or state that it does not intend to rely upon expert testimony." *Fairfax v Lords* (2006) 138 CA4th 1019, 1021, 41 CR3d 850. Because the defendant in *Fairfax* neither listed the experts he intended to call (although he did list 26 health care professionals as "potential" experts) nor stated that he had no present intention to offer expert testimony (instead, he reserved the right to designate "'experts in rebuttal'"), defendant had not participated in the exchange and thus should not have been permitted to use the services of a subsequently designated expert at trial. 138 CA4th at 1024.

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§11.16 2. Contents of Written Exchange

Each party must prepare and exchange with each other party, either:

- A statement that the party does not presently intend to offer the testimony of any expert witness (CCP §2034.260(b)(2)); or
- A designation setting forth the name and address of any natural person whose oral or deposition testimony the party expects to offer in evidence as an expert opinion. CCP §§2034.210(a), 2034.260(b)(1). For this purpose, "natural person" includes any party or employee of a party whose expert opinion is expected to be offered by the party preparing the list. CCP §2034.210(a).

NOTE: If the party intends to use a treating physician as an expert, designate the physician by name and address. *Kalaba v Gray* (2002) 95 CA4th 1416, 116 CR2d 570. On treating physicians as experts, see §§11.4, 11.20.

No particular form of written list is specified in CCP §§2034.010-2034.730. For a sample form of a written list, see §11.69. However, it is insufficient to designate an expert by reserving the right to call experts designated by other parties. If such a practice were allowed, it is possible that experts would be called whose subjects of testimony had not been previously disclosed, making an effective pretrial deposition difficult and bringing an element of gamesmanship into the process. *Gallo v Peninsula Hosp.* (1985) 164 CA3d 899, 211 CR 27.

JUDGE'S PERSPECTIVE: Counsel should take care to ensure full compliance with the rules governing the witness designation. A defective designation may prevent a party from successfully pursuing a motion to augment or exclude. The expert witness designation must be lodged in support of such motions, which require a showing that a moving party engaged in a timely exchange of expert witness information. CCP §§2034.300, 2034.610-2034.630. See §§11.32, 11.60. Counsel should not rely on the designation of an expert made by another party.

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§11.17 3. Expert Witness Declaration

If any witness included in the expert witness list is an expert described in CCP §2034.210(b)*, i.e.,* a party, an employee of a party, or a person who has been retained by a party to form and express an opinion in anticipation of the litigation or in preparation for the trial of the action, that party's exchange must also include or be accompanied by an expert witness declaration. CCP §2034.260(c). See §§11.10-11.12.

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§11.18 a. Contents of Expert Witness Declaration

The term "expert witness declaration" is something of a misnomer; it does not refer to a declaration made by an expert witness. It is a statement signed only by the party's attorney (or by the party if he or she is unrepresented) setting forth specific factual information supplied by the party making the disclosure and executed under penalty of perjury. CCP §2034.260(c). It must contain the following specific factual information (CCP §2034.260(c)(1)-(5)):

- A brief statement of the expert's qualifications;
- A brief statement of the general substance of the testimony that the expert is expected to give at trial;
- A representation that the expert has agreed to testify at the trial;
- A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition about the specific testimony that the expert is expected to give at trial, including any opinion and its basis; and
- A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

JUDGE'S PERSPECTIVE: Counsel should be aware that the expert witness declarations submitted in the exchange may be used by the trial court, *e.g.,* on a pretrial motion in limine to evaluate whether to limit the expert's testimony so that it is confined to the area of the expert's professed expertise. See *Korsak v Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 1523, 3 CR2d 833 (court has duty to limit expert's testimony to range of his or her expertise). Moreover, because the declaration must be executed under penalty of perjury, discipline or sanctions may result if misrepresentations in the declaration are shown.

For an expert witness declaration form, see §11.69.

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§11.19 b. Sufficiency of Declaration

Under CCP §2034.260(c), an expert witness declaration must contain a "brief narrative statement of the general substance of the testimony that the expert is expected to give." A party is not permitted to offer expert testimony at trial on undisclosed subjects. See *McCoy v Gustafson* (2009) 180 CA4th 56, 96, ___ CR3d ___. If a party decides to offer testimony on new subjects, a timely motion to amend the expert witness declaration must be filed and served "with respect to the general substance of the testimony that an expert previously designated is expected to give." CCP §2034.610(a)(2); *Bonds v Roy* (1999) 20 C4th 140, 144, 83 CR2d 289 (trial court order properly excluded expert testimony on subject that was not disclosed in expert witness declaration). But see *Hirano v Hirano* (2007) 158 CA4th 1, 9, 69 CR3d 646 (no demand for statutory exchange of expert witness information made by any party after new trial date set following reversal of judgment on appeal; thus, *Bonds v Roy, supra,* inapplicable in context of new trial following reversal of judgment). On discovery motions generally, see chap 15.

JUDGE'S PERSPECTIVE: Some jurisdictions require counsel's expert witness declaration to be provided to the court along with a statement of the case and a list of exhibits and witnesses at the readiness conference shortly before trial. An uninformative boilerplate witness declaration is not likely to enhance counsel's position and credibility with the trial court. Particularly in light of *Bonds v Roy, supra,* care in the preparation of expert declarations is strongly advised. See, *e.g.,* San Diego Ct R 2.1.15. Even though §2034.260(c) requires only a "brief narrative statement," the declaration must be able to withstand an objection that it fails to comply with the statutory scheme; narratives that are overly broad, too brief, or at odds with the deposition testimony may result in the exclusion of or limitations on the expert witness testimony.

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§11.20 c. Declarations Involving Treating Physicians

The expert witness requirements in CCP §2034.260(c)(1)-(5) apply only to retained experts under CCP §2034.210(b), not to percipient witnesses or other "nonretained" experts. See §§11.3-11.5. Under *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 91 CR2d 293, a treating physician does not become a "retained" expert within the meaning of former §2034 (now CCP §2034.210(b)) simply because the physician has given opinion testimony, and an expert witness declaration generally is not required for a treating physician. The *Schreiber* court disapproved *Plunkett v Spaulding* (1997) 52 CA4th 114, 60 CR2d 377, to the extent that it concluded that a treating physician could never testify about standard of care without an expert witness declaration, regardless of the manner in which he or she obtained the factual basis of his or her opinion. Consistent with *Schreiber,* to the extent a treating physician acquired personal knowledge of the facts independent of the litigation, no expert witness declaration is required, and he or she may testify regarding any opinions formed on the basis of facts independently acquired and informed by his or her training, skill, and experience, including opinions regarding causation and standard of care. See also *Huntley v Foster* (1995) 35 CA4th 753, 756, 41 CR2d 358 (expert witness declaration not required for treating physician to give opinion testimony).

However, if a treating physician is formally retained for the purpose of offering opinion testimony at trial, the party must provide an expert designation complete with the name and address of the physician; no expert declaration is required. See *Gotschall v Daley* (2002) 96 CA4th 479, 116 CR2d 882 (failure to disclose treating physician as expert resulted in dismissal because of lack of evidence on causation; no relief available under CCP §473(b) for failure to make timely disclosure under CCP §2034); *Kalaba v Gray* (2002) 95 CA4th 1416, 116 CR2d 570 (trial court correctly rejected standard of care testimony from plaintiff's treating physicians who were not designated as expert witnesses; absence of expert testimony on standard of care resulted in nonsuit for defendant). See also *Fatica v Superior Court* (2002) 99 CA4th 350, 120 CR2d 904 (trial court erred in prohibiting plaintiffs' treating physician, who was timely designated as expert but had not reviewed all of plaintiffs' medical records at time of his deposition, from testifying at trial about his opinions; citing *Schreiber,* court of appeal held that, as treating physician, he should have been permitted to testify about his opinion).

On fees payable to a treating physician for attending deposition, see §11.41. See also CCP §2034.430(a)(2); *Baker-Hoey v Lockheed Martin Corp.* (2003) 111 CA4th 592, 3 CR3d 593.

PRACTICE TIP: Counsel should exercise caution when the testimony of treating physicians will be used. If counsel intends to elicit expert standard of care testimony from the witness, then the safer practice is to disclose the physician as an expert and provide the physician's name and address in the disclosure.

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§11.21 4. Service of Written Exchange

The exchange of written expert trial witness information, and any included or accompanying expert witness declarations required by CCP §2034.260(c), "may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange." CCP §2034.260.

PRACTICE TIP: Because any delay in mail service further limits time available for designation of supplemental experts, parties should seek to agree to service of the written expert trial information by faster methods (*e.g.,* overnight delivery or fax transmission). However, CCP §2034.260 does not contemplate service by any method other than "at a meeting of attorneys" or mail. Therefore, strict compliance with this section requires that while parties may use fax or overnight delivery service, a copy of the written exchange should also be timely mailed.

The statute indicates that *each party* is to receive the required exchange of every other party. Code of Civil Procedure §2034.210 provides that "any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses."

The written exchanges are not filed with the court. CCP §2034.290(a). Originals of the written exchanges are lodged with the court if their contents become relevant to an issue in any pending matter in the action. CCP §2034.610(b). The demanding party should retain the original demand with the original proof of service attached, serving copies of that demand, with copies of the proof of service attached, on all other parties at the time of the exchange. All other parties should serve originals, with original proofs of service attached, on the party demanding the exchange.

On a party's duty to retain and preserve the originals of all expert witness lists and declarations, as well as the original of the demand with the original proof of service affixed, see §11.27.

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5. Production of Discoverable Reports and Writings

§11.22 a. Scope of Requirement

Reports and writings made in course of preparing expert's opinion. If under CCP §2034.210(c) a party has demanded production and exchange of certain discoverable reports and writings of experts described in CCP §2034.210(b), all parties, including the party initiating the demand, must produce and exchange them at the place and on the date specified in the demand. CCP §2034.270. According to CCP §2034.210(b), "experts" include an expert who is a party or an employee of a party or who has been retained by a party to form and express an opinion in anticipation of the litigation or in preparation for the trial of the action. The production requirements of CCP §§2034.010-2034.730 apply only to discoverable reports and writings "made by any expert described in [CCP §2034.210(b)] in the course of preparing that expert's opinion." CCP §2034.210(c).

Other discoverable material. Counsel should not assume that a demand for production under CCP §2034.210(c) will yield all materials that might otherwise be discoverable, but that were not "made by the expert," or not made "in the course of preparing that expert's opinion." These might include (a) other writings and reports of the expert that were not prepared for this particular action, but that the expert consulted, or on which the expert relied, in forming an opinion about an issue in the present action; (b) transmittals to the expert by counsel, or the party retaining the expert, for the expert's use as background or in forming an opinion on the issue for which the expert was retained; and (c) articles, books, previous drafts of the expert's reports, or other writings of the expert that might provide useful material for cross-examination. Production of otherwise discoverable writings that are not within the statutory description in CCP §2034.210(c) must be obtained by informal agreement of counsel, stipulation, or other discovery methods. See §11.7. Because an opposing expert's file may be managed and retained electronically (see §11.7), any such agreement or other discovery method should make as clear as possible what electronic documents and data counsel requests. This could include e-mails, drafts and versions of documents, spreadsheets, databases, scientific tables, and websites.

PRACTICE TIP: When working with his or her own expert, counsel must keep electronic discovery and data management in mind. Although e-mails are convenient and tend to encourage quick and casual communications, they should be treated as fully discoverable. It is wise to apply to electronic communications the same discipline that is applied to written communications with experts. Even initial inquiries are discoverable, as are any transmittal letters or memos attached to documents that counsel provides to the expert.

Possible bias. A party has the right to delve into the potential biases of an expert witness. Inquiries regarding the number of times the expert has testified for plaintiffs and defendants and an estimate of income generated as an expert are proper questions. *Stony Brook I Homeowners Ass'n v Superior Court* (2000) 84 CA4th 691, 700, 101 CR2d 67. A party is also entitled to receive reports, deposition transcripts, and trial testimony from the expert's previous engagements.

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§11.23 b. Time, Place, and Nature of Exchange

The mutual and simultaneous production and exchange of discoverable reports is to permit the other parties to inspect and copy the reports. CCP §2034.210(c). The place of production is ordinarily that specified in the demand, although a party may seek a protective order directing a different date and place. CCP §2034.250(b)(4). Because experts employed or retained by parties are considered to be under the direction and control of those parties, it ordinarily does not create an undue burden or hardship on that party's expert to require production at the place and time specified for the party's production.

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§11.24 6. Submission of Supplemental Information

The supplemental exchange procedure is designed to allow a party in full compliance with CCP §§2034.010-2034.730 a limited chance to reconsider a prior tactical decision to forgo retaining an expert to testify on a given subject. For example, if a party discovers in the initial exchange of expert information that an opponent has designated an expert to testify on a subject, the party may also decide to retain an expert to testify on that subject. CCP §2034.280. However, the supplemental expert witness list procedure is not available to allow listing of additional experts on a subject. A party who has previously retained and designated an expert to testify on a subject and wishes to retain additional experts should move to augment or amend the expert witness list under CCP §§2034.610-2034.630. See §§11.51-11.56.

A party likewise may not use the supplemental expert witness list procedure to replace an expert already designated. *Richaud v Jennings* (1993) 16 CA4th 81, 19 CR2d 790. Indeed, it has been held to be reversible error for a trial court to allow an expert who has been supplementally designated to testify on the same subjects for which an expert was initially designated by the same party. *Basham v Babcock* (1996) 44 CA4th 1717, 1723, 52 CR2d 456. A party who desires to replace an already-designated expert with a different one should move to augment the expert witness list under CCP §§2034.610-2034.630. See §§11.33-11.37.

Finally, the supplemental exchange procedure is limited to those parties participating in the original exchange. *Fairfax v Lords* (2006) 138 CA4th 1019, 41 CR3d 850. A party who fails to participate in the original exchange must seek relief from default by motion to submit tardy expert witness information under CCP §§2034.710-2034.720. See §§11.57-11.60.

The consequences of waiting to see who the other party designates as an "expert" before designating one's own can be dire. In *Fairfax v Lords, supra,* a medical malpractice action, the trial court erred in permitting defendant to designate his expert witness after receiving plaintiff's designation. Because expert testimony on the critical issue of the standard of care could have affected the outcome of the case, the judgment for defendant was reversed. The court said:

> When it comes to issues that both sides anticipate will be disputed at trial, a party cannot merely "reserve its right" to designate experts in the initial exchange, wait to see what experts are designated by the opposition, and then name its experts only as purported "rebuttal" witnesses. Whether such a strategy is somehow beneficial to defendants, as Lords claims, is simply irrelevant. The trial court erred by acquiescing in it.

138 CA4th at 1021.

NOTE: *Fairfax* emphasizes the importance of participating in the exchange of expert witness information in a timely manner. If a party intends to call an expert on a known disputed issue, then the expert must be disclosed. If the party does not presently intend to do so, then to avoid the bad news delivered in *Fairfax*, it should disclose that as well. This latter disclosure at least will provide a potential opportunity to supplement a disclosure because the party will have been deemed to have participated in the initial exchange. The failure to disclose an expert or the lack of present intent to call an expert at the time of the exchange will invite a ruling that the party did not participate in the process and thus waived the right to call an expert on the known disputed issue.

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§11.25 a. Procedure

Within 20 days after the initial exchange of expert witness information, any party who has engaged in the original exchange may submit a supplemental expert witness list and, if appropriate, an expert witness declaration about the newly identified experts and all discoverable reports and writings made by them. CCP §2034.280. These experts must be made available "immediately" for deposition; such depositions may be taken even after expiration of the discovery time limit set forth in CCP §2024.020(a). CCP §2034.280.

NOTE: In jurisdictions that permit the parties to dispense with the demand requirements of CCP §§2034.010-2034.730, a second or supplemental exchange date will be set at the case management conference. See Judge's Perspective, §11.19.

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§11.26 b. Contents

The supplemental expert list must contain the name and address of any expert who will express an opinion on a subject covered by an expert originally designated by an adverse party in the original exchange, provided "the party supplementing an expert witness list has not previously retained an expert to testify on that subject." CCP §2034.280. The supplementing party must also include an expert witness declaration under CCP §2034.260(c) "concerning those additional experts," as well as "all discoverable reports and writings, if any, made by those additional experts." CCP §2034.280.

A party who submits a supplemental list must also submit "all discoverable reports and writings, if any, made by those additional experts." CCP §2034.280. The supplemental exchange is to be accompanied by this submission, whether or not exchange of reports and writings under CCP §2034.210(c) was demanded originally. The language "all discoverable reports and writings, if any… made by those additional experts" should be read in conjunction with the general statement in CCP §2034.210(c) that refers to writings made "in the course of preparing that expert's opinion." See §11.22.

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§11.27 7. Retention and Preservation of Expert Witness Demands, Lists, and Declarations

The party initiating the demand retains the original of the demand, with the original proof of service affixed, and the original of all expert witness lists and declarations exchanged in response to the demand until 6 months after final disposition of the action. CCP §2034.290. Final disposition ordinarily means expiration of the time for, or exhaustion of, all appeals after dismissal, entry of judgment, or settlement of the action. After expiration of the retention period, all originals may be destroyed unless the court, on motion of any party and for good cause shown, orders preservation of the originals for a longer period. CCP §2034.290. As a practical matter, this burden of preservation rests not on the party but on the attorney.

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C. Protective Orders

§11.28 1. Procedure

A party served with a demand under CCP §§2034.010-2034.730 may move promptly for a protective order. CCP §2034.250. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. CCP §§2016.040, 2034.250(a).

If the motion is denied in whole or in part, the court can order the parties against whom the motion was brought to provide or permit the discovery against which protection was sought on "terms and conditions that are just." CCP §2034.250(c).

Monetary sanctions provided under CCP §2023.030(a) must be awarded to the prevailing party and against any party, person, or attorney who unsuccessfully made or opposed the motion for a protective order, unless the court finds that the ones to be sanctioned acted with substantial justification or that other circumstances make imposition of the sanction unjust. CCP §2034.250(d).

NOTE: A party seeking a protective order should do all of the following:

- Make and document reasonable and good faith efforts to resolve the issue informally;
- Move promptly for a protective order;
- Establish, by affidavit or declaration, good cause for the order sought;
- Show a good faith attempt at informal resolution of the issues; and
- Seek monetary sanctions.

On protective orders generally, see §§15.59-15.84. On sanctions generally, see §§15.85-15.116.

JUDGE'S PERSPECTIVE: A "reasonable and good faith attempt" at informal resolution of the issues ordinarily will consist of more than one phone call or letter. An honest and thoughtful effort at compromise must be made. Cursory or superficial attempts at informal resolution may result in the court's ordering all counsel to appear for a "meet and confer" session in a conference room at the trial court. On the "meet and confer" requirement, see §15.3. Most judges view with particular disfavor a party's failure or unwillingness to engage in a meaningful meet and confer process to resolve differences over expert witnesses.

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§11.29 2. Seeking Protective Order Before Demand Served

Under a literal reading of CCP §2034.250(a), parties may seek a protective order only after service of a CCP §2034.210 demand. This narrow reading might also preclude a party initiating a demand under CCP §2034.210 from seeking a protective order under CCP §2034.250. For example, a party in a multiparty action may wish to seek an order of the kind described in CCP §2034.250(b)(5), dividing the parties into sides on the basis of identity of interest in the issues, and requiring that the sides so created designate any retained experts. On problems in cases involving many experts, see §11.10. However, under CCP §2034.250(b), the court is empowered to protect any party from "unwarranted annoyance, embarrassment, oppression, or undue burden and expense." See §11.30. Counsel might argue that requiring the service of a demand as a condition precedent to a motion for a protective order would run counter to the purposes of the statutory scheme and that a narrow reading of the statute would defeat the intent of the law.

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§11.30 3. Grounds

Under CCP §2034.250, the court may make any order "that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense," including, among others, an order that:

- The demand be quashed as not timely served;
- The date of exchange be earlier or later;
- The exchange be made only on specified terms and conditions;
- Production and exchange of reports be made at a different time or place than specified in the demand;
- The parties be divided into sides on the basis of identity of interest in the issues, and the designation of employed or retained experts be made by sides so created rather than parties; and
- A party or a side reduce its list of employed or retained experts.

PRACTICE TIP: A motion for a protective order under CCP §2034.250 is the only proper method for objecting to the untimely demand for an exchange of expert witness information. A party cannot simply file an objection to the demand. *Zellerino v Brown* (1991) 235 CA3d 1097, 1109, 1 CR2d 222.

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IV. DEPOSITION OF LISTED EXPERTS

§11.31 A. Authorization

After receipt of an expert witness list from a party, any other party may take the oral or written deposition of any person on the list. CCP §2034.410. In other words, once the expert witness list is received, parties have the right to take depositions of designated expert witnesses.

The procedures in CCP §§2025.010-2028.080 for taking oral and written depositions apply to depositions of listed trial expert witnesses, except as specifically provided in CCP §§2034.410-2034.470. The variations from general deposition procedure concern compelling attendance, place of deposition, and payment of witness fees. For discussion of these procedures, see §§11.32-11.47.

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B. Compelling Attendance

§11.32 1. Party, Employed, or Retained Experts

Service of a proper deposition notice accompanied by a tender of any required expert witness fee is sufficient to require the party employing or retaining the expert to produce the expert for deposition. CCP §2034.460.

Expert witness fees can be tendered either when the expert's deposition notice is served or at the commencement of the deposition, at the option of the party noticing the deposition. CCP §2034.450(a); *True v Shank* (2000) 81 CA4th 1250, 1256, 97 CR2d 462 (quoting various continuing legal education practice books, including former §11.49 (now §11.42) of this chapter).

PRACTICE TIP: Although a deposition notice is sufficient to secure the deposition of an expert "retained" by a party to form and express an opinion about the litigation (see CCP §2034.210(b)), even if reports have already been exchanged, it is still advisable to use a deposition subpoena to compel the expert to produce material at the deposition from the expert's files, *e.g.,* any earlier drafts of the expert's reports, notes, writings about treatises in the field, and copies of the expert's bills for time spent on the case. Such material may provide a fertile ground for cross-examination. A deposition subpoena for the opposing expert's file should consider all forms of electronic and paper data, including e-mail, drafts and versions of electronic documents, spreadsheets, databases, scientific tables, and websites. See §§11.7, 11.22. Counsel's own expert can help specify the scope and level of detail for an effective subpoena.

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§11.33 2. Nonparty, Nonemployed, or Nonretained Experts

Counsel must use a deposition subpoena to compel the attendance of experts who are not parties and are neither employed nor retained by a party. On deposition subpoena, see §§5.85-5.93. The burden of producing an expert witness for deposition applies only to experts retained to form and express an opinion in the litigation. *Hurtado v Western Med. Ctr.* (1990) 222 CA3d 1198, 272 CR 324 (plaintiff had no burden to produce her treating physicians for deposition when they were to testify as percipient witnesses, not as retained experts under CCP §2034.210(b)). On percipient expert witnesses, see §11.4.

Treating physicians. Because a deposition notice is not sufficient to compel a treating physician to appear at the deposition, counsel should personally serve a treating physician with the Judicial Council form of deposition subpoena for personal appearance and production of documents and things. See form reproduced in §5.217. Even if a deposition for production of documents only was served earlier, the physician will bring any newer information in the patient's files to the deposition. On advantages of obtaining copies of patient's medical records before scheduling depositions, see §5.42.

Electronic information. A subpoena for an opposing expert's file should consider all forms of electronic and paper data, including e-mails, drafts, and versions of electronic documents, spreadsheets, databases, scientific tables, and websites. See §11.7. Counsel's own expert can help specify the scope and level of detail for an effective subpoena.

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C. Time of Deposition

§11.34 1. Allow Sufficient Time for Deposition

Parties must be careful to allow themselves sufficient time to depose expert witnesses before the trial date. Code of Civil Procedure §595.2, which states that courts must grant continuances of a trial on agreement of the parties, is directory only, not mandatory. Thus a court is not obligated to grant a continuance merely because parties have stipulated to a continuance to allow time to depose expert witnesses. On the other hand, the statute is still meaningful as a statement of policy, encouraging trial courts to accommodate stipulated continuances whenever it is not impractical to do so. *Pham v Nguyen* (1997) 54 CA4th 11, 62 CR2d 422 (trial court did not abuse its discretion in denying parties' stipulated request for continuance submitted only 4 days before trial date).

PRACTICE TIP: Under Cal Rules of Ct 3.1332(c)(6), a party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts, is good cause to continue a trial. A continuance is also permitted when a motion to amend or augment has been granted. CCP §2034.629(d). Counsel seeking a continuance based on the inability to obtain expert witness discovery should review these provisions.

Generally, an expert's deposition cannot be compelled until he or she is designated a trial expert under CCP §§2034.010-2034.730. However, an exception may be warranted when a party's expert submits a declaration in opposition to a summary judgment motion and the moving party presents objective facts that tend to impeach the foundational basis of the expert's opinion as stated in the declaration. *St. Mary Med. Ctr. v Superior Court* (1996) 50 CA4th 1531, 58 CR2d 182.

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2. Specific Timing Considerations

§11.35 a. Deadlines for Expert Witness Discovery and Motions

Discovery pertaining to experts identified under CCP §§2034.010-2034.730 must be completed on or before the 15th calendar day before the date initially set for trial, and motions concerning expert witness discovery must be heard on or before the 10th calendar day before the date initially set for trial. CCP §2024.030. When the date for completion of expert discovery provided by the statutes falls on a Saturday, Sunday, or holiday, the time limit is extended until the next court day closer to the trial date. CCP §2016.060.

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§11.36 b. When Deposition Notice Served by Mail

The statutory framework seems to provide a maximum of 25 calendar days within which to depose experts who have been disclosed, or a maximum of 20 calendar days if deposition notices are served by mail. Except as specified in CCP §§2034.410-2034.470, expert witness depositions are governed by CCP §§2025.010-2028.080. Under CCP §2025.270(a), 10 calendar days' notice is required for depositions, plus 5 additional calendar days if the deposition notice is served by mail. See CCP §1013(a). Thus, because the expert witness exchange must occur 20 days after service of the demand or 50 days before the initial trial date (CCP §2034.230(b)) and discovery must be completed 15 days before the initial trial date (CCP §2024.020), there are only 35 days (50 minus 15) within which to conduct expert depositions; from these remaining 35 days, 10 days must be subtracted for notice of the deposition (see CCP §2025.270(a)), with the result that, after serving the notice, only 25 days remain to depose the opposing experts, unless service is by mail, in which case only 20 days remain to take the deposition.

On extensions of time due to method of service, see §2.22.

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§11.37 c. Court's Discretion to Alter Deadlines

On motion of any party, the trial court has the discretion to permit the completion of discovery within 15 calendar days before trial, to permit a motion to be heard within 10 calendar days before trial, or to reopen discovery after a new trial date is set. CCP §§2024.030, 2024.050(a)-(b).

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§11.38 d. Agreed-On Extensions

The parties to an action may, with the consent of any party affected by it, agree to extend the time for the completion of discovery or for the hearing of motions concerning discovery or to reopen discovery after a new trial date is set. CCP §2024.060.

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§11.39 e. When There Are Many Experts

In cases in which numerous experts are disclosed by several parties, counsel must take the time limitations of CCP §§2024.030 and 2034.220-2034.230 into consideration in establishing a discovery plan. On multiple experts, see §§11.10, 11.64. On developing a discovery plan involving experts, see chap 2. Because of the requirements governing the timing of expert disclosure, expert depositions frequently cannot be completed within the required time limitations before a scheduled trial date. Possible solutions include the following:

- A stipulation among all attorneys to establish an expert discovery schedule starting before the statutory disclosure period of CCP §§2034.010-2034.730 and to permit discovery to continue after the dates established under CCP §2024.030;
- Use of CCP §2034.230(b), which allows the court, on motion and a showing of good cause, to order an exchange date that is earlier or later than that specified;
- A motion for a protective order under CCP §2034.250, asking the court to reduce the list of designated experts;
- A motion to establish the sequence and timing of discovery for the convenience of parties and witnesses under CCP §2019.020(b); and
- Asking the trial court to change discovery cutoff dates or reopen discovery if a new trial date has been set (CCP §2024.050(a)).

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§11.40 D. Place of Deposition

Experts designated under CCP §2034.210(b), *i.e.,* any expert who is a party or an employee of a party or who has been retained by a party for the purpose of forming and expressing an expert opinion in the action, must be deposed at a place within 75 miles of the courthouse where the action is pending. CCP §2034.420. A CCP §2034.210(b) expert can be required to travel to the area where the trial will be held for a deposition. CCP §2034.420. However, on a motion for a protective order by the party designating the expert, the court may order a more distant place for deposition, provided a showing of exceptional hardship is made. CCP §2034.420.

The rules regarding the place of the deposition of experts, other than CCP §2034.210(b) experts, are found in CCP §§2025.010-2025.620. See §§5.42-5.43.

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E. Expert Witness Fees

§11.41 1. Experts Entitled to Fees for Attending Depositions

Certain experts are entitled to be paid, by the party taking the deposition, at their reasonable and customary hourly or daily rates for the actual time consumed in their examination by any party attending the deposition. See, *e.g., Baker-Hoey v Lockheed Martin Corp.* (2003) 111 CA4th 592, 602, 3 CR3d 593 (treating physician entitled to reasonable and customary hourly rate for deposition). Under CCP §2034.430(a)-(b), experts for whom witness fees must be paid are as follows:

- Any expert who has been retained for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, and who is neither a party nor an employee of a party;
- A treating physician or other treating health care practitioner who is to be asked to express an opinion during the deposition;

NOTE: A treating practitioner's "opinion testimony" includes opinion or factual testimony about the physician's past or present diagnosis or prognosis or the reasons for a particular treatment decision made by the physician. Opinion testimony does not include only the reading of notes and symbols in the relevant medical records or, if not legible to the deponent, an approximation of what those words and symbols are. CCP §2034.430(a)(2). See also *Baker-Hoey v Lockheed Martin Corp., supra*.

- An architect, professional engineer, or licensed land surveyor who was involved with the original project design or survey for which he or she is asked to express an opinion within his or her expertise that is relevant to the action or proceeding; and
- Any expert on another party's expert witness list deposed in any workers' compensation case arising under Division 4 of the Labor Code (commencing with Lab C §3201) or under Division 4.5 (commencing with Lab C §6100).

A physician or other health care practitioner deposed solely as a percipient witness (see §11.4) is not entitled to expert witness fees but is entitled to his or her daily hourly rates for the time spent in deposition. 111 CA4th at 602.

PRACTICE TIP: As a practical matter, counsel rarely question a treating physician without eliciting some opinions (see CCP §2034.430(a)(2), discussed in the above Note), and most attorneys consider it inadvisable to argue with a treating physician over the payment of expert witness fees. Such confrontations can produce a hostile witness whose testimony is less forthcoming or whose schedule for appearing at a deposition becomes inflexible.

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§11.42 2. Tender of Expert Witness Fees

Service of a proper deposition notice accompanied by a tender of any required expert witness fee is sufficient to require the party employing or retaining the expert to produce the expert for deposition. CCP §2034.460. The party desiring to depose the expert witness is responsible for the fees to which the expert is entitled. CCP §2034.430(b).

At the option of the party taking the deposition, the fee may be tendered at the commencement of the deposition, or such tender may accompany the deposition notice delivered to the attorney for the party designating the expert. CCP §2034.450(a); *True v Shank* (2000) 81 CA4th 1250, 1256, 97 CR2d 462 (quoting various continuing legal education practice books, including text of this section).

PRACTICE TIP: To assure attendance of the expert who is entitled to expert witness fees, the tender of fees should accompany the deposition notice served on counsel for the party designating the expert.

The party designating the expert is responsible for any fee charged by the expert to prepare for the deposition, and for any travel expenses incurred by the expert. CCP §2034.440. If the deposition runs longer than expected, the party taking the deposition is responsible for any additional fees of the expert during the course of the deposition, which must be paid within 5 days of receipt of an itemized statement of the expert. CCP §2034.450(c).

An expert must be paid for attending a deposition even if the expert is not actually deposed by a party. CCP §2034.430(b).

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§11.43 3. Calculation of Expert Witness Fees

Under CCP §2034.430(b), an expert's fee is based on the

> reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed in the deposition subpoena, or from the time of the arrival of the expert witness should that time be later than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from the deposition, regardless of whether the expert is actually deposed by any party attending the deposition.

A "daily fee" can be charged by the expert only for a full day of attendance in deposition or when the deposing party requires the expert to be available all day and the expert necessarily has to forgo all business he or she would have otherwise conducted that day, *e.g.*, when the expert must travel to the deposition. CCP §2034.430(e).

An expert witness is entitled to charge different fees for different services, as long as those fees are reasonable. *Rancho Bernardo Dev. Co. v Superior Court* (1992) 2 CA4th 358, 2 CR2d 878 (court allowed architect to charge higher hourly rate for testimony than for investigative services).

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§11.44 4. Tardy Counsel's Payment of Fees

If counsel representing the expert or a nonnoticing party is late to the deposition, that counsel must pay the expert's fee for time consumed by the delay, *i.e.,* from the time scheduled for the deposition until the late attorney's arrival. CCP §2034.430(c). This fee may not exceed the fee charged by the expert to the retaining party unless the expert donated his or her services to a charitable or other nonprofit organization. CCP §2034.430(e).

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§11.45 5. When Expert Witness Fees Are Disputed

If a party desiring to take a deposition feels that the fees of the expert are unreasonable, that party may move for an order setting the compensation of the expert. The motion must be accompanied by a declaration stating facts that show a reasonable and good faith attempt at an informal resolution of each issue presented by the motion, and notice of the motion must be given to the expert. CCP §2034.470. On motion practice and informal resolution generally, see chap 15.

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§11.46 a. Informal Resolution of Dispute

In any attempt to informally resolve a dispute about the reasonableness of an expert witness's fee for a deposition, either the party or the expert must provide the other with:

- The expert's customary fee for similar services;
- The total number of times the expert has received the presently demanded fee; and
- The frequency and regularity with which the expert has charged the presently demanded fee within a 2-year period preceding the hearing on the motion. CCP §2034.470(b)-(d).

JUDGE'S PERSPECTIVE: A number of courts have adopted a schedule of hourly rates thought to be generally representative of the ordinary and customary fees charged by experts in various fields in the community. Although not binding on the parties or the trial court, these schedules assist in discussions leading to informal resolution of issues. See San Diego Ct R 2.1.11; Imperial Ct R 3.1.4.

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§11.47 b. Court's Determination of Dispute

In determining a reasonable expert witness fee, the court must base its decision on the following three factors in addition to any other facts or evidence:

- The expert's customary fee for similar services;
- The total number of times the expert has received the presently demanded fee; and
- The frequency and regularity with which the expert has charged the presently demanded fee within a 2-year period preceding the hearing on the motion. CCP §2034.470(c)-(d).

This evidence must be provided by the expert or the party designating the expert. The court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community and any other factors the court considers necessary or appropriate to make its determination. CCP §2034.470(e). See *Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 300, 50 CR2d 493.

If the court finds that the expert's fee is unreasonable, it must set a different fee and award monetary sanctions against the unsuccessful party, person, or attorney unless it finds that the party, person, or attorney acted with substantial justification or that other circumstances make an award of sanctions unjust. CCP §2034.470(g). On sanctions, see §§15.85-15.116.

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§11.48 F. Video Recorded Depositions

Under CCP §2025.620(d), a video deposition of any expert witness, including a treating or consulting physician, may be used at trial by any party, even though the deponent is available to testify, if the deposition notice under CCP §§2025.220-2025.230 reserved the right to use the deposition at trial and if the party noticing the deposition has complied with CCP §2025.340(m).

PRACTICE TIP: Counsel should consider the implications of CCP §2025.620 on the case. Section 2025.620(d) allows any party to use a video deposition at trial of a treating or consulting physician or of any expert witness, *"even though the deponent is available to testify"* (emphasis added), if the deposition notice has reserved the right to use the deposition at trial, and if the requesting party has complied with the requirements of CCP §2025.340(m). However, having an underprepared expert attend a deposition can be a much greater risk if the deposition is videotaped. If counsel or the expert take such a deposition lightly, both run the risk of being embarrassed when the video (or selected portions of it) is played at trial.

Parties frequently serve notice of an intention to videotape the depositions of their own experts, both to avoid the problems of scheduling the expert's personal appearance at trial and to avoid the expense of paying the expert to give live testimony. Conversely, many parties noticing the depositions of opposing experts give notice of an intention to videotape to take a "dry run" at cross-examining the expert. For further discussion of the use and availability of videotaped depositions, see §§5.75-5.84, 6.139.

PRACTICE TIP: If it is anticipated that the expert's videotaped deposition will be used at trial, counsel should be sure that any documents shown to the expert during the deposition are visible in the video, *e.g.,* if documents are shown to the expert on a computer screen, they should also be visible in the video. To ensure unambiguous identification of the documents, counsel might also consider showing them at trial with a "split screen" or other presentation simultaneous with the video.

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§11.49 G. Duty to Notify Adversary of Change in Expert's Testimony After Deposition

Designated experts should be as fully prepared at their depositions as if they were testifying at trial. The parties' declarations must include the representation that the particular expert will be sufficiently familiar with the pending action to submit to a meaningful deposition on the specific testimony, including any opinion and its basis, that the expert is expected to give at trial. CCP §2034.260(c).

A party is not permitted to offer expert testimony at trial on undisclosed subjects. *Bonds v Roy* (1999) 20 C4th 140, 148, 83 CR2d 289 (trial court order properly excluded expert testimony on subject that was not disclosed in expert witness declaration). But see *Hirano v Hirano* (2007) 158 CA4th 1, 9, 69 CR3d 646 (no demand for statutory exchange of expert witness information made by any party after new trial date set following reversal of judgment on appeal; thus, *Bonds v Roy, supra,* inapplicable in context of new trial following reversal of judgment). See *Amtower v Photon Dynamics, Inc.,* 158 CA4th 1582, 1599, 71 CR3d 361 (court may exclude expert opinion that goes beyond opinions expressed at deposition). See also *DePalma v Rodriguez* (2007) 151 CA4th 159, 164, 59 CR3d 479 (testimony of plaintiff's expert on standard of care properly excluded). But see *Easterby v Clark* (2009) 171 CA4th 772, 780, 90 CR3d 81 (expert may not offer trial testimony that exceeds scope of deposition testimony *if* opposing party lacks notice of new testimony or notice comes when deposing expert is unreasonably difficult).

When a party realizes that an expert will offer testimony on an undisclosed subject, a timely motion to amend the expert witness declaration must be filed and served "with respect to the general substance of the testimony that an expert previously designated is expected to give." CCP §2034.610(a)(2). On discovery motions generally, see chap 15.

PRACTICE TIP: Counsel has a duty to inform opposing counsel and to attempt to resolve the situation before making the motion to amend. See CCP §2034.610(c). If an expert intends to offer additional opinions at trial that the expert did not express during his or her deposition, and that were not described in the declaration as part of the testimony the expert was expected to give, counsel should seek a stipulation to an amended declaration and to opposing counsel's deposing the expert on the undisclosed topics.

If the expert's opinions were not expressed at the deposition, however, because the examiner had not affirmatively asked the expert to state all opinions that would be given at trial (and those opinions fell within the broad categories listed in the expert's declaration), the expert is not limited at trial to only those opinions stated in his deposition. *Jones v Moore* (2000) 80 CA4th 557, 566, 95 CR2d 216 (testimony of defendant's expert on standard of care properly admitted). In *Jones,* the court noted that if the expert had testified during the deposition about only specific opinions and affirmatively stated that those were the only opinions to be offered at trial, "it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial." 80 CA4th at 565. The expert had not expressly limited his opinions, however, and because the testimony came within the scope of his expert witness declaration, it was admissible. 80 CA4th at 566. See also *DePalma v Rodriguez* (2007) 151 CA4th 159, 165, 59 CR3d 479 (when expert disclosed general substance of facts and opinions to which he would testify (*i.e.*, that he would have expected plaintiff to have suffered no injury in accident), trial testimony about lack of injury to plaintiff's knee and shoulder was merely expanded description and interpretation of conclusion stated in deposition and thus admissible). See Practice Tip in §11.61.

PRACTICE TIP: Counsel should not rely on the disclosure statement alone to determine the permissible scope of the expert's testimony at trial. Rather, counsel should ask specific questions at the deposition concerning the subjects on which the expert will give an opinion and whether the opinions at trial will be limited to those expressed during the deposition.

On the risk that an expert's testimony might be excluded because of irregularities in complying with procedures for exchanging information on expert witnesses, see §§11.61-11.66.

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§11.50 H. Scope of Discovery From Expert

Only a few California decisions address the scope of discovery from persons designated as experts. In *Allen v Superior Court* (1984) 151 CA3d 447, 198 CR 737, for example, the attorney was permitted to examine a medical expert regarding the percent of time and amount of compensation derived from his work as an expert. But the details of his billing and accounting, and the specifics of his prior testimony at trial and depositions, were considered proper subjects of a protective order. In the court's view, "[e]xact information as to the number of cases and amounts of compensation paid to medical experts is unnecessary for the purpose of showing a bias." 151 CA3d at 453. See also *Stony Brook I Homeowners Ass'n v Superior Court* (2000) 84 CA4th 691, 101 CR2d 67, in which, relying on *Allen,* the appellate court held that although the plaintiff was entitled to know what percentage of the expert's practice involved examining patients for plaintiffs or defendants, and how much compensation he received for that work, the discovery order went too far when it required a more excessive intrusion into information about the expert's practice and patients.

Allen leaves open the question of whether, and to what extent, opinions reached and reports prepared by the expert in previous cases are discoverable. The issue was discussed in *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 210 CR 535. In *National Steel,* the court refused to rule out discovery of reports created by an expert as a consultant in a prior steel building case in New York, even though the expert declared that he had neither referred to nor relied on his previous report about the New York building in arriving at his opinions in the California case. The court stated that it was still possible that the expert had "considered" the earlier report and remanded the case for the trial court to determine whether, under a three-part test, discovery should be denied on the ground of attorney work product privilege.

JUDGE'S PERSPECTIVE: Although there are few California decisions addressing the scope of discovery from designated experts, counsel can look to, *e.g.,* Evid C §721(a) (expert may be fully cross-examined on qualifications, subject matter of testimony, and matter on which opinion is based), as the basis for arguing that this evidentiary mandate permits wide discovery. Counsel may also elicit from discovery and public sources enough information to permit counsel to find cases and attorneys with whom the expert has been involved.

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V. MODIFICATION OF EXPERT WITNESS DESIGNATION AND INFORMATION

§11.51 A. Motion to Augment and Amend Expert Witness Information

The party who has engaged in a timely exchange may move the court for leave to augment that party's expert witness list or amend that party's expert witness declaration. CCP §§2034.610-2034.630. Leave to augment allows for the addition of the name and address of an expert witness whom the party has subsequently retained. The newly designated expert need not be "cumulative"; *i.e.,* the new expert can replace the previously designated expert rather than simply add to his or her testimony. *Dickison v Howen* (1990) 220 CA3d 1471, 270 CR 188.

Replacing or adding expert. When planning to replace a previously designated expert or simply to add a new one, counsel should carefully follow the motion procedure under CCP §§2034.610-2034.630. Written notice to the other side that a previously designated expert is being substituted for another is inadequate. *Richaud v Jennings* (1993) 16 CA4th 81, 19 CR2d 790. On motion practice generally, see chap 15.

Amending substance of testimony. Leave to amend allows amendment of an expert witness declaration "with respect to the general substance of the testimony that an expert previously designated is expected to give." CCP §2034.610(a)(2). Parties who have not engaged in a timely exchange may not move to augment or amend, but must move under CCP §§2034.710-2034.720 for leave to submit tardy expert witness information. See §§11.57-11.60.

Motion must be timely. Counsel should make a motion to augment or amend as soon as it becomes apparent that an additional expert is necessary to a client's action or defense, or that there will be a change in the general substance of the testimony of a previously designated expert. Counsel should immediately serve on all parties copies of the updated declaration and any augmented expert witness list containing the proposed changes. CCP §§2034.610-2034.630. For a dramatic illustration of the need to strictly comply with the procedures governing augmentation, see *Richaud v Jennings* (1993) 16 CA4th 81, 19 CR2d 790, in which the plaintiff's failure to properly augment her expert witness list resulted in the dismissal of the action because the plaintiff did not have expert testimony on an issue essential to her case. The court held that a party cannot simply serve a "supplemental" expert witness designation and attempt to call the witnesses at trial. The party must make a timely motion to augment.

On discovery motions in general, see chap 15.

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§11.52 1. Procedure

A motion to augment or amend must be made a sufficient time in advance of the CCP §2024.020(a) time limit for completion of discovery to allow deposition of "any expert to whom the motion relates" to be taken within the time limit. However, the court may permit such motion at a later time "under exceptional circumstances." CCP §2034.610(b). Because the written expert witness information exchange date is generally 50 days before trial and the "cut-off" date for deposing experts identified under CCP §§2034.010-2034.730 is 15 days before trial (see §2.21), parties generally have, at most, 35 days within which to serve and file a motion to augment or amend, have the motion heard, and make the expert available for deposition. See §11.36. This short timeline for relief usually requires orders shortening time on the motion and notice of deposition and emphasizes the need to agree to exchange written expert witness information via facsimile or overnight delivery to reduce any potential delay. See §11.21.

The motion must be accompanied by a declaration showing reasonable and good faith attempts at an informal resolution of each issue presented by the motion. CCP §2034.610(c).

Promptly after deciding to call the expert witness or to offer the different or additional testimony, the moving party must serve a copy of the proposed expert witness information concerning the expert or the testimony on all parties who have appeared in the action. CCP §2034.620(c)(2).

The originals of the expert witness demand and all expert witness lists and declarations exchanged in response must be lodged with the court before the hearing on the motion, because their contents have "become relevant to an issue." CCP §2034.290(c).

PRACTICE TIP: Because the deadline for discovery can be immediately at hand when a request to augment is made, counsel must make sure that the newly designated expert can be made available for deposition during the time frame involved. This can be difficult with a busy expert; thus, counsel should know in advance what the expert's availability might be. The more readily the expert can be available, the greater the chance that the motion to augment will be granted. Note also that CCP §2034.620(d) requires that the expert be made "immediately" available for deposition as a condition for the court's order to augment or amend.

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§11.53 2. Showing Necessary to Support Order

Before the court may grant leave to augment or amend under CCP §2034.620(c), it must:

- Take into account the extent to which the opposing party has relied on the original list; and
- Determine that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits.

The court also must determine that the moving party either:

- Would not in the exercise of reasonable diligence have determined to call the proposed new expert or decided to offer the proposed different or additional testimony; or
- Failed to do so as a result of mistake, inadvertence, surprise, or excusable neglect.

And the court likewise must determine that the moving party promptly:

- Sought leave to augment or amend; and
- Served on all parties the information sought to be augmented or amended.

The expert witness list can be augmented under CCP §2034.620(c)(2) as a result of surprise when an expert witness reverses his or her opinion during the deposition, contrary to the expectations of the party designating the witness, and no prejudice results to other parties as a result of the augmentation. A party is not prejudiced merely because the new expert will give testimony adverse to the party, however. *Dickison v Howen* (1990) 220 CA3d 1471, 270 CR 188. Similarly, surprise was demonstrated in *McLaughlin v Sikorsky Aircraft* (1983) 148 CA3d 203, 210, 195 CR 764, when the plaintiff's expert testified at trial to opinions that were more harmful to the defendant than those to which he had testified in his deposition. Under these circumstances, it was proper under former CCP §2037 to permit the defendant to call a new, previously undisclosed expert to rebut those charges. *McLaughlin* also demonstrates how a party could not in the exercise of reasonable diligence have known of the need to designate a new expert witness before trial.

If the court is inclined to permit a supplemental disclosure during trial, it can (and probably should) order the trial recessed to allow opposing counsel to depose the expert. See *Whitehill v United States Lines, Inc.* (1986) 177 CA3d 1201, 1210, 223 CR 452.

JUDGE'S PERSPECTIVE: As stated previously, counsel must establish a reasonable and good faith attempt at informal resolution; facts showing mistake, inadvertence, or surprise; timely service; and that the new expert is deposition-ready. Often, counsel will set forth this information in the supporting memorandum and not in a declaration. However, facts in the *declaration,* not "facts" in the supporting memorandum, form the basis for the court's ruling. Counsel must also remember to lodge a copy of their prior expert designations to demonstrate their timely participation in the exchange.

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§11.54 3. Order

If the court grants leave to amend or augment under CCP §2034.610(d), it must be conditioned on the moving party's making the expert available immediately for deposition. An order granting such leave to amend or augment may also include "any other terms as may be just," including, under CCP §2034.620(d):

- Leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated;
- Continuance of the trial for a reasonable period; and
- An award of costs and litigation expenses to any party opposing the motion.

JUDGE'S PERSPECTIVE: If the court grants leave to augment or amend, the court may also require the moving party to pay opposing counsel's costs associated with deposing the augmented expert under the court's authority to condition leave to augment or amend "on such other terms as may be just." See CCP §2034.620(d).

Denial of relief under CCP §§2034.610-2034.630 to augment or amend will not preclude a party from using the expert's testimony if the expert's identity was disclosed to other parties in a timely fashion along with a description of his or her testimony, even though the description was inaccurate or inadequate. Code of Civil Procedure §2034.300 does not absolutely preclude an expert's testimony in such circumstances. In other words, denial of relief under CCP §§2034.610-2034.630 will not preclude an expert's testimony when a party's timely designation of the expert and timely description of the expert's testimony makes a motion to augment the expert witness list unnecessary. *Martinez v City of Poway* (1993) 12 CA4th 425, 15 CR2d 644, disapproved in part by *Bonds v Roy* (1999) 20 C4th 140, 149 n4, 83 CR2d 289.

PRACTICE TIP: Counsel who are confronted with a late-disclosed expert should be prepared to make a record that the case will be substantially prejudiced if the expert is permitted to testify, notwithstanding the availability of an initial deposition. The opportunity to depose an expert during trial, particularly if the testimony relates to a central issue, often provides a wholly inadequate opportunity to understand the expert's opinion and to prepare to meet it. See, *e.g., City of Fresno v Harrison* (1984) 154 CA3d 296, 300, 201 CR 219; *Redevelopment Agency v First Christian Church* (1983) 140 CA3d 690, 701, 189 CR 749. As Professor Hogan, Reporter for the State Bar-Judicial Council Joint Commission on Discovery, has pointed out, "the need for pretrial discovery is greater with respect to expert witnesses than it is for ordinary fact witnesses" because of the difficulty of coping with an expert's specialized knowledge—one reason the drafters of the Civil Discovery Act of 1986 built in significant advance disclosure of experts with limited exceptions. Hogan & Weber, California Civil Discovery §10.1 (2d ed 2005).

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§11.55 4. Sanctions

The court must impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to augment or amend, unless it finds that the person to be sanctioned acted with substantial justification or that other circumstances make an award unjust. CCP §2034.630.

Local rules may require that the amount of monetary sanctions be substantiated in the attorney's supporting declaration (*e.g.*, nature of work performed, hourly rate, time spent) or be subject to limitation. See, *e.g.,* Imperial Ct R 3.2.7F; Sacramento Ct R 3.15; Yuba Ct R 3.4(F).

JUDGE'S PERSPECTIVE: Even in the absence of such a rule, counsel must provide an admissible evidentiary basis for the sanctions award.

On sanctions in general, see §§15.85-15.16.

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§11.56 B. Withdrawal of Expert Designation

A party can withdraw its designation of an expert trial witness who has not yet been deposed. If the expert continues his or her relationship with the party as a consultant, the opposing party is barred from communicating with or retaining the expert as its own expert. *Collins v State* (2004) 121 CA4th 1112, 18 CR3d 112; *County of Los Angeles v Superior Court (Hernandez)* (1990) 222 CA3d 647, 271 CR 698.

In *Hernandez,* the court ruled that the report of a designated but undeposed expert was privileged as attorney work product and that the expert's conversation regarding the report was similarly privileged. Consequently, the court ordered the opposing counsel recused after counsel discussed the report with the expert, even though the expert at that time had been withdrawn as an expert trial witness. The court ruled that the expert was still functioning as a consultant to the party who had originally retained him. See also *Shadow Traffic Network v Superior Court* (1994) 24 CA4th 1067, 29 CR2d 693 (plaintiff's interview of expert regarding damages, in which confidential information regarding plaintiff's damage theories was disclosed, remained confidential and nondiscoverable by defendants even though expert was never retained by plaintiff; defendant's counsel may not retain such expert without risk of disqualification). For further discussion of attorney work product, see §§3.52-3.68. On consulting experts, see §11.5

NOTE: The one exception to this rule is when the expert has conducted a physical or mental examination under CCP §§2032.210-2032.650. In that case, the examined party has the right to depose the expert on matters related to the examination, even if the expert has been withdrawn or designated as a consultant. *Kennedy v Superior Court* (1998) 64 CA4th 674, 75 CR2d 373. See §§10.58, 10.61.

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C. Motion to Submit Tardy Expert Witness Information

§11.57 1. Procedure

A party who has failed to submit expert witness information on the date specified may seek leave to submit that information by motion under CCP §§2034.710-2034.720. Unless the court permits the motion to be made at a later time "under exceptional circumstances," this motion must be made sufficiently in advance of the CCP §2024.020(a) discovery cutoff to permit the taking of depositions of any experts to whom the motion relates. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion. CCP §§2034.710-2034.720. On discovery motions, see chap 15.

If the court grants the motion, the expert must be made available for a deposition "immediately." CCP §2034.720(d). The moving party, at or before the time the motion is made, must take necessary measures to ensure the expert's prompt availability. The statute also indicates that the moving party must have provided the tardy information to all appearing parties "promptly" after the moving party discovered the "mistake, inadvertence, surprise, or excusable neglect" on which the motion is based. An effort to provide this information should precede or, at the very least, accompany the motion. See §11.58.

PRACTICE TIP: As the language of CCP §2034.710 indicates, any party who has failed to submit expert witness information and then desires to do so after the original due date should make a motion as soon as possible after the decision to disclose the information is reached. Prompt action should leave several weeks within which to schedule the additional expert depositions and thereby enhance the chance that the late disclosure will be permitted by the court.

Because the written expert witness information exchange date is generally 50 days before trial and the "cut-off" date for deposing experts identified under CCP §§2034.010-2034.730 is 15 days before trial (see §2.21), parties generally have, at most, 35 days within which to serve and file a motion to submit tardy expert witness information, have the motion heard, and make the expert available for deposition. See §11.36. This short timeline for relief usually requires orders shortening time on the motion and notice of deposition, and emphasizes the need to agree to exchange written expert witness information via facsimile or overnight delivery to reduce any potential delay. See §11.21.

JUDGE'S PERSPECTIVE: As a practical matter, counsel must make the motion under CCP §2034.710 and agree to set the deposition within a very short time. Given this situation, one can argue that "sufficient time" in advance of the discovery cutoff to permit the taking of a deposition is *any time* available for such depositions. Of course, the motion and arrangements for depositions should still be made *as soon as possible*.

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§11.58 2. Showing Necessary to Support Order

As in the case of augmentation and amendment, the provision for a tardy filing is tightly drawn. Code of Civil Procedure §§2034.710-2034.730 require that before the court grants leave to submit expert witness information late, it must:

- Take into account the extent to which the opposing party relied on the absence of a submission of expert witness information; and
- Determine that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits.

The court must also find that the moving party:

- Has failed to submit the information as the result of "mistake, inadvertence, surprise, or excusable neglect" (see CCP §2034.720(c)(1));
- Has sought leave for the late submission promptly after learning of the default; and
- Has served the information on all other parties in the action promptly thereafter.

JUDGE'S PERSPECTIVE: The factual showing must be contained in counsel's declaration, not merely in the supporting memorandum or legal arguments. The court's ruling with respect to factual issues such as "mistake" or "inadvertence" will be based on facts (*i.e.*, evidence) presented to the court in counsel's declaration.

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§11.59 3. Order

Under CCP §§2034.710-2034.730, an order granting late submission of expert witness information must be conditioned on the moving party's making the expert available immediately for deposition, and on such other terms as may be just, including:

- Leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated;
- A continuance of the trial for a reasonable time; or
- An award of costs and litigation expenses to any party opposing the motion.

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§11.60 4. Sanctions

As in other discovery procedures, the court must impose a monetary sanction under CCP §2023.030(a) against a party, person, or attorney who does not prevail on a motion for leave to submit tardy expert witness information, unless it finds substantial justification or other circumstances making an award unjust. CCP §2034.730.

JUDGE'S PERSPECTIVE: Local rules may require that the amount of sanctions be supported with specificity in counsel's declaration. Further, in the absence of specific information, such as hourly rate and billable hours expended, sanctions may be limited. A local rule that might require support for the sanction does not appear to conflict with CCP §§2023.030(a) and 2023.040.

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VI. EXCLUSION OF EXPERT TESTIMONY AT TRIAL

§11.61 A. Grounds for Exclusion of Expert Opinion

Once the exchange procedure under CCP §§2034.010-2034.730 is initiated, failure to comply with its requirements can have drastic consequences.

The penalty for failure to comply with the expert designation provisions is set forth in CCP §2034.300. On objection of any party who has fully complied with the requirements of CCP §2034.260 in a timely manner, the trial court must exclude from evidence the expert opinion of any expert that is offered by a party who has not obtained relief from default under CCP §§2034.610-2034.630 (see §§11.31-11.45) and who has "unreasonably failed" to:

- List that witness as an expert under CCP §2034.260;
- Submit an expert witness declaration;
- Produce reports and writings of expert witnesses under CCP §2034.270; or
- Make that expert available for deposition under CCP §§2034.410-2034.470, 2034.300(d).

To avoid exclusion of expert testimony under CCP §2034.300, counsel should promptly move for augmentation or amendment under CCP §§2034.610-2034.630, or for leave to submit tardy expert witness information under CCP §§2034.710-2034.730. See §§11.51-11.60.

Often, the formal objection to the opposing party's expert testimony at trial is in the form of a motion in limine, the timing of which precludes the opposing party's ability to seek leave to augment, amend, or submit a tardy designation. For methods of challenging an excessive number of experts designated in the exchange, see §11.64.

The court may preclude the expert from expressing opinions that are different from those disclosed in his or her declaration. A party is not permitted to offer expert testimony at trial on undisclosed subjects. *Bonds v Roy* (1999) 20 C4th 140, 144, 83 CR2d 289 (trial court order properly excluded expert testimony on subject that was not disclosed in expert witness declaration). See §11.49.

On the other hand, if an attorney does not ask the expert during the deposition to expressly state that his or her opinions at trial will be limited to those given in the deposition, the expert may testify at trial according to the broad categories listed in the expert witness declaration. *Jones v Moore* (2000) 80 CA4th 557, 566, 95 CR2d 216 (because plaintiff did not ask defense expert to affirmatively state all opinions that he would express at trial, he was not limited at trial to only those opinions stated in his deposition). In *Jones,* the court noted that if an expert had expressed *all* opinions in his or her deposition that the expert intended to offer at trial, the expert cannot later testify during trial to additional opinions without informing opposing counsel of the new opinions before trial. 80 CA4th at 565. See also *Easterby v Clark* (2009) 171 CA4th 772, 780, 90 CR3d 81 (expert may not offer trial testimony that exceeds scope of deposition testimony *if* opposing party lacks notice of new testimony or notice comes when deposing expert is unreasonably difficult). But see *DePalma v Rodriguez* (2007) 151 CA4th 159, 165, 59 CR3d 479 (when expert disclosed general substance of facts and opinions to which he would testify (*i.e.*, that he would have expected plaintiff to have suffered no injury in accident), trial testimony about lack of injury to plaintiff's knee and shoulder was merely expanded description and interpretation of conclusion stated in deposition and thus admissible).

PRACTICE TIP: When taking the deposition of an expert witness, counsel should always ask the expert to affirmatively state *all* of the opinions that he or she may express at trial. Counsel are strongly advised to ask a question periodically during the deposition, such as, "Are there any other opinions that you will testify to at trial that you have not yet specifically stated in your deposition?"

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§11.62 1. Examples: Expert's Testimony Excluded

Expert attempts to testify on subject outside of designation. In *Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289, a medical malpractice case, one of defendant's experts was designated to testify on damages. Consistent with the designation, the expert testified in deposition that he had been retained to evaluate the plaintiff's disability and would not give any testimony or opinion concerning standard-of-care issues. On the last day of trial, defense counsel sought to expand the expert's testimony to include two new areas relating to the standard-of-care issue. The trial court refused the request on the grounds that it would be unfair, prejudicial, and a surprise to the plaintiff. The defendant appealed an adverse verdict, and both the court of appeal and the California Supreme Court affirmed the trial court's decision. In doing so, the supreme court disapproved *Castaneda v Bornstein* (1995) 36 CA4th 1818, 43 CR2d 10, and *Martinez v City of Poway* (1993) 12 CA4th 425, 15 CR2d 644, which had held that an expert witness's testimony may not be excluded at trial because the expert witness declaration does not disclose all the issues on which the expert is expected to testify.

Expert hired by party after consultation with adversary. In *Shadow Traffic Network v Superior Court* (1994) 24 CA4th 1067, 1081, 29 CR2d 693, an expert who was initially interviewed by plaintiff's counsel, was informed at the interview of the plaintiff's damage theories in the case, and was later hired by defendant's counsel was held to be properly excluded from testifying at trial. In addition to excluding the expert testimony, the *Shadow Traffic* court also held that defendant's counsel needed to be recused from the case. "Having become privy to an opposing attorney's work product, there is no way the defending attorney could separate that knowledge from his or her preparation of the case" (quoting *County of Los Angeles v Superior Court (Hernandez)* (1990) 222 CA3d 647, 271 CR 698).

Expert is uncooperative. An expert witness who is repeatedly uncooperative in having his or her deposition taken can be disqualified from testifying at trial. *Waicis v Superior Court* (1990) 226 CA3d 283, 276 CR 45 (in dental malpractice action, plaintiff's expert witness was disqualified when, after repeated attempts to schedule his deposition, expert left deposition early despite trial court order requiring him to be available all day).

Party's failure to augment witness list. An expert who was not previously designated when expert witness information was exchanged, and who is offered to replace a previously designated but now unavailable expert, is properly excluded at trial unless counsel has made a motion under CCP §§2034.610-2034.630 to augment the expert witness list to include the new expert. CCP §2034.300; *Richaud v Jennings* (1993) 16 CA4th 81, 19 CR2d 790. One purpose of CCP §§2034.010-2034.730 is to require that expert witness information be exchanged at a time in the pretrial stage when expert witness discovery will not interfere with other trial preparation and when the adverse party has an opportunity to depose the opponent's expert. 16 CA4th at 90.

PRACTICE TIP: When an adversary party's expert significantly changes his or her postdeposition testimony without notice to opposing parties, counsel should consider making a motion in limine to exclude.

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§11.63 2. Examples: Expert's Testimony Admitted

Inadvertent disclosure of protected documents. Exclusion of the plaintiff's expert was not warranted when the expert inadvertently disclosed documents that were previously subject to a protective order in another litigation. The documents were discoverable in plaintiff's litigation by other methods. Likewise, their discovery could have been subject to the same kind of protective order that was issued in the previous litigation. No actual harm accrued to the defendant as a result of the inadvertent violation. *McGinty v Superior Court* (1994) 26 CA4th 204, 31 CR2d 292.

Expert's lack of preparation for deposition. A party aggrieved by an opposing expert's lack of preparation during a deposition may be required to raise the issue before trial to obtain relief. See *Stanchfield v Hamer Toyota, Inc.* (1995) 37 CA4th 1495, 44 CR2d 565 (plaintiff who took no action to obtain follow-up deposition, seek relief from discovery referee, or make in limine motion to exclude expert's testimony waived right to object at trial to expert's failure to give complete deposition). See also *Fatica v Superior Court* (2002) 99 CA4th 350, 120 CR2d 904 (trial court abused its discretion in preventing plaintiff's treating physician in personal injury case from expressing opinion on causation because expert had not reviewed plaintiff's records of prior medical treatment at time of deposition).

Submitted in support of motion for summary judgment. In a summary judgment proceeding, a party can submit testimony by an expert not previously designated, despite the inadmissibility of the evidence at trial due to the party's failure to comply with CCP §§2034.010-2034.730. *Kennedy v Modesto City Hosp.* (1990) 221 CA3d 575, 270 CR 544. The exclusion of expert testimony provided in CCP §§2034.010-2034.730 specifically refers to trial proceedings and does not apply to a summary judgment proceeding.

Testimony merely expands and interprets deposition testimony. If an expert's trial testimony merely provides an expanded description and interpretation of conclusions stated in deposition testimony, the trial testimony is properly admitted. *DePalma v Rodriguez* (2007) 151 CA4th 159, 164, 59 CR3d 479. During his deposition, the defense expert in *DePalma* testified that he would not expect plaintiff to have suffered "any" injury; the expert did not, however, opine on plaintiff's left knee and left shoulder injuries. Over plaintiff's objection that the expert's trial testimony exceeded the scope of his deposition testimony, the expert was properly permitted to express his previously concealed opinions about these injuries. In his deposition, the expert had disclosed the "general substance" of his expected testimony sufficiently for the parties to adequately prepare for trial. 151 CA4th at 165.

Absence of unfair surprise and prejudice. An expert may not offer trial testimony that exceeds the scope of the expert's deposition testimony *if* the opposing party lacks notice of the new testimony or that notice comes at a time when deposing the expert is unreasonably difficult. *Easterby v Clark* (2009) 171 CA4th 772, 780, 90 CR3d 81. Plaintiff's expert in *Easterby* stated at his deposition that he had no opinions on causation. Three weeks before trial, plaintiff notified defendants by letter that the expert would testify regarding causation. It was error to strike the expert's testimony, because defendants were explicitly notified of the new testimony and had the opportunity to depose the expert about his changed opinion and prepare for cross-examination and rebuttal. 171 CA4th at 780.

PRACTICE TIP: If notice of a change of scope of the expert's testimony is given, counsel should take reasonable steps to determine what the new testimony is or run the risk of having the expanded scope of testimony admitted at trial without the benefit of pretrial examination.

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§11.64 3. Challenging Excessive Number of Experts Designated in Exchange

Under former CCP §2037, it was all too common for counsel to file expert witness disclosure statements that resembled the yellow pages of the telephone book, listing multiple experts, many of whom counsel had never contacted and had no intention of using. They were listed either to harass the opposition or simply because disclosing counsel had not yet decided the actual membership of the expert team that would be used at trial. Several provisions in present CCP §§2034.010-2034.730 have tended to curtail this practice. Counsel now must file a declaration stating that experts have agreed to testify (CCP §2034.260(c)(3)) and are prepared to give meaningful oral depositions (CCP §2034.260(c)(4)). The declaration must also state each expert's hourly and daily fee, information that suggests that the expert has at least been contacted, if not retained. See CCP §2034.260(c)(5). On planning discovery, see chap 2.

PRACTICE TIP: Counsel should check the local rules of the county in which the action is pending. To reduce trial delay, some courts have adopted local rules limiting the number of experts that can be called at trial on any single issue. See *e.g.,* San Diego Ct R 2.1.11.

JUDGE'S PERSPECTIVE: In any event, with or without a motion from opposing counsel, judges are likely to closely examine and possibly restrict the use at trial of multiple experts on a single issue.

In addition, CCP §2034.250 authorizes the court to issue a protective order reducing the list of experts who are parties or employed or retained experts designated by a party or side, or any other order "to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense."

PRACTICE TIP: A motion challenging an excessive number of disclosed experts should argue that reducing the number of experts when too many are listed is best accomplished at the disclosure stage. The parties should not be left to guess, after taking a burdensome number of depositions, which one of the many listed experts the designating party will choose to call on a particular issue at trial. By successfully moving the court for an order restricting the number of experts that can be disclosed before trial, all parties in the case are relieved of the burden of conducting needless depositions and covering witness fees and expenses for experts whom the designating party may have no serious intention of actually calling at trial.

A list containing an excessive number of names, particularly of experts in the same field whose testimony manifestly will overlap or be cumulative, is also subject to attack under Evid C §723, which allows the court at any time before or during trial to limit the number of expert witnesses to be called by any party. All reported cases considering Evid C §723 have dealt with the court's power to limit the number of experts that any one party may call during trial. See, *e.g., Horn v General Motors Corp.* (1976) 17 C3d 359, 371, 131 CR 78. See also *Ruud v U.S.* (9th Cir 1958) 256 F2d 460 (recognizing court's inherent power to limit number of experts at trial). Counsel, however, should not hesitate to invoke the "before" trial portion of Evid C §723.

JUDGE'S PERSPECTIVE: The litigation tactic of excessive expert designation is generally not well received by the court. If opposing counsel refuses to reduce an excessive list of experts in the same field, it may be advisable to bring the issue to the court's attention by ex parte application at the earliest opportunity, depending on the practice of the jurisdiction. This may save the court and counsel the time and expense of formal motion practice, thereby getting the case back on a proper discovery track.

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§11.65 B. Statutory Exception When Expert Listed and Deposed

A party may call an expert not previously designated by that party if the expert has been designated by another party and has thereafter been deposed under CCP §§2034.410-2034.470. CCP §2034.310. This applies even if the party that designated the expert intends to call the expert to testify but has not yet done so. The application of CCP §2034.310 is not restricted to situations in which a party designates an expert and then decides not to call him or her as a witness or to situations in which co-parties agree to share an expert but the disclosing co-party leaves the case. *Powell v Superior Court* (1989) 211 CA3d 441, 259 CR 390. See *Alef v Alta Bates Hosp*. (1992) 5 CA4th 208, 6 CR2d 900 (court of appeal found reversible error when trial court refused to let plaintiff read from deposition of disclosed and deposed defense expert who was not called by defense at trial).

PRACTICE TIP: The right to call an opposing party's expert under CCP §2034.310 is subject to the power of the court to grant a protective order under CCP §2034.250. Counsel confronted with the prospect of a retained expert being called by an opposing party should consider seeking such an order. As one leading commentator has noted, the calling of an expert who was originally retained by an adverse party has "explosive" potential that is totally unrelated to the substance of the expert's testimony. While "[i]t may be possible to keep this explosive fact from the jury… there seems little reason to require that effort if other expert witnesses are available." 8 Wright, Miller & Marcus, Federal Practice and Procedure §2032 at 447 (2d ed 1994). Unless the witness in question has unique testimony to present, counsel for the party who originally retained the expert should seek a protective order on the ground that the potential for prejudice and confusion outweighs the merely cumulative testimony that could be offered by the expert. Evid C §352. See *Rubel v Eli Lilly & Co.* (SD NY 1995) 160 FRD 458 (plaintiff deposed expert initially consulted by defendant, then sought to subpoena expert to testify at trial; subpoena quashed on ground that prejudice to defendant outweighed cumulative testimony of expert).

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§11.66 C. Statutory Exception for Rebuttal Testimony by Unlisted Expert

At the time of trial, a party may call an expert not previously designated if "[t]hat expert is called as a witness … to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness." CCP §2034.310(b). In other words, an undisclosed expert witness, whose testimony is offered to impeach another expert's testimony, can testify only to "foundational facts" (facts that form the basis of the other expert's opinions). However, that undesignated expert witness is not allowed to contradict the opinion itself. CCP §2034.310. See *Fish v Guevara* (1993) 12 CA4th 142, 15 CR2d 329. See also *Mizel v City of Santa Monica* (2001) 93 CA4th 1059, 113 CR2d 649 (proposed testimony by undisclosed rebuttal expert that alcohol can be detected through smell only when there has been consumption level in range of .08 percent was not impeachment on foundational fact and therefore was impermissible); *Howard Contracting, Inc. v G.A. MacDonald Constr. Co.* (1998) 71 CA4th 38, 53, 83 CR2d 590 (proposed testimony by undisclosed expert that opposing expert misapplied damage calculation formula was not impeachment under former CCP §2034(m) (CCP §2034.310).

PRACTICE TIP: *Stark v City of Los Angeles* (1985) 168 CA3d 276, 287, 214 CR 216, illustrates the proper use of a rebuttal expert. In *Stark,* a defense expert had testified on the audibility of a police siren. The trial court permitted an undisclosed rebuttal expert for impeachment purposes but limited his testimony to the foundational facts about the siren's audibility range. Affirming, the court of appeal held that this limited area of impeachment was a proper matter for an unlisted expert to address. In permitting the impeachment testimony, the trial court could also consider that the defense expert's testimony was a surprise because there had been no prior disclosure that he would testify on the audibility range.

JUDGE'S PERSPECTIVE: Counsel should use the utmost care and consideration if seeking to rely on this exception to disclosure. The exception is limited in scope and frequently misunderstood by trial counsel seeking to gain tactical advantage.

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§11.67 VII. FEDERAL PROCEDURES

The Federal Rules of Civil Procedure were amended in 1993 to impose on parties a mandatory duty to disclose information about witnesses, including experts, without awaiting formal discovery requests. Fed R Civ P 26(a)(2).

NOTE: Effective December 1, 2006, Fed R Civ P 26 was amended to require, among other things, that during the initial disclosures the parties provide information about electronically stored information. See §8.104.

JUDGE'S PERSPECTIVE: Counsel should be sure to check whether the assigned judge has his or her own standing order governing expert discovery and comply with it. Standing orders may be available on the court's website, *e.g.,* for standing orders of judges in the Northern District of California, see http://www.cand.uscourts.gov.

Detailed disclosure requirements; treating physicians. Expert witness disclosure under the federal rules is more detailed than under the California discovery provisions. Disclosure in federal court must include not only the identity and qualifications of each expert and the subject matter of each expert's opinion but also a written report prepared and signed by the expert with a complete statement of all opinions to be expressed, the basis and reasons for each opinion, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary or in support of the opinions, a list of publications authored by the witness within the preceding 10 years, compensation paid for the testimony, and a list of any other cases in which the witness has testified at trial or in deposition within the preceding 4 years. Fed R Civ P 26(a)(2)(B).

JUDGE'S PERSPECTIVE: Counsel should comply fully with the disclosure requirements for each expert whom he or she intends to call to testify at trial. Failure to comply may result in exclusion of expert testimony unless noncompliance was "substantially justified" or harmless to the other side. See Fed R Civ P 37(c). If counsel discovers additional information or the opposing side raises any issue concerning whether counsel complied, counsel should promptly supplement the report and offer the expert for deposition as soon as possible to cure any harm.

The failure to disclose treating physicians or other medical professionals whom counsel intends to call at trial to express an expert opinion concerning, *e.g.,* the extent of injury or need for future medical treatments, creates the risk that the court will limit the physicians to lay witness status. A treating physician who is not specially retained to express opinions beyond those formed in the course of treatment need not produce an expert report, however, unless the court specifically orders one. See, *e.g., Kirkland v Union Pac. RR* (D Nev 1999) 189 FRD 604 (no report required of treating physician); *Hall v Sykes* (ED VA 1995) 164 FRD 46, 48 (treating physician generally not required to submit report; attorney's referral of plaintiff to physician, however, created appearance that physician was specifically retained to supply expert testimony and report was ordered). See also *Ordon v Karpie* (D Conn 2004) 223 FRD 33 (when physician plaintiff's proposed opinion testimony extended beyond facts made known to him during course of treatment and he was specifically retained to give opinion, report could be required).

Court sets timing. The timing of these disclosures is usually prescribed by the court, often at an initial or further case management conference. In the absence of other directions from the court or stipulation by the parties, the disclosures must be made at least 90 days before the trial date or the date the case is to be ready for trial, or, if the evidence is intended solely to contradict or rebut evidence identified by another party under Fed R Civ P 26(a)(2)(B), within 30 days after the disclosure made by the other party. Fed R Civ P 26(a)(2)(C).

Duty to supplement disclosures. Consistent with federal practice, parties also have a duty to supplement all disclosures "in a timely manner" and, with regard to expert information, no later than the final pretrial disclosures. Fed R Civ P 26(e)(1)-(2).

JUDGE'S PERSPECTIVE: Some judges specify a deadline for supplementing disclosures.

The duty to supplement arises when the party learns that the disclosed information is incomplete or incorrect in a material respect and the correct information has not been communicated to the other parties during discovery or in

writing. Fed R Civ P 26(e)(1)(A). A judgment may be reversed due to a party's failure to properly supplement interrogatory responses dealing with expert witnesses. See *Scott & Fetze Co. v Dile* (9th Cir 1981) 643 F2d 670; *Smith v Ford Motor Co.* (10th Cir 1980) 626 F2d 784; *Shelak v White Motor Co.* (5th Cir 1978) 581 F2d 1155; *Holiday Inns, Inc. v Robertshaw Controls Co.* (7th Cir 1977) 560 F2d 856. But see *Phil Crowley Steel Corp. v Macomber, Inc.* (8th Cir 1979) 601 F2d 342 (Rule 26 error was not considered prejudicial enough to cause reversal).

For further discussion about federal procedures, including the designation of additional expert witnesses and the withdrawal of designated expert witnesses, see California Expert Witness Guide §§10.48-10.51 (2d ed Cal CEB 1991).

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Source: Civil Litigation/California Civil Discovery Practice/11 Exchange of Expert Information/§11.68 VIII. CHECKLIST: PROCEDURES FOR DISCOVERY OF EXPERT WITNESS INFORMATION

§11.68 VIII. CHECKLIST: PROCEDURES FOR DISCOVERY OF EXPERT WITNESS INFORMATION

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PROCEDURAL CHECKLIST

SIMULTANEOUS EXCHANGE OF INFORMATION

Demanding party must:

- Serve written demand on each party, specifying place and date of exchange and whether reports and writings are demanded (see §§11.9-11.14)
- Retain original demand, proof of service, lists, and declarations (see §11.27)

Demanding party and parties served must:

- Exchange, with each other party, at attorney's meeting or by mail (see §11.15)
- Written statement that party does not intend to offer any expert witness testimony (see §11.16), or
- Expert witness list (name and address of each expert whose opinion testimony the party expects to offer at trial), attaching, for each expert described in CCP §2034.210(b) (see §11.16):
- Expert witness declaration (see CCP §2034.260(c)) (see §§11.17-11.20)
- *If demanded*, copies of discoverable reports and writings (see §§11.22-11.23)

OBTAINING PROTECTIVE ORDER

Moving party must:

- Make reasonable, good faith attempt to resolve issues (see §11.28)
- Serve and file notice of motion for protective order, attaching declaration showing reasonable and good faith attempt (see §11.28)

SUPPLEMENTING EXPERT WITNESS LIST

(By party that has participated in timely exchange when adverse party has designated expert on subject on which supplementing party has not previously retained expert to testify)

Supplementing party must:

- Submit supplemental expert witness list (see §§11.24-11.25)
- Attach, for each CCP §2034.210(b) expert:
- Expert witness declaration (see §11.25)
- Copies of discoverable reports and writings (see §11.26)
- Prepare expert(s) for immediate deposition (see §11.25)

AUGMENTING LIST OR AMENDING EXPERT WITNESS DECLARATION

(By party that has participated in timely exchange)

Augmenting or amending party must:

- Make reasonable, good faith attempt to resolve informally (see §11.52)
- Serve and file notice of motion for leave to augment or to amend, with supporting papers, including (see §§11.51-11.53):

- Declaration(s) showing reasonable and good faith attempt (see §11.52)
- If augmenting, name and address of newly retained expert (see §11.51)
- Amended or added expert witness declarations (see §11.52)
- Competent evidence to establish mistake, inadvertence, surprise, or excusable neglect (see §11.53)
- Prepare expert(s) for immediate deposition (see §11.54)

SUBMITTING TARDY EXPERT WITNESS INFORMATION

Submitting party must:

- Promptly serve tardy information on all appearing parties as soon as possible (see §11.57)
- Make reasonable, good faith attempt to resolve informally (see §11.57)
- Serve and file notice of motion for leave to submit tardy information, with supporting papers, including declaration showing reasonable and good faith attempt (see §11.57)
- Submit competent evidence to establish mistake, inadvertence, surprise, or excusable neglect (see §11.58)
- Prepare expert(s) for immediate deposition (see §11.59)

DEPOSING LISTED EXPERTS

Deposing party must:

- Serve deposition notice on all parties (see §§11.32-11.33)

If witness fee is payable:

- Tender fee to attorney for party that listed expert (with deposition notice or at commencement of deposition) (see §11.42)

If requested fee is unreasonable:

- Make reasonable, good faith attempt to resolve informally (see §11.46)
- Serve and file notice of motion for order setting fee (with copy to expert), with supporting papers, including declaration showing reasonable and good faith attempt (see §11.45)

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IX. FORMS

§11.69 A. Form: Demand for Exchange of Expert Trial Witness Information

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number, email address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DEMAND FOR EXCHANGE OF**
vs	)	**EXPERT TRIAL WITNESS**
	)	**INFORMATION UNDER CCP**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**§§2034.210-2034.310** _ _[*AND*
	)	*DEMAND FOR PRODUCTION*
	)	*OF EXPERT REPORTS AND*
	)	*WRITINGS UNDER CCP*
_____	)	*§2034.201(c)*]_ _

PARTY MAKING THIS DEMAND: _ _[*Name*]_ _
DATE AND TIME OF EXCHANGE: _ _[*Specify*]_ _
PLACE OF EXCHANGE: _ _[*Specify*]_ _

_ _[*Name of party making demand*]_ _ **demands under CCP §§2034.210-2034.310 that, on or before the above date of exchange and at the above place of exchange, all parties to this action participate in a mutual and simultaneous exchange of information concerning each party's expert trial witness(es), in writing as required by CCP §§2034.210-2034.310, to the following extent:**

1. Either a written list containing the name and address of each natural person (including any party) whose oral or deposition testimony in the form of an expert opinion the responding party expects to offer in evidence at the trial, or a statement that the responding party does not presently intend to offer the testimony of any expert witness.

2. If any witness on the list to be exchanged is a party or an employee of a party or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, an expert witness declaration signed by the responding party's attorney of record (or, if that party is without an attorney of record, by the party), containing for each such witness:

(a) A brief narrative statement of the qualifications of the expert;

(b) A brief narrative statement of the general substance of the testimony that the expert is expected to give;

(c) A representation that the expert has agreed to testify at the trial;

(d) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial; and

(e) A statement of the expert's hourly and daily fee for providing deposition testimony.

[*Add if simultaneous production of discoverable reports and writings of listed experts under CCP §2034.210(c) is desired*]

Under CCP §2034.210(c), each party is also required to produce for inspection and copying, at the time and place of exchange stated above, any discoverable reports and writings made in the course of preparing an expert opinion by any witness on the list to be exchanged who is a party or an employee of a party or who has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (retain with original proof of service for possible filing with court); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: For discussion, see §§11.9-11.14.

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Source: Civil Litigation/California Civil Discovery Practice/11 Exchange of Expert Information/§11.70 B. Form: Written Exchange of Required Expert Witness Information; Expert Witness Declaration

§11.70 B. Form: Written Exchange of Required Expert Witness Information; Expert Witness Declaration

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number, email address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**WRITTEN EXCHANGE OF**
vs	)	**REQUIRED EXPERT WITNESS**
	)	**INFORMATION (CCP**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**§2034.260)** _ _[*AND EXPERT*
	)	*WITNESS DECLARATION*
_____	)	*(CCP §2034.260(c))*]_ _

PARTY MAKING THIS DEMAND: _ _[*Name*]_ _
DATE AND TIME OF EXCHANGE: _ _[*Specify*]_ _
PLACE OF EXCHANGE: _ _[*Specify*]_ _

[*Option 1: Expert witness testimony will be offered*]

The name and address of each person whose expert opinion _ _[*name of party*]_ _ **expects to offer in evidence at the trial are:** _ _[*List*]_ _**.**

[*Option 2: No expert testimony is presently intended to be offered*]

_ _[*Name of party*]_ _ **does not presently intend to offer the testimony of any expert witness in evidence at the trial.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

EXPERT WITNESS DECLARATION

_ _[*Name of attorney for party making demand*]_ _ **declares:**

1. I am the attorney of record in this action for _ _[*name of party*]_ _**.**

2. I make this expert witness declaration as required by Code of Civil Procedure §2034.260(c).

3. I am informed and believe that the following facts are true about _ _[*name of expert*]_ _**:**

(a) Qualifications:

_ _[*Refer to and attach a resume with the necessary qualifications or provide brief narrative statement, e.g., Dr. Keppler, who specializes in the molecular structure and strength of synthetic materials, was awarded a B.S. degree in physics from the University of California (Berkeley) in 1970, an M.S. degree in engineering from Harvard in 1972, and a Ph.D. degree in materials science from UC Berkeley in 1975. He has been employed as a structural engineer from 1975 to the present with Acme Engineering, Inc.; Adjunct Professor of Metals Science at the University California (Los Angeles) from 1977-1982; author of the following books, articles, and treatises: _ _[List]_ _; and is a member of the following professional societies: _ _[List]_ _.]_ _

(b) General substance of testimony this expert is expected to give:

_ _[*Provide brief narrative statement, e.g., Dr. Keppler was retained by _ _[name of party]_ _ to conduct tests of material to determine the cause of failure of material; performed tests; and, based on tests and expertise, formed an opinion that the cause of failure was stress and that this design defect was foreseeable.*]_ _

(c) This expert's hourly fee for providing deposition testimony is $_ _[*amount*]_ _. This expert's daily fee for providing deposition testimony is $_ _[*amount*]_ _.

[*Continue providing information about other experts*]

[4.] Each expert identified in this declaration has agreed to testify at the trial and will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning any opinion and its basis.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except for matters stated on my information and belief, and as to those matters I believe it to be true.

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (for party initiating demand for exchange, with original proof of service affixed); copies for service (one for each party); office and client copies.

Comment: The expert witness declaration is required if any listed witness is an expert described in CCP §2034.210(b). See §§11.3-11.5, 11.16.

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12

Depositions in Other States

William A. Daniels

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§12.1 I. SCOPE OF CHAPTER

This chapter focuses on the procedures for scheduling and attending depositions in other states in pending California actions. It includes evaluating whether to take an out-of-state deposition (see §§12.2-12.19); discussion of written depositions under CCP §§2028.010-2028.080 (see §12.17); planning an out-of-state deposition (see §§12.20-12.27); procedures for noticing an out-of-state deposition (see §§12.28-12.33); procedures for the issuance of commissions (see §§12.34-12.40); and opposing out-of-state depositions (see §§12.43-12.44). Alternatives to taking an out-of-state deposition are discussed in §§12.13-12.18. Procedures in federal court are discussed at §12.56. A procedural checklist can be found in §12.57. For forms, see §§12.58-12.63.

On discovery in foreign nations, see chap 13.

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II. EVALUATING WHETHER TO TAKE OUT-OF-STATE DEPOSITION

§12.2 A. Statutory Authority

Statutory authority for taking oral out-of-state depositions for use in pending California state court actions is contained in CCP §2026.010(a). Except as modified by CCP §2026.010, the procedures for taking oral depositions in California under CCP §§2025.010-2025.620 apply to oral depositions taken in another state of the United States. CCP §2026.010(a). For detailed discussion of taking and defending oral depositions, see chap 6. Preparing for oral depositions is covered in chap 5.

Written depositions under CCP §§2028.010-2028.080 may also be propounded outside California. Except as modified by CCP §§2028.010-2028.080, the procedures under CCP §§2025.010-2027.010 for taking oral depositions both in California and outside the state also apply to taking depositions by written questions. CCP §2028.010(a). On written depositions, see §§5.160-5.199.

If the witness is cooperative, out-of-state depositions may be taken by stipulation. The better practice, however, is to serve the witness with a subpoena. Doing so will provide protection if the witness becomes less cooperative and refuses to appear. It is important to understand and follow the procedural steps necessary to compel attendance and document production. Although both sides may have an economic interest in cooperating as much as possible in conducting out-of-state depositions, the best practice is to take the required steps so that if a motion becomes necessary, counsel can protect the client's interest.

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B. Reasons to Use Out-of-State Deposition

§12.3 1. To Depose Nonresident Nonparty Witness

A nonresident nonparty witness cannot be compelled to appear in California to have a deposition taken. See CCP §1989. See also *People v Cavanaugh* (1968) 69 C2d 262, 265, 70 CR 438 (compulsory process applies only to persons located within court's jurisdiction). The deposition of such an out-of-state witness can be taken only in the state, territory, or insular possession where he or she resides (unless the witness otherwise consents). See CCP §§1989, 2026.010(c). On stipulation to pay expenses for witness to appear for deposition in California, see §12.14.

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§12.4 2. To Compel Production of Materials Outside California

When it is either impossible or impractical to compel the deponent to attend a deposition within California to produce documents or other material objects situated out of the state, a deposition should be taken outside California.

EXAMPLE 1: The person with custody of relevant documents or tangible things may not be a party to the action and may reside outside the jurisdiction of the California courts. If so, that person cannot be compelled to appear and produce at a deposition within the state. See §12.3.

EXAMPLE 2: The deponent may be a California resident who cannot be compelled to produce certain documents or other material objects located outside the state. See, *e.g., Coopman v Superior Court* (1965) 237 CA2d 656, 47 CR 131 (resident defendant in divorce proceeding, who was also president of out-of-state corporation that was not party to proceeding and had never conducted business within California, not required to produce records of nonparty corporation). In this situation, the custodian of records should be deposed to produce the documents or things in the state where they are located. On compelling production of documents, see §§12.28-12.29.

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§12.5 3. To Depose Party or Party-Related Witness Outside California

The deposition of a party or a party-related witness (an officer, director, managing agent, or employee of a party) may be noticed in another state at a place within 75 miles of that deponent's residence or business office. CCP §2026.010(b). No subpoena or court order is required to compel attendance or production of documents and tangible things for inspection and copying at the deposition. CCP §2026.010(b).

PRACTICE TIP: A party is not *required* to depose an out-of state party or a party-related witness within 75 miles of that deponent's residence or business office. Instead, the noticing party may make a motion under CCP §2025.260 for the court to order an out-of-state party deponent to appear beyond the 75-mile radius or even to travel and appear at a deposition in California. *Glass v Superior Court* (1988) 204 CA3d 1048, 1052, 251 CR 690. See §12.18.

See §§12.13-12.18 on alternatives to out-of-state deposition.

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§12.6 4. To Perpetuate Testimony

A deposition may be taken out of state to perpetuate testimony regarding any action that "may be cognizable in any court of the State of California." CCP §2035.010(a). On perpetuating testimony pending appeal, see CCP §§2036.010-2036.050. On depositions to perpetuate testimony generally, see §§5.147-5.155.

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.7 5. For Evidence in Special Proceedings

§12.7 5. For Evidence in Special Proceedings

A deposition may be taken out of state for use in any of the proceedings in which a deposition may be taken within the state, including special proceedings of a civil nature. CCP §2016.020(a). On what is a special proceeding, see §§1.6-1.12.

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.8 C. Determining Need for Commission

§12.8 C. Determining Need for Commission

The main distinction between the procedures for taking a deposition within California and outside the state is that it may be necessary, under the laws of the state in which the deposition will be taken, for the clerk of the court in California to issue a commission. CCP §2026.010(c), (f).

A commission provides official evidence to the courts of another jurisdiction that an action is pending in the issuing court and gives the out-of-state court a foundation to issue a subpoena to compel the witness to attend the deposition. A commission can also serve as an order appointing a specified person to act as deposition officer at the out-of-state proceeding. On determining the need and procedure for obtaining a commission, see §§12.34-12.40.

PRACTICE TIP: Commissions are usually simple to obtain. Even if the practitioner expects to proceed by stipulation, it is good practice to obtain a commission for each out-of-state witness to avoid unnecessary delay if more informal arrangements fail.

NOTE: Letters of request (see §§13.21-13.30) or letters rogatory (see §§13.36-13.40) are used in connection with taking depositions in foreign countries.

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D. Reviewing Choice-of-Law Issues

§12.9 1. Other State's Law Applies to Subpoena Process, Motions to Compel, and Sanctions

When deposing a nonparty witness out of state, the laws of the state where the deposition is to be taken will generally apply regarding issuance of a subpoena, compelling attendance, and sanctions against the witness. See CCP §2026.010(c) (if deponent is not party to action, initiating party must "use any process and procedures required and available under laws of the state").

NOTE: This is one of the most important reasons to associate local counsel before an out-of-state deposition. On considerations when associating local counsel, see §§12.20-12.23.

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§12.10 2. Other State's Law May Govern Privilege Claims

The law of the state where the deposition is taken may apply to claims of privilege raised by a nonparty witness. See *Palmer v Fisher* (7th Cir 1955) 228 F2d 603, 608, overruled in part on other grounds by *Carter Prods., Inc. v Eversharp, Inc.* (7th Cir 1966) 360 F2d 868, 870 (certified public accountant privilege under Illinois statute applied to deposition taken in Illinois for use in Florida). See also Witkin, California Evidence, *Introduction* §10 (4th ed 2000) (although as a general principle evidentiary rules are considered procedural, and thus governed by law of state in which the action is pending, this principle may not necessarily prevail regarding privileges, which are "based on policy rather than the necessity for or probative value of evidence").

JUDGE'S PERSPECTIVE: Generally a court attempts to protect a nonparty witness consistent with the law of that witness's residence.

The party noticing the deposition may argue, however, that California law rather than the law of the state where the deposition is being taken should apply.

EXAMPLE: If a nonparty who was a resident of California at the time a communication took place refuses to testify on the ground of a privilege, and under California law the privilege is narrower than under the other state's law, the party desiring to compel testimony may argue that, because the action is a California action and the deponent was a California resident when the communication took place, California has a greater interest in having its laws applied. See, *e.g., People v Carter* (1973) 34 CA3d 748, 752, 110 CR 324 (although communication was made in Chicago, question of privilege is determined by law of California, the state in which action is pending). The party resisting discovery can argue, however, that the state where the deposition is being taken has a greater interest in having its laws apply because the deposition is being taken of a resident of that state. See *Palmer v Fisher*, *supra*.

PRACTICE TIP: The motion to compel will be heard in the state in which the deposition was set to take place and that state may be more inclined to apply its own law than California law.

For detailed discussion of privilege, see chap 3.

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§12.11 3. California Law Applies to Discovery Procedures

Although CCP §2026.010(c) requires a party to notice an out-of-state deposition according to the other state's laws, California law governs discovery disputes between the parties in California cases. *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1371, 282 CR 783. In *International,* the court applied California's discovery laws to a motion to compel production of documents that were used by a nonresident, nonparty deponent to refresh his memory for a deposition taken in Connecticut. The documents did not belong to the deponent but to the defendant and were in the possession of the defendant's attorney. See also *Unzipped Apparel, LLC v Bader* (2007) 156 CA4th 123, 130, 67 CR3d 111 (rejecting request to apply New York law in dispute over business record subpoenas issued by California court pursuant to commission and order of New York court and served on California nonparty witnesses in New York action).

NOTE: Under CCP §2060.010(c), if the motion had been directed to the deponent regarding documents in his possession, the court would apply Connecticut law.

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§12.12 4. Other State's Injunction to Prevent Discovery Is Unenforceable

A California court need not recognize a stipulated out-of-state injunction under the Full Faith and Credit Clause (US Const art IV, §1) when that injunction "violates fundamental California public policy." *Smith v Superior Court* (1996) 41 CA4th 1014, 1018, 49 CR2d 20. In *Smith,* the court of appeal ruled that the plaintiff in a product liability case had the right to depose a former engineer for the defendant-manufacturer, despite a Michigan injunction preventing the engineer from testifying without the manufacturer's consent in any case involving product liability issues. The court noted that agreements to suppress evidence have long been held void in California, and enforcement of an out-of-state judgment that violates the fundamental public policy of another state (California) is not required by the Full Faith and Credit Clause.

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E. Considering Alternatives

§12.13 1. Stipulating With Other Parties

When the distance requirements of CCP §2025.250, mandating that a deposition must be taken within 75 miles of a deponent's residence or business office, cannot be satisfied, the parties may agree that the deposition of a party or a party-related witness be taken at a place without regard to those distance requirements. Unless otherwise ordered by the court, the parties are free to enter into a written stipulation providing that the deposition be taken before any person at any time or place. CCP §2016.030. If an out-of-state deponent is not a party or a party-related witness, the parties must also obtain the deponent's agreement to appear for a deposition at a more distant place. See §12.3.

PRACTICE TIP: Stipulations between the parties are common. It is good practice to meet and confer with opposing counsel early in the case to see if agreement on out-of-state discovery is possible. Cooperation in this area can often translate into substantial cost savings for all parties.

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§12.14 a. To Pay Expenses for Witness to Come to California for Deposition

To avoid the time and expense of taking an out-of-state deposition, counsel should explore whether other less costly means of obtaining the testimony are available. Paying the expenses of a witness who would be willing to appear in California for a deposition may be an effective approach. Opposing counsel may be willing to stipulate to sharing this cost.

Even when opposing counsel will not share the cost of bringing an out-of-state witness to California, it may still be less expensive for a client to pay for the witness's expenses to come to California than to cover the deposing attorney's time traveling to a distant deposition.

CAUTION: Counsel should bear in mind that an attorney's traveling expenses for taking or attending an out-of-state deposition may be recoverable as an item of costs, but the witness's expenses may be allowed or denied in the court's discretion. See CCP §1033.5(a)(3), (c)(2), (c)(4); *Gorman v Tassajara Dev. Corp.* (2009) 178 CA4th 44, 72, 100 CR3d 152; *Marocco v Ford Motor Co.* (1970) 7 CA3d 84, 97, 86 CR 526. Section 1033.5(a)(3) does not provide for recovery of local travel expenses unrelated to attending depositions or expenses for meals eaten while attending local depositions. *Gorman*, 178 CA4th at 72.

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§12.15 b. To Schedule Telephonic Deposition

Under CCP §2025.310, a person is entitled to take a deposition by telephone or other remote electronic means. Except for the deponent, any other person may attend the deposition by telephone. The court may expressly provide that a nonparty deponent may appear at the deposition by telephone if the court finds there is good cause and there is no prejudice to any party. A party deponent must appear at his or her deposition in person and be in the presence of the deposition officer. On taking telephonic depositions, see §§5.30, 5.206.

There are inherent problems in proceeding in this manner, *e.g.,* inability to view the deponent and reporter; possible difficulty in dealing with exhibits; and, if any counsel are permitted to attend with the deponent, inability to view counsel. Some of these may be cured by a video conference call, but deposing counsel must weigh the importance of obtaining the testimony in person against the expense of traveling to a distant location. This procedure is usually a cost-saving means for securing the testimony of a witness who is not vital to the party's case. On using telephone or video conferences, and other long-distance methods of obtaining deposition testimony, see §§5.30, 5.206.

PRACTICE TIP: When conducting video conference depositions, it is often useful to give notice of a video deposition under CCP §2025.220(a)(5) and to follow the CCP §2025.340 requirements for a video deposition, so that the video transcript may be used at trial.

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§12.16 2. Obtaining Sworn Statement

Rather than deposing an out-of-state favorable witness who counsel is certain will voluntarily appear at trial, counsel should consider obtaining a written statement or a statement under oath taken before a court reporter. Such statements are admissible in a California court proceeding to impeach the favorable witness if his or her testimony deviates from the statement (see Evid C §780(h)) or to refresh the witness's recollection at trial (see Evid C §771). Such statements are inadmissible, however, if the favorable witness fails to attend the trial.

CAUTION: Before obtaining such a statement, counsel must weigh the benefit of committing the witness to favorable testimony against the risk that the statement may become discoverable, providing opposing counsel with a basis for showing inconsistencies between the statement and the later testimony. Because of this concern, some attorneys will not seek a witness statement from a favorable witness. Even more important, if the favorable testimony of the out-of-state witness is not merely helpful but vital to the outcome of the case, counsel should depose the witness. If for some unforeseen reason the witness does not attend the trial, counsel can then arrange for the deposition to be read into evidence (or the deposition video to be shown to the jury; see §§6.136-6.139). On deposing a friendly witness, see §5.39.

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§12.17 3. Taking Written Deposition

The written deposition procedure under CCP §§2028.010-2028.080 may be the most satisfactory (and perhaps the only) means of obtaining testimony when the out-of-state deponent is, *e.g.,* incarcerated, in the armed forces, or ill and confined to bed. The moving party should request the commission from the clerk of the court in sufficient time to allow for the parties' exchange of direct, cross, and redirect questions and service of any required subpoena before the deposition officer propounds the written questions to the out-of-state deponent. For form of deposition notice by written questions, see §5.170.

On procedures for taking depositions by written questions, see §§5.160-5.199.

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§12.18 4. Making Motion for Court to Order Party to Attend Deposition in California

To compel out-of-state party to attend deposition in California requires stipulation or court order. The deposition of a party or a party-related witness must be taken within 75 miles from the deponent's residence or business office (CCP §2026.010(b)), unless the parties stipulate or the court orders the deposition to be taken at a more distant location. CCP §§2016.030, 2025.260. A deposing party may make a motion for an order that the deponent attend for deposition at a place that is more distant than that permitted under CCP §2025.250, including requiring an out-of-state party deponent to travel and appear for a deposition in California. CCP §2025.260; *Glass v Superior Court* (1988) 204 CA3d 1048, 1052, 251 CR 690. In the absence of a written stipulation or an order issued under CCP §2025.260, it is not possible to compel a party who is a nonresident natural person or a nonresident officer, director, managing agent, or employee of a party to attend the taking of his or her noticed deposition within the state.

Motion procedures. The motion must be accompanied by a meet-and-confer declaration. CCP §2025.260(a). On motion requirements and procedures, see §§15.30-15.58.

Factors court considers. In determining whether to grant the motion, the court must take into consideration any factor tending to show whether the interests of justice will be served by requiring the deponent's attendance at the more distant place, including, but not limited to the following (CCP §2025.260(b)):

- Whether the moving party selected the forum;
- Whether the deponent will be present to testify at the trial of the action;
- The convenience of the deponent;
- The feasibility of conducting the deposition by written questions under CCP §§2028.010-2028.080 or of using a discovery method other than a deposition;
- The number of depositions sought to be taken at a place more distant than the distance permitted under CCP §2025.250;
- The expense to the parties of requiring the deposition to be taken within the distance permitted under CCP §2025.250; or
- The whereabouts of the deponent at the time at which the deposition is scheduled.

JUDGE'S PERSPECTIVE: Whether the prospective deponent is a party or party-related witness who brought the action in California can be a determinative factor for the court.

Conditions of order. The court may condition its order on the moving party's advancement of reasonable expenses and costs to the deponent for travel to the deposition location. CCP §2025.260(c).

Possible sanctions. The court must (CCP §2025.260(d))

> impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to increase the travel limits for a party deponent, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

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§12.19 F. Limited Civil Cases

In limited civil cases, a party may ordinarily take only one deposition regarding each adverse party. CCP §94(b). This limitation applies unless the court, on noticed motion and "a showing that the moving party will be unable to prosecute or defend the action effectively without the additional discovery," orders otherwise. CCP §95.

NOTE: Given the lesser jurisdictional amount in limited civil cases (see §14.2), the expense of an out-of-state deposition may be prohibitive. See CCP §86 (amount in controversy, exclusive of interest, must be $25,000 or less).

On discovery limitations generally in limited civil actions, see CCP §§90-98; chap 14.

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III. PROCEDURES BEFORE DEPOSITION

§12.20 A. Associating Local Counsel

Counsel may find it useful to associate an out-of-state attorney to assist with obtaining out-of-state subpoenas, coordinate court reporters, provide a location for the deposition itself, and enforce process if the witness proves uncooperative. Retaining such local counsel can be expensive, however. Often, the client is best served if the California practitioner explores the possibility of obtaining cooperation from the witness and opposing counsel before committing to formal process. In any event, whenever discovery takes the practitioner out-of-state, additional time must be built into the discovery schedule to allow for the inevitable delays that conducting multi-state litigation generally require.

PRACTICE TIP: If local counsel is to be retained, counsel's references should be checked beforehand. Local bar associations, judges, and retired judges are useful sources for local counsel.

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.21 1. Recommended for Nonparty Deponents

§12.21 1. Recommended for Nonparty Deponents

A California attorney who is not admitted to practice law in the state where the deposition will be taken should make arrangements with local counsel for assistance with the out-of-state deposition. Some of the tasks that local counsel may perform include:

- Advising California counsel on the procedures and remedies available under the law of the jurisdiction where the deposition will be taken (see CCP §2026.010(c));
- Subpoenaing witnesses, if necessary;
- Appearing at the deposition on behalf of California counsel;
- Seeking relief in the local court, *e.g.,* to compel attendance or completion of the deposition; and
- Arranging for an officer to transcribe deposition testimony.

The local attorney may also be willing to make his or her offices available for the taking of the deposition.

NOTE: Whether to retain local counsel should be decided early in the case to avoid delay in the discovery process. Before representing a nonparty witness at an out-of-state deposition, counsel should consult the rules of that state to determine whether it is necessary to associate local counsel or obtain permission to appear pro hac vice (*i.e.,* for the single occasion).

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§12.22 2. May Not Be Necessary for Party Deponents

Counsel need not invoke the aid of the local court to compel discovery when deposing an out-of-state party or a party-related witness (*i.e.,* an officer, director, managing agent, or employee of a party) who refuses to appear or answer appropriate questions. Counsel can move for sanctions in California under CCP §§2023.010-2023.040, and 2025.450. See §12.50.

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§12.23 3. When Out-of-State Attorney Should Appear at Deposition

When to attend the deposition. For depositions vital to the outcome of the case, California counsel for both the noticing and adverse parties will usually attend to conduct and defend the proceeding. When present, counsel can ensure that desired information is obtained, required foundations are satisfied, appropriate objections are timely interposed, privileges are asserted, and the record is otherwise protected. Counsel who are present can also ensure compliance with the California rules of evidence. Attendance also affords California counsel an opportunity to evaluate the deponent's demeanor. On conducting and defending depositions, see chap 6.

When to associate local attorney. California counsel should consider associating a local attorney to take or defend a deposition only under limited circumstances such as the following:

- The information and facts sought are of a limited and noncontroversial nature and can be gathered by an attorney not thoroughly familiar with the entire case.
- Opposing counsel will be taking the deposition of a witness who is not essential to the case, and local counsel's role will merely be to appear at the deposition to monitor the proceeding and to protect the record.
- The time and expense of traveling and remaining out of state during the deposition greatly exceed the cost of associating local counsel, and the amount at issue in the litigation does not warrant such an expenditure.

PRACTICE TIP: California counsel should make certain that the associated attorney is sufficiently familiar with the facts and theories of the case and is aware of California procedures concerning depositions and the California rules of evidence germane to the deposition (*e.g.,* the business records foundational requirements if a custodian of records will be deposed). Counsel should evaluate whether the time involved in bring local counsel up to speed on the case will eliminate any potential cost savings.

When associating local counsel, it is a good idea to outline any special concerns or issues about the case in written correspondence to the local attorney.

Because other states' requirements for preserving objections at a deposition may be different, California counsel should inform local counsel that objections, if not timely made at the deposition, are waived regarding the form of questions or answers and any other errors and irregularities occurring at the oral examination that might be cured if promptly objected to. See CCP §2025.460. See also §6.29. When appropriate, California counsel may also attend all or part of the deposition by telephone and consult with the associated attorney during breaks about any concerns arising from the questioning.

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B. Selecting Deposition Officer

§12.24 1. Out-of-State Officer

An out-of-state deposition may be taken before a person (a) authorized to administer oaths under the laws of the United States or the place where the deposition is to take place or (b) appointed by the court in which the action is pending. CCP §2026.010(d). The deposition may not be taken before a relative or employee of an attorney for a party or a person financially interested in the action. CCP §2025.320(a).

For convenience and economy, the deposition officer authorized to administer oaths (usually a notary public) should also be a certified court reporter with the ability to record the deponent's testimony.

PRACTICE TIP: The following sources may aid California counsel in locating a qualified out-of-state deposition officer: local counsel, the clerk of the appropriate local court, published lists of notaries public, and court reporting services. Many court reporting services within California can also recommend competent out-of-state reporters. Some local trial bar chapters will also give references for out-of-state reporters. There are also nationwide court reporting services available.

If a commission will be issued, it should designate by name or descriptive title the person before whom it will be taken. If the deposition will be taken by written questions, the deposition notice must state the name or descriptive title and the address of the officer before whom the deposition will be taken. CCP §2028.020(a). On drafting notice for deposition on written questions, see §5.170. On procedures for obtaining commission, see §§12.34-12.40.

Because the deposition officer is usually unfamiliar with the applicable procedures, instructions for taking and completing the deposition should be attached to the commission or the other pertinent papers forwarded to him or her. See §12.33

PRACTICE TIP: It is usually preferable to designate the officer by descriptive title, rather than by name, to avoid any difficulties if a specified person is unable to serve. This is not an option, however, when the deposition will be taken by written questions. Under CCP §2028.020, the notice of deposition must include the name or descriptive title and the address of the deposition officer. On deposition by written questions, see §§5.160-5.199.

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§12.25 2. California Officer

It is not necessary to select an out-of-state deposition officer. If deposing counsel wants the court to appoint a California deposition officer to travel to the out-of-state deposition, the motion for commission should request appointment of a specified person. Counsel should state the grounds for the appointment, such as the following:

- At the place where the deposition will be taken, no person is qualified to serve as deposition officer because the case involves technical terminology or other unique aspects. Thus, the deposition can be taken only if the court appoints someone to act as deposition officer, to administer oaths, and to take testimony.
- The parties have stipulated to the appointment of the person specified.
- Under the laws of the place where the deposition will be taken, an order appointing a specified person to serve as deposition officer will facilitate the taking of the deposition.

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§12.26 C. Selecting Place for Taking Deposition

California counsel can arrange for the out-of-state deposition to be taken in any convenient place, such as the offices of a local attorney or the designated deposition officer, a courtroom made available for the purpose, or a hotel conference room, as long as distance requirements are met. See CCP §2026.010(b). On distance requirements, see §12.5.

The deposition of a party or a party-related witness (an officer, director, managing agent, or employee of a party) may be noticed in another state at a place within 75 miles of that deponent's residence or business office. CCP §2026.010(b). The deposition of a nonparty must conform to the laws of the foreign jurisdiction. See CCP §2026.010(c).

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§12.27 D. Deciding Whether to Video Deposition

As long as the deposition notice specifies an intention to videotape the testimony, a party may offer the video deposition into evidence at trial. See CCP §§2025.330(c), 2025.620. It is good practice to include the information that the deposition will be videotaped in the subpoena as well. On procedure for videotaping depositions, see CCP §2025.340. For detailed discussion of procedures and strategies involved in scheduling and conducting video depositions, see §§5.75-5.84, 6.22.

For a video deposition to be effective, counsel should select a service that is highly qualified and experienced in videotaping techniques so that the quality of the video transcript is usable at trial. On requirements for the recording technician, see CCP §2025.340(b). The sources for finding a competent out-of-state recording technician are similar to those for selecting a deposition officer. See §§12.24-12.25.

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IV. PROCEDURES FOR NOTICING OUT-OF-STATE DEPOSITION

§12.28 A. Compelling Parties to Appear and Produce

When the proposed deponent is a party or a party-related witness (an officer, director, managing agent, or employee of a party), giving proper notice is sufficient to compel attendance and the production of documents or tangible things at an out-of-state deposition as long as the deposition of a party or a party-related witness is taken within 75 miles of the deponent's residence or business office (see CCP §2026.010(b)). A deposition subpoena or subpoena duces tecum is not required. CCP §2025.280(a); *Snyder v Superior Court* (1970) 9 CA3d 579, 89 CR 534 (decided under former CCP §§2019, 2024).

Appropriate sanctions can be awarded in the California court against a party or a party-related witness who fails to appear, testify, or produce the desired documents or other things at the out-of-state deposition. See CCP §§2023.010-2023.040. See also *Snyder v Superior Court*, *supra* (plaintiff's failure to attend deposition deemed "willful" within meaning of former CCP §2034(d); sanctions in amount of defendant's expenses awarded against plaintiff).

For contents of deposition notice, see §5.52.

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§12.29 B. When Unable to Attach Deposition Subpoena to Parties' Notice

With respect to the production of books, records, or things by a nonparty, CCP §2025.240(c) requires that an identical copy of the deposition subpoena served on the nonparty under CCP §§2020.010-2020.510 be served with the deposition notice. Under CCP §2026.010(a), the procedures specified in CCP §2025.010 for taking oral depositions in California apply to taking depositions in another state, territory, or insular possession, except as modified in CCP §2026.010. Code of Civil Procedure §2026.010 is silent, however, on whether a copy of the deposition subpoena must be served with the deposition notice. Presumably, there is no such requirement for a subpoena issued in another state; arguably, the subpoena is issued under the laws of that state and not under CCP §§2020.010-2020.510.

PRACTICE TIP: Often, counsel serve all parties with a deposition notice but do not provide counsel with a copy of the deposition subpoena served on the witness until the deposition.

Counsel should set the out-of-state deposition date sufficiently in advance, taking into account time for issuance and service of the commission and time for service of a subpoena or subpoena duces tecum under the law of the forum in which the witness will be deposed. On obtaining a commission, see §§12.34-12.40. On other requirements concerning the timing of the out-of-state deposition, see §12.30.

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C. Scheduling Deposition

§12.30 1. Timing

A party may take a deposition of any person, including a party, as a matter of right. Prior court approval is not required unless the plaintiff serves a deposition notice within 20 days after service of the summons or the defendant's appearance. A defendant may serve a deposition notice any time after appearing or being served in the action. CCP §§2025.210, 2026.010. See *Snyder v Superior Court* (1970) 9 CA3d 579, 89 CR 534 (decided under former CCP §§2016, 2018(a), 2019, 2024).

The deposition must be scheduled for a date that is at least 10 days after service of the notice. CCP §2025.270(a). If service is made by mail, an additional 5 calendar days must be added if the place of mailing and the address for service is within California; an additional 10 calendar days must be added if either the place of mailing or address for service is outside California but within the United States. CCP §§1013(a), 2016.050. On extensions of time limits due to method of service, see §2.22. On motion of any party, with or without notice, and a showing of good cause, the court may shorten or extend the time period for service of the deposition notice. CCP §2025.270(d). On deposition scheduling time limits, see chap 5. On applications to shorten time, see §§15.11-15.29.

NOTE: If issuance of a commission for the subpoena of an out-of-state nonparty witness will be required, counsel giving the parties notice of the deposition must take into account any time requirements under the law of that jurisdiction for obtaining a commission and serving the subpoena. See §12.9.

PRACTICE TIP: When conducting out-of-state depositions, counsel should keep communications with opposing counsel open. Last-minute changes in schedule, missed flights, or scrambled directions can wreak havoc on the most carefully planned deposition schedule. Counsel should consider exchanging cell phone numbers or e-mail addresses for better communication. Cooperation in this area benefits both sides, especially given the high cost of travel.

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§12.31 2. Changing Time or Place of Deposition

If the time and place specified in the notice of deposition are later changed, timely notice of the change must be given to the deponent and to all other parties. If it is not, the party seeking the deposition risks the imposition of sanctions. See CCP §2025.430.

A party that notices a deposition and fails to serve a subpoena is subject to the same sanctions if, because of this failure, the witness does not attend the deposition.

PRACTICE TIP: Counsel should serve a subpoena on every witness, even if the witness is cooperative.

On sanctions under CCP §§2023.010-2023.040 for failure of a party or a party-related deponent (an officer, director, managing agent, or employee of a party or a person designated by an organization that is a party under CCP §2025.230 to appear, see CCP §2025.450. For further discussion, see §§5.40-5.41. On the noticing party's failure to attend or subpoena a witness, see §12.47.

NOTE: The deposition of a party or a party-related witness may be noticed in another state at a place within 75 miles of that deponent's residence or business office. CCP §2026.010(b). The deposition of a nonparty must conform to the laws of the foreign jurisdiction. See CCP §2026.010(c).

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§12.32 D. Right of Nondeposing Party to Submit Written Questions Instead of Participating in Oral Examination

Instead of participating in an out-of-state deposition, parties may send written questions in a sealed envelope to the party taking the deposition for delivery to the deposition officer, who must unseal the envelope and propound them to the deponent after completion of the oral examination. CCP §2025.330(e).

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§12.33 E. Forwarding Instructions to Deposition Officer

The party noticing the deposition may forward to the designated officer a set of instructions for taking and returning the deposition, particularly if the out-of-state procedures differ from California laws or if special conditions apply to the taking of the deposition. As a matter of course, some attorneys forward instructions to the deposition officer regardless of any possible differences between California law and the law of the state where the deposition will be taken. When a commission has been issued, any instructions transmitted to the deposition officer may be attached to the commission.

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V. PROCEDURES FOR OBTAINING COMMISSION

§12.34 A. Description of Commission

A commission to take a deposition is a warrant or order issued under seal by the clerk of the court in which the action is pending, providing official evidence to the courts of another jurisdiction that an action is pending in the issuing court. The commission gives the out-of-state court a foundation to issue a subpoena to compel the witness to attend the deposition.

The party seeking a commission should request the clerk where the action is pending to issue a commission. The commission must be issued by the clerk to any party in any action pending in its venue, without a noticed motion or court order. CCP §2026.010(f). If the out-of-state jurisdiction requires a court order for a commission, however, an order issuing the commission may be obtained by ex parte application. CCP §2026.010(f). On discovery in a foreign country, see chap 13.

A commission also empowers a designated person (or person named by descriptive title) to take the deposition of a specified witness outside California. A commission may serve as an order of appointment, authorizing a named person to serve as deposition officer and to administer oaths, if he or she is not otherwise qualified to do so. For form of commission, see §§12.62-12.63.

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B. When Commission Required

§12.35 1. Deposition of Nonparty Witness

The principal function of a commission is to provide a foundation for issuance of a subpoena by the court of another jurisdiction. It is necessary to obtain a commission when:

- The proposed deponent is a nonparty witness who might not appear voluntarily; and
- Under the law of the jurisdiction where the deposition will be taken, a subpoena will issue only if the court in which the action is pending has issued a commission.

For pre-Civil Discovery Act of 1986 cases in which application was made for a commission under former CCP §2024 to take the out-of-state deposition of a nonresident or non-party-related witness, see *Rosen v Superior Court* (1966) 244 CA2d 586, 589, 53 CR 347; *Beverly Hills Nat'l Bank & Trust Co. v Superior Court* (1961) 195 CA2d 861, 864, 16 CR 236.

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§12.36 2. Depositions of More Than One Nonparty Witness

When several witnesses who live in separate states will be deposed, California counsel will need to obtain a separate commission for each state. The deposing party need not, however, obtain a separate commission for each witness residing in a particular state. A commission may designate that the depositions of several named witnesses residing in a state be taken.

PRACTICE TIP: It is the better practice, however, to get separate commissions for each witness. If there is any doubt, counsel should ask the court issuing the commission if the court would prefer to have all witnesses in the same state listed on one commission or wants a separate commission application for each witness.

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C. When Commission May Be Needed

§12.37 1. Deposition of Party or Party-Related Witness

It is unnecessary to obtain a commission to compel a party or a party-related witness (*i.e.,* an officer, director, managing agent, or employee of a party) to attend an out-of-state deposition and to produce at the deposition any documents or tangible things. As long as geographical limits are met with regard to the deponent's residence or business office, notice is sufficient to compel a party or party-related witness's attendance, as well as the production of documents or things for inspection and copying. CCP §2026.010(b). Failure of a party or a party-related witness to attend or testify at the deposition can result in the California court in which the action is pending imposing sanctions on the party. See CCP §§2023.010-2023.040, 2025.450(c)-(d).

Similarly, service of a notice to take the written deposition of a party or a party-related witness should be sufficient, and no commission should be necessary. See CCP §2028.010, which makes the procedures for taking oral depositions in CCP §§2025.010-2027.010 applicable to written depositions, except as modified in CCP §§2028.010-2028.080. On written depositions, see §§5.160-5.199.

JUDGE'S PERSPECTIVE: Many counsel nonetheless obtain a commission whenever they take an out-of-state deposition, even of a party or party-related witness, to ensure that the procedures required by the state in which the deposition is to be held are met. Counsel then has the option of moving to compel discovery or request sanctions either within California or in the foreign jurisdiction where the deponent works or resides.

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§12.38 2. Deposition of Other Party's Expert

After lists of expert trial witnesses are exchanged under CCP §§2034.010-2034.730, a party desiring to depose another party's expert, described in CCP §2034.210(b) (*i.e.,* an expert who is a party or an employee of the party or whom the party has retained "for the purpose of forming and expressing an opinion in anticipation of litigation or in preparation for trial"), may proceed by noticing the deposition and need not also subpoena the expert. CCP §§2034.420-2034.460. Obtaining a commission when such an expert will be deposed is unnecessary. But see Judge's Perspective in §12.37.

PRACTICE TIP: Service of a proper deposition notice accompanied by tender of the expert witness fee *requires* the party retaining the expert to produce the witness as noticed. See CCP §2034.460(a). If there is any question about whether the opposing party will produce its expert or whether the expert will cooperate with the deposition process, counsel should tender the expert witness fee with the notice. Counsel should also serve a deposition subpoena on the expert witness to obtain documents beyond the expert's report.

Under CCP §2034.420, the deposition of an expert must be taken within 75 miles of the courthouse where the action is pending. On motion for a protective order by the party designating the expert and on a showing of exceptional hardship, the court may order that the deposition be taken at a location more distant from the courthouse. CCP §2034.420. The parties may select a more distant location for deposing the expert by written stipulation (see CCP §2016.030).

NOTE: The party designating the expert witness is responsible for any deposition preparation fees and for travel expenses. CCP §2034.440.

On expert witnesses, see chap 11; on motions for protective order, see §§15.59-15.84.

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.39 3. Exception When Commission Needed to Depose Independent Expert

§12.39 3. Exception When Commission Needed to Depose Independent Expert

A commission may be necessary to depose a nonresident nonparty expert witness who has acquired knowledge independently, if the jurisdiction in which the deposition will take place requires the issuance of a commission as a prerequisite to issuing a subpoena. See CCP §2026.010(f).

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§12.40 D. How to Obtain Commission

If a party requests, the clerk of the court must issue a commission authorizing a deposition in another state or place. A noticed motion or a court order is not necessary. The court clerk must issue the commission when requested by any party in any action pending in the venue. CCP §2026.010(f).

The commission must request that process issue in the place where the examination will be held, requiring attendance and enforcing the obligation of the deponents to produce documents and to answer questions. The commission may contain terms that the foreign jurisdiction requires to initiate the process. CCP §2026.010(f).

If the foreign jurisdiction requires a court order for a commission, an order for a commission may be obtained by ex parte application. CCP §2026.010(f). See forms in §§12.58-12.63.

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VI. PROCEDURES FOR SUBPOENAING NONPARTY WITNESS

§12.41 A. Obtaining Out-of-State Subpoena or Subpoena Duces Tecum

The law of the state where the deposition will be taken governs the issuance of a subpoena. CCP §2026.010(c). The requirements vary considerably from state to state. Counsel desiring to take the deposition of a nonparty residing out of state should consult with local counsel and carefully review the law of that state governing issuance of a subpoena.

EXAMPLE: In many states (*e.g.,* New York), the courts will issue subpoenas to local residents simply on a showing that the nonparty deposition is required by notice or by agreement of the parties in a lawsuit pending in another state. See NY Civ Prac Law & Rules (CPLR) §3102(e). See also CPLR §328. Some states require an additional showing to be made. Counsel should ascertain the means provided by local law for compelling the witness to attend and produce documents and other things. For a useful digest of laws of every state, see Martindale-Hubbell Law Directory, Law Digest (1999).

Counsel should ascertain the requirements of the out-of-state forum for providing issuance of the commission. On associating local counsel, see §§12.20-12.23.

PRACTICE TIP: When an out-of-state court conditions the issuance of a subpoena on proof that a commission has been issued by the California court, the deposing party will have to prove the issuance of that commission. Such proof might be accomplished by filing, *e.g.,* a certified copy of the order of commission or the deposing attorney's affidavit with the out-of-state court.

California counsel should arrange with local counsel to obtain and serve a subpoena or subpoena duces tecum, providing local counsel with proof of the commission and all other papers necessary under the law of the jurisdiction for obtaining and serving the subpoena or subpoena duces tecum. Counsel should also ascertain the amount of any witness fees and mileage that may be required. The manner of service must conform to the law of the place where the deposition is to be taken. See CCP §2026.010(c).

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§12.42 B. Seeking Personal Consumer and Employment Records

If the noticing party is a subpoenaing party as defined in CCP §1985.3(a)(3), and the deponent is a witness commanded to produce a consumer's personal records or an employee's employment records, the date for the deposition must be at least 20 days after issuance of that subpoena or 15 days after service, whichever is later. CCP §§2020.410(c), 2025.270(c). This period is extended if service is made by mail. See CCP §§1013, 2016.050. For procedures and time limits, see §2.22.

Whether CCP §2025.270 applies when a subpoena issues out of state compelling a nonparty witness to produce consumer personal records or employment records is unclear and may depend on whether the records sought are those of California residents.

Because CCP §2026.010(a) specifically provides that, except as modified in CCP §2026.010, the procedure for taking oral depositions in California specified in CCP §§2025.010-2025.620 applies to taking depositions in another state, territory, or insular possession, the safer practice is to comply with the notice provisions in CCP §2025.270(a) to avoid any possibility of an objection to the notice of deposition being sustained for failure to comply with those time requirements. This is particularly true if the consumer or employment records to be produced under CCP §§1985.3 or 1985.6 are those of California residents. California counsel should also find out whether there are any additional requirements concerning consumer records imposed by the law of the jurisdiction in which the deposition will be taken.

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VII. PROCEDURES FOR OPPOSING OUT-OF-STATE DEPOSITION AND QUASHING SUBPOENA

§12.43 A. Opposing Out-of-State Deposition

Under CCP §§2025.010-2026.010, the procedures and grounds for making objections and obtaining protective orders are the same for out-of-state depositions as for those taken in California. See *Snyder v Superior Court* (1970) 9 CA3d 579, 585, 89 CR 534, discussing former CCP §2019(b)(1). See also *Rosen v Superior Court* (1966) 244 CA2d 586, 591, 53 CR 347.

Except for a motion to quash a subpoena (see §12.44), all objections and motions relating to a deposition may be made in the trial court in which the action is pending. See CCP §§2025.410-2025.480. A motion to terminate or limit an examination may be made either in the court in which the action is pending (if the deponent is a party or otherwise subject to the court's jurisdiction) or in the court in the place where the deposition is being taken when a subpoena has been issued out of that court. See CCP §2025.420(b)(16).

On the procedures and grounds for making objections and obtaining protective orders for depositions generally, see §§6.86, 15.59-15.84.

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§12.44 B. Motion to Quash Subpoena or Subpoena Duces Tecum

A motion to quash a deposition subpoena or deposition subpoena duces tecum must be made in the court that issued the subpoena. See, *e.g., Wemyss v Superior Court* (1952) 38 C2d 616, 241 P2d 525. See §5.138.

When a subpoena has been served on a nonresident nonparty witness who then seeks in the out-of-state jurisdiction to oppose the taking of the deposition, the law of that jurisdiction controls regarding:

- The procedure to be followed; and
- The grounds for objecting and obtaining protective orders.

In some circumstances, however, deposing counsel may be able to argue successfully that California law should apply. On choice of law, see §§12.9-12.12.

PRACTICE TIP: Although out-of-state judges generally apply local law to discovery disputes within their jurisdictions, they may be persuaded by California law on the discovery and admissibility of evidence at trial. Counsel should be prepared to argue California standards but be knowledgeable about local restrictions, procedures, and customs. If the action is on a contract under which the parties have agreed that California law applies to the dispute, counsel should use this fact to bolster the argument that the court should apply California law.

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VIII. CONDUCTING OUT-OF-STATE DEPOSITION

§12.45 A. Taken in Same Manner as Deposition Within California

An out-of-state deposition is taken in the same manner as a deposition within the state. See CCP §2026.010(a) (incorporating by reference procedures for oral depositions under CCP §§2025.010-2025.620). On forwarding instructions to deposition officer to conform procedures to California law, see §12.33. On conducting depositions generally, see chap 6.

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.46 B. Handling Disputes During Deposition

§12.46 B. Handling Disputes During Deposition

Resolution of discovery disputes that occur during an out-of-state deposition may entail considerable delay. Because of this fact, when a party deponent refuses to answer a question or to produce documents and things at the deposition, counsel will usually attempt to complete the deposition on other matters, as permitted by CCP §2025.460(d), rather than suspend the deposition. See CCP §2025.470. See §§6.75-6.82 On use of referee during deposition, see §§2.68-2.72.

The same approach may be taken when deposing a nonparty witness. Any motions to compel further answers and to request attorney fees or sanctions must be made through local counsel in the out-of-state jurisdiction. See §12.50.

JUDGE'S PERSPECTIVE: Some courts allow telephonic hearings before the assigned or otherwise appropriate judge to rule on matters arising during the deposition.

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§12.47 C. Party's Failure to Appear or Subpoena Witness

If the party giving notice of an out-of-state oral deposition fails to attend, or the deponent fails to appear because the noticing party failed to serve a required deposition subpoena, any party who attends in person or by attorney under the notice can apply to the court in which the action is pending for sanctions under CCP §2023.030(a), requiring the noticing party or the noticing party's attorney, or both, to pay the reasonable expenses incurred by the party and the party's attorney in attending, including reasonable attorney fees. See CCP §§2025.430-2025.440. On sanctions for this behavior, see §12.49. On motions for sanctions, see §§15.85-15.116.

The court must award monetary sanctions unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the award of such a sanction unjust. CCP §§2025.430-2025.440. See *Rosen v Superior Court* (1966) 244 CA2d 586, 53 CR 347 (decided under former CCP §2019(g); trial court erred in refusing to impose sanctions on party for failure to subpoena witness in New York deposition).

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IX. POSTDEPOSITION PROCEDURES

§12.48 A. Obtaining Sanctions

With regard to depositions, various provisions of the Civil Discovery Act (CCP §§2016.010-2036.050) authorize the court to award monetary sanctions, including payment of attorney fees. See, *e.g.,* CCP §§2023.030(a), 2025.420(d), 2025.430-2025.440, 2025.480(f)-(g). See chart in §15.103.

For sanctions that have been imposed as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, see §15.107 (sanctions outside the Civil Discovery Act). On contempt, see §15.102.

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§12.49 1. Sanctions Against Party

The procedure for obtaining sanctions against a party for failure of the party or a party-related witness (an officer, director, managing agent, or employee of a party) to attend the deposition or produce books, documents, or other things in connection with out-of-state depositions is the same as for depositions taken in California. See *Snyder v Superior Court* (1970) 9 CA3d 579, 586, 89 CR 534 (decided under former CCP §§2018(a), 2024, 2034(d); trial court properly imposed sanctions on nonresident party-deponent for failure to attend deposition at her place of residence). See also CCP §§2026.010(a), 2028.010. On sanctions for failure of deponent to attend, see CCP §§2025.440-2025.450. On sanctions for refusal to answer or produce, see CCP §§2025.450, 2025.480(f)-(g). See also §§15.85-15.116.

A noticed motion for sanctions against a party is made to the court in which the action is pending, regardless of where the deposition is taken. See CCP §2023.040. See also *Snyder v Superior Court*, *supra*.

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§12.50 2. Sanctions Against Nonparty

If a nonparty witness refuses to obey a subpoena to attend and be sworn at the taking of the deposition, counsel's usual remedy is to initiate contempt proceedings through local counsel in the court that issued the subpoena. See generally CCP §§2020.240, 2023.030(e), 2025.440(b), 2026.010(a), 2028.010. Whether any other sanctions (*e.g.,* recovery of costs and expenses, including reasonable attorney fees) are recoverable against the nonparty will depend on the law where the deposition was supposed to have taken place. In essence, enforcing an out-of-state subpoena requires recourse to the issuing court, which is asked to issue orders to enforce its own power and jurisdiction.

If a nonparty witness refuses to answer a question or to produce books, documents, or other things under a deposition subpoena duces tecum, deposing counsel may associate local counsel to apply to the court of the state in which the deposition is taken for an order compelling the witness to answer or produce. See, *e.g.,* CCP §2025.480. A motion for such an order must be made in the manner specified by the law of the jurisdiction where the deposition is taken.

On associating local counsel to enforce out-of-state deposition procedures, see §§12.20-12.23.

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§12.51 3. Sanctions Against Counsel

If opposing counsel advised the deponent to take a position that the court finds to have been a misuse of the discovery process, sanctions are available against the attorney representing that deponent. CCP §2023.030(a). See *Marriage of Lemen* (1980) 113 CA3d 769, 780, 170 CR 642, decided under former CCP §2034(a). For examples of misuse of the discovery process generally, see CCP §2023.010.

When requesting sanctions, the notice of motion must (CCP §2023.040):

- Name every person, party, and attorney against whom sanctions are being sought;
- Identify the type of sanction sought; and
- Be accompanied by a supporting memorandum and a declaration stating facts supporting the amount of any monetary sanction sought.

On sanctions that have been imposed as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, see §15.107.

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§12.52 B. Dealing With Deposition Transcript

The procedures for signing, certifying, and custody of an out-of-state deposition are the same as for a deposition taken in California. See CCP §§2025.520-2025.570, 2026.010(a). See §§6.126-6.140.

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.53 C. Making Motion to Suppress

§12.53 C. Making Motion to Suppress

A motion to suppress an out-of-state deposition is made in the same manner and on the same grounds as a motion to suppress a deposition taken in California. See CCP §§2026.010(a), 2028.010 (incorporating by reference the procedures applicable to depositions taken in the state except as modified in those sections). See §5.197.

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X. USING OUT-OF-STATE DEPOSITION AT TRIAL

§12.54 A. Same as Any Other Deposition

An out-of-state deposition may be used in the same manner, for the same purposes, and subject to the same limitations at the trial as a deposition taken in the state. See CCP §2026.010(a). See also CCP §2035.060, relating to use of out-of-state depositions to perpetuate testimony.

CAUTION: Before the trial, counsel should ensure that an out-of-state deposition is available for filing when needed. Local rules or policies should be checked for special filing requirements. On procedure for filing transcript with court at trial, see California Trial Practice: Civil Procedure During Trial §12.14 (3d ed Cal CEB 1995). For procedure when a party intends to offer an audio or video recording of a deposition in evidence, see CCP §2025.340(m).

For further discussion, see §§5.147-5.155. On use of depositions at trial generally, see Civ Proc During Trial, chap 12.

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§12.55 B. Deposition Taken in Earlier Action

If an action has been instituted in any court of the United States or of any state and thereafter another action involving the same subject matter is brought between the same parties, their representatives, or successors in interest, any deposition lawfully taken and duly filed in the initial action may be used in the later action as if it was originally taken in the later action. CCP §2025.620(g). A previously taken deposition "may also be used as permitted by the Evidence Code." CCP §2025.620(g).

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§12.56 XI. FEDERAL COURTS

Seeking discovery from persons outside the state in which the action is pending presents no jurisdictional problems when the action is in federal court, because the reach of the Federal Rules of Civil Procedure is nationwide. On distance limitations in noticing the depositions of parties in federal actions, see §5.212. A federal subpoena is necessary to compel attendance of a nonparty witness at a deposition. Counsel should be certain that the correct federal court issues the subpoena. The reach of the federal subpoena for compulsory attendance of a witness in discovery proceedings is, however, strictly limited. See Fed R Civ P 45(b)(2), (c)(3).

PRACTICE TIP: A lawyer admitted to practice in the federal district where an action is pending can issue a deposition subpoena enforceable in the federal district in which the deposition is to take place. Fed R Civ P 45(a)(3). Because of this, a lawyer with a choice of filing an action in state or federal court should consider filing in federal court if the case might involve a large number of out-of-state depositions.

Conflict-of-law problems may arise in multistate federal discovery situations. For example, although the law of the state where the action was filed governs the elements of a claim or defense in a diversity case, the state where the deposition takes place may govern claims of privilege in confidential communication. See Fed R Evid 501. See also *Palmer v Fisher* (7th Cir 1955) 228 F2d 603, 608, overruled in part on other grounds by *Carter Prods., Inc. v Eversharp, Inc.* (7th Cir 1966) 360 F2d 868, 870 (diversity case; deposition taken in Illinois for use in action pending in United States District Court in Florida).

On federal jurisdiction discovery procedures generally, see 6, 7 Moore, Moore's Federal Practice (3d ed 1997).

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.57 XII. CHECKLIST: PROCEDURES FOR SCHEDULING OR OPPOSING NOTICE OF OUT-OF-STATE DEPOSITION

§12.57 XII. CHECKLIST: PROCEDURES FOR SCHEDULING OR OPPOSING NOTICE OF OUT-OF-STATE DEPOSITION

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This checklist outlines the range of procedures available when scheduling or opposing an out-of-state deposition under CCP §2026.010.

PROCEDURES FOR SCHEDULING OR OPPOSING NOTICE OF OUT-OF-STATE DEPOSITION

1. For party, a party-related witness, or a CCP §2034.210 listed expert who is a party, party's employee, or retained expert:

Deposing Party

- Associate local counsel (see §§12.20-12.23)
- Prepare deposition notice:
- Note distance limits on place for deposition, generally 75 miles from (a) residence or business office of party or party-related deponent or (b) court where action is pending if deponent is a listed expert (see §12.18)
- Tender expert witness fee when required (see §12.38)

Opposing Party

- Serve objection to deposition notice (see §12.43)
- Move for order staying deposition and quashing notice (see §12.44)
- Move for protective order (see §12.43)

2. For non-party-related witness or other CCP §2034.210 listed expert:

Deposing Party

- Determine whether commission is required (see §§12.35-12.39)

If commission is not required:

- Serve notice of deposition, noting distance limitations of state where deposition will be taken (see §12.26)

If commission is required:

- Request issuance of commission in California (see §12.40)
- Serve deposition notice on each party (see §12.28)
- Present certified copy of commission to state court that will issue subpoena, if required by that court (see §12.41)
- Obtain subpoena or subpoena duces tecum from that court (see §12.41)
- Serve subpoena or subpoena duces tecum on deponent (see §12.41)
- Tender any required witness fee (see §12.38)

Opposing Party

If commission is requested:

- Object to errors and irregularities in deposition notice (see §12.43)

- Move for protective order (see §12.43)

If no commission has been requested:

- Serve objection to deposition notice (see §12.43)
- Move for order staying deposition and quashing notice (see §12.44)
- Move for protective order (see §12.43)

Deponent

- Move to quash subpoena (see §12.44)
- Move for protective order (see §12.43)

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/ XIII. FORMS/§12.58 A. Form: Notice of Out-of-State Deposition on Oral Examination

XIII. FORMS

§12.58 A. Form: Notice of Out-of-State Deposition on Oral Examination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF OUT-OF-STATE**
vs	)	**DEPOSITION ON ORAL**
	)	**EXAMINATION** _ _[*AND TO*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*PRODUCE, E.G., BOOKS, DOCUMENTS, RECORDS*]_ _
_____	)	**(CCP §§2025.010-2026.010)**

To each party and attorney of record:

[*Option 1: Named deponent is a natural person*]

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, at the offices of** _ _[*name*]_ _**, located at** _ _[*address*]_ _**,** _ _[*name of noticing party*]_ _ **will take the deposition on oral examination of** _ _[*name and, if deponent is not a party, deponent's address and (if known) telephone number; if name is unknown, insert description sufficient to identify person or particular class or group to which person belongs*]_ _**.**

[*Option 2: Named deponent is not a natural person*]

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, at the offices of** _ _[*name*]_ _**, located at** _ _[*address*]_ _**,** _ _[*name of noticing party*]_ _ **will take the deposition on oral examination of** _ _[*name of deponent corporation, partnership, association, or government agency*]_ _ **regarding** _ _[*describe with reasonable particularity the matters on which examination is requested*]_ _**. Under Code of Civil Procedure §2025.230,** _ _[*name of deponent*]_ _ **must designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf regarding those matters to the extent of any information known or reasonably available to** _ _[*name of deponent*]_ _**.**

[*Continue*]

The deposition will be taken before _ _[*a notary public/a judge/an officer authorized to administer oaths by the laws of the United States or the place where the examination is to be held/an officer appointed by the Court*]_ _**. The deposition will proceed from day to day until completed, excluding weekends and holidays.**

[*Add if a party or party-related deponent is to produce books, documents, or other things*]

PLEASE TAKE FURTHER NOTICE that _ _[*name of deponent*]_ _ **is required under Code of Civil Procedure §§2025.220(a)(4) and 2025.280(a) to bring to the deposition the following** _ _[*e.g., books, documents, and*

records]_ _**, which are in your possession or under your control:** _ _[*Specify with reasonable particularity any materials or category of materials that deponent must produce at deposition.*]_ _

[*Add if a nonparty deponent has been subpoenaed to produce books, documents, or other things*]

PLEASE TAKE FURTHER NOTICE that _ _[*name of deponent*]_ _ **is required to bring to the deposition the** _ _[*e.g., books, documents, and records*]_ _ **that are described in the accompanying subpoena duces tecum.**

[*Add if noticing party intends to audio or video record deposition or intends to use video deposition of treating or consulting physician of an expert at trial under CCP §2025.620(d), or both*]

PLEASE TAKE FURTHER NOTICE that _ _[*name of noticing party*]_ _ **intends to** _ _[*audio/video*]_ _ **record deponent's testimony in addition to recording the testimony stenographically.**

[*Continue if appropriate*]

and reserves the right under Code of Civil Procedure §2025.620(d) to use the video deposition of the deponent who is a _ _[*treating physician/consulting physician/expert witness*]_ _ **at trial.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (retain with proof of service for filing with court if future motion is made); copies for service (one for each attorney of record and unrepresented party; one for deposition officer, if designated); office copies.

Comment: On notice to compel party or party-related witness to deposition, see §12.28. The accompanying proof of service should list all the parties' attorneys and unrepresented parties who have been served with the notice. CCP §2025.240(a).

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.59 B. Form: Ex Parte Application for Order Issuing Commission and Appointing Person to Take Out-of-State Deposition

§12.59 B. Form: Ex Parte Application for Order Issuing Commission and Appointing Person to Take Out-of-State Deposition

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**EX PARTE APPLICATION FOR**
vs	)	**ORDER ISSUING**
	)	**COMMISSION AND**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**SUPPORTING MEMORANDUM;**
	)	**SUPPORTING DECLARATION**
	)	**OF** _ _[*NAME*]_ _**;**
	)	**DECLARATION OF NOTICE;**
	)	**PROPOSED ORDER**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

To each party and attorney of record:

This ex parte application is made by _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, for a court order directing a commission to issue under its seal authorizing** _ _[*name or descriptive title, e.g., any person authorized to administer oaths by the laws of the United States or by the laws of* _ _[*name of state, territory, or insular possession where deposition is to take place*]_ _]_ _**, who is not otherwise disqualified under Code of Civil Procedure §2025.320, to take the deposition of** _ _[*name of deponent*]_ _ **on** _ _[*oral examination/written questions*]_ _**.**

[*Continue*]

SUPPORTING MEMORANDUM

This application is made under Code of Civil Procedure §2026.010(f), on the grounds that the laws of the foreign jurisdiction in which the deposition will be taken requires a court order for a commission to initiate its process, as described in the supporting declaration of _ _[*name*]_ _**; on the declaration of notice, as required by California Rules of Court 3.1204 for an ex parte application;**

[*Add if oral and documentary evidence to be presented*]

and oral and documentary evidence to be presented at the hearing.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies (one copy for each attorney of record or unrepresented party); office copies.

Comment: Unless the foreign jurisdiction requires an order for commission, it is not necessary to apply ex parte for a court order. A simple request to the clerk of the court to issue a commission authorizing the deposition in another state is sufficient. CCP §2026.010(f). See §12.40.

In addition to a declaration in support of the ex parte application, a competent declaration of notice based on personal knowledge attesting to the fact, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected, or a declaration stating reasons why notice should not be required must accompany a request for an ex parte order. A party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances. Cal Rules of Ct 3.1204.

It is usually preferable to designate the officer by descriptive title, rather than by name, to avoid any difficulties if a specified person is unable to serve. Deposing counsel may also request the appointment of a deposition officer who will travel from California to the out-of-state deposition. See §12.25. On written depositions, see chap 5.

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.60 C. Form: Declaration Supporting Ex Parte Application for Order Issuing Commission

§12.60 C. Form: Declaration Supporting Ex Parte Application for Order Issuing Commission

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number; e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'s EX PARTE**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**APPLICATION FOR ORDER ISSUING COMMISSION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*plaintiff/defendant/attorney for plaintiff/attorney for defendant*]_ _ **in this matter.**

2. I have personal knowledge of the matters stated in this declaration and could competently testify to them if called on to do so.

3. This declaration is made in support of the ex parte application of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, **for an order directing a commission to issue authorizing** _ _[*name or descriptive title, e.g., any person authorized to administer oaths by the laws of the United States or by the laws of* _ _[*name of state, territory, or insular possession where deposition is to take place*]_ _]_ _, **who is not otherwise disqualified under Code of Civil Procedure §2025.320, to take the deposition of** _ _[*name of deponent*]_ _ **on** _ _[*oral examination/written questions*]_ _ **outside the State of California for use in the above action.**

4. A court order for a commission is necessary because the foreign jurisdiction where the deposition is to take place requires it, as follows: _ _[*Set forth statute or other law of foreign jurisdiction that requires court order for the commission.*]_ _

5. _ _[*Name of deponent*]_ _ **resides outside the State of California at** _ _[*address*]_ _**.**

6. _ _[*Plaintiff/Defendant*]_ _ **seeks to take the** _ _[*oral/written*]_ _ **deposition of** _ _[*name of deponent*]_ _ **because** _ _[*e.g.,* _ _[*name of deponent*]_ _ *was an eyewitness to the accident that is the basis for this action and has knowledge of matters relevant to the subject matter of the action*]_ _**.**

[*Add if appropriate*]

_ _[*Name of deponent*]_ _ **has in** _ _[*his/her*]_ _ **possession the following** _ _[*books/documents/records/things*]_ _**:** _ _[*Specify.*]_ _ **These** _ _[*e.g., books*]_ _ **are relevant to the subject matter of this action in that** _ _[*state how information expected to be contained in specified books, documents, records, or other things relates to subject matter of action*]_ _.

[*Continue*]

7. It is necessary that a court-ordered commission to take _ _[*name of deponent*]_ _**'s deposition** _ _[*on oral examination/by written questions*]_ _ **issue because** _ _[*he/she*]_ _ _ _[*resides/is presently staying*]_ _ **outside the State of California and the law of** _ _[*name of state, territory, or insular possession of United States in which deponent resides or is presently staying*]_ _ **requires it for** _ _[*his/her*]_ _ **attendance at this deposition**

[*Add if appropriate*]

and _ _[*his/her*]_ _ **production of the** _ _[*e.g., books*]_ _ **specified above**

[*Continue*]

and can be compelled only if such commission issues under the seal of this Court.

8. The deposition officer before whom the deposition will be taken, referred to above, is competent and proper to be _ _[*authorized in the commission/appointed by the Court*]_ _ **to take the deposition of this witness.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies (one copy for each attorney of record or unrepresented party); office copies.

Comment: The caption of the declaration must state the name of the declarant. Cal Rules of Ct 3.1115.

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.61 D. Form: Order That Commission Issue

§12.61 D. Form: Order That Commission Issue

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Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**ORDER THAT COMMISSION**
vs	)	**ISSUE TO TAKE OUT-OF-**
	)	**STATE DEPOSITION**
_ _[*Name(s)*]_ _,	)	
Defendant(s)	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The ex parte application of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, for an order that a commission issue

[*Continue*]

to take the deposition of _ _[*name of deponent*]_ _ was regularly heard at the above date and time. Appearing as attorneys were _ _[*list names of attorneys and parties represented by each*]_ _.

IT IS ORDERED that:

1. A commission issue under the seal of this Court directed to

[*Option 1: Any person to take deposition who is authorized to take oaths*]

any person authorized to administer oaths by the laws of the United States or by the laws of _ _[*name of state, territory, or insular possession where deposition is to take place*]_ _, who is not otherwise disqualified under Code of Civil Procedure §2025.320, to take the deposition on _ _[*oral examination/written questions*]_ _ of _ _[*, and obtain records from,*]_ _ _ _[*name of deponent*]_ _, whose address is _ _[*address*]_ _.

[*Option 2: Particular person to take deposition by written questions*]

_ _[*name of person*]_ _, **whose address is** _ _[*address*]_ _, **to take the deposition on** _ _[*oral examination/written questions*]_ _ **of** _ _[*name of deponent*]_ _ _ _[*, and obtain records from him/her*]_ _, **whose address is** _ _[*address*]_ _.

[*Add if appropriate*]

Unless modified by stipulation of the parties, the deposition will be taken in accordance with the attached directions: _ _[*Specify.*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (present to judge for signature and file with court clerk; retain conformed copy); copies (one for each

attorney of record or unrepresented party); office copies.

Comment: A court order to issue a commission is not necessary unless the foreign jurisdiction requires an order for commission to initiate its process. See CCP §2026.010(f). See §12.41.

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.62 E. Form: Commission to Take Out-of-State Deposition

§12.62 E. Form: Commission to Take Out-of-State Deposition

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Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
vs	)	**COMMISSION TO TAKE OUT-OF-STATE DEPOSITION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

THE PEOPLE OF THE STATE OF CALIFORNIA TO _ _[*NAME OR DESCRIPTIVE TITLE*]_ _:

By request to the above Court, made by _ _[*name of party*]_ _ in the above action, you are hereby appointed, commissioned, and authorized to take the deposition of, _ _[*and obtain records from*]_ _, _ _[*name of deponent*]_ _**, whose address is** _ _[*address*]_ _**.**

You are authorized under that order to:

1. Administer an oath to _ _[*name of deponent*]_ _ **and to take** _ _[*his/her*]_ _ **deposition on** _ _[*oral examination/written questions*]_ _**.**

2. Cause the examination of this witness to be reduced to writing and signed by this witness.

3. Certify that the witness was duly sworn and that the deposition is a true record of the witness's testimony.

4. Forward the deposition, along with this commission, in a sealed envelope endorsed with the title of the action and marked "Deposition of _ _[*name of deponent*]_ _**" by certified mail to** _ _[*name and address of deposing party's attorney*]_ _**.**

The deposition of this witness will be taken in _ _[*city and state*]_ _ _ _[*at a time and place to be fixed later/at* _ _[*time*]_ _*, on* _ _[*date*]_ _*, at* _ _[*address*]_ _]_ _**.**

The deposition of this witness will be taken unless modified by written stipulation of the parties in accordance with the following directions: _ _[*Set forth directions in court order*]_ _**.**

Date: _ _ _ _ _ _ **Clerk of the Court**

By: __[*Signature*]__
_ _[*Typed name*]_ _
Deputy

[*Seal of court*]

Copies: Original (filed with court clerk); copies (one certified copy to be forwarded to deposition officer; one copy for each attorney of record and unrepresented party); office copies.

Comment: Because an out-of-state deposition officer may be unfamiliar with the applicable procedures, instructions for taking and completing the deposition should be attached to the commission or the other pertinent papers forwarded to him or her. See §12.33.

Some courts (*e.g.,* the Los Angeles County Superior Court) have printed commission forms. The above form may be used when a printed form is not available in a particular county. The Judicial Council also has an optional form that may be used. See §12.63.

For the commission to designate that the depositions of several named witnesses residing in the state be taken, see §12.36.

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Source: Civil Litigation/California Civil Discovery Practice/12 Depositions in Other States/§12.63 F. Commission to Take Deposition Outside California (Judicial Council Form DISC-030)

§12.63 F. Commission to Take Deposition Outside California (Judicial Council Form DISC-030)



DISC-030

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
SHORT TITLE:	
COMMISSION TO TAKE DEPOSITION OUTSIDE CALIFORNIA ☐ **ORDERED BY COURT** ☐ **ISSUED BY THE CLERK OF THE COURT**	CASE NUMBER:

1. The Superior Court of California hereby authorizes the deposition, upon oral examination, of *(identity of deponent)*:

2. The deposition is to be taken in *(state of the United States, territory, or insular possession subject to its jurisdiction)*:

3. The deposition will be conducted *(check one)*:
   a. ☐ Under the supervision of a person who is authorized to administer oaths by the laws of the United States or those of the place where the examination is to be held, and who is not otherwise disqualified under California Code of Civil Procedure sections 2025.320 and 2025.340(b)–(f); or
   b. ☐ Before *(name of appointee)*:
   who is appointed to administer oaths and to take testimony.

4. The documents or things to be produced at the time and place of the deposition are
   ☐ described in Attachment 4 ☐ none.

5. Additional terms required by the foreign jurisdiction to initiate the process are contained in Attachment 5. Number of pages attached:____.

6. Under California Code of Civil Procedure section 2026.010, California authorizes that a commission to take an out-of-state deposition may be issued by the clerk of the court or, if the foreign jurisdiction requires it, by order of the court.

7. The Superior Court of the State of California hereby requests that process issue in the above-referenced place where the examination is to be held, requiring the attendance and enforcing the obligations of the deponent to produce documents and answer questions.

Court Seal

Date: _____

☐ Judge

OR

☐ Clerk, by _____, Deputy

Form Approved for Optional Use
Judicial Council of California
DISC-030 [New January 1, 2008]

COMMISSION TO TAKE DEPOSITION OUTSIDE CALIFORNIA

Code Civ. Proc., § 2026.010(f)
www.courtinfo.ca.gov

Copies: Original (filed with court clerk); copies (one certified copy to be forwarded to deposition officer; one copy for each attorney of record and unrepresented party); office copies.

Comment: Use of Judicial Council Form DISC-030 is optional. Because an out-of-state deposition officer may be unfamiliar with the applicable procedures, instructions for taking and completing the deposition should be attached to the commission or the other pertinent papers forwarded to him or her. See §12.33.

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13

Discovery in Other Nations

Nathan Lane III

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XII. TABLE: CENTRAL AUTHORITY OF NATIONS PARTY TO HAGUE EVIDENCE CONVENTION §13.80

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§13.1 I. SCOPE OF CHAPTER

This chapter discusses the procedures for obtaining discovery in countries other than the United States for use in California civil cases. The chapter covers relevant California law, international treaties and conventions, and the policies and customs of foreign countries on the conduct of civil discovery in American cases. Special emphasis is placed on practical advice that practitioners should follow in planning and conducting discovery abroad. Relevant federal law is covered, along with a brief discussion of federal discovery abroad.

A checklist of procedures for foreign discovery is found in §13.71. Forms for use in foreign discovery are found in §§13.72-13.79. The principal international convention dealing with obtaining evidence abroad is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 UST 2555, TIAS 7444 (entered into force October 7, 1972) ("Hague Evidence Convention"), which can be found at the website for the Hague Conference on Private International Law (http://www.hcch.net) at http://www.hcch.net/index_en.php?act=conventions.text&cid=82. In general, discovery in a foreign nation that is party to the Hague Evidence Convention is initiated by a Letter of Request directed to a Central Authority appointed in the foreign nation for that purpose. For a table listing the Central Authority of each nation party to the Hague Evidence Convention, see §13.80.

For discussion of conducting depositions in other states for use in California courts, see chap 12.

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II. PLANNING DISCOVERY ABROAD

§13.2 A. When Foreign Discovery May Be Necessary

The need to obtain foreign evidence for use in California proceedings may arise for a number of reasons, including the following:

- One of the parties is domiciled outside the United States;
- The transaction at issue took place abroad; or
- Third party witnesses or documents are located in a foreign country.

When seeking discovery abroad, counsel must consider not only the general principles applicable to discovery in California (or possibly federal courts) but also the special requirements of international agreements to which the United States is a party; the laws, procedures, and customs of the foreign jurisdiction in which the evidence is located; and the significant practical problems of proceeding in a foreign jurisdiction.

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§13.3 B. Deciding Whether to Pursue Discovery Abroad

Before determining whether to seek discovery of evidence located abroad, counsel should take the steps outlined in §§13.4-13.9.

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§13.4 1. Determining What Evidence Is Sought

Counsel should determine as precisely as possible the nature, location, and substantive content of evidence to be sought. If possible, counsel should interview any prospective witnesses by telephone or in person before seeking their depositions.

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§13.5 2. Verifying That Evidence Is Not Available in U.S.

Before seeking documents located abroad or the testimony of witnesses in foreign countries, counsel should verify that copies of the documents are not available in the United States. For example, pertinent corporate records may be found in the possession of a parent, subsidiary, affiliate, officer, or employee of a foreign corporation.

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§13.6 3. Narrowing Focus of Foreign Discovery

To the extent practicable, counsel should narrow the focus of any necessary foreign discovery by conducting discovery in the United States and by informally obtaining information from abroad.

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§13.7 4. Deciding Whether Hague Evidence Convention or Another Treaty Applies

After deciding that some foreign discovery is essential and establishing the location of the evidence sought, counsel should ascertain whether the Hague Evidence Convention or any other treaty or convention governs the scope or manner of discovery. If a treaty applies, counsel should select the permissible discovery method most likely to yield prompt, responsive results. If no treaty applies, counsel should determine from State Department, embassy sources, or foreign local counsel whether letters rogatory or depositions on notice or commission are available.

NOTE: ABA section commentaries often provide practical insight into discovery in particular countries. See ABA Tort, Trial & Insurance Practice Section, *International Litigation: Defending and Suing Foreign Parties in U.S. Federal Courts* §8.7 (ABA 2003); ABA Antitrust Section, *Obtaining Discovery Abroad* (2d ed 2005).

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§13.8 5. Evaluating Costs and Benefits of Foreign Discovery

Counsel should estimate the expense of obtaining the evidence and the time required to obtain it and balance those costs against the benefits to be derived from the evidence. If the benefits outweigh the costs, counsel should schedule foreign discovery sufficiently before trial to ensure that the evidence can be successfully procured. On discovery time limits, see §§2.20-2.28.

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§13.9 6. Consulting Trial Judge and Retaining Local Counsel

If counsel's case has been assigned to a judge for all purposes, at the first case management conference or on a noticed request for an ex parte hearing before the trial judge, counsel should raise the need for discovery in a foreign jurisdiction and suggest procedures and possible orders as to the conduct of the foreign discovery.

Counsel should also consider retaining an attorney in the foreign country (*i.e.*, local counsel) to provide advice on the particular requirements of foreign law and to make necessary arrangements with foreign witnesses and government authorities. For considerations on associating local counsel, see §§12.20-12.23. For help in locating local counsel, see the American embassy or consulate in a particular area or the State Department's Office of American Citizens Services and Crisis Management. See §13.16.

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§13.10 C. Drafting Foreign Discovery Requests

After deciding to seek discovery of evidence located abroad, counsel should draft discovery requests carefully to avoid potential conflicts with foreign law or policy and take the steps set out in §§13.11-13.13.

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§13.11 1. Using Official Forms When Possible

Counsel should determine whether official forms, such as those adopted for letters of request under the Hague Evidence Convention, are available and, if so, should use those forms to the extent practicable. See §13.72.

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§13.12 2. Framing Requests Narrowly

Counsel should frame discovery requests (particularly requests for documents) as narrowly and precisely as possible. Counsel should emphasize that any requested documents are for use at trial rather than merely as a part of pretrial discovery of documents, which many foreign authorities neither understand nor condone. Foreign tribunals also tend to be resistant to requests that appear to be fishing expeditions or are unfocused inquiries that in effect are designed to determine whether the documents exist. To the extent possible, counsel should avoid use of phrases such as "related to" or "pertaining to" in describing generic categories of documents. The phrase "referring to" is more apt to withstand challenge by the foreign party from whom documents are sought. See, *e.g., First Am. Corp. v Price Waterhouse LLP* (2d Cir 1998) 154 F3d 16, 23 ("[p]ursuant to Article 23 of the Hague Convention, which allows signatory countries to restrict pretrial discovery of documents, the U.K. permits pretrial discovery only if each document sought is separately described"); *Rio Tinto Zinc Corp. v Westinghouse Elec. Corp.* (1978) AC (English Law Reports Appeal Cases) 547, 562.

If specificity is not possible, counsel should consider asking the court for relief from the requirements of the Hague Evidence Convention. In *First American*, for example, the court conducted a balancing test and allowed discovery, without requiring compliance with the Hague Evidence Convention, because specificity of the documents was impossible and the information sought was crucial to the claims. 154 F3d at 23. On applying the Hague Evidence Convention under California case law, see §§13.17-13.29.

NOTE: Some countries have declared that they will not execute letters of request for pretrial discovery. The intention of Article 23 of the Hague Evidence Convention is to permit countries to require that requests for production of documents be sufficiently substantiated to ensure that the requesting party is not merely seeking to find out what documents may generally be in the other party's possession. See *Conclusions and Recommendations adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence, and Service Conventions* (2003 Report). This and other reports are available on the Hague Conference on Private International Law's website at http://www.hcch.net/index_en.php?act=conventions.publications&dtid=2&cid=82.

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§13.13 3. Anticipating Privilege Claims

Counsel should draft discovery requests to anticipate and, to the extent possible, avoid claims of privilege by foreign nationals or corporations asked to give testimony or produce documents. Advice of local counsel can be helpful in this respect.

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III. PRINCIPAL STATUTORY PROVISIONS GOVERNING FOREIGN DISCOVERY

§13.14 A. California Law

The statutory provisions applicable to the conduct of discovery within California generally apply to discovery taken in foreign countries, but are also subject to international agreements and conventions. See §13.17. Thus, CCP §§2031.010-2031.510 set forth the procedures that apply to demands for production of documents; CCP §§2030.010-2030.410 apply to written interrogatories; CCP §§2028.010-2028.080 govern the procedure for taking a deposition by written questions; and CCP §§2025.010-2025.620 set forth the general procedures for taking oral depositions.

Code of Civil Procedure §2027.010 explicitly permits California litigants to take oral depositions in foreign nations. Except as limited by CCP §2027.010, the procedures in CCP §§2025.010-2025.620 apply to depositions in foreign nations.

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§13.15 B. International Agreements

The principal international agreement dealing with discovery of evidence in foreign countries is the Hague Evidence Convention, which entered into force in the United States on October 7, 1972. The text of the convention can be found at the Hague Conference on Private International Law website at http://www.hcch.net/index_en.php?act=conventions.text&cid=82 and is discussed in detail in §§13.17-13.35. In addition, the United States is a party to the Inter-American Convention on Letters Rogatory and Additional Protocol. See §13.36. More information regarding the scope of this agreement can be found at the U.S. State Department website at http://travel.state.gov/law/info/judicial/judicial_687.html.

Other bilateral agreements to which the United States is a party may affect the manner in which discovery is taken in particular countries. See, *e.g.,* Consular Convention and Protocol Between the United States and Japan, Mar. 22, 1963 (15 UST 768, TIAS 5602, art 17(1)(e)(ii)). If the dispute is between a California company and a maquiladora in Mexico or a Mexican or Canadian company, the North American Free Trade Agreement (19 USC §§3301-3473) may be the controlling agreement.

NOTE: In general, a maquiladora is a Mexican corporation that exports most of its products under a program that permits foreign investment in the capital and management of the corporation and allows the corporation special customs treatment. For more information, see http://www.itds.treas.gov/maquiladora.html.

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§13.16 C. Foreign Law

The legislative, judicial, or administrative requirements of the foreign countries in which evidence or witnesses are located may also affect the manner in which evidence can be obtained for use in judicial proceedings. Counsel should consider these requirements before embarking on foreign discovery. Limited information about such requirements may be obtained from the Office of American Citizens Services and Crisis Management of the United States State Department, Department of State, 2201 C Street N.W., SA 29 4th Floor, Washington, DC 20520.

NOTE: The chiefs of the various regional divisions of the office may best be able to answer questions for specific countries: European/Canadian Division: (202) 647-6714; Africa Division: (202) 736-4937; East Asia Pacific Division: (202) 647-6137; Near East and South Asia Division: (202) 736-4999; Western Hemisphere Division: (202) 647-5113.

The State Department maintains a useful Internet site that contains specific information about obtaining evidence in a number of countries, including Belgium, Canada, China, Czech Republic, El Salvador, France, Germany, Hong Kong S.A.R., Indonesia, Japan, Malaysia, Philippines, Singapore, Slovak Republic, Taiwan, Thailand, and the United Kingdom. See http://travel.state.gov/law/info/judicial/judicial_2510.html.

For more information or assistance in a particular case, the practitioner should retain local counsel in the country where discovery is sought. For help in locating such counsel, see the American embassy or consulate in a particular area or the State Department's Office of American Citizens Services and Crisis Management. Other services might also be available. For example, the American Arbitration Association (international department, (888) 855-9575) offers arbitration and other dispute services with arbitrators, mediators, and conciliators selected from the countries of the region.

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IV. OBTAINING EVIDENCE UNDER HAGUE EVIDENCE CONVENTION

A. Applicability to Discovery in California Proceedings

§13.17 1. California Case Law

Rule of first resort. Before 1987, California courts generally required parties to comply, at least initially, with the procedures of the Hague Evidence Convention when seeking evidence located in a foreign nation that was party to the Convention (This is sometimes referred to as the "rule of first resort"). See *Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 176 CR 874 (trial court should have declined to permit discovery from German defendant other than under Hague Evidence Convention at initial stages of lawsuit); *Pierburg GmbH & Co. KG v Superior Court* (1982) 137 CA3d 238, 186 CR 876 (litigant's initial failure to assert Hague Evidence Convention did not waive its applicability). In 1987, however, the United States Supreme Court decided *Société Nationale Industrielle Aerospatiale v U.S. Dist. Court* (1987) 482 US 522, 96 L Ed 2d 461, 107 S Ct 2542. See *American Home Assur. Co. v Société Commerciale Toutelectric* (2002) 104 CA4th 406, 409, 128 CR2d 430 (stating its view that *Société Nationale Industrielle Aerospatiale* supersedes the rule of *Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 176 CR 874).

In *Société Nationale Industrielle Aerospatiale v U.S. Dist. Court, supra,* the Supreme Court found that the Hague Evidence Convention was intended to establish optional procedures for discovery abroad and that the rule of first resort (adopted in *Volkswagenwerk*) was unwise insofar as it is "inconsistent with the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts. See Fed. Rule Civ Proc. 1." 482 US at 542, 96 L Ed 2d at 483. "[T]he concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioner's proposed general rule [of first resort to the convention] would generate." 482 US at 543, 96 L Ed 2d at 483. The Court held that to determine whether to apply the Hague Evidence Convention, federal district courts should analyze the facts on a case-by-case basis and weigh the sovereign interests and effectiveness of resorting to one set of procedures over another. 482 US at 544, 96 L Ed 2d at 484.

At least one California appellate court has followed *Aerospatiale* and expressly rejected the rule of first resort. *American Home Assur. Co. v Société Commerciale Toutelectric* (2002) 104 CA4th 406, 409, 128 CR2d 430 ("[w]e hold that the rule of first resort to the Hague Convention… has been superseded by the balancing test provided in *Aerospatiale*"). For balancing test, see §13.18.

NOTE: The California Supreme Court has not yet considered whether the rule of *Aerospatiale* should be adopted in California, but it seems probable that California trial courts and Courts of Appeal will find the reasoning of *American Home Assurance* and *Aerospatiale* persuasive.

Waiver of Hague Convention. The court in *American Home Assurance* also rejected, as superseded by *Aerospatiale,* the holding of *Pierburg GmbH & Co. KG v Superior Court* (1982) 137 CA3d 238, 186 CR 876, and held that the provisions of the Hague Evidence Convention could be waived, observing that "a waiver of the Hague Convention should never be lightly implied." 104 CA4th at 430. In *American Home Assurance,* defense counsel demonstrated awareness of his client's rights under the Convention, but nevertheless participated in discovery outside the Convention (*e.g.*, a multi-day deposition at the American Embassy in Paris) and did not seek a protective order or make a formal objection of any kind. See 104 CA4th at 431. See discussion in §13.19. In determining that the French defendant in *American Home Assurance* had indeed waived application of the Hague Evidence Convention, the court found the record sufficient to support waiver by "clear and convincing evidence of intentional relinquishment of a known right with awareness of the relevant facts." 104 CA4th at 430.

Under *American Home Assurance,* a party seeking to require application of the Hague Evidence Convention in a particular case instead of otherwise applicable California discovery procedures must seek resort to the Convention early in the discovery process and bears the burden of persuading the trial court why the Convention should apply. Thus, counsel seeking application of the Hague Evidence Convention should pay close attention to the balancing standards set forth in §13.18 and be prepared to convince the court that resort to the Hague Evidence Convention will actually promote the convenience of the parties in concluding discovery in a fair and expeditious way.

PRACTICE TIP: Counsel urging resort to the Hague Evidence Convention must be thoroughly familiar with its terms and with the way in which it would be applied in the applicable foreign jurisdiction.

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§13.18 2. Standards and Application of Balancing Approach

In *Société Nationale Industrielle Aerospatiale v U.S. Dist. Court* (1987) 482 US 522, 96 L Ed 2d 461, 107 S Ct 2542, the Supreme Court observed that general principles of international comity are pertinent to the determination of whether a court should require resort to the Hague Evidence Convention for discovery from foreign party litigants. Some of the factors to be considered by courts making a case-by-case comity analysis include (482 US at 544 n28, 96 L Ed 2d at 484 n28):

- The importance of the evidence to the litigation;
- Whether the information originated in the U.S.;
- The availability of alternative means for securing the information;
- The specificity of the request; and
- The respective interests of the countries involved.

Other state courts have engaged in balancing these factors when ruling on the need for U.S. litigants to comply with the Hague Evidence Convention when conducting discovery abroad. See, *e.g., Umana v SCM S.p.A.* (NY App Div 2002) 737 NYS2d 556 (court should consider particular facts of case, sovereign interests, and likelihood that resort to procedures will be effective); *Husa v Laboratories Servier SA* (NJ Super Ct 1999) 740 A2d 1092, 1096 (encouraging use of Convention "unless it is demonstrated that its use will substantially impair the search for truth, which is at the heart of all litigation, or will cause unduly prejudicial delay"); *Bank of Tokyo-Mitsubishi, Ltd. v Kvaerner* (NY Sup Ct 1998) 671 NYS2d 902 (discovering party need not resort to Convention procedures when court otherwise had in personam jurisdiction over party controlling foreign subsidiary from which documents were sought); *Moake v Source Int'l Corp.* (NJ Super Ct 1993) 623 A2d 263 (Convention does not apply if no indication that discovery request would violate sovereignty of foreign country, that interrogatories sought were relevant, and that U.S. had strong interest in assuring that product liability actions by its citizens were given full attention). For a California case, see *American Home Assur. Co. v Société Commerciale Toutelectric* (2002) 104 CA4th 406, 409, 128 CR2d 430, discussed in §13.17.

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§13.19 3. Waiver of Convention

A foreign litigant may waive its right to rely on the Hague Evidence Convention. In *American Home Assur. Co. v Société Commerciale Toutelectric* (2002) 104 CA4th 406, 430, 128 CR2d 430, the court held that the defendant had waived its right to require application of the Hague Evidence Convention because there was clear and convincing evidence of intentional relinquishment and awareness of the right. See §13.17.

The court specifically noted that the defendant's counsel demonstrated a clear awareness of the provisions and potential application of the Hague Evidence Convention early in the case: Counsel had faxed to the discovery referee a review of three Hague Evidence Convention methods of discovery, noting the French law of 1980 criminalizing discovery outside the Hague Evidence Convention. Defendant's counsel requested that the referee comply with those procedures, but did not seek a protective order or make a formal objection. In addition, the defendant's counsel proceeded with extensive discovery outside the scope of the Hague Evidence Convention by appearing for a deposition of the defendant company's officer in France. See also *Bakala v Bakala* (2003) 576 SE2d 156, 164 (failure to seek imposition of Hague Evidence Convention procedures until appeal constituted waiver).

PRACTICE TIP: Counsel seeking application of the Hague Evidence Convention must be familiar with the terms of the Convention in order to properly assert objections if other parties attempt to proceed outside the scope of the Convention. Failure to object to non-Convention discovery at an early stage may result in waiver to the Convention.

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B. Procedures for Obtaining Evidence Under Convention

§13.20 1. Determining Whether Country Is Party to Convention

The Hague Evidence Convention is available as a discovery tool for evidence in the possession of a foreign person or entity in the territory of a contracting country. As noted in §§13.17-13.19, resort to the Hague Evidence Convention is not necessarily required when the foreign party is a litigant before the court, but it may be the only means available to obtain evidence from foreign nonparty witnesses. Generally, the Hague Evidence Convention provides for discovery through letters of request and for the taking of evidence by diplomatic or consular agents and by commissioners. The Convention is intended to provide an effective bridge between civil law and common law systems with respect to the taking of evidence.

Because the Hague Evidence Convention applies only to the countries that have acceded to it, a California party seeking discovery abroad should first determine whether the evidence is located in a country that is a party to the Convention. For a current list of the parties to the Hague Evidence Convention, see http://www.hcch.net.

To verify the current status of an apparent nonparty country, counsel should contact the specific regional chief within the Office of American Citizens Services and Crisis Management of the United States State Department, Department of State, 2201 C Street N.W., SA 29 4th Floor, Washington, DC 20520 (phone numbers for the Chiefs of various regional divisions: European/Canadian Division: (202) 647-6714; Africa Division: (202) 736-4937; East Asia Pacific Division: (202) 647-6137; Near East and South Asia Division: (202) 736-4999; Western Hemisphere Division: (202) 647-5113).

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2. Applying for and Drafting Letters of Request

§13.21 a. Scope of Discovery Obtainable Through Letters of Request

The principal method of obtaining evidence from a signatory to the Hague Evidence Convention is the letter of request. The Convention sets standard requirements and formats for letters of request and specifies the procedures for their service and enforcement. Letters of request effectively supplant letters rogatory when the Hague Evidence Convention applies. Historically, letters rogatory have been enforced by courts to which they were addressed in the exercise of the court's discretion and in accord with principles of international comity. They have not been uniform in format or governed by specific, uniform procedures, nor has their enforcement been mandatory. On letters rogatory, see §§13.39-13.40.

Under Hague Evidence Convention, art 1, a letter of request is a request by a court in one country to a "competent authority" (usually a court) in another country "to obtain evidence, or to perform some other judicial act" (other than to serve papers, enforce judgments, or issue protective orders or other provisional orders). It can be used to obtain the testimony of witnesses, documentary evidence, and the inspection of real or personal property. Hague Evidence Convention, art 3e-g.

Although the Convention does not expressly provide for obtaining interrogatory answers by a letter of request, its language is sufficiently broad to permit the use of written interrogatories either because the receiving parties recognize their use as a method of obtaining evidence or as a "special method or procedure" of the requesting authority. See Hague Evidence Convention, art 9. On privileges constraining the scope of evidence obtainable through letters of request, see §13.28.

Letters of request can be used only to obtain evidence for use in judicial proceedings and only in connection with "civil or commercial matters." These limitations exclude criminal proceedings but include bankruptcy cases that do not seek the imposition of penal sanctions. See *Report on the Work of the Special Commission of May 1985 on the Operation of the Hague Evidence Convention* (1986 Report).

NOTE: The 1986 Report is available on the Hague Conference on Private International Law's website. To view these and other materials, go to http://www.hcch.net/index_en.php?act=conventions.publications&dtid=2&cid=82.

On the alternative to letters of request under the Hague Evidence Convention, see §13.31.

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§13.22 b. Procedure for Obtaining Letters of Request

To obtain a letter of request in California, counsel should apply to the court by motion, generally following the procedures outlined in §13.55. See CCP §2027.010(e).

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§13.23 c. Required Content of Letters of Request; Recommended Model

The required contents of a letter of request are set forth in Hague Evidence Convention, art 3, as follows:

- The authority requesting execution of the letter and the authority requested to execute it, if known to the requesting authority;
- The names and addresses of the parties to the proceedings and their representatives, if any;
- The nature of the proceedings for which the evidence is required; and
- The evidence to be obtained or other judicial act to be performed.

If appropriate, the letter must specify the following:

- The names and addresses of the persons to be examined;
- The questions to be asked of these persons or a statement of the subject matter about which they will be examined;
- The documents or other real or personal property to be inspected;
- Any requirement that the evidence must be given under oath or affirmation and any specific form to be used; and
- Any special method or procedure to be followed under Hague Evidence Convention, art 9.

A letter may also mention any information necessary for application of Hague Evidence Convention, art 11 (governing privileges or a duty to refuse to give evidence). No legalization or other formality may be required.

The reference to any special method or procedure refers to Hague Evidence Convention, art 9, which requires the executing authority to follow a special method or procedure for obtaining the requested evidence "unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties." Examples of special methods of obtaining evidence that fall within the intended scope of the Hague Evidence Convention include:

- The taking of depositions under oath and the preparation of verbatim deposition transcripts (see 1986 Report §3(B); Note, *Taking Evidence Outside of the United States*, 55 BU L Rev 368 (1975));
- The use of written interrogatories (see *Pierburg GmbH & Co. KG v Superior Court* (1982) 137 CA3d 238, 247, 186 CR 876, questioned in *American Home Assur. Co. v Société Commerciale Toutelectric* (2002) 104 CA4th 406, 128 CR2d 430) (procedures in Hague Evidence Convention waived after repeated failures to comply with discovery orders)); and
- Requests for blood tests in paternity cases (see *Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* §5(C) (1978 Report), available at http://www.hcch.net/index_en.php?act=publications.details&pid=3308&dtid=2).

Article 11 of the Hague Evidence Convention, which is also referred to in Hague Evidence Convention, art 3, provides that a letter of request may specify any privilege or duty under the law of the requesting country for the person from whom evidence is sought to refuse to provide that evidence.

A special commission of experts concerned with the operation of the Hague Evidence Convention has adopted a recommended form for letters of request (see 1978 Report §9, Annex; 1986 Report §2(C)). That model, which is reproduced in §13.72, should guide the preparation of letters of request. As indicated in that section, the letter of request should be signed by the court and bear the court's seal.

NOTE: The 1978, 1986, 1989, and 2003 Reports are available on the Hague Conference on Private International Law's website, as is the recommended form for letters of request. To view these and other materials, go to http://www.hcch.net/index_en.php?act=conventions.publications&dtid=2&cid=82.

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§13.24 d. Language of Letters of Request

In general, Hague Evidence Convention, art 4 requires that a letter of request either be in the language of the country by which it is to be executed or be accompanied by a translation. A letter in English or French, however, will be accepted unless specific reservation is made to the contrary by a contracting country.

Some countries will not accept letters of request if they are only in English. For example, Germany, Portugal, and Italy require that documents be written in or accompanied by translations into their respective official languages. Counsel should check with the State Department for country-specific requirements of Convention members. See U.S. Department of State website at http://www.travel.state.gov/law/info/judicial/judicial_2510.html.

PRACTICE TIP: Although most countries accept letters of request written in English, counsel should provide a translation to expedite execution of the letter and help avoid misunderstandings. For example, Belgium explicitly recommends that the request be translated into the language of the recipient because the recipient may later successfully insist on a translation. Even if a letter of request written in English is accepted, the response may be in the language of the country executing it, and certainly any documents produced under a letter of request will be in their original language.

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§13.25 e. Considerations of Foreign Legal Systems

Other country's legal requirements. Because a letter of request will ultimately be enforced by judicial officers in another country, counsel must consider the requirements of that country's legal system in drafting the letter of request. For example, civil law countries (*e.g.,* France, Germany) generally view the gathering of evidence as a function of the courts rather than the litigants. See *Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 852, 176 CR 874.

A country's attitude toward a letter of request may depend on the subject matter of the underlying action (see §§13.59-13.64), the type of evidence sought, and the phrasing of the letter of request. Local counsel in the country and judicial subdivision where the letter of request is to be executed may provide useful assistance on these points. A relatively brief consultation before the letter of request is transmitted may eliminate unnecessary misunderstandings and delays in receiving the desired evidence.

Clear, precise request that seeks only relevant evidence. Requests should be clear and precise and seek only demonstrably relevant evidence. This is particularly important when a letter of request seeks documents because most parties to the Hague Evidence Convention have declared, by specific reservation under Hague Evidence Convention, art 23, that they will not execute letters of request "for the purpose of obtaining pretrial discovery of documents." This reservation will probably only be applied, however, "where the lack of specificity in the letter of request was such that it did not permit sufficient identification of the documents to be produced or examined." 1978 Report §2.

PRACTICE TIP: American discovery practice is largely misunderstood in foreign nations and has been condemned as overbroad and unduly disruptive of normal business activities. Therefore, counsel should take care to frame specific requests as narrowly as possible. See 1978 Report §2. Narrowly framing requests will also assist parties who seek to obtain evidence abroad in resisting protective orders.

NOTE: To view the 1978 Report, go to the Hague Conference on Private International Law's website at, http://www.hcch.net/index_en.php?act=conventions.publications&dtid=2&cid=82.

If country does not accept letters of request for pretrial discovery. On a country-specific inquiry, litigants may find that even though a foreign state does not accept letters of request for pretrial discovery, it may nevertheless allow for pretrial discovery under Chapter II of the Hague Evidence Convention, which covers the taking of evidence by diplomatic officers, consular agents, and commissioners. In addition, some declarations under article 23 may only exclude documentary pretrial discovery, and would otherwise allow for pretrial discovery through depositions or interrogatories. Counsel should carefully review the pretrial reservations of the foreign country where the evidence is located.

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§13.26 f. Transmittal of Letters of Request

After a letter of request has been issued by the court, it must be transmitted to the country where it is to be executed. Each party to the Hague Evidence Convention has designated at least one central authority to which letters of request should be sent. Hague Evidence Convention, art 2. For a list of these authorities, see http://hcch.e-vision.nl/index_en.php?act=conventions.authorities&cid=82.

The Convention does not specify any method by which a letter of request should be sent to the appropriate central authority. The court could send the letter of request directly by mail, or the party on whose behalf the letter is propounded might arrange with local counsel to deliver it personally. Before attempting the latter method, however, counsel should check with the State Department's Office of American Citizens Services and Crisis Management (see §13.16) to determine whether the country might object to transmission by local counsel. State Department personnel should also be able to advise counsel whether any benefit could be derived from using diplomatic channels.

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§13.27 g. Execution of Letters of Request

Proper form mandatory. Execution of letters of request in proper form is mandatory unless either the execution of the letter of request "does not fall within the functions of the judiciary" of the executing country or it would prejudice the "sovereignty or security" of the executing country. Hague Evidence Convention, art 12. Unless special procedures are requested, the letter of request will be executed in accordance with the methods and procedures of the executing country. Hague Evidence Convention, art 9.

PRACTICE TIP: Consult with local foreign counsel to determine whether these "methods and procedures" are satisfactory or special methods or procedures are needed. For example, counsel should determine whether verbatim transcripts of testimony will be prepared or simply summaries by the foreign judge.

Parties may be present when request executed. The parties or their representatives may be present when the letter of request is executed. Hague Evidence Convention, art 7. If a party desires to be represented, the letter of request should explicitly request that notification of the time and place of the proceedings be sent to counsel. Theoretically, a California judge could request permission to be present at the execution of a letter of request (Hague Evidence Convention, art 8), but the circumstances in which this might be appropriate would be most unusual.

Compelling compliance. The Hague Evidence Convention requires the executing country to apply appropriate measures of compulsion to secure the requested evidence. Compulsory process will be used to the same extent as it would be in proceedings under local law. Hague Evidence Convention, art 10. In some civil law countries, parties to a lawsuit or third parties may not be compelled to produce documents. Courts in those countries may be willing, however, to use their own means to obtain requested information. For example, a German court has required testimony concerning the contents of documents even if production of the documents themselves could not be compelled. See 1986 Report §1(C) (see §13.21). The requirement of the use of compulsory process distinguishes letters of request from the use of consular officers or commissioners to take testimony or receive evidence from voluntary witnesses.

PRACTICE TIP: Because compulsion is mandatory, letters of request are more potent discovery tools than are letters rogatory (see §13.39), which depend entirely on discretionary notions of comity for their enforcement.

Consulting 2003 survey. In 2003, the Permanent Bureau of the Hague Conference on Private International Law distributed a survey to, and collected responses from, a number of countries about the practical operation of the Hague Evidence Convention. A number of countries, including the United States, submitted responses. The responses to the questionnaire and a related report by the International Litigation Committee of the American Bar Association can be found at http://hcch.e-vision.nl/index_en.php?act=conventions.publications&dtid_33&cid=82. The ABA report contains very useful, practical information about the experience of U.S. lawyers who have used the Hague Evidence Convention to obtain evidence abroad. The discussion of experience in particular countries is particularly illuminating. Likewise, the responses of individual countries highlight their issues of concern and can be useful to counsel seeking to draft letters of request that local authorities will find acceptable.

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§13.28 h. Privileges Available to Persons to Whom Letter of Request Is Directed

A person from whom evidence is sought by letters of request under the Hague Evidence Convention may assert any privilege under the law of the country where the letter of request is to be executed. The witness may also assert a privilege under the law of the country of origin if that privilege is specified in the letter of request or is subsequently confirmed by the requesting authority. Hague Evidence Convention, art 11.

PRACTICE TIP: When representing a party seeking evidence abroad, counsel should be aware not only of privileges available under California law, but also of those under the law of the foreign jurisdiction. When representing a foreign witness or a party affiliated with the foreign witness, counsel should urge the California court issuing the letter of request to specify in it any privilege available to the witness under California law. This specification will eliminate the necessity of initially raising the privilege with the foreign tribunal, which must then request confirmation of the privilege's existence with the California court.

Foreign privileges may differ substantially from those available in this country and may materially affect the scope of evidence that can be secured. For example, parties in Germany may assert a business secret privilege, which can present an obstacle to obtaining certain testimony. See Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide,* 16 Int'l Lawyer 575, 584 (1982). In England, corporations enjoy a privilege against producing documents that might subject them to criminal penalties. 16 Int'l Lawyer at 580. See *Rio Tinto Zinc Corp. v Westinghouse Elec. Corp*. (1978) AC (English Law Reports Appeal Cases) 547. Local counsel in the country where a letter of request will be executed should be consulted to determine any significant privileges that might affect the scope of evidence that can be obtained. For further discussion of applicable privileges, see §13.62.

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§13.29 i. Return of Letter of Request

After a letter of request has been executed, the resulting evidence is returned to the issuing court by the same channel through which the letter was transmitted. If the letter is not executed in whole or in part, the requesting authority will be informed immediately through the same channel and advised of the reasons. See Hague Evidence Convention, art 13.

NOTE: Even if the original letter of request was accepted in English, the evidence returned may be in the language of the executing country.

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§13.30 j. Fees and Costs

Generally, the execution of a letter of request will not result in the imposition of any fees or costs. Hague Evidence Convention, art 14. If, however, experts, interpreters, or requested special procedures under Hague Evidence Convention, art 9 are employed, the country executing the letter of request may seek reimbursement for these fees and costs. Hague Evidence Convention, art 14. Counsel requesting the use of special procedures should check with local counsel or the appropriate central authority of the country of execution to determine whether the use of those procedures will give rise to any reimbursement costs.

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§13.31 3. Evidence Taken by Diplomatic Officers, Consular Agents, and Commissioners

Hague Evidence Convention, ch II (arts 15-22) provides an alternative means of obtaining evidence located abroad. Under Hague Evidence Convention, art 15, a diplomatic officer or consular agent may take evidence without compulsion of nationals of the country he represents for use in judicial proceedings instituted in that country. The advantage of this procedure is that it permits American-style oral depositions, as opposed to the procedures of a foreign judicial system.

Hague Evidence Convention, art 16 authorizes a diplomatic officer or consular agent to take evidence without compulsion of a foreign national for use in judicial proceedings instituted in the diplomat's home country. Evidence from foreign nationals may be taken only if (a) the country where the diplomatic officer or consular agent exercises his functions has given its permission either generally or in the specific case and (b) the diplomatic officer or consular agent complies with any conditions imposed by the host country.

Commissioners, who need not be diplomatic officers or consular agents, may be appointed by the court where the action is pending to take evidence in a country that is party to the Hague Evidence Convention. Hague Evidence Convention, art 17. As in the case of consular officials, the evidence must be given without compulsion, the foreign country must give its express permission either generally or in the specific case, and the commissioner must comply with any conditions imposed by the country in which the evidence will be taken.

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§13.32 a. Compelling Evidence Under Articles 15-22

Although neither diplomatic officials nor commissioners can compel a witness to give evidence, Hague Evidence Convention, art 18 permits a country to declare in connection with its accession to the Hague Evidence Convention that a diplomatic officer, consular agent, or commissioner may apply to a designated "competent authority … for appropriate assistance to obtain the evidence by compulsion."

Of course, the availability of compulsory process in a particular case will depend not only on whether it may be applied for under the Convention but also on the particular requirements of local law. Local counsel should be consulted if it will be necessary to compel the attendance of a reluctant witness.

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§13.33 b. Permissible Representation of Parties

Hague Evidence Convention, art 20 provides that "persons concerned may be legally represented" whether evidence is taken before diplomatic officers, consular agents, or commissioners. The phrase "persons concerned" is not defined but surely permits counsel for the witness and counsel for the parties to the underlying action to be present. Whether others (*e.g.,* insurers, indemnitors, witness's employer) may be considered "persons concerned" is open to determination on a case-by-case basis. See Message From the President of the United States Transmitting the Convention on the Taking of Evidence Abroad (Explanatory Report of the Rapporteur), Senate Report Executive A, 92d Cong, 2d Sess 37 (1972).

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§13.34 c. Language of Request to Appear

A prospective witness must be requested to appear before the consular official or commissioner by a request in the language of the country where the evidence will be taken (or accompanied by a translation into that language) "unless the recipient is a national of the State where the action is pending." A request to a United States national may, therefore, be made in English. The request to appear must advise the witness of his or her right to counsel and that he or she is not compelled to appear or to give evidence. Hague Evidence Convention, art 21(b)-(c).

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§13.35 d. Procedure for Taking Evidence

Although the diplomatic officer, consular agent, or commissioner may take any kind of evidence if to do so is not contrary to the laws of the country where the evidence is taken or contrary to any permission granted by the host country, such evidence will usually be taken by deposition on oral examination. The practical guidelines for depositions taken before diplomatic officers or consular agents are discussed in §§13.41-13.58.

Generally, depositions may be taken in accordance with California procedures unless the country in which they are to be taken has some particular objection to these procedures. Hague Evidence Convention, art 21(d). Embassy personnel or local counsel should be able to identify any impediments to conducting a deposition in the normal way.

During the course of an examination conducted before a diplomatic officer, consular agent, or commissioner, the witness may assert any applicable privileges to the same extent as he or she would in response to a letter of request. See §13.28.

If, for one reason or another, an attempt to obtain evidence voluntarily by a diplomatic officer, consular agent, or commissioner fails, a party may still seek that evidence by letter of request. Hague Evidence Convention, art 22.

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V. OBTAINING EVIDENCE BY LETTERS ROGATORY IN COUNTRIES THAT ARE NOT PARTIES TO HAGUE EVIDENCE CONVENTION

A. Other Multinational Conventions

§13.36 1. Inter-American Convention on Letters Rogatory

In April 1980, the United States signed the Inter-American Convention on Letters Rogatory (see 14 Int'l Legal Materials 339 (1975)) and the 1979 Additional Protocol to That Convention (see 18 Int'l Legal Materials 1238 (1979)). The full Senate ratified the Convention and Additional Protocol on October 9, 1986.

NOTE: The convention is available at http://www.oas.org/juridico/english/treaties/b-36.html. For U.S. State Department information about preparing letters rogatory, see http://travel.state.gov/law/info/judicial/judicial_683.html. For information about specific countries, see http://travel.state.gov/law/info/judicial/judicial_2510.html.

The Convention and Additional Protocol have been signed and ratified by Argentina, Brazil, Chile (did not ratify the Additional Protocol, only acceded to it), Colombia, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. This Convention deals principally with methods by which procedural acts, such as service of process, may be accomplished. Although the Convention also sets forth procedures to be followed for the use of letters rogatory to obtain evidence or information in the member countries (Convention on Letters Rogatory, art 2), the United States excluded by reservation the application of the Convention to letters rogatory that have the taking of evidence as their purpose. 132 Cong Rec S 15882 (1986). The Convention's principal effect is to designate a uniform system of central authorities responsible for the receipt and transmission of letters rogatory to appropriate local authorities for execution.

The Convention includes a model form for letters rogatory. See §13.73. This model should be used to guide counsel in preparation of letters rogatory directed to the signatory states. On letters rogatory generally, see §§13.39-13.40.

NOTE: For a description of Inter-American conventions that is updated periodically by U.S. government attorneys, see http://www.osec.doc.gov/ogc/occic/iac.html.

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§13.37 2. Inter-American "Evidence Convention"

The Inter-American Convention on the Taking of Evidence Abroad (Inter-American Evidence Convention) (see 14 Int'l Legal Materials 328 (1975)) is more directly related to substantive and procedural aspects of taking evidence abroad than is the Inter-American Convention on Letters Rogatory (see 14 Int'l Legal Materials 339 (1975)), discussed in §13.36.

NOTE: A copy of the Inter-American Evidence Convention can be found at http://www.oas.org/juridico/english/treaties/b-37.html. For a description of Inter-American conventions that is updated periodically by U.S. government attorneys, see http://www.osec.doc.gov/ogc/occic/iac.html.

The Inter-American Evidence Convention has not been ratified by the United States, and there appear to be no immediate prospects of ratification. Counsel should consult this Convention, however, before seeking to obtain evidence from a party located in a signatory to the Convention because its provisions illustrate the procedures to be used. Countries that have ratified the Inter-American Evidence Convention include Argentina, Chile, Columbia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. See website for the Department of International Legal affairs at http://www.oas.org/DIL/agreements.htm.

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§13.38 B. Bilateral Treaties

Bilateral treaties and exchanges of diplomatic notes between the United States and specific foreign states can also affect the discovery of evidence located abroad. See, *e.g.*, Consular Convention and Protocol Between the United States and Japan, Mar. 22, 1963 (15 UST 768, TIAS 5602). See also the exchange of "notes verbales" between the United States and the Federal Republic of Germany, discussed in *Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 854, 176 CR 874. To discover any potentially applicable bilateral treaties, consult Guide to the United States Treaties in Force, updated yearly by the United States State Department. For further assistance, contact the Treaty Affairs Section of the Office of the Legal Advisor, Department of State, Washington, DC 20520.

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C. Letters Rogatory in Absence of Multinational or Bilateral Treaties

§13.39 1. Definition of "Letter Rogatory"

Broadly defined, a letter rogatory is a formal request by a court in which an action is pending to a foreign court to perform some judicial act. 22 CFR §92.54; *Intel Corp. v Advanced Micro Devices, Inc.* (2004) 542 US 241, 248, 159 L Ed 2d 355, 367, 124 S Ct 2466 ("a letter rogatory is the request by a domestic court to a foreign court to take evidence from a certain witness"). Typically, letters rogatory issued by courts in the United States are used to obtain evidence located in a foreign jurisdiction when voluntary cooperation of a witness or custodian of documentary evidence cannot be obtained. In the absence of an applicable treaty, enforcement of letters rogatory depends on considerations of comity. 22 CFR §92.54. Unlike letters of request under the Hague Evidence Convention, foreign judicial authorities are not obliged to enforce letters rogatory.

Customarily, letters rogatory contain an explicit or implicit promise of reciprocity. See 22 CFR §92.54. In California, the notion of reciprocity is set forth in CCP §2029.300, which provides for the issuance of compulsory process by California courts to take discovery from witnesses in this state under orders or requests of foreign courts. See generally the California version of the Uniform Interstate and International Depositions and Discovery Act (CCP §§2029.100-2029.900), which governs taking discovery from a witness in California in actions pending outside the state.

In the federal system, district courts have authority to execute letters rogatory issued by foreign courts under 28 USC §1782. See *In re Letters Rogatory From Tokyo District Prosecutor's Office* (9th Cir 1994) 16 F3d 1016; *In re Letters Rogatory From Tokyo District* (9th Cir 1976) 539 F2d 1216.

PRACTICE TIP: Counsel should carefully evaluate the evidence actually required from abroad before determining to proceed by letters rogatory. Some limited categories of evidence may be obtained in ways less formal than letters rogatory. For example, consular officers of the United States will make efforts to obtain foreign public records for any United States citizen or person acting on behalf of a United States citizen. 22 CFR §92.79(a). The requesting party must bear any costs associated with obtaining such documents. 22 CFR §92.79(b).

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§13.40 2. Procedure for Obtaining Issuance and Execution of Letters Rogatory

Letters rogatory to facilitate taking an oral deposition in a foreign nation may be issued on motion in California by the court in which the action is pending if the court determines that they would be "necessary or convenient." CCP §2027.010(e). Forms of such motion, a supporting memorandum, and a supporting declaration can be adapted from the forms presented in §§13.75-13.79.

Letters rogatory may "include any terms and directions that are just and appropriate." CCP §2027.010(e). They should be addressed to the foreign court that is to execute them, but if the identity of the court is not known, they may be addressed "[T]o the [a]ppropriate Judicial Authority in [name of foreign nation]." CCP §2027.010(e); 22 CFR §92.66(c). See form in §13.74. The State Department has published a circular on the preparation of letters rogatory at http://travel.state.gov/law/info/judicial/judicial_683.html. Counsel may wish to consult this circular for further information about letters rogatory, citations to additional sources, and guidelines for drafting letters rogatory.

PRACTICE TIP: Although letters rogatory may, in some instances, be sent directly from one court to another (see 22 CFR §92.66(b)), transmittal through diplomatic channels may eliminate unnecessary misunderstandings. When using this method of transmittal, counsel should anticipate a delay of 6 months to one year or more in scheduling pretrial discovery and planning for trial. Whether a California court will extend pretrial and trial deadlines to accommodate delays in obtaining foreign discovery requires a case-by-case analysis. Extensions will be more likely if the evidence sought abroad is essential to the case and if counsel have proceeded expeditiously.

Formal requirements for letters rogatory may differ from country to country, but they should typically be accompanied by a complete translation both of the letters rogatory and any accompanying documents. Any required fees should accompany the letters rogatory. 22 CFR §92.66(b). After they have been executed by the foreign court, letters rogatory will be returned to the issuing court through the same channels by which they have been transmitted. 22 CFR §92.66(c). For requirements of a particular country, counsel should contact the appropriate geographical division of the State Department's Office of American Citizens Services and Crisis Management. See §13.16.

For a sample form of letters rogatory directed to nations that are not signatories to the Inter-American Evidence Convention, along with a comment concerning transmittal considerations, see §13.74.

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VI. TAKING DEPOSITIONS ABROAD

§13.41 A. Preliminary Considerations

Because depositions abroad can be expensive and time consuming to take and sometimes require a considerable amount of administrative effort, careful advance planning by counsel is necessary. See §§13.42-13.58.

JUDGE'S PERSPECTIVE: Taking depositions abroad, as well as other foreign discovery, can delay any case up to 1 year. There are cases in which the service of summons abroad took 8 months.

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§13.42 1. Necessity of Foreign Deposition

Counsel should evaluate the necessity for the testimony sought and, in particular, whether it can be obtained from witnesses in the United States or by other discovery techniques. If the witness will be unavailable at trial and his or her deposition will be used in place of trial testimony, counsel should be prepared to conduct a thorough examination in accordance with evidentiary rules that would apply at trial.

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§13.43 2. When Deponent Will Appear Voluntarily

If a foreign witness's testimony is essential, counsel should determine whether the witness will appear voluntarily for his or her deposition. Of course, if the witness is willing to travel to the United States, many of the potential problems and expenses associated with discovery abroad can be eliminated. In that respect, it may be cost-effective to offer to pay the witness's expenses and arrange for him or her to be deposed in this country.

If the witness is unwilling to travel to the United States but is willing to be deposed, counsel should ascertain whether depositions of voluntary witnesses are allowed in the witness's home country. As noted above, countries that are parties to the Hague Evidence Convention generally permit depositions of willing witnesses to be taken before consular officers and in some cases before private commissioners. For additional information about procedures for depositions and other matters in specific countries, contact the Office of American Citizens Services and Crisis Management of the United States State Department, (202) 647-5226. The State Department also maintains a useful Internet site about obtaining evidence in specific countries at http://travel.state.gov/law/judicial/judicial_702.html.

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§13.44 3. When Deponent Is Reluctant to Appear Voluntarily

If witnesses are reluctant to appear voluntarily to be deposed, counsel must consider how best to compel or encourage their appearance. For example, if a witness is a party (or an officer, director, managing agent, or employee of a party), the witness's deposition may be compelled by notice, and sanctions may be available to encourage or compel his or her testimony. CCP §2027.010(b). If the witness is located in a country that is a party to the Hague Evidence Convention, application may be made to an appropriate foreign authority to obtain assistance in compelling the witness to testify. Hague Evidence Convention, art 18.

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§13.45 B. Making Arrangements to Schedule and Conduct Deposition

Once counsel has made efforts to ensure the appearance of a foreign witness, appropriate arrangements must be made to schedule and conduct the deposition. See §§13.45-13.55. Somewhat more detailed administrative and scheduling arrangements are necessary than would ordinarily be the case for depositions taken in the United States. See §§13.45-13.55.

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§13.46 1. Determining Where and Before Whom Foreign Deposition Will Be Taken

Under CCP §2027.010(d), a deposition must be conducted under the supervision of:

- A person authorized to administer oaths or their equivalent by the laws of the United States or of the foreign nation not otherwise disqualified under CCP §2025.320;
- A person or officer appointed by commission or under letters rogatory; or
- Any person agreed to by all the parties.

Under CCP §2025.320(a), a deposition cannot be taken before a person who is "financially interested in the action" or who is "a relative or employee of any attorney of the parties, or of any of the parties."

In some countries that are parties to the Hague Evidence Convention, it may be possible to have deposition testimony taken before a private commissioner. In other countries (particularly civil law countries), depositions may be taken only before consular officers within the confines of a consulate or embassy.

PRACTICE TIP: To determine whether it is desirable to have a private commissioner appointed to take deposition testimony in countries where this method is permitted, counsel should consult with the State Department's Office of American Citizens Services and Crisis Management, the United States Embassy in the country in question, and foreign local counsel. United States officials can advise counsel on the benefits and disadvantages of proceeding before consular officials as well as on the availability and qualifications of private commissioners. Local foreign counsel should be in a position to provide information on this latter point.

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§13.47 2. Scheduling Depositions Before Consular Officials

Most major United States embassies have conference rooms and similar physical facilities available for taking depositions. Because space is limited, arrangements must be made in advance with the appropriate embassy or consulate to ensure availability. Generally, a party can make reservations for specific days only after depositing the estimated amount of total consular officer fees that will be incurred during the course of the deposition. See 22 CFR §22.5(c). See also §13.51.

Counsel must coordinate the availability of the deposition facilities at the consulate or embassy with the schedule of the witness who has agreed voluntarily to appear. Counsel should make these arrangements well in advance to ensure that all other necessary arrangements for the deposition can be completed before its commencement.

Counsel should furnish the following information by letter, telegram, fax, or telex to the American Services Section of the Consular Section of the American embassy or consulate:

- Full name, address, fax, telex, and telephone number of requesting counsel;
- A brief description of the nature of the case and the purpose of the deposition;
- The full name and address of the persons to be deposed as well as their citizenship and a statement that the witnesses' appearance is voluntary;
- Suggested dates for taking the deposition or a period within which the deposition should be taken;
- Whether the deposition will be oral or based on written questions;
- Who will attend the taking of the deposition (*e.g.,* requesting counsel, opposing counsel, translator); and
- Whether the consular officer will be required to preside at the entire proceedings or administer the appropriate oaths and withdraw subject to recall (this option is not available in all foreign countries).

To confirm the arrangements, counsel should include in the letter, telegram, fax, or telex, authorization for a return collect cable or telephone call from the consular office. For more information on arranging for consular depositions, see generally the State Department website at http://travel.state.gov/law/info/judicial/judicial_689.html.

Counsel should also attach to the letter or (if a telegram, fax, or telex has been sent) forward separately the following:

- Commission of the consular officer or notice of the taking of deposition. See 22 CFR §§92.52-92.53.
- For depositions on written questions, a list of interrogatories and any special instructions.
- A check for a nonrefundable scheduling fee of $475. The consular officer will provide an estimate of the additional fees and expenses that must be deposited in advance of the deposition and will advise requesting counsel. The certified or corporate check should be made payable to "The American Embassy (Consulate General, Consulate) at (City)." Note that current consular fees are $265 per hour or fraction of an hour plus expenses. See 22 CFR §22.1.

The State Department publishes a useful pamphlet, Obtaining Evidence Abroad, which can be obtained from the State Department's Office of American Citizens Services and Crisis Mangement ((202) 647-5226) or downloaded from the State Department's website at http://travel.state.gov/law/judicial/judicial_702.html.

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§13.48 3. Interpreters

If the witness whose deposition is to be taken does not speak English, it will be necessary to arrange for an interpreter. Generally, the obligation to provide and pay for an official interpreter rests with the party noticing and taking the deposition. See *In re Puerto Rico Elec. Power Auth.* (1st Cir 1982) 687 F2d 501; *East Boston Ecumenical Community Council, Inc. v Mastrorillo* (D Mass 1989) 124 FRD 14; *In re Korean Air Lines Disaster of Sept. 1, 1983* (D DC 1984) 103 FRD 357.

Arrangements for interpreters can usually be made in the country where the deposition will be taken. American embassies and consulates frequently maintain lists of interpreters who are available to interpret depositions and other proceedings. Because the interpreters on these lists are not necessarily qualified, counsel should interview them in the company of someone skilled in the foreign language to be used for the deposition.

PRACTICE TIP: Whenever precise interpretation is required, counsel should consider retaining a separate interpreter to verify the interpretation of the official interpreter, so that any disputed questions of interpretation can be resolved during the course of the deposition. If it is not feasible to hire a check interpreter, the deposition may be videotaped or a back-up audio recording may be prepared so that the witness's responses can be preserved for later review if disputes arise.

If, during the deposition, counsel plans to show the witness documents in English or a language that the witness cannot read, they should be translated in advance. When documents are written in the witness's native tongue, translations can be used to examine the witness.

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§13.49 4. Court Reporters

Before scheduling depositions in foreign countries, counsel should investigate the availability of court reporters capable of preparing a transcript of the examination. In some countries (*e.g.,* Japan and China), court reporters are not readily available, because they are not employed during the course of domestic litigation. Moreover, it may be difficult to find a court reporter who is able to take a transcript in English.

Consequently, counsel should consider whether it is practical to transport a court reporter from the United States to prepare the transcript of proceedings. Although this method can be expensive, counsel will be able to obtain the transcript more rapidly because it will be prepared in the United States. In addition, the transcript will be prepared in accordance with the practice of the United States jurisdiction in which the litigation is pending, which should be more convenient for both the parties and the court.

If the party noticing the deposition determines that it would be impracticable for a court reporter to take the testimony stenographically, counsel should consider soliciting the agreement of the other parties to another means of recording the witness's testimony. In addition, the party seeking the deposition may provide in its notice that the deposition will also be videotaped, which could provide a useful back-up in case a transcript prepared by a foreign court reporter is delayed. See CCP §2025.220(a)(5).

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§13.50 5. Visas

Before traveling abroad to participate in depositions, counsel should obtain proper visas from the appropriate foreign authorities in addition to a United States passport. Some countries (*e.g.,* Japan) require that special visas be issued to attorneys participating in the taking of depositions. Particular requirements may apply, such as obtaining copies of the court order or commission providing for the taking of the deposition as well as some information about the proceedings in which the deposition is to be taken. Counsel also should determine whether special visas will be required for court reporters, interpreters, or others accompanying counsel to participate in the depositions.

Visa applications should be submitted well before the dates for the scheduled deposition so that any necessary administrative requirements of the foreign authorities can be satisfied. Because embassy officials and consular officers are particularly sensitive to the legal requirements of their host countries, they may not permit counsel with improper visas to participate in deposition proceedings scheduled to take place before them. Information about special visa requirements can be obtained from the State Department or the American embassy in the country in question, but more specific and current information may be available in the United States from that country's consulate or embassy.

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§13.51 6. Fees of Consular Officials or Commissioners

If private commissioners will be used, counsel should determine in advance the compensation to be paid to such commissioners and the appropriate method of payment. Presumably, these arrangements can be made privately or, for foreign public officials, are prescribed by local regulation or practice.

For depositions taken before United States consular officials, 22 CFR §22.1 provides for payment of fees of $265 per hour, plus expenses, for the time spent by consular officials in taking depositions or executing commissions to take testimony. (A fee of $70 is imposed for providing seal and certification of depositions.) As a practical matter, embassies are rarely in a position to provide services of interpreters or stenographers on an ongoing basis. A careful estimate of the required fees must be made and an advance deposit must be provided to the American embassy or consulate before the deposition takes place. 22 CFR §22.5(c). Generally, payment is required in the form of an international money order or a certified check, made payable to the embassy or consulate at its designated foreign location. For more information, see Obtaining Evidence Abroad, which can be obtained from the State Department's Office of American Citizens Services and Crisis Mangement ((202) 647-5226) or downloaded from the State Department's website at http://travel.state.gov/law/info/judicial/judicial_2514.html.

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§13.52 C. Procedure for Initiating Foreign Depositions

Under California law, a deposition notice is sufficient to compel the deposition of a "party to the action or an officer, director, managing agent, or employee of a party" and is also sufficient to require such a deponent to "produce any document or tangible thing for inspection and copying." CCP §2027.010(b). A party seeking to take the deposition of a nonparty witness in a foreign nation "shall use any process and procedures required and available under the laws of the foreign nation where the deposition is to be taken to compel the deponent to attend and to testify" as well as to produce documents. CCP §2027.010(c).

On motion by a party seeking to take a foreign deposition, the court "shall issue a commission, letters rogatory, or a letter of request, if it determines that one is necessary or convenient." CCP §2027.010(e). On commissions, see §13.55. Letters of request are described in §§13.21-13.30. Letters rogatory are described in §§13.39-13.40. The deposition might also be taken by stipulation. See §13.53.

The deposition officer "may be designated by name or by descriptive title in the deposition notice and in the commission." CCP §2027.010(e). On deposition officer requirements, see §13.46.

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§13.53 1. Depositions by Stipulation

According to CCP §2027.010(d), the parties may stipulate that a deposition in a foreign country may be taken before a designated person. Similar flexibility is provided by Fed R Civ P 29.

Although this procedure may be the most convenient for the parties when discovery is proceeding cooperatively, it may not be acceptable to foreign authorities. As noted in §13.46, the Hague Evidence Convention does not allow for depositions by stipulation, but rather permits the taking of depositions only before consular officers or, when authorized, before designated commissioners.

PRACTICE TIP: Before attempting to take depositions by stipulation, counsel should carefully consider the internal requirements of the foreign country where the deposition will be given. In civil law countries particularly, taking depositions in a manner not permitted by local law may expose counsel to penalties under the law of the foreign jurisdiction. In exceptional cases, attorneys may be jailed or deported by the foreign authorities. See Note, *Obtaining Testimony Outside the United States: Problem for the California Practitioner*, 29 Hastings LJ 1237, 1244 (1978).

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§13.54 2. Depositions by Notice

Code of Civil Procedure §2027.010(d) authorizes a party to notice a deposition before persons authorized to administer oaths or appointed by commission or letters rogatory. Similar authority may be found in Fed R Civ P 28(b), which permits depositions to be taken before a person authorized to administer oaths in the place in which the examination is held either by the law of the foreign country or by the law of the United States.

Diplomatic and consular officers are, as a matter of federal law, competent to take depositions on notice in foreign countries. See 22 CFR §§92.52, 92.55. Notarizing officers, as defined by 22 CFR §92.1, are competent to take depositions on notice in foreign countries in place of diplomatic or consular officers. See 22 CFR §92.52. Consular officials will not participate in depositions where the laws or authorities of the host country prohibit them from doing so. 22 CFR §92.55(c). Even countries that permit consular officers to take depositions may require a specific court order or commission as a condition to permitting consular officers to take depositions.

For example, Japanese authorities have construed the Consular Convention and Protocol Between the United States and Japan, Mar. 22, 1963 (15 UST 768, TIAS 5602) to authorize depositions only when a court order or commission directs that a deposition go forward. This interpretation derives from the language of Consular Convention, art 17(1)(e)(ii)-(iii), which authorizes a consular officer of the United States within his or her consular district to "take depositions, on behalf of the courts or other judicial tribunals or authorities of the sending state _____, voluntarily given." The depositions may be taken "in accordance with the laws of the sending state _____ and in a manner not inconsistent with the laws of the receiving state _____."

PRACTICE TIP: Before deciding to proceed on notice without issuance of a commission, counsel should determine whether the local foreign authorities or the United States consular officials in the foreign locale require or prefer the issuance of a commission or other appropriate court order. As a practical matter, because commissions are ordinarily not difficult to obtain and will in many cases facilitate the scheduling and conduct of foreign depositions, counsel should seriously consider applying for issuance of a commission authorizing a consular officer to proceed with the deposition, unless compelling reasons suggest otherwise.

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§13.55 3. Commission

In general, a commission is a written authority issued by the court that gives power to take the testimony of witnesses who cannot appear personally before the court issuing the commission. 22 CFR §92.53. When a party seeking to take an oral deposition in a foreign nation moves the court in which the action is pending for issuance of a commission, the court must issue a commission if it determines that one is necessary or convenient. The commission may include any terms and directions that are just and appropriate. CCP §2027.010(e).

Commissions for discovery in foreign countries are issued on noticed motion. For service and reply requirements, see CCP §1005(b) and Cal Rules of Ct 3.1113, discussed in §§15.47, 15.54.

"Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter." Cal Rules of Ct 3.1110(g). For forms of notice of motion, supporting memorandum, supporting declarations, and order, see §§13.75-13.78. The commission issued is illustrated in §13.79.

NOTE: Although analysts have termed "unnecessarily restrictive" the requirement that issuance of a commission be based on a showing of necessity or convenience (see Note, *Obtaining Testimony Outside the United States: Problem for the California Practitioner*, 29 Hastings LJ 1237, 1242 (1978)), the burden of establishing convenience in the international context does not appear to be particularly great. Indeed, information obtained from State Department or embassy sources to the effect that the issuance of commissions would be desirable as an administrative matter should suffice to justify their issuance. Of course, when the deposition cannot proceed without the issuance of commissions, the court should find that they are "necessary" within the meaning of CCP §2027.010(e).

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§13.56 D. Procedure for Examining Witnesses at Depositions Taken Before Consular Officers

In the absence of special requirements of local foreign law controlling the manner of taking depositions, depositions before consular officers outside the United States may be taken on oral examination and proceed in generally the same manner as depositions taken in California. CCP §2027.010(a). Unless the commission or notice otherwise instructs, the consular officer will administer oaths to the interpreter, the court reporter, and the witness and will remain present throughout examination of the witness to control the conduct of the proceedings. 22 CFR §92.56(c), (g). In general, the party taking a deposition will conduct the examination of the witness uninterrupted except for objections of opposing counsel. Whether objections will be interpreted for the witness's benefit is usually a matter for agreement between the parties. Moreover, the ground rules of the deposition on minor matters such as this should be established in advance.

Following examination of the witness, opposing counsel has the right of cross-examination, which may be followed by redirect and recross-examination until the deposition is complete. The consular officer has no authority to rule on objections but will ensure that the objections are recorded for determination by the court. The consular officer will control the conduct of the deposition only insofar as is appropriate to maintain decorum and to restrain counsel from lengthy digressions or attempts to intimidate or mislead the witness. 22 CFR §92.57. In rare situations, a consular officer may explain a particular question to a witness. See 22 CFR §92.60.

The consular officer will permit the witness to refresh his or her recollection by reference to notes or other documents and may, during the course of the deposition, propound questions to the witness to determine whether he or she is testifying from personal knowledge. See 22 CFR §92.60. In practice, consular officers only rarely conduct any examination of the witness, but tend to let counsel conduct the deposition as if it were being taken in the absence of any third party. The consular officer will permit the witness to confer with counsel and will note any such conferences on the record. 22 CFR §92.60(c). Because lengthy depositions tend to disrupt their routine, consular officers tend to require that the deposition proceed only during normal business hours, with periodic breaks and a recess for lunch. Counsel should not count on being able to persuade consular officers to start early or work late.

PRACTICE TIP: After deciding to take the deposition of a witness located abroad, counsel should follow the procedures discussed in §§13.52-13.58. In framing questions for a witness whose testimony must be interpreted into English, counsel should remember (1) to ask simple, direct questions that will not confuse either the witness or the interpreter and (2) that interpreted depositions take at least twice as long as depositions taken in English.

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§13.57 E. Review, Signing, and Return of Deposition Transcript

After the witness has been examined and the transcript prepared, the court reporter transmits the completed transcript to the consular officer, who will make it available to the witness for examination. The witness is permitted to make changes in the transcript, which the consular officer notes on the transcript. The witness initials each correction made at his or her request and signs the completed transcript. If the witness refuses to sign, the transcript is nevertheless returned by the consular officer with a statement of the reason for the witness's refusal or inability to sign. 22 CFR §92.61.

Finally, the consular officer certifies that the witness was duly sworn and that the deposition is a true record of the witness's testimony, binds the transcript and related papers together with a ribbon secured beneath the consular officer's seal, and returns them to the court in which the action is pending. 22 CFR §§92.62-92.64. On request, the consular officer makes copies of the deposition available to the deponent or to any party to the action on payment of appropriate copying charges. 22 CFR §92.64(b).

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§13.58 F. Deposition on Written Questions

If it is impractical to conduct a deposition on oral examination, counsel may submit written questions, cross-questions, and redirect questions to be asked of a willing witness by a consular officer. The questions are asked orally in the order set forth, and the witness's answers are then transcribed. See 22 CFR §92.58. On written depositions, see §§5.160-5.199.

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VII. PARTICULAR PROBLEMS IN OBTAINING DISCOVERY ABROAD

§13.59 A. Foreign Statutes Precluding Discovery of Certain Categories of Evidence

Principally in response to broad jurisdictional inquiries by the United States government and private parties in federal antitrust litigation, various foreign governments have enacted legislation precluding the production of certain categories of documents or evidence. These are often referred to as "blocking statutes." See, *e.g.*, *Société Nationale Industrielle Aerospatiale v U.S. Dist. Court* (1987) 482 US 522, 526 n6, 96 L Ed 2d 461, 473 n6, 107 S Ct 2542 (describing French blocking statute). See also *FTC v Compagnie de Saint-Gobain-Pont-á-Mousson* (DC Cir 1980) 636 F2d 1300, 1326; *Rich v KIS Cal., Inc.* (MD NC 1988) 121 FRD 254, 258 (French blocking statute "overly broad and vague and need not be given the same deference as a substantive rule of law").

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§13.60 1. Local Courts Not Governed by Foreign Blocking Statutes

Foreign "blocking statutes" do not deprive an American court of jurisdiction to order a party subject to its jurisdiction to order the production of evidence in violation of the blocking statute. Such statutes do identify specific concerns and policies of foreign sovereigns and to that extent should be considered in any particularized comity analysis undertaken by the court. *Société Nationale Industrielle Aerospatiale v U.S. Dist. Court* (1987) 482 US 522, 96 L Ed 2d 461, 107 S Ct 2542.

In *Richmark Corp. v Timber Falling Consultants* (9th Cir 1992) 959 F2d 1468, 1476, the court acknowledged that a statute adopted by the People's Republic of China, providing criminal penalties for the disclosure of confidential business information, reflected an expression of a national interest of that country. This interest was outweighed by United States interests in vindicating the rights of American plaintiffs and in enforcing judgments of United States courts.

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§13.61 2. Commentaries on Blocking Statutes

So-called blocking statutes have been the subject of substantial commentary. For more detailed discussion of these issues, see:

- ABA Antitrust Section, *Obtaining Discovery Abroad* (2d ed 2005);
- Feagle, *Extraterritorial Discovery: A Social Contract Perspective*, 7 Duke J Comp & Int'l L 297 (1997);
- Price, *Foreign Blocking Statutes and the Gatt: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad*, 28 GW J Int'l L & Econ 315 (1995);
- Comment, *Obtaining Discovery Abroad: The Utility of the Comity Analysis in Determining Whether to Order Production of Documents Protected by Foreign Blocking Statutes*, 22 Hous J Int'l L 525;
- Article, *Legal Representation in the International Securities Market: Representing a Party or Witness in an SEC or SRO Proceeding*, 14 Del J Corp L 893;
- Note, *Court Ordered Violations of Foreign Bank Secrecy and Blocking Laws: Solving the Extraterritorial Dilemma*, 1988 U Ill L Rev 563;
- Article, *International Discovery After Aerospatiale: The Question for an Analytical Framework*, 82 AJIL 521;
- Note, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 NYUJ Int'l L & Pol 1061 (1984);
- Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 Colum L Rev 1320 (1983); and
- Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 Fordham L Rev 877 (1982).

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§13.62 B. Privileges

Evidence taken in accordance with the Hague Evidence Convention or under letters rogatory is subject not only to the privileges recognized by United States law, but also to the privileges recognized by the law of the foreign jurisdiction. Restatement of Foreign Relations Law of the United States §473(3). See §13.28. Consequently, counsel should consult with local foreign counsel to become familiar with any specific foreign privileges that might prevent the discovery of the specific evidence sought.

EXAMPLE 1: In *Rio Tinto Zinc Corp. v Westinghouse Elec. Corp*. (1978) AC (English Law Reports Appeal Cases) 547, the House of Lords held that Rio Tinto Zinc could claim a privilege against self-incrimination when Westinghouse requested the production of documents for use in American antitrust litigation, because the production of those documents might tend to expose Rio Tinto Zinc to fines and penalties.

EXAMPLE 2: Germany apparently recognizes a business-secret privilege that may foreclose inquiry into details of confidential business communications and information. See Federal Republic of Germany, Court of Appeals (Munich) Decision With Regard to a United States Court Request for Judicial Assistance and the Taking of Evidence, issued in *Corning Glass Works v International Tel. & Tel. Corp.* (1981) 20 Int'l Legal Materials 1025. See also Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide,* 16 Int'l Lawyer 575 (1982).

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§13.63 C. Linguistic Difficulties

In cases involving discovery in countries where documents are normally written in languages other than English, counsel must anticipate the problems associated with obtaining translations of documentary evidence and of interpreting oral testimony. The cost of preparing translations in cases requiring the production of large quantities of documents can be enormous and must normally be borne by the party requesting the discovery. See *In re Puerto Rico Elec. Power Auth.* (1st Cir 1982) 687 F2d 501; *In re Korean Air Lines Disaster of Sept. 1, 1983* (D DC 1984) 103 FRD 357; *Cook v Volkswagen of Am., Inc*. (SD W Va 1984) 101 FRD 92.

Similarly, it can be difficult to obtain a precise rendering or construing of a particular foreign term, phrase, or idiom. Consequently, counsel should be prepared for potential disagreements about the meaning of important documents written originally in foreign languages.

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§13.64 D. Absence of Full Diplomatic Relations

Discovery of evidence located abroad depends either on the existence of an international treaty or convention to which both the United States and the particular foreign country are parties or on considerations of international comity based on mutual recognition of beneficial, friendly relations between the two countries. In the absence of such treaties or friendly relations, discovery of evidence located abroad may be exceptionally difficult.

When diplomatic relations between the United States and the country where evidence is located are strained or broken, counsel may find it difficult or impossible to obtain necessary cooperation from the foreign authorities. In those situations, counsel should consider the possibilities of (1) persuading a willing witness to travel to another country where the evidence may be taken without difficulty or (2) obtaining comparable evidence from other sources.

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VIII. FOREIGN DISCOVERY PROTECTION AND ENFORCEMENT

§13.65 A. Protective Orders, Motions to Compel, and Sanctions

Disputes concerning the propriety of foreign discovery generally arise in three contexts:

- A motion for a protective order brought by the party from whom the discovery is sought;
- A motion to compel discovery; and
- A motion that sanctions be issued for failure to comply with a discovery order.

See *Pierburg GmbH & Co. KG v Superior Court* (1982) 137 CA3d 238, 240, 186 CR 876 (protective order followed by motion to compel); *Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 176 CR 874 (motions to compel and for sanctions). But see *American Home Assur. Co. v Société Commerciale Toutelectric* (2002) 104 CA4th 406, 409, 128 CR2d 430, questioning both of the above cases.

Because motions for protective orders, motions to compel, and motions for sanctions are discussed generally in chap 15, they are not discussed in detail in this chapter. Concerns particular to disputes over foreign discovery are, however, analyzed in §§13.65-13.68.

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§13.66 B. Procedural Defenses to Foreign Discovery

Because *Pierburg GmbH & Co. KG v Superior Court* (1982) 137 CA3d 238, 240, 186 CR 876, has not been affirmatively overruled by the California Supreme Court, there is the potential that a California court may still mandate compliance with the procedures set forth in the Hague Evidence Convention (see §§13.17-13.19).

In *Pierburg,* the Convention was used initially as the ground for a protective order and later as a defense to a motion to compel. If the *Pierburg* rationale is still valid, the trial court will require, at least initially, that discovery take place in compliance with the Hague Evidence Convention if the evidence is located in a country that has adopted the Convention. In federal court, objections to discovery based on the failure to comply with the Convention will be evaluated on a case-by-case basis. See §§13.17-13.19.

In contrast, the court in *American Home Assur. Co. v Société Commerciale Toutelectric* (2002) 104 CA4th 406, 128 CR2d 430, rejected the holding of *Pierburg* and questioned *Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 176 CR 874, adopting instead the balancing approach of *Société Nationale Industrielle Aerospatiale v U.S. Dist. Court* (1987) 482 US 522, 96 L Ed 2d 461, 107 S Ct 2542, holding that the Hague Evidence Convention provides merely optional procedures for discovery abroad and those procedures can be waived either expressly or impliedly by a party's failure to insist on their application.

In *American Home Assur. Co. v Société Commerciale Toutelectric* (2002) 104 CA4th 406, 451, 128 CR2d 430, the defendant sought to avoid terminating sanctions by asserting that the actions were reasonable because party witnesses had been advised that they would be subject to criminal sanctions under a French blocking statute if they appeared at deposition. The court did not hold directly that the French blocking statute could never provide a defense to a sanctions motion. Rather, the court noted that the defendant had been inconsistent in its assertions concerning the application of the statute—it had produced some documents but not others and earlier in the proceedings had produced a witness for deposition. 104 CA4th at 434. Moreover, the court noted that in its *Aerospatiale* decision, the Supreme Court had considered the same French blocking statute and had concluded that it would not divest courts in the United States of the power to require the production of evidence. 104 CA4th at 426.

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§13.67 C. Foreign Illegality as Defense to Foreign Discovery

The claim that compliance with a discovery request would violate a substantive foreign law has been raised as the basis for a protective order and in response to motions to compel, for sanctions, or both, in the federal courts and other state courts.

Even if a court requires the production of evidence in the face of a foreign blocking statute, the effect of the statute may provide a defense to a motion for sanctions. The landmark case in this area is *Société Internationale Pour Participations Industrielles & Commerciales, S.A. v Rogers* (1958) 357 US 197, 2 L Ed 2d 1255, 78 S Ct 1087. The plaintiff in *Rogers* refused to comply with an order to produce certain records on the ground that production would violate the Swiss Penal Code. The district court held that foreign illegality was not an excuse for noncompliance and that dismissal of the complaint was an appropriate sanction. Reversing, the United States Supreme Court ruled that the dismissal was not justified in light of the plaintiff's good faith efforts to comply with the discovery order.

Although *Rogers* has been the source of much confusion, it does establish that the court should apply some sort of balancing test whenever discovery might conflict with foreign sovereignty. *Rogers* treats the question of the validity of a discovery order separately from that of the propriety of sanctions—an issue surrounded by substantial confusion. For example, some courts apply the balancing approach only to the propriety of sanctions and not to the validity of the initial discovery order. See, *e.g., Arthur Andersen & Co. v Finesilver* (10th Cir 1976) 546 F2d 338, 341. For detailed analysis of this competition and the issues raised in *Rogers,* see Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 Colum L Rev 1320 (1983). In *American Home Assur. Co. v Société Commerciale Toutelectric* (2002) 104 CA4th 406, 128 CR2d 430, the court distinguished *Rogers* on the grounds that the party failing to comply with the discovery order in *Rogers* had promptly and consistently invoked the Swiss blocking statute there at issue, while the defendant in *American Home Assurance* had been inconsistent from the beginning to the end of the discovery process about the application of the blocking statute. 104 CA4th at 435.

PRACTICE TIP: As *American Home Assurance* suggests, reliance on the application of a blocking statute will probably not prevent a California court from ordering production of relevant evidence. Reliance on a blocking statute will only be a potential defense to terminating sanctions if the party promptly and consistently invokes the blocking statute.

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§13.68 D. Obtaining Relief From Foreign Sovereign

Article 10 of the Hague Evidence Convention provides that:

> the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

This provision suggests that, if a person refuses to comply with a validly issued letter of request, it may be appropriate to petition the foreign authority to compel compliance.

In the case of a foreign third party witness, such a petition may be the only available recourse because a California court ordinarily lacks jurisdiction to compel a foreign nonparty witness to comply with discovery requests or to impose sanctions for failure to comply. When the Convention does not apply, a litigant is left to whatever redress the foreign jurisdiction makes available.

A foreign litigant or third party witness may also seek protection from the discovery request from the state where the discovery is sought. See, *e.g., Radio Corp. of Am. v Rauland Corp.* (1956) 1 QB (English Law Reports Queens Bench Cases) 618, 630. Such action can create complex questions of choice of law and international law.

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IX. FEDERAL COURT PROCEDURES

§13.69 A. Federal Statutory Law

In federal civil actions, discovery of evidence located abroad generally follows the otherwise applicable discovery rules, but is also subject to applicable international agreements. See §13.70. Federal Rules of Civil Procedure 34 sets forth the procedures governing requests for production of documents to parties; Fed R Civ P 33 applies to written interrogatories to parties; Fed R Civ P 31 sets forth procedures for deposition on written questions; and Fed R Civ P 30 describes the procedure for deposition on oral examination.

Under Fed R Civ P 28(b), depositions in foreign countries are authorized to be taken:

- Under any applicable treaty or convention;
- Under a letter of request (whether or not titled a letter rogatory);
- On notice before a person authorized to administer oaths in the place where the examination is held, either by the law of that place or by the law of the United States; or
- Before a person commissioned by the court to administer any necessary oath and take testimony.

A commission (see §13.55) or letter rogatory (see §§13.36-13.40) may be issued on "appropriate terms after an application and notice of it" without showing that taking the deposition in any other manner is impracticable or inconvenient. Fed R Civ P 28(b)(2)(A).

In addition to these procedures, 28 USC §1783 authorizes the service of a subpoena in a foreign country to require "a national or resident of the United States who is in a foreign country" to produce specified documents or things or to give testimony. See also Fed R Civ P 45(b)(3). Title 28 USC §1783 does not authorize the issuance of subpoenas to nonresident aliens. See, *e.g., U.S. v Haim* (SD NY 1963) 218 F Supp 922, 926. Under 28 USC §1783, any consul or vice consul of the United States may serve a subpoena through the State Department's Office of Citizens Consular Services.

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§13.70 B. Effect of Hague Evidence Convention

In *Société Nationale Industrielle Aerospatiale v U.S. Dist. Court* (1987) 482 US 522, 96 L Ed 2d 461, 107 S Ct 2542, the Supreme Court considered for the first time the role that the Hague Evidence Convention should play in federal court discovery of evidence from foreign litigants over whom the district court has jurisdiction. Relying on the language of the Convention and the history of its proposal and ratification by the United States, the court concluded that the procedures of the Convention were not mandatory (482 US at 539, 96 L Ed 2d at 481):

> We conclude accordingly that the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation.

The court also rejected the position that the Convention did not apply to the production of evidence in a foreign litigant's possession, concluding instead that "the optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention." 482 US at 541, 96 L Ed 2d at 482.

The court recognized that considerations of international comity must play a role in the district court's consideration of a foreign litigant's objections to discovery, but it rejected a rule that would require first resort to the procedures of the Hague Evidence Convention in every case. See §13.17. The court held that federal district courts should, in each case, engage in a particularized analysis of the facts at issue, the sovereign interests of both the United States and the foreign nation, and the likelihood that resort to the Convention's procedures would prove effective. See 482 US at 543, 96 L Ed 2d at 483.

Although the court did not articulate specific rules to guide the district courts in this case-by-case analysis, it noted with approval factors drawn from the Restatement of Foreign Relations Law of the United States §437(1)(c) (Tentative Draft No. 7, 1986), now the Restatement (Third) of the Foreign Relations Law of the United States §442 (1986). As quoted by the court, those factors are (482 US at 544 n28, 96 L Ed 2d at 484 n28) :

- The importance to the litigation of the documents or other information requested;
- The degree of specificity of the request;
- Whether the information originated in the United States;
- The availability of alternative means of securing the information; and
- The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Recognizing that some discovery procedures are more intrusive than others, the court suggested that although broad document requests may prove too burdensome or intrusive for a foreign litigant, district courts could, in many cases, refuse to insist on the use of Convention procedures "before requiring responses to simple interrogatories or requests for admissions." 482 US at 545, 96 L Ed 2d at 484. Nevertheless, the court admonished the district courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." 482 US at 546, 96 L Ed 2d at 485.

The court's decision in *Société Nationale Industrielle Aerospatiale* imposes a significant burden on the federal district courts, and thus on counsel, in cases involving foreign parties objecting to broad discovery requests. Decisions of federal courts seeking to apply the Supreme Court's instructions in *Société Nationale Industrielle Aerospatiale* have confirmed the difficult issues to be resolved. See, *e.g., Richmark Corp. v Timber Falling Consultants* (9th Cir 1992) 959 F2d 1468.

The case-by-case analysis required by the court in *Société Nationale Industrielle Aerospatiale* necessarily means that overriding principles will be difficult to ascertain from individual cases. From the available cases, however, it appears that foreign defendants will have some difficulty persuading courts to require initial resort to the Hague Evidence Convention in the absence of a showing that the discovery sought is particularly burdensome and oppressive and that the national interests of the country from which the discovery is sought has particularly important national interests at stake. For foreign nonparties, of course, the Convention or other means of obtaining evidence with the cooperation of foreign courts may prove to be the only way to obtain needed evidence. Moreover, in particular cases courts have been willing to require initial resort to the Hague Evidence Convention to curb perceived discovery abuses or to assuage concerns of foreign sovereigns.

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§13.71 X. CHECKLIST: PROCEDURES FOR SEEKING DISCOVERY ABROAD

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PARTY SEEKING DISCOVERY ABROAD

- Ascertain whether foreign country is party to Hague Evidence Convention (see §13.20)

If foreign country is party to Convention:

- File letter of request (compulsory procedure)
- Prepare letter of request for issuance by California court (see §§13.21-13.24), following foreign country requirements and Hague Evidence Convention, art 3 (see §13.25)
- Transmit letter to central authority of foreign country for execution (see §13.26)
- Examination by diplomatic officer or consular agent (noncompulsory procedure)
- Obtain permission of foreign country (general or specific) (see §13.27) and prepare letter of request or letter rogatory (see §§13.23, 13.40)
- Determine whether United States and relevant foreign countries are parties to non-Hague Evidence Convention treaty (see §§13.36-13.38) and prepare letter rogatory (see §13.40)

If foreign county is not party to Convention:

- Oral or written depositions before person authorized to administer oaths
- Prepare stipulation (see §13.53), serve notice (see §13.54), serve notice of motion for commission (see §13.55), or prepare letter rogatory (see §13.40)

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XI. FORMS

§13.72 A. Form: Sample Letter of Request Recommended for Use in Applying Hague Evidence Convention on Taking of Evidence Abroad in Civil or Commercial Matters

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REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE PURSUANT TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE IN CIVIL OR COMMERCIAL MATTERS.

(NOTE: Under the first paragraph of Article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. However, the provisions of the second and third paragraphs may permit use of English, French, or another language.)

_____

Please fill out an original and one copy of this form; to avoid confusion, please spell out the name of the month in each date (use additional space if required).

1	Sender	_____[*identity and address*]_____ _____ _____
2	Central Authority of the Requested State	_____[*identity and address*]_____ _____ _____
3	Person to whom the executed request is to be returned	_____[*identity and address*]_____ _____ _____
4	Specifications of the date by which the requesting authority requires receipt of the response to the letter of request Date _____ Reason for Urgency _____ IN CONFORMITY WITH ARTICLE 3 OF THE CONVENTION, THE UNDERSIGNED APPLICANT HAS THE HONOUR TO SUBMIT THE FOLLOWING REQUEST:	
5a	Requesting judicial authority (**article 3a**)	_____[*identity and address*]_____ _____ _____
5b	To the competent authority of (**article 3a**)	_____[*identity and address*]_____ _____ _____
5c	Name of the case and any identifying number	_____ _____ _____
6	Names and addresses of parties and their representatives (including representatives in the	

	requested State (article 3b) [*omit if not applicable*]	
6a	Plaintiff	_____ _____ _____
	Representatives	_____ _____ _____
6b	Defendant	_____ _____ _____
	Representatives	_____ _____ _____
6c	Other parties	_____ _____ _____
	Representatives	_____ _____ _____
7a	Nature and purpose of the proceedings and summary of the facts (article 3c)	_____ _____ _____
7b	Summary of complaint	_____ _____ _____
7c	Summary of defense and counterclaim	_____ _____ _____
7d	Other necessary information or documents	_____ _____ _____
8a	Evidence to be obtained or other judicial act to be performed (article 3d)	_____ _____ _____ _____
8b	Purpose of the evidence or judicial act sought	_____ _____ _____
9	Identity and address of any person to be examined (article 3e) [*omit if not applicable*]	_____ _____ _____
10	Questions to be put to the persons to be examined or statement of the subject matter about which they are to be examined (article 3f) [*omit if not applicable*]	_____ _____ _____ _____ _____ _____ _____ _____
11	Documents or other property to be inspected (article 3g)	_____ _____ _____

	[*omit if not applicable*]	_____
12	Any requirement that the evidence be given on oath or affirmation and special form to be used (article 3h) [*omit if not applicable*]	_____ _____ _____ (If the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law on formal taking of evidence)
13	Special methods or procedure to be followed (*e.g.*, oral or in writing verbatim, transcript, or summary cross-examination, etc.) (article 3i and 9) [*omit if not applicable*]	_____ _____ _____ _____ (If the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law)
14	Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (article 7) [*omit if not applicable*]	_____ _____ _____ _____ _____ _____ _____ _____ _____
15	Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request (article 8)*	_____ _____ _____ _____ _____ _____ _____ _____ _____
16	Specification of privilege or duty to give evidence under the law of the State of origin (article 11b) [*omit if not applicable*]	_____ _____ _____ _____ (Attach copies of relevant laws or regulations)
17	The fees and costs incurred, which are reimbursable under the 2d paragraph of article 14 or 26 of the Convention, will be borne by [*omit if not applicable*]	_____[*identity and address*]_____ _____ _____ _____ _____ _____
	DATE OF REQUEST	_____
	SIGNATURE AND SEAL OF THE REQUESTING AUTHORITY	_____ _____ _____

Comment: This form appears on the website of the Hague Conference on Private International Law at http://hcch.e-vision.nl/index_en.php?act=conventions.publications&dtid=2&cid=82. Counsel should check this website for possible changes to the form.

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Source: Civil Litigation/California Civil Discovery Practice/13 Discovery in Other Nations/§13.73 B. Form: Sample Letter Rogatory Recommended for Use in Applying Inter-American Convention on Letters Rogatory

§13.73 B. Form: Sample Letter Rogatory Recommended for Use in Applying Inter-American Convention on Letters Rogatory

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LETTER ROGATORY

REQUESTING JUDICIAL OR ADMINISTRATIVE AUTHORITY

CASE:
DOCKET NO:

Name: _____

Address: _____

CENTRAL AUTHORITY IN STATE OF ORIGIN

Name: _____

Address: _____

CENTRAL AUTHORITY IN STATE OF DESTINATION

_____

_____

REQUESTING PARTY

Name: _____

Address: _____

COUNSEL TO REQUESTING PARTY

_____

_____

PERSON DESIGNATED TO ACT IN CONNECTION WITH THE LETTER ROGATORY

Name: _____

Address: _____

Is this person responsible for costs and expenses?
YES [ ] NO [ ]
If not, check in the amount of
$_ _ _ _ _ _ is attached
or proof of payment is attached

The Central Authority signing this letter rogatory has the honor to transmit to you in triplicate the documents listed below and, in conformity with the Protocol to the Inter-American Convention on Letters Rogatory:

A. Requests their prompt service on:

_____
_____
_____

The undersigned authority requests that service be carried out in the following manner:

(1) In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention; or

_____
_____
_____

(2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent; or

(3) If the person or the authorized agent of the entity to be served is not found, service shall be made in accordance with the law of the State of destination.

B. Requests the delivery of the documents listed below to the following judicial or administrative authority:

Authority:_____
_____
_____

C. Requests the Central Authority of the State of destination to return to the Central Authority of the State of origin one copy of the documents listed below and attached to this letter rogatory, and an executed Certificate on the attached form.

Done at _____ date of _____, 20____.

__[*Signature and stamp of the judicial or administrative authority of the State of origin*]__

__[*Signature and stamp of the Central Authority of the State of origin*]__

Title or other identification of each document to be delivered:

_____
_____

(Attach additional pages, if necessary)

ESSENTIAL INFORMATION FOR THE ADDRESSEE

TO (Name and address of person being served):

_____

You are hereby informed that (brief statement of nature of service):

_____
_____

A copy of the letter rogatory that gives rise to the service or delivery of these documents is attached to this document. This copy also contains essential information for you. Also attached are copies of the complaint or pleading initiating the action in which the letter rogatory was issued, of the documents attached to the complaint or pleading, and of any rulings that ordered the issuance of the letter rogatory.

ADDITIONAL INFORMATION

I

FOR SERVICE

A. The document being served on you (original or copy) concerns the following:_____
_____

B. The remedies sought or the amount in dispute is as follows: _____
_____
_____

C. By this service, you are requested: _____
_____
_____

D. In case of service on you as a defendant, you can answer the complaint before the judicial or administrative authority specified in the Letter Rogatory Form (state place, date, and hour): _____
_____
_____
_____

You are being summoned to appear as: _____
_____

If some other action is being requested of the person served, please describe:
_____
_____

E. If you fail to comply, the consequences might be: _____
_____
_____

F. You are hereby informed that a defense counsel appointed by the Court or the following legal aid societies are available to you at the place where the proceeding is pending.

_ _[*Name:*]_ _
_ _[*Address:*]_ _

II

FOR INFORMATION FROM JUDICIAL
OR ADMINISTRATIVE AUTHORITY

TO: (Name and address of the judicial or administrative authority)
_____
_____
_____

You are respectfully requested to furnish the undersigned judicial or administrative authority with the following information:
_____
_____
_____

The documents listed in Part III are being furnished to you to facilitate your reply.

III

LIST OF ATTACHED DOCUMENTS

_____
_____
_____
_____
_____

(attach additional pages, if necessary)

Done at _ _ _ _ _ _ this _ _ _ day of _ _ _ _ _ _, 20_ _ _ _.

CERTIFICATE OF EXECUTION

TO: (Name and address of judicial or administrative authority that issued the letter rogatory)

_____
_____
_____

In conformity with the Additional Protocol to the **Inter-American Convention on Letters Rogatory**, signed at Montevideo on May 8, 1979, and in accordance with the attached original letter rogatory, the undersigned Central Authority has the honor to certify the following:

A. That one copy of the documents attached to this Certificate has been served or delivered as follows:

Date:_____
At (address):_____

By one of the following methods authorized by the Convention:

(1) In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention; or

_____
_____
_____

(2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent; or

(3) If the person or the authorized agent of the entity to be served was not found, in accordance with the law of the state of destination (specify method used):

_____
_____
_____
_____

B. That the documents referred to in the letter rogatory have been delivered to:

Identity of person: _____
_____
_____

Relationship to the addressee (family, business, or other): _____
_____
_____
_____

C. That the documents attached to the Certificate have not been served or delivered for the following reason(s):

_____
_____
_____

D. In conformity with the Protocol, the party requesting execution of the letter rogatory is requested to pay the outstanding balance of costs in the amount indicated on the attached statement.

Done at _ _ _ _ _ _ the _ _ _ day of _ _ _ _ _ _, 20_ _ _ _.

__[*Signature and stamp of Central Authority of the state of destination*]__

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§13.74 C. Form: Sample Letter Rogatory for Use in Absence of Treaties

▶ To download **Word** version, right click and choose *Save Target As*

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**Letter Rogatory**
_ _[*Name(s)*]_ _, **Defendant(s)**	

The People of the State of California to the Appropriate Judicial Authority in _ _[*name of country*]_ _**,**

GREETINGS:

An action is currently pending before the _ _[*title of court*]_ _ **in which** _ _[*name(s)*]_ _ _ _[*is/are*]_ _ **the plaintiff(s) and** _ _[*name(s)*]_ _ _ _[*is/are*]_ _ **the defendant(s).**

It has been represented to us that it is necessary for the purposes of justice and due determination of matters in dispute between the parties that _ _[*name of witness*]_ _**, said to be residing in your jurisdiction at** _ _[*address*]_ _**, should be examined as a witness under oath.**

We therefore respectfully request that you cause:

1. The witness to be summoned to attend, at a time and place selected by you, before you or such other person who, according to the procedure of your Court, is competent to preside over the examination of witnesses.

2. The witness to answer under oath or on solemn affirmation the interrogatories and cross-interrogatories _ _[*and redirect interrogatories*]_ _ **attached to this letter.**

3. The testimony of the witness to be reduced to writing.

4. The record of the proceedings to be authenticated by the seal of your Court or in another way in accordance with your procedure.

[*Add if appropriate*]

5. Any books, papers, or other articles that the witness may produce or identify to be marked as _ _[*plaintiff/defendant*]_ _**'s exhibits in the manner indicated in the attached interrogatories or cross-interrogatories.**

[*Continue*]

[6.] The record of the proceedings and any exhibits to be returned to us by mail or other usual conveyance in a sealed envelope endorsed with the caption of this action and marked "Deposition of _ _[*name of witness*]_ _**" and addressed to the Clerk of the** _ _[*title of court*]_ _**, at** _ _[*address*]_ _**.**

We are prepared to reimburse you for all costs incurred in executing these letters rogatory, and we are ready and willing to do the same for you in a similar case when required.

Witness, the Honorable _ _[*name of judge*]_ _**, Judge of the** _ _[*title of court*]_ _**, this** _ _ _ **day of** _ _[*date*]_ _**.**

[*Seal of court*]

__[*Signature*]__
Judge of the _ _[*title of court*]_ _

Attest:

__[*Signature*]__

Court Clerk

Comment: To authenticate the document, certificates of the clerk and judge on printed forms provided by the clerk should be attached to this letter rogatory. Because the United States is now party to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (TIAS 10072), counsel should use the apostille (certificate) form provided for by that Convention when applicable. See generally 65 Ops Cal Atty Gen 205 (1982), under which the Hague Evidence Convention (TIAS 7444) superseded the provisions of former CC §1183 with respect to proof or acknowledgment of public documents executed by countries that are signatories to the convention. Civil Code §1183 was amended in 1984 (Stats 1984, ch 1017) expressly to permit use of the apostille authorized by that Convention.

Before using this form, counsel should consult with foreign local counsel to determine whether it will suffice in a particular case.

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D. Motion for Issuance of Commission to Take Foreign Deposition

§13.75 1. Form: Notice of Motion and Motion for Order Issuing Commission to Take Deposition Abroad

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number, e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION FOR ORDER ISSUING COMMISSION TO TAKE DEPOSITION ABROAD**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, moves the Court for an order directing a commission to issue under its seal,** _ _[*authorizing/appointing*]_ _ _ _[*name or descriptive title*]_ _**, whose address is** _ _[*address*]_ _**, to take the deposition of** _ _[*name of deponent*]_ _ **on** _ _[*oral examination/written questions*]_ _ _ _[*attached to this notice*]_ _, _ _[*under the attached instructions*]_ _**. This motion is made on the grounds that** _ _[*name of deponent*]_ _ **resides abroad and** _ _[*state further grounds; see Comment*]_ _**.**

This motion is based on this notice; all pleadings, papers, and records in this action; the attached supporting memorandum; the declaration of _ _[*name*]_ _**;** _ _[*and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: When the motion does not request appointment of a particular person to serve as deposition officer and any officer may serve, it is usually preferable to designate the officer by descriptive title, as permitted by CCP §2027.010(e), rather than by name, to avoid any difficulties if a specified officer is unable to serve.

When the motion requests appointment of a particular person, grounds for the appointment should be stated, *e.g.,* that the parties have stipulated to the appointment of the person specified or that, under the laws of the place where the deposition will be taken, an order appointing a particular person to serve as deposition officer will facilitate the taking of the deposition. Because the deposition officer usually is unfamiliar with the applicable procedures, it is good practice to attach instructions for taking and completing the deposition and any protective orders or other papers to the court order issuing the commission itself. It is also permissible to forward such documents to the deposition officer. See §§12.33, 13.47.

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§13.76 2. Form: Memorandum Supporting Motion for Order Issuing Commission to Take Deposition Abroad

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number, e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**MEMORANDUM SUPPORTING**
vs	)	_ _[*NAME*]_ _**'S MOTION FOR ORDER ISSUING**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**COMMISSION TO TAKE DEPOSITION ABROAD**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

I. Issuance of a commission under Code of Civil Procedure §2027.010(e) to take the deposition of _ _[*name of deponent*]_ _ **is necessary or convenient because** _ _[*state reasons*]_ _**.**

II. A deposition may be taken under a commission in _ _[*name of country*]_ _**.**

_ _[*Cite authority, e.g., Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.*]_ _

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: On page limitations on supporting memorandums, see Cal Rules of Ct 3.1113.

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Source: Civil Litigation/California Civil Discovery Practice/13 Discovery in Other Nations/§13.77 3. Form: Declaration Supporting Motion for Order Issuing Commission to Take Deposition Abroad

§13.77 3. Form: Declaration Supporting Motion for Order Issuing Commission to Take Deposition Abroad

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Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Optional fax number, e-mail address*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*PLAINTIFF/*
_ _[*Name(s)*]_ _,	)	*DEFENDANT*]_ _**'S MOTION**
Defendant(s)	)	**FOR COMMISSION TO TAKE**
	)	**DEPOSITION ABROAD**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*plaintiff/defendant/attorney for plaintiff/attorney for defendant*]_ _, _ _[*name*]_ _**, in this matter.**

2. This declaration is based on my personal knowledge and, if called as a witness, I could and would competently testify to it.

3. This declaration is made in support of the motion of _ _[*plaintiff/defendant*]_ _ **for an order directing a commission to issue to** _ _[*name*]_ _**, whose address is** _ _[*address*]_ _**, appointing** _ _[*him/her*]_ _ **as a person to take the deposition of** _ _[*name of deponent*]_ _ **abroad for use in this action, concerning** _ _[*state nature of action*]_ _**.**

4. Summons was duly served on _ _[*names of parties served*]_ _ **on** _ _[*date*]_ _**.**

5. _ _[*Name of deponent*]_ _**, who resides in** _ _[*country*]_ _ **at** _ _[*address*]_ _**, has knowledge of matters relevant to the subject matter of this action in that** _ _[*state how expected testimony of witness relates to subject matter of action*]_ _

[*Add if appropriate*]

and has in _ _[*his/her*]_ _ **possession the following** _ _[*books/documents/records/other things*]_ _**:** _ _[*Identify*]_ _**. These** _ _[*e.g., books*]_ _ **are relevant to the subject matter of this action in that** _ _[*state how information expected to be contained in books, documents, records, or other things relates to subject matter of action*]_ _**.**

[*Continue*]

and _ _[*name of deponent*]_ _ **is a necessary and material witness in this action.** _ _[*Plaintiff/Defendant*]_ _ **cannot fully prepare or properly proceed to trial without taking** _ _[*his/her*]_ _ **testimony by deposition.**

6. It is necessary and convenient that a commission issue to take _ _[*name of deponent*]_ _**'s deposition on** _ _[*oral examination/written questions*]_ _ **because** _ _[*he/she*]_ _ _ _[*resides/is abroad*]_ _ **and cannot be compelled to appear as a witness in California but is willing to testify** _ _[*and produce specified documents*]_ _ **before a commissioner duly appointed by this Court.**

7. _ _[*Name of deposition officer/descriptive title*]_ _ _ _[*is/will be*]_ _ **a competent and proper person to be**

_ _[*authorized/appointed*]_ _ **in the commission to be issued by this Court and to take the deposition of this witness.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: On designating appointment of commissioner by name or descriptive title, see Comment to form in §13.75.

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§13.78 4. Form: Order That Commission Issue to Take Deposition Abroad

To download **Word** version, right click and choose *Save Target As*

To download **WordPerfect** version, right click and choose *Save Target As*

Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**ORDER THAT COMMISSION**
vs	)	**ISSUE TO TAKE DEPOSITION**
	)	**ABROAD**
_ _[*Name(s)*]_ _,	)	
Defendant(s)	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, for an order that a commission issue** _ _[*authorizing/appointing*]_ _ _ _[*name or descriptive title*]_ _**, whose address is** _ _[*address*]_ _**, to take the deposition of** _ _[*name of deponent*]_ _ **was regularly heard at the above date and time.**

Satisfactory proof having been made, the Court finds that _ _[*name of witness*]_ _ **resides abroad and is a necessary and material witness in this action and that** _ _[*name or descriptive title*]_ _ **is competent and qualified to take this deposition; and good cause appearing,**

IT IS ORDERED that:

1. A commission issue under the seal of this Court directed to _ _[*name or descriptive title*]_ _**, whose address is** _ _[*address*]_ _**, authorizing the taking of** _ _[*oral examination/written questions*]_ _**,** _ _[*which are attached to this order*]_ _**.**

2. The deposition be taken in accordance with the attached documents: _ _[*Specify all instructions, protective orders, or other papers that are attached*]_ _**.**

3. The fees of the commissioner _ _[*and of any necessary interpreter*]_ _ **be borne by** _ _[*e.g., the moving party*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original and copy (present to judge for signature and file with court clerk; retain conformed copy); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: On attaching instructions and other papers to the order that a commission issue, see Comment to form in §13.75.

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Source: Civil Litigation/California Civil Discovery Practice/13 Discovery in Other Nations/§13.79 5. Form: Commission to Take Deposition of Witness

§13.79 5. Form: Commission to Take Deposition of Witness

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

Note: *A footer showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, is required on every page below the page number. See Cal Rules of Ct 2.110.*

_ _[*Title of Court*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	
	)	**COMMISSION TO TAKE**
vs	)	**DEPOSITION OF** _ _[*NAME OF WITNESS*]_ _
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	

The People of the State of California to _ _[*name and title of any consul or vice consul of United States of America*]_ _ **in** _ _[*designated foreign location*]_ _**,**

GREETINGS:

You have been appointed and are authorized in accordance with the order of the Honorable _ _[*name of judge*]_ _**, Judge for the** _ _[*title of court*]_ _**, to cause to come before you and to testify, under oath or on solemn affirmation,** _ _[*on oral examination or by written questions*]_ _ **in a manner not inconsistent with the laws of** _ _[*designated foreign country*]_ _**,** _ _[*name and address of witness*]_ _**, at** _ _[*time and place*]_ _**, as witness in this action, which is now pending undetermined in the** _ _[*title of court*]_ _**.**

We do hereby require you, the Commissioner before whom such testimony may be taken, to:

1. Cause the testimony to be reduced to writing by a duly qualified shorthand reporter;

2. Request the person examined to read the written record of _ _[*his/her*]_ _ **testimony and to subscribe** _ _[*his/her*]_ _ **name at the end of it if** _ _[*he/she*]_ _ **finds it accurately to reflect** _ _[*his/her*]_ _ **testimony;**

3. Close this written record under your hand and seal directed to the Clerk, _ _[*court title and address*]_ _**, as soon as convenient after execution of this commission; and**

4. Return the record with the title and number of this action and the notation, "Deposition of _ _[*name of witness*]_ _**" endorsed on the envelope, by registered or certified mail to the clerk of this Court.**

The testimony of this witness will be taken in accordance with the attached documents: _ _[*Specify all instructions, any protective orders, or other papers that are attached*]_ _**.**

Witness, the Honorable _ _[*name of judge*]_ _**, Judge of the** _ _[*title of court*]_ _**, this** _ _ _ **day of** _ _[*date*]_ _**.**

[*Seal of court*]

__[*Signature*]__
Judge of the _ _[*title of court*]_ _

Attest:

__[*Signature of clerk*]__
Court Clerk

Copies: Original (deliver to appointed commissioner); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The original commission or a certified copy should be delivered to the appointed commissioner, who should return it after execution with the original transcript of the examination. On attaching instructions and other documents to the commission, see Comment to form in §13.75.

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§13.80 XII. TABLE: CENTRAL AUTHORITY OF NATIONS PARTY TO HAGUE EVIDENCE CONVENTION

Generally, Cyprus, Finland, the Netherlands, Norway, Singapore, and the United Kingdom do not allow pretrial discovery of documents if the letters of request require a person (1) to state which documents relevant to the proceedings to which the letter relates are, or have been, in his or her possession, custody, or power; or (2) to produce any documents other than particular documents specified in the letter, which are likely to be in his or her possession, custody, or power. Thus, the counties marked with an asterisk in the last column of the table below appear to allow pretrial discovery of documents if the document is described with particularity in the letter of request.

Contracting Party	Central Authority	English Permitted	Other Languages Permitted	Deposition Permitted Before Consular Officers	Deposition Permitted Before Commissioner	Pretrial Discovery of Documents Permitted
Argentina	Ministerio de Relaciones y Culto	No	Spanish	No	No	No
Australia	Secretary to the Attorney General's Department of the Common-wealth of Australia	Yes	No	Yes—only with prior permission	Yes—with prior permission	No
Barbados	Registrar of the Supreme Court of Barbados	Yes	French	(a) of own nationals—yes (b) of others—with prior permission	Yes—with prior permission	Yes
Belarus	Supreme Court of the Republic of Belarus and the Supreme Economic Court of the Republic of Belarus	No	Belarusian, Russian	Yes—with prior permission	Yes—with prior permission	Yes
Bulgaria	Ministry of Justice and European Legal Integration	No	Bulgarian	(a) of own nationals—yes (b) of others—no	No	No
China	Bureau of International Judicial Assistance	Yes	Mandarin Chinese, French	(a) of own nationals—yes (b) of others—no	No	Only requests for documents clearly enumerated and in direct and close connection with the subject matter of litigation
Cyprus	Ministry of Justice and Public Order	Yes	No	Yes—with prior permission	Yes—with prior permission	Generally no*
Czech Republic	Ministry of Justice of the Czech Socialist Republic	Yes	French, Czech	Yes—without prior permission if reciprocity applies	Yes—with prior permission	Yes
Denmark	Ministry of Justice	No	Danish, Norwegian, Swedish with reservations	Yes—with prior permission	No	Generally no*
Estonia	Ministry of Justice of the Republic of Estonia	Yes	Estonian, French	(a) of own nationals—yes (b) of others—with prior	Yes—with prior permission	Generally yes

				permission		
Finland	Ministry of Justice	Yes—but see reservations	Swedish, Finnish	Yes—without prior permission	Yes—without prior permission	Generally no*
France	Ministry of Justice, Civil Division of International Judicial Assistance	No	French	(a) of own nationals—yes (b) of others—with prior permission	Yes—with prior permission	No
Germany	Various—see Convention	No	German	Yes—with prior permission, unless national is from the state of the requesting court Not if German nationals are involved	Yes—with prior permission Not if German nationals are involved.	No
Greece	Ministry of Justice, Department of International Judicial Cooperation in Civil Cases	Greek	No	(a) of own nationals—yes (b) of others—with prior permission	Yes—with prior permission	No
Hong Kong Special Administrative Region	Administrative Secretary of the Government of the Hong Kong Special Administrative Region	Yes	Cantonese Chinese	No	Yes—with prior permission	Generally no*
Hungary	Ministry of Justice	No	Hungarian	(a) of own (exclusive) nationals—yes (b) of others—with prior permission	Yes—with prior permission	No
Israel	Director of Courts 19 Jaffa Road Jerusalem	Yes	Hebrew, French	(a) of own nationals—yes (b) of others—with prior permission	Yes—with prior permission	Yes
Italy	Ministry of Foreign Affairs	Yes	French, Italian	(a) of own nationals—yes (b) of others—with prior permission	Yes—with prior permission	No
Kuwait	The State of Kuwait, Ministry of Justice, International Relations Department	Yes	Arabic, French	(a) of own nationals—yes (b) of others—with prior permission	Yes—with prior permission	Yes
Latvia	Ministry of Justice	Yes	Latvian, French	(a) of own nationals—yes (b) of others—	Yes—with prior permission	Yes

				with prior permission		
Lithuania	Ministry of Justice	Yes	Lithuanian, French, Russian	Yes—with prior permission	Yes—with prior permission	No
Luxembourg	Parquet General	Yes	French, German	(a) of own nationals—yes (b) of others—with prior permission	Yes—with prior permission	No
Macao Special Administrative Region	Procuratorate of the Macao Special Administrative Region	No	Chinese, Portuguese	(a) of own nationals—yes (b) of others—no	No	No
Mexico	Secretaría de Relaciones Exteriores, Dirección General de Asuntos Jurídicos.	No	Spanish	No, except when specifically ordered to do so by Central Authority.	Generally no See text at the beginning of §13.71.	Generally yes
Monaco	Direction des Services Judiciaires, Palais de Justice	No	French	(a) of own nationals—yes (b) of others—with prior permission	Yes—with prior permission	No
Netherlands	De Officier van Justitie (Public Prosecutor at The Hague District Court)	Yes	French, German, Dutch	Yes—without prior permission	Yes—with prior permission from the President of the District Court	Generally no*
Norway	Royal Ministry of Justice and Police	Yes—with reservations	Norwegian, Danish, and Swedish—with reservations	Yes—with prior permission	Yes—with prior permission	Generally no*
Poland	Ministry of Justice	No	Polish	(a) of own nationals—yes (b) of others—no	No	No
Portugal	Director-General of Judiciary Department (Director Geral dos Serviços Judiciários) of the Ministry of Justice	No	Portuguese	(a) of own nationals—yes with permission (b) of others—no	No	No
Romania	Ministry of Justice	Yes	Romanian, French	(a) of own nationals—yes (b) of others—no	No	Yes
Russian Federation	Ministry of Justice of the Russian Federation	Yes	Russian, French	(a) of own nationals—yes (b) of others—with prior permission	Yes—with prior permission	Yes
Seychelles	Registrar of the Supreme Court	Yes	French	(a) of own nationals—yes (b) of others—	Yes—with prior permission	No

				with prior permission		
Singapore	Registrar of the Supreme Court	Yes	None	No	No	Generally no*
Slovakia	Ministerstvo spravodlivosti Slovenskej republiky	Yes	Slovak, French	Yes—without prior permission if reciprocity applies	Yes—with prior permission	Yes
Slovenia	Ministry of Justice of the Republic of Slovenia	Yes	Slovenian, French	(a) of own nationals—yes (b) of others—with prior permission	Yes—with prior permission	Yes
South Africa	The Director General of the Department of Justice	Yes	Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, isiNdebele, isiXhosa isiZulu	No	Yes—with prior permission	No
Spain	Secretaría General Técnica del Ministerio de Justicia	No	Spanish	Yes	Yes	No
Sri Lanka	Secretary/Ministry of Justice and Constitutional Affairs	English	French (but must be accompanied with English translation)	No	No	No
Sweden	Ministry of Justice	Yes	French, Swedish, Danish, Norwegian	Yes—with prior permission	Yes—with prior permission	Generally no*
Switzerland	Cantonal Central Authorities (See http://www.rhf.admin.ch/rhf/d/service/recht/Kantonale-Zentralbehoerden.pdf)	No	German, French, Italian	Yes—with prior permission	Yes—with prior permission	Generally yes, with reservations
Turkey	Ministry of Justice General Directorate for International Law and Foreign Relations	No	Turkish	Yes—with prior permission	Yes—with prior permission	No
Ukraine	Ministry of Justice	No	Ukrainian	(a) of own nationals—yes (b) of others—no	No	No
United Kingdom—See text of Convention for extensions to British territories	The Foreign and Common-wealth Office (For territories see Convention)	Yes	None	Yes—with prior permission, except if reciprocity applies	Yes—with prior permission, except if reciprocity applies	Generally no* Note: Reciprocity required only when requesting authority seeks to obtain evidence by compulsion under art 18.
United States Note: Includes Guam, Puerto Rico, and Virgin Islands.	U.S. Department of Justice	Yes	French, Spanish for execution in Puerto Rico	Yes—without permission	Yes—without prior permission	Yes

Venezuela	Ministerio de Relaciones Exteriores / Ministry of Foreign Affairs Esquina Carmelitas	No	Spanish	(a) of own nationals—yes (b) of others—with prior permission	No	Generally yes, with reservations

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14

Discovery in Limited Civil Cases

Gayle L. Gough
Peter J. Messrobian

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V. FORMS
- A. Case Questionnaire—For Limited Civil Cases (Under $25,000) (Judicial Council Form DISC-010) §14.23
- B. Request for Statement of Witnesses and Evidence—For Limited Civil Cases (Under $25,000) (Judicial Council Form DISC-015) §14.24
- C. Form Interrogatories—Limited Civil Case (Economic Litigation) (Judicial Council Form DISC-004) §14.25

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§14.1 I. SCOPE OF CHAPTER

In general, a limited civil case is a matter such as a typical tort, lien, or contract dispute in which the amount in controversy does not exceed $25,000. See CCP §§85-87. The economic litigation procedures in CCP §§90-100 provide the discovery procedures for such cases, which are to be resolved more quickly than unlimited civil cases. See §§14.3-14.4. This chapter addresses:

- The nature of a limited civil case and the discovery permitted (see §§14.2-14.4);
- Conducting discovery in a limited civil case, including:
- Creating a discovery plan for a limited civil case (see §§14.6-14.9);
- Using case questionnaires (see §§14.10-14.11);
- Obtaining statements of witnesses and evidence to be introduced at trial (see §§14.12-14.15);
- Using depositions, expert discovery, and interrogatories in a limited civil case (see §14.19); and
- Using deposition subpoenas duces tecum (see §14.21).
- Resolving discovery disputes (see §14.22); and
- Forms for use in a limited civil case (see §§14.23-14.25).

For discussion of creating a discovery plan generally, see chap 2. For discussion of privileges and other protections generally, see chap 3. For discussion of issues created by electronic evidence generally, see chap 4.

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II. NATURE OF LIMITED CIVIL CASES

§14.2 A. Limited Civil Cases Explained

Limited civil cases are those in which all of the following conditions are met (CCP §85):

- The amount in controversy does not exceed $25,000;
- The relief sought is a type which may be granted in a limited civil case; and
- The relief sought is exclusively of a type described in one of a number of statutes, including provisions in the Civil Code, Code of Civil Procedure, Food and Agricultural Code, Government Code, Public Utilities Code, and Vehicle Code.

Limited civil cases under CCP §85 include those cases listed in CCP §86, which include, *e.g.*, actions at law in which the demand or value of the property at issue is $25,000 or less, not including interest; actions for partnership dissolution when the partnership assets do not exceed $25,000; and actions to cancel or rescind contracts in which the amount or property at issue does not exceed $25,000. CCP §86(a)(1)-(3).

For discussion of classification of cases as unlimited or limited, see *Walker v Superior Court* (1991) 53 C3d 257, 262, 279 CR 576 (matter may not be reclassified as municipal court case (now limited civil case) unless matter will necessarily result in verdict of less $25,000). See also *Ytuarte v Superior Court* (2005) 129 CA4th 266, 279, 28 CR3d 474 (plaintiff entitled to reclassification of civil action as unlimited if it demonstrates possibility that damages will exceed $25,000). On classification and reclassification of cases, see California Civil Procedure Before Trial, chap 6 (4th ed Cal CEB 2004).

PRACTICE TIP: When a client is confronted with a matter that does not appear large or complex, counsel should review the statutes listed in CCP §85(c) to determine whether the matter may be appropriately classified as a limited case. For example, proceedings to dispose of an abandoned mobile home (CC §798.61), an action seeking the removal or destruction of an animal that has bitten a person (CC §3342.5), and a motion for the return of a vehicle wrongfully seized by a peace officer (Pub Util C §5411.5(e)) are all limited civil matters.

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§14.3 1. Economic Litigation Procedures

Limited civil cases are subject to the streamlined "economic litigation" procedures set out in CCP §§90-100, including a mechanism for disclosure of witnesses and evidence before trial (see CCP §96). All provisions applicable to civil actions generally also apply to limited civil actions, except as changed by the provisions of the rules of economic litigation. CCP §90. However, a statute related to the authority of the court in an unlimited civil case does not imply that the same authority exists or does not exist in a limited civil case. CCP §89(b).

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§14.4 2. Court's Case Management Rules

Most cases are assigned a disposition time goal of 1 year from the date of filing to disposition. Cal Rules of Ct 3.714(b). For unlimited civil cases, the trial court's time goals are to dispose of 75 percent of cases within 12 months, 85 percent within 18 months, and 100 percent within 24 months. For limited civil cases, however, the time goals are to dispose of 90 percent of cases within 12 months, 98 percent within 18 months, and 100 percent within 24 months. Cal Rules of Ct 3.714(b). Local rules may authorize additional procedures that simplify case management review and conference procedures for limited civil cases (see Cal Rules of Ct 3.722(e)). See, *e.g.,* Los Angeles Ct R 7.9(a)(2).

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§14.5 B. Permissible Discovery in Limited Civil Cases

Limited discovery. Discovery in limited civil cases is allowed only to the extent permitted by CCP §§94 and 95. Under CCP §94(a), a party is limited to using any combination of 35 of the following discovery methods, as to each adverse party:

- Interrogatories, with no subparts;
- Demands to produce documents or things; and
- Requests for admission, with no subparts.

In addition, a party may take one oral or written deposition as to each adverse party, serve on any person a deposition subpoena duces tecum, obtain physical and mental exams, and obtain the identity of expert witnesses. CCP §94. A deposition of an organization is treated as a single deposition even though more than one person may be designated or required to testify. CCP §94(b).

JUDGE'S PERSPECTIVE: Most practitioners in limited personal injury cases issue several deposition subpoenas duces tecum to obtain medical records. This does not defeat the purposes of economic litigation; CCP §94(c) does not limit the number of subpoenas which a party may serve. See §14.21.

Except for the express limitations in the economic litigation provisions, the discovery that is permitted in a limited civil case must comply with the notice and format provisions governing discovery in other civil cases. See CCP §§90, 94, 2016.010-2036.050.

PRACTICE TIP: To limit discovery expense, consider the desirability of filing a smaller case as a limited civil case.

Additional discovery. Additional discovery is permissible on stipulation of the parties or on noticed motion, subject to such terms and conditions as are just. CCP §95. When a motion is made for additional discovery, however, the party must make a showing that the moving party will be unable to prosecute or defend the action effectively without the additional discovery requested. The court must consider whether the moving party used all applicable discovery in good faith and whether the party attempted to secure the additional discovery by stipulation or by means other than formal discovery. CCP §95.

JUDGE'S PERSPECTIVE: Motions for additional discovery are extremely rare. Counsel must be very specific as to why additional discovery is needed and why the current questions and informal discovery could not reveal the needed information.

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III. CONDUCTING DISCOVERY IN LIMITED CIVIL CASE

§14.6 A. Creating a Discovery Plan

Although certain types of matters must be classified as limited civil cases (see §14.2), in essence, almost any matter in which the amount in controversy is less than $25,000 may be classified as limited. Counsel must weigh the advantages and disadvantages of pursuing a limited civil action (or, on the defense side, of seeking to reclassify an unlimited case as limited). The two most significant differences between limited and unlimited matters are the maximum recoverable amount—$25,000 in limited and no ceiling in unlimited—and the limitations on discovery in limited matters. Those limitations apply to all parties to a limited case, although it is also possible to seek leave of court to conduct additional discovery. See CCP §95.

JUDGE'S PERSPECTIVE: Counsel should use the 35 discovery requests judiciously. If further discovery is necessary later, counsel will not want to have used all 35 requests too early.

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§14.7 1. Considering Cost

If a case is valued at less than $25,000, then the cost of a single deposition and propounding and preparation of responses to 35 interrogatories, requests for production, and/or requests for admission is likely to be close to the budget that counsel and the client may set to prepare the case for trial. Thus, the limitations on discovery may comport with the case plan. In short, the discovery limitations may not as a practical matter operate to prevent counsel from accomplishing the discovery necessary to prepare a case for trial.

PRACTICE TIP: Be judicious when planning written discovery in a limited case. Counsel will reach the limit very quickly unless he or she adopts a conservative plan. Consider propounding only those document demands, interrogatories, and requests for admission which elicit the most useful information in unlimited cases and which would be difficult to duplicate informally. Discovery that may result in objections or responses that contain little valuable information should be avoided.

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§14.8 2. Considering Privileges and Other Protections

All of the privileges and protections (such as the attorney work product doctrine) applicable to unlimited civil matters are equally applicable to limited civil matters. CCP §90. On privileges and other protections, see chap 3.

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§14.9 3. Evaluating Impact of Electronic Evidence

There are no special rules concerning the discovery of electronic evidence in limited civil cases. Electronic evidence can have a substantial impact on the conduct of discovery in limited cases, however. The costs associated with responding to demands for electronic evidence, particularly for parties with large repositories of computerized information, can easily become far greater than the maximum value of a limited civil case, a fact that may create pressure on institutional parties to resolve matters quickly. Judges presiding over limited civil cases may look with disfavor on broad discovery demands, however, in part because judges are becoming more aware of the substantial burden electronic evidence discovery places on parties in an era when arguably the vast majority of information is created and maintained solely in electronic form. See §4.2. This burden includes the cost of searching for responsive documents, recovering "lost" or "deleted" documents, and privilege review. To compel a party to expend upwards of tens of thousands of dollars to respond to discovery in a forum in which the maximum recovery is $25,000 is arguably unduly burdensome and certainly undermines the rationale for the creation of limited jurisdiction cases.

PRACTICE TIP: A court may order the requesting party to assume all or part of the costs of translating electronic data into usable form, so use caution in propounding wide-ranging demands for electronic discovery. See *Toshiba Am. Electronic Components, Inc. v Superior Court* (2004) 124 CA4th 762, 773, 21 CR3d 532.

If, however, a discovery demand is relatively narrow, then it may be possible to quickly find helpful information possessed by institutional parties by using the power of computer databases to search vast quantities of information for responsive material. On the use of databases, see §4.26. Because limited cases typically concern very discrete and factually simple issues, counsel should consider carefully crafting very clear, specific, and narrow demands for electronic evidence. In doing so, they may avoid providing the opposing party with a basis for seeking a limit to the demand.

On conducting discovery of electronically stored information, see chaps 4 and 8.

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B. Using a Case Questionnaire

§14.10 1. Case Questionnaire Explained

In addition to the discovery permitted by CCP §§94 and 95, plaintiff may serve a case questionnaire (Judicial Council Form DISC-010) along with the complaint. CCP §93. For sample form, see §14.23. If plaintiff decides to use the questionnaire process, plaintiff must use this form. The plaintiff must complete one copy of the questionnaire and serve it on the defendant along with a blank copy of the questionnaire for the defendant to complete and return to plaintiff. See CCP §93(a)-(b). If plaintiff serves a completed case questionnaire, defendants must serve a completed case questionnaire with defendant's answer to the complaint. CCP §93(b). The reverse is not true: if plaintiff chooses not to serve a completed case questionnaire on defendant, defendant may not serve one on plaintiff in order to compel plaintiff to serve a completed questionnaire.

The purpose of the case questionnaire is to elicit fundamental information about each party's case. The form developed by the Judicial Council is mandatory. It is comprehensive and includes questions that seek:

- A list of claims and defenses;
- The names and addresses of all witnesses with knowledge of facts related to the lawsuit and a list of all documents related to the issues or facts;
- A description of all physical evidence related to the issues and the facts;
- A list of all treating physicians and details of the services they provided;
- The nature and amount of each type of claimed damage (including physical injuries, medical expenses, lost income, property damage and other damage); and
- Information about insurance coverage.

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§14.11 2. Strategic Considerations

If the responses are inadequate, counsel may move for an order compelling supplemental responses. If the opposing party does not comply with the order, the moving party may seek monetary, issue, evidence, and/or terminating sanctions. CCP §93(e).

Use of the questionnaire is voluntary. Counsel for plaintiff must consider whether the value of the information likely to be provided by defendant outweighs the strategic cost of providing the information called for in the questionnaire. As the questions are largely directed to plaintiff's claims, counsel may be hesitant to offer substantial and detailed information to defendant, and risk sanctions if the information is deemed inadequate by the court, in exchange for information about defendant's insurer and defenses. This is particularly true because defendant may state that the information regarding potential defenses is limited because defendant has just received the complaint. A countervailing consideration for plaintiff's counsel is the fact that if defendant does not have the information about plaintiff's claim, defense counsel will not be in a position to recommend settlement to his or her client. The questionnaire seeks the type of information demanded by form interrogatories and the disclosure of that information may help the parties resolve the case.

The questionnaire primarily requests the type of information relevant in a tort matter, but also includes a short section related to contract disputes. See case questionnaire form in §14.23.

JUDGE'S PERSPECTIVE: Parties rarely use the case questionnaire because they are unfamiliar with it and because of its reciprocal nature. Most courts have not heard a motion to compel responses to the case questionnaire.

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§14.12 C. Requesting Statement of Witnesses and Evidence to Be Used at Trial

Either party may serve a request for disclosure of witnesses to be called at trial and documents, photographs, and other evidence to be offered at trial. CCP §96(a). Parties do not need to disclose witnesses and evidence that will be used only for impeachment. See CCP §97.

The request is made on mandatory Judicial Council Form DISC-015. For form, see §14.24.

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§14.13 1. Deadline

To serve. The request for disclosure must be served not more than 45 days or less than 30 days before the date first set for trial unless otherwise ordered. CCP §96(b).

To respond. The statement responding to the request must be served within 20 days from service of the request. CCP §96(c).

NOTE: The times to request disclosure and to respond are subject to extension for mailing and other forms of service as set out in CCP §1013. On the effect of method of service on time to respond to discovery requests, see §2.22.

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§14.14 2. Additional or Amended Disclosure

A party may not serve an additional, amended, or late disclosure except by written stipulation, or unless ordered for good cause on noticed motion. CCP §96(d).

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§14.15 3. Effect of Failure to Respond

A party who fails to respond properly to the request runs the risk that witnesses and evidence omitted from that party's statement will be excluded by the court on the adversary's objection. CCP §97(a). Exceptions to CCP §97(a) include (CCP §97(b)):

- Testimony by a party in his or her individual capacity, called by himself or herself as a witness;
- Testimony of an adverse party;
- Witnesses and evidence used solely for impeachment; and
- Documents obtained by discovery under CCP §§94-95.

The court can admit other testimony and evidence after finding that the party has made a good faith effort to comply with CCP §96(c) or that such noncompliance is excused by mistake, inadvertence, surprise, or excusable neglect under CCP §473. CCP §97(b)(5).

JUDGE'S PERSPECTIVE: When ruling on a motion to exclude witnesses and/or documents for failure to respond, courts often find good faith, mistake, or excusable neglect, especially with parties appearing in pro per.

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D. Depositions in Limited Civil Cases

§14.16 1. One-Deposition Limit

Depositions are subject to stringent limitations in comparison to unlimited civil cases. See CCP §§94-95. In limited cases, each party is permitted only one deposition "[a]s to each adverse party." CCP §94(b).

EXAMPLE: In a three-car motor vehicle accident case involving two plaintiffs (one driver and one passenger) and two defendants (two other drivers), each plaintiff could take two depositions (because each plaintiff is adverse to the two defendants and plaintiffs did not sue each other so they are not adverse), and each defendant could take three depositions (because each defendant is adverse to each plaintiff and the other defendant).

The language of CCP §94 makes it clear that a party in a limited action may notice the deposition of anyone (*e.g.,* parties, witnesses, "persons most knowledgeable") who may be deposed in an unlimited jurisdiction case.

A deposition of an organization must be treated as a single deposition even if more than one person is designated or must be produced to testify under CCP §2025.230. CCP §94(b). Thus, it appears that despite the one-deposition limit, an entity may be compelled to produce any number of witnesses in response to a "person most knowledgeable" notice. On notice of deposition of entity, see §§5.40-5.41. The court may limit the scope of such a notice, given the possibility that a party may be put in the position of producing a host of witnesses in response to a notice which sets forth a substantial number of topics.

PRACTICE TIP: The proper method for seeking relief from an excessive number of depositions is the same in a limited civil case as in any other case, *i.e.*, the party should seek a protective order. On protective orders, see §§15.59-15.84. On depositions, see chaps 5 and 6.

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§14.17 2. Obtaining Additional Depositions

The parties may stipulate to additional discovery, or the court may order additional discovery, subject to just terms and conditions, on a party's noticed motion and a showing that the action cannot be effectively prosecuted or defended without additional discovery. CCP §95. The court must consider the moving party's good faith and its attempts to secure the additional discovery by stipulation or other informal means. CCP §95(a). Thus, it is possible to obtain more than one deposition in a limited civil case.

PRACTICE TIP: Because the only depositions taken in a limited case are likely to be those of the plaintiff and defendant, it is not easy to obtain sworn testimony from witnesses. Counsel can consider obtaining declarations from witnesses as early as possible in the case in order to "lock in" their testimony at trial. Declarations are admissible at trial if certain conditions are met. CCP §98.

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§14.18 3. Out-of-State Depositions in Limited Civil Case

There are no special rules or limitations regarding out-of-state depositions in a limited civil case. Although the expenses associated with an out-of-state deposition may be prohibitive in a limited case, if the key witness is out of state then the deposing party may notice and take the deposition pursuant to CCP §2026.010 (depositions in another state) or §2027.010 (depositions in a foreign nation). On out-of-state depositions, see chap 12; on foreign depositions, see chap 13.

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§14.19 E. Expert Discovery in Limited Civil Cases

Under CCP §94(e), parties in limited civil cases may discover the identity of expert witnesses by availing themselves of the procedures governing the simultaneous exchange of expert witness information. See CCP §§2034.010-2034.730. Although §94(e) refers only to the "identity" of expert witnesses, it also appears to permit the parties to demand the exchange of expert information available in unlimited civil matters. Generally, parties will agree to produce all information required under CCP §2034.260, including expert reports, but the statute is not clear on this issue.

JUDGE'S PERSPECTIVE: Courts vary on whether a party must provide just the identity of the expert or all the information required in an expert witness disclosure under CCP §2034.260.

Under certain conditions, depositions or declarations of expert witnesses may be offered to the court instead of direct testimony, provided the offering party serves the other side with the statement 30 days prior to trial (CCP §98(a)), or the proposed statement consists of all or part of a deposition in which the other side had the opportunity to participate. CCP §98(b).

JUDGE'S PERSPECTIVE: The "one-deposition rule" probably does not allow for an additional deposition of a designated expert. If counsel has taken a deposition and needs to depose a designated expert, counsel should move for additional discovery. The court will probably grant a motion to depose an expert.

On exchange of expert witness information, see chap 11.

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§14.20 F. Interrogatories

As to each adverse party, a party may propound up to 35 interrogatories (see CCP §94(a)), but doing so will prevent the requesting party from serving the responding party with any demands to produce documents or things or requests for admissions. In limited civil cases, a total of 35 interrogatories, production demands, and requests for admission may be used. CCP §94.

The optional Judicial Council form interrogatories for economic litigation (Form DISC-004) count towards the total. CCP §94(a). For form, see §14.25. The form interrogatories are modeled on the Judicial Council form interrogatories for unlimited litigation and there is substantial overlap between them and the Case Questionnaire (see §14.10).

PRACTICE TIP: Because some of the information sought by the form interrogatories may not be of great value in a given case (*i.e.,* plaintiff's driver's license number is not typically of much use to defendant in a slip-and-fall matter), counsel should carefully consider which, if any, form interrogatories to serve.

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§14.21 G. Deposition Subpoenas Duces Tecum in Limited Civil Case

Any party may serve any person with a deposition subpoena duces tecum requiring the person served to mail copies of the requested documents, books, or records to the party's counsel, along with an affidavit complying with Evid C §1561. CCP §94(c). The issuing party must serve a copy of the response to any other party who tenders the reasonable cost of duplicating the response. CCP §94(c). Section 94 does not place a limit on the number of subpoenas which a party may serve. On deposition subpoenas for the production of records and documents, see §§5.85-5.107.

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§14.22 IV. RESOLVING DISPUTES IN LIMITED CIVIL CASE

All motions permitted in unlimited civil litigation are permitted in limited matters, with the exception of special demurrers and motions to strike on any grounds other than that the damages or relief sought are unsupported by the allegations of the complaint. CCP §92(d)-(e). Thus dispositive motions and discovery motions are permitted in limited matters. On motions and sanctions, see chap 15.

PRACTICE TIP: The decision to file a discovery motion in a limited civil case depends more on strategy than cost. If the propounding party has carefully planned the discovery and the responding party fails to comply, then the propounding party must consider whether the lack of discovery may have an adverse impact on the case. If so, then a clear and concise motion may be advisable. For example, if the responding party fails to produce the names of treating doctors or witnesses to the incident, then the propounding party may need to file a motion to compel the production of the names in order to subpoena records or conduct an investigation.

JUDGE'S PERSPECTIVE: Most motions to compel in limited civil cases arise when the answering party has failed to respond to discovery requests. The cost to bring the motion to compel and a second motion for terminating sanctions may be justified to avoid a trial. A motion to compel further responses after an inadequate response is often not cost-effective.

Writ petitions or appeals from a discovery order in limited civil cases should be filed in the appellate division of the superior court. CCP §77. See §16.28. See also California Civil Writ Practice §12.4 (4th ed Cal CEB 2008); California Civil Appellate Practice, chap 10 (3d ed Cal CEB 1996).

Some jurisdictions offer economical early evaluation services, *e.g.,* the Voluntary Early Mediation Program and Early Settlement Program offered by the Superior Court of the City and County of San Francisco. Courts may also be able to provide lists of independent mediators who may serve as mediators. Judicial arbitration also may provide clients with an economical, neutral evaluation of the case and facilitate resolution. On judicial arbitration and other forms of alternative dispute resolution, see A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005).

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Source: Civil Litigation/California Civil Discovery Practice/14 Discovery in Limited Civil Cases/ V. FORMS/§14.23 A. Case Questionnaire--For Limited Civil Cases (Under $25,000) (Judicial Council Form DISC-010)

V. FORMS

§14.23 A. Case Questionnaire—For Limited Civil Cases (Under $25,000) (Judicial Council Form DISC-010)



DO NOT FILE WITH THE COURT

THIS IS NOT AN ANSWER OR RESPONSE TO THE COMPLAINT

DISC-010

SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
PLAINTIFF *(Name)*: DEFENDANT *(Name)*:	CASE NUMBER

CASE QUESTIONNAIRE—FOR LIMITED CIVIL CASES (Under $25,000)

REQUESTING PARTY *(Name)*:

RESPONDING PARTY *(Name)*:

—INSTRUCTIONS—

A. The purpose of the case questionnaire is to help the parties settle their differences without spending a lot of money. This is accomplished by exchanging information about the case early in the lawsuit. The exchange of case questionnaires may be started only by a plaintiff (or cross-complainant) in a limited civil case. The case questionnaire is optional, and if plaintiff (or cross-complainant) exercises the option, only this form may be used.

B. **Instructions for plaintiffs (and cross-complainants)**

1. Under Code of Civil Procedure section 93, a plaintiff (or cross-complainant) may serve a completed case questionnaire and a blank questionnaire with a complaint (or cross-complaint).
2. This is the only way you can require defendants (or cross-defendants) to serve you with a completed case questionnaire.

C. **Instructions for defendants (and cross-defendants)**

1. If you have been served with a completed case questionnaire by a plaintiff (or cross-complainant), then you must fill in the blank case questionnaire. Your completed case questionnaire must be served on that same plaintiff (or cross-complainant) with your answer to the complaint (or cross-complaint).
2. **THIS IS NOT AN ANSWER OR RESPONSE TO THE COMPLAINT.**

D. **Instructions for all parties**

1. **ALL QUESTIONS REFER TO THE INCIDENT OR AGREEMENT IN THIS LAWSUIT ONLY.**
2. Answer each question. If a question is not applicable, answer "NA."
3. Your answers are not limited to your personal knowledge, but you are required to furnish information available to you or to anyone acting on your behalf, whether you are a plaintiff, defendant, cross-complainant, or cross -defendant.
4. Type or legibly print your answer below each question. If you cannot completely answer a question in the space provided on the case questionnaire, check the "attachment" box and put the number of the question and the complete answer on an attached sheet of paper or form MC-025. You should *not* put part of an answer on the case questionnaire and part on the attachment. You may put more than one answer on each attached page.
5. When you have completed the case questionnaire, sign the verification and serve the original.
6. You may compel compliance with these requirements under Code of Civil Procedure section 93.
7. **DO NOT FILE THIS CASE QUESTIONNAIRE WITH THE COURT.**

Print

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

—QUESTIONS—

1. FOR ALL CASES

   a. State your name and street address.

   b. State your current business name and street address, the type of business entity, and your title.

   c. Describe in detail your claims or defenses and the facts on which they are based, giving relevant dates.

   ☐ See attachment for answer number 1c.

   d. State the name, street address, and telephone number of each person who has knowledge of facts relating to this lawsuit, and specify his or her area of knowledge.

   ☐ See attachment for answer number 1d.

   e. Describe each document or photograph that relates to the issues or facts. You are encouraged to attach a copy of each. For each that you have described but not attached, state the name, street address, and telephone number of each person who has it.

   ☐ See attachment for answer number 1e.

Print

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

1. f. Describe each item of physical evidence that relates to the issues and facts; give its location; and state the name, street address, and telephone number of each person who has it.

☐ See attachment for answer number 1f.

g. State the name and street address of each insurance company and the number of each policy that may cover you in whole or part for the damages claimed.

☐ See attachment for answer number 1g.

2. FOR PERSONAL INJURY OR PROPERTY DAMAGE CASES

a. Describe each injury or illness that you received and your present complaints about each.

☐ See attachment for answer number 2a.

b. State the name, street address, and telephone number of each physician, dentist, or other health care provider who treated or examined you; the type of treatment; the dates of treatment; and the charges by each to date.

☐ See attachment for answer number 2b.

c. Itemize the medical expenses you anticipate in the future.

☐ See attachment for answer number 2c.

d. Itemize your loss of income to date, give the name and street address of each source, and show how the loss is computed.

☐ See attachment for answer number 2d.

Print

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

2. e. Itemize the loss of income you anticipate in the future, give the name and street address of each source, and show how the loss is computed.

☐ See attachment for answer number 2e.

f. Itemize your property damage, and state the amount or attach an itemized bill or estimate.

☐ See attachment for answer number 2f.

9. Describe each other item of damage or cost that you claim, and state the amount.

☐ See attachment for answer number 2g.

3. FOR CASES BASED ON AGREEMENTS

a. In addition to your answer to 1e, state all the terms and give the date of any part of the agreement that is not in writing.

☐ See attachment for answer number 3a.

b. Describe each item of damage or cost you claim, state the amount, and show how it is computed.

☐ See attachment for answer number 3b.

VERIFICATION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

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Source: Civil Litigation/California Civil Discovery Practice/14 Discovery in Limited Civil Cases/§14.24 B. Request for Statement of Witnesses and Evidence--For Limited Civil Cases (Under $25,000) (Judicial Council Form DISC-015)

§14.24 B. Request for Statement of Witnesses and Evidence—For Limited Civil Cases (Under $25,000) (Judicial Council Form DISC-015)



DO NOT FILE WITH THE COURT **DISC-015**

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name *and Address*):
TELEPHONE NO.: FAX NO. (*Optional*):
E-MAIL ADDRESS (*Optional*):
ATTORNEY FOR (*Name*):
SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:
PLAINTIFF:
DEFENDANT:

REQUEST FOR STATEMENT OF WITNESSES AND EVIDENCE— FOR LIMITED CIVIL CASES (UNDER $25,000) **Requesting Party *(name):*** **Responding Party *(name):***	CASE NUMBER:

Under Code of Civil Procedure section 96, you are requested to serve on the undersigned, within 20 days, a statement of:

1. The names and street addresses of witnesses you intend to call at trial (except for any individual who is a party to this action).

2. A description of each document that you intend to offer at trial. Attach a copy of each document available to you.

3. A description of each photograph and other physical evidence you intend to offer at trial.

Witnesses and evidence that will be used only for impeachment need not be included.

You Will Not Be Permitted To Call Any Witness Or Introduce Any Evidence Not Included In Your Statement in Response To This Request, Except As Otherwise Provided By Law.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

Form Adopted for Mandatory Use
Judicial Council of California
DISC-015 [Rev. January 1, 2007]

REQUEST FOR STATEMENT OF WITNESSES AND EVIDENCE— FOR LIMITED CIVIL CASES (UNDER $25,000)

Code of Civil Procedure, §§ 96, 97

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Source: Civil Litigation/California Civil Discovery Practice/14 Discovery in Limited Civil Cases/§14.25 C. Form Interrogatories--Limited Civil Case (Economic Litigation) (Judicial Council Form DISC-004)

§14.25 C. Form Interrogatories—Limited Civil Case (Economic Litigation) (Judicial Council Form DISC-004)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	
TELEPHONE NO.: FAX NO. (*Optional*): E-MAIL ADDRESS (*Optional*): ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
SHORT TITLE:	
FORM INTERROGATORIES—LIMITED CIVIL CASES (Economic Litigation) **Asking Party:** **Answering Party:** **Set No.:**	CASE NUMBER:

Sec. 1. Instructions to All Parties

(a) Interrogatories are written questions prepared by a party to an action that are sent to any other party in the action to be answered under oath. The interrogatories below are form interrogatories approved for use in economic litigation.

(b) For time limitations, requirements for service on other parties, and other details, see Code of Civil Procedure sections 2030.010–2030.410 and the cases construing those sections.

(c) These form interrogatories do not change existing law relating to interrogatories, nor do they affect an answering party's right to assert any privilege or make any objection.

Sec. 2. Instructions to the Asking Party

(a) These interrogatories are designed for optional use by parties under economic litigation in limited civil cases. See Code of Civil Procedure sections 90 through 100. However, these interrogatories also may be used in unlimited civil cases.

(b) There are restrictions on discovery for most limited civil cases. These restrictions limit the number of interrogatories that may be asked. For details, read Code of Civil Procedure section 94.

(c) Some of these interrogatories are similar to questions in the *Case Questionnaire for Limited Civil Cases* (form DISC-010) and may be omitted if the information sought has already been provided in a completed *Case Questionnaire*.

(d) Check the box next to each interrogatory that you want the answering party to answer. Use care in choosing those interrogatories that apply to the case and are within the restrictions discussed above.

(e) You may insert your own definition of **INCIDENT** in Section 4, but only where the action arises from a course of conduct or a series of events occurring over a period of time.

(f) The interrogatories in section 116.0, Defendant's Contentions - Personal Injury, should not be used until defendant has had a reasonable opportunity to conduct an investigation or discovery of plaintiff's injuries and damages.

(g) Additional interrogatories may be attached, subject to the restrictions discussed above.

Sec. 3. Instructions to the Answering Party

(a) Subject to the restrictions discussed above, you must answer or provide another appropriate response to each interrogatory that has been checked below.

(b) As a general rule, within 30 days after you are served with these interrogatories, you must serve your responses on the asking party and serve copies of your responses on all other parties who have appeared. See Code of Civil Procedure sections 2030.260–2030.270 for details.

(c) Each answer must be as complete and straight-forward as the information reasonably available to you permits. If an interrogatory cannot be answered completely, answer it to the extent possible.

(d) If you do not have enough personal knowledge to fully answer an interrogatory, say so, but make a reasonable and good faith effort to get the information by asking other persons or organizations, unless the information is equally available to the asking party.

(e) Whenever an interrogatory may be answered by referring to a document, the document may be attached as an exhibit to the response and referred to in the response. If the document has more than one page, refer to the page and section where the answer to the interrogatory can be found.

(f) Whenever an address and telephone number for the same person are requested in more than one interrogatory, you are required to furnish them in answering only the first interrogatory asking for that information.

(g) Your answers to these interrogatories must be verified, dated, and signed. You may wish to use the following form at *the end of your answers:*

I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.

(DATE) _____ (SIGNATURE) _____

Sec. 4. Definitions

Words in **BOLDFACE CAPITALS** in these interrogatories are defined as follows:

(Check one of the following):

(a) ☐ (1) **INCIDENT** includes the circumstances and events surrounding the alleged accident, injury, or other occurrence or breach of contract giving rise to this action or proceeding.

Form Approved for Optional Use Judicial Council of California
DISC-004 [Rev. January 1, 2007]

CEB
Code of Civil Procedure, §§ 94, 2030.010-2030.410, 2033.710

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☐ **(2) INCIDENT** means *(insert your definition here or on a separate, attached sheet labeled "Sec. 4(a) (2)"):*

(b) **YOU OR ANYONE ACTING ON YOUR BEHALF** includes you, your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf.

(c) **PERSON** includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

(d) **DOCUMENT** means a writing, as defined in Evidence Code section 250, and includes the original or a copy of handwriting, typewriting, printing, photostating, photographing, electronically stored information, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(e) **HEALTH CARE PROVIDER** includes any **PERSON** referred to in Code of Civil Procedure section 667.7(e)(3).

(f) **ADDRESS** means the street address, including the city, state, and zip code.

Sec. 5. Interrogatories

The following interrogatories have been approved by the Judicial Council under Code of Civil Procedure section 2033.710:

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101.0 Identity of Persons Answering These Interrogatories

☐ 101.1 State the name, **ADDRESS,** telephone number, and relationship to you of each **PERSON** who prepared or assisted in the preparation of the responses to these interrogatories. (Do not identify anyone who simply typed or reproduced the responses.)

102.0 General Background Information - Individual

☐ 102.1 State your name, any other names by which you have been known, and your **ADDRESS.**

☐ 102.2 State the date and place of your birth.

☐ 102.3 State, as of the time of the **INCIDENT,** your driver's license number, the state of issuance, the expiration date, and any restrictions.

☐ 102.4 State each residence **ADDRESS** for the last five years and the dates you lived at each **ADDRESS.**

☐ 102.5 State the name, **ADDRESS,** and telephone number of each employer you have had over the past five years and the dates you worked for each.

☐ 102.6 Describe your work for each employer you have had over the past five years.

☐ 102.7 State the name and **ADDRESS** of each academic or vocational school you have attended, beginning with high school, and the dates you attended each.

☐ 102.8 If you have ever been convicted of a felony, state, for each, the offense, the date and place of conviction, and the court and case number.

☐ 102.9 State the name, **ADDRESS,** and telephone number of any **PERSON** for whom you were acting as an agent or employee at the time of the **INCIDENT.**

☐ 102.10 Describe any physical, emotional, or mental disability or condition that you had that may have contributed to the occurrence of the **INCIDENT.**

☐ 102.11 Describe the nature and quantity of any alcoholic beverage, marijuana, or other drug or medication of any kind that you used within *24* hours before the **INCIDENT.**

103.0 General Background Information - Business Entity

☐ 103.1 State your current business name and **ADDRESS,** type of business entity, and your title.

104.0 Insurance

☐ 104.1 State the name and **ADDRESS** of each insurance company and the policy number and policy limits of each policy that may cover you, in whole or in part, for the damages related to the **INCIDENT.**

105.0 *[Reserved]*

106.0 Physical, Mental, or Emotional Injuries

☐ 106.1 Describe each injury or illness related to the **INCIDENT.**

☐ 106.2 Describe your present complaints about each injury or illness related to the **INCIDENT.**

☐ 106.3 State the name, **ADDRESS,** and telephone number of each **HEALTH CARE PROVIDER** who treated or examined you for each injury or illness related to the **INCIDENT** and the dates of treatment or examination.

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☐ 106.4 State the type of treatment or examination given to you by each **HEALTH CARE PROVIDER** for each injury or illness related to the **INCIDENT.**

☐ 106.5 State the charges made by each **HEALTH CARE PROVIDER** for each injury or illness related to the **INCIDENT.**

☐ 106.6 State the nature and cost of each health care service related to the **INCIDENT** not previously listed (for example, medication, ambulance, nursing, prosthetics).

☐ 106.7 State the nature and cost of the health care services you anticipate in the future as a result of the **INCIDENT.**

☐ 106.8 State the name and **ADDRESS** of each **HEALTH CARE PROVIDER** who has advised you that you may need future health care services as a result of the **INCIDENT.**

107.0 Property Damage

☐ 107.1 Itemize your property damage and, for each item, state the amount or attach an itemized bill or estimate.

108.0 Loss of Income or Earning Capacity

☐ 108.1 State the name and **ADDRESS** of each employer or other source of the earnings or income you have lost as a result of the **INCIDENT.**

☐ 108.2 Show how you compute the earnings or income you have lost, from each employer or other source, as a result of the **INCIDENT.**

☐ 108.3 State the name and **ADDRESS** of each employer or other source of the earnings or income you expect to lose in the future as a result of the **INCIDENT.**

☐ 108.4 Show how you compute the earnings or income you expect to lose in the future, from each employer or other source, as the result of the **INCIDENT.**

109.0 Other Damages

☐ 109.1 Describe each other item of damage or cost that you attribute to the **INCIDENT,** stating the dates of occurrence and the amount.

110.0 Medical History

☐ 110.1 Describe and give the date of each complaint or injury, whether occurring *before or after* **INCIDENT,** that involved the same part of your body claimed to have been injured in the **INCIDENT.**

☐ 110.2 State the name, **ADDRESS,** and telephone number of each **HEALTH CARE PROVIDER** who examined or treated you for each injury or complaint, whether occurring *before or after* the **INCIDENT,** that involved the same part of your body claimed to have been injured in the **INCIDENT** and the dates of examination or treatment.

111.0 Other Claims and Previous Claims

☐ 111.1 Identify each personal injury claim that **YOU OR ANYONE ACTING ON YOUR BEHALF** have made within the past ten years and the dates.

☐ 111.2 State the case name, court, and case number of each personal injury action or claim filed by **YOU OR ANYONE ACTING ON YOUR BEHALF** within the past ten years.

112.0 Investigation - General

☐ 112.1 State the name, **ADDRESS,** and telephone number of each individual who has knowledge of facts relating to the **INCIDENT,** and specify his or her area of knowledge.

☐ 112.2 State the name, **ADDRESS,** and telephone number of each individual who gave a written or recorded statement relating to the **INCIDENT** and the date of the statement.

☐ 112.3 State the name, **ADDRESS,** and telephone number of each **PERSON** who has the original or a copy of a written or recorded statement relating to the **INCIDENT.**

☐ 112.4 Identify each document or photograph that describes or depicts any place, object, or individual concerning the **INCIDENT** or plaintiff's injuries, or attach a copy. (if you do not attach a copy, state the name, **ADDRESS,** and telephone number of each **PERSON** who had the original document or photograph or a copy.)

☐ 112.5 Identify each other item of physical evidence that shows how the **INCIDENT** occurred or the nature or extent of plaintiff's injuries, and state the location of each item, and the name, **ADDRESS,** and telephone number of each **PERSON** who has it.

113.0 *[Reserved]*

114.0 Statutory or Regulatory Violations

☐ 114.1 If you contend that any **PERSON** involved in the **INCIDENT** violated any statute, ordinance, or regulation and that the violation was a cause of the **INCIDENT,** identify each **PERSON** and the statute, ordinance, or regulation.

115.0 Claims and Defenses

☐ 115.1 State in detail the facts upon which you base your claims that the **PERSON** asking this interrogatory is responsible for your damages.

☐ 115.2 State in detail the facts upon which you base your contention that you are not responsible, in whole or in part, for plaintiff's damages.

☐ 115.3 State the name, **ADDRESS,** and the telephone number of each **PERSON,** other than the **PERSON** asking this interrogatory, who is responsible, in whole or in part, for damages claimed in this action.

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116.0 Defendant's Contentions - Personal Injury

[See Instruction 2(f)]

☐ 116.1 If you contend that any **PERSON,** other than you or plaintiff, contributed to the occurrence of the **INCIDENT** or the injuries or damages claimed by plaintiff, state the name, **ADDRESS,** and telephone number of each individual who has knowledge of the facts upon which you base your contention.

☐ 116.2 If you contend that plaintiff was not injured in the **INCIDENT,** state the name, **ADDRESS,** and telephone number of each individual who has knowledge of the facts upon which you base your contention.

☐ 116.3 If you contend that the injuries or the extent of the injuries claimed by plaintiff were not caused by the **INCIDENT,** state the name, **ADDRESS,** and telephone number of each individual who has knowledge of the facts upon which you base your contention.

☐ 116.4 If you contend that any of the services furnished by any **HEALTH CARE PROVIDER** were not related to the **INCIDENT,** state the name, **ADDRESS,** and telephone number of each individual who has knowledge of the facts upon which you base your contention.

☐ 116.5 If you contend that any of the costs of services furnished by any **HEALTH CARE PROVIDER** were unreasonable, identify each service that you dispute, the cost, and the **HEALTH CARE PROVIDER.**

☐ 116.6 If you contend that any part of the loss of earnings or income claimed by plaintiff was unreasonable, identify each part of the loss that you dispute and each source of the income or earnings.

☐ 116.7 If you contend that any of the property damage claimed by plaintiff was not caused by the **INCIDENT,** identify each item of property damage that you dispute.

☐ 116.8 If you contend that any of the costs of repairing the property damage claimed by plaintiff were unreasonable, identify each cost item that you dispute.

☐ 11 6.9 If you contend that, within the last ten years, plaintiff made a claim for personal injuries that are related to the injuries claimed in the **INCIDENT,** identify each related injury and the date.

☐ 116.10 If you contend that, within the past ten years, plaintiff made a claim for personal injuries that are related to the injuries claimed in the **INCIDENT,** state the name, court, and case number of each action filed.

117.0 *[Reserved]*

120.0 How the Incident Occurred - Motor Vehicle

☐ 120.1 State how the **INCIDENT** occurred.

☐ 120.2 For each vehicle involved in the **INCIDENT,** state the year, make, model, and license number.

☐ 120.3 For each vehicle involved in the **INCIDENT,** state the name, **ADDRESS,** and telephone number of the driver.

☐ 120.4 For each vehicle involved in the **INCIDENT,** state the name, **ADDRESS,** and telephone number of each occupant other than the driver.

☐ 120.5 For each vehicle involved in the **INCIDENT,** state the name, **ADDRESS,** and telephone number of each registered owner.

☐ 120.6 For each vehicle involved in the **INCIDENT,** state the name, **ADDRESS,** and telephone number of each lessee.

☐ 120.7 For each vehicle involved in the **INCIDENT,** state the name, **ADDRESS,** and telephone number of each owner other than the registered owner or lien holder.

☐ 120.8 For each vehicle involved in the **INCIDENT,** state the name of each owner who gave permission or consent to the driver to operate the vehicle.

150.0 Contract

☐ 150.1 Identify all **DOCUMENTS** that are part of the agreement and for each state the name, **ADDRESS, and** telephone number of the **PERSON** who has each **DOCUMENT.**

☐ 150.2 State each part of the agreement not in writing, the name, **ADDRESS,** and telephone number of each **PERSON** agreeing to that provision, and the date that part of the agreement was made.

☐ 150.3 Identify all **DOCUMENTS** that evidence each part of the agreement not in writing, and for each state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT.**

☐ 150.4 Identify all **DOCUMENTS** that are part of each modification to the agreement, and for each state the name **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT.**

☐ 150.5 State each modification not in writing, the date, and the name, **ADDRESS,** and telephone number of the **PERSON** agreeing to the modification, and the date the modification was made.

☐ 150.6 Identify all **DOCUMENTS** that evidence each modification of the agreement not in writing and for each state the name, **ADDRESS,** and telephone number of the **PERSON** who has each **DOCUMENT.**

☐ 150.7 Describe and give the date of every act or omission that you claim is a breach of the agreement.

☐ 150.8 Identify each agreement excused and state why performance was excused.

☐ 150.9 Identify each agreement terminated by mutual agreement and state why it was terminated, including dates.

☐ 150.10 Identify each unenforceable agreement and state the facts upon which your answer is based.

☐ 150.11 Identify each ambiguous agreement and state the facts upon which your answer is based.

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Discovery Motion Practice and Sanctions

Jeffrey A. Tidus

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§15.1 I. SCOPE OF CHAPTER

This chapter discusses the use of motions to obtain judicial intervention in the discovery process. It begins by discussing the judicial role in the chiefly self-executing discovery process (see §§15.2-15.10) and then addresses:

- How counsel can obtain orders shortening time, including issues relating to timing and the statutory guidelines that restrict when a motion can be brought (see §§15.11-15.29);
- The use of motions to compel discovery and other discovery motions (see §§15.30-15.58);
- Motions for protective orders (see §§15.59-15.84); and
- Motions for sanctions and the role of the various types of sanctions available under the California Civil Discovery Act and the Federal Rules of Civil Procedure (see §§15.85-15.116).

Further information about discovery motions may also be found in the chapters on each of the particular discovery methods. See chaps 5-12.

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II. UNDERSTANDING THE JUDICIAL ROLE IN DISCOVERY

§15.2 A. Discovery Generally Self-Executing

The provisions of the Civil Discovery Act are generally self-executing. *Townsend v Superior Court* (1998) 61 CA4th 1431, 1434, 72 CR2d 333. In other words, a party may, without prior court approval or any showing of good cause, obtain from any other party discovery regarding any unprivileged matter "that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if that matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." CCP §2017.010. On the scope of discovery, see §§1.34-1.81.

There are a few exceptions. For example, unless the plaintiff is seeking recovery for personal injuries (CCP §§2032.210-2032.260), a party wishing to obtain discovery by a physical or mental examination must first obtain a court order. CCP §2032.310(a). On physical and mental examinations, see chap 10. In a civil action alleging sexual harassment, sexual assault, or sexual battery, a party may obtain discovery concerning the plaintiff's sexual conduct with individuals other than with the alleged perpetrator only by means of a noticed motion. CCP §2017.220(a). See §15.7. On the right to privacy and discovery, see §§1.57, 3.156-3.164. And, unless the defendant's financial condition is itself an issue, information about a defendant's assets, although potentially relevant to the ability to respond in damages, is discoverable only when there is a claim for punitive damages, and then only when the conditions of CC §3295 are met. See discussion in §1.41.

In general, however, the parties are to conduct discovery themselves, without recourse to the court unless necessary.

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§15.3 B. Attempting Informal Resolution (Meet-and-Confer Requirement)

Because discovery is intended to be self-executing, virtually all motions authorized under California's discovery statutes require that counsel for both the moving and opposing parties make a good faith effort to informally resolve their dispute before seeking court intervention. CCP §2016.040. See §§15.42-15.44, 15.70. A "meet-and-confer" declaration stating facts showing a good faith attempt at an informal resolution of each issue presented must accompany most motions. See, *e.g.*, CCP §§2030.300(b) (interrogatories), 2031.310(b)(2) (inspection demands), 2033.290(b) (requests for admission).

PRACTICE TIP: Even if an effort to informally resolve the dispute is not statutorily required, such as when no responses at all have been served (see, *e.g.*, CCP §2030.290), counsel will be hard pressed to justify to the client the time, effort, and expense of preparing a motion to compel if counsel has not sent opposing counsel a letter or made a telephone call inquiring about the status of the overdue discovery. Even if the court later grants a request for attorney fees, the award will almost never cover the full cost to the client of a motion that might easily have been avoided.

The meet-and-confer process can help resolve the issues and, at the same time, foster greater communication with opposing counsel. Taking advantage of opportunities to communicate with opposing counsel on substantive issues in the case generally helps facilitate an early resolution.

The importance of the meet-and-confer requirement cannot be overstated. In fact, the court is required to impose monetary sanctions not only on any party or attorney who fails to engage in the meet-and-confer process (CCP §2023.020), but also on any party, person, or attorney who unsuccessfully makes or opposes a motion to compel, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (see, *e.g.*, CCP §2030.300(d)). The refusal to meet-and-confer is a separate offense entitling the moving party to sanctions. *Parker v Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 294, 57 CR3d 18. On sanctions, see §§15.85-15.116.

JUDGE'S PERSPECTIVE: Sometimes counsel does nothing more than make a pro forma gesture that does not represent a meaningful effort to resolve the discovery dispute (*e.g.*, faxing a letter demanding that the adversary concede on all issues and further demanding a response in a few hours). In this instance, counsel is likely not only to lose the motion, but also to be sanctioned for failing to meet and confer. See *Townsend v Superior Court* (1998) 61 CA4th 1431, 1437, 72 CR2d 333 (trial court order granting motion to compel and awarding sanctions vacated when parties made no attempt at informal resolution other than engaging in heated argument during deposition).

The amount of effort required to satisfy the meet-and-confer requirement depends on a number of factors, including the history of the litigation, the type and scope of discovery requested, the size and complexity of the case, the prospect for success, and the availability of opposing counsel to confer. See *Stewart v Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1016, 105 CR2d 115, citing *Obregon v Superior Court* (1998) 67 CA4th 424, 431, 79 CR2d 62.

PRACTICE TIP: Sometimes even the best efforts of the parties cannot resolve a legitimate dispute over discovery. In such cases, in addition to detailing the efforts counsel have made to resolve the dispute in the motion to compel, it can be useful for counsel to stipulate that neither party will seek monetary sanctions. Such a stipulation helps demonstrate to the trial court that each party is trying to act in good faith and that the parties really need the court's assistance to resolve the issues.

For further discussion of the duty to meet and confer, see §§15.42-15.44, 15.70.

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§15.4 C. Role of Good Cause

When a party must apply to the court to obtain discovery or relief from discovery, a showing of good cause is often a statutory requirement.

Good cause is a flexible concept that entails considerable trial court discretion. *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 379, 15 CR 90. What specific facts are required to show good cause depends on the issues in the particular case. *Associated Brewers Distrib. Co. v Superior Court* (1967) 65 C2d 583, 587, 55 CR 772.

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§15.5 1. Existence of Good Cause Is Factual Question

The existence of good cause is a question of fact. *Associated Brewers Distrib. Co. v Superior Court* (1967) 65 C2d 583, 55 CR 772. The presence or absence of good cause must be established by production of, and arguments about, evidence. See *Westinghouse Elec. Corp. v Newman & Holtzinger* (1995) 39 CA4th 1194, 1208, 46 CR2d 151; *Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 CA3d 840, 850, 176 CR 874. Unlike most questions of fact, the presence or absence of good cause will generally be determined on motion rather than at trial. Accordingly, the evidence may be presented in any manner consistent with rules of pleading and practice, but it is ordinarily presented by declaration or affidavit. *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 389, 15 CR 90. Good cause may also be established by pleadings, by oral testimony, and, in rare circumstances, by admitted facts.

PRACTICE TIP: When a showing of good cause is at issue in a motion, the moving party should identify in the supporting declaration specifically what documents and facts are being relied on.

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2. When Showing of Good Cause Is Required

§15.6 a. Physical or Mental Examinations Under CCP §2032.310

Except in cases in which the plaintiff is seeking recovery for personal injuries, good cause is required to justify a physical or mental examination under CCP §2032.310. CCP §2032.320(a). On physical and mental examinations, see chap 10.

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§15.7 b. Discovery of Plaintiff's Sexual Conduct Under CCP §2017.220(a)

In a civil action alleging sexual harassment, sexual assault, or sexual battery, a party must show good cause to obtain discovery concerning the plaintiff's sexual conduct with individuals other than with the alleged perpetrator. CCP §2017.220(a). Specific facts must be established to show good cause, and the matter sought to be discovered must be shown to be relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. CCP §2017.220(a).

The showing of good cause to justify a discovery order under CCP §2017.220(a) is stronger than the showing necessary to justify an order for a general mental examination. *Vinson v Superior Court* (1987) 43 C3d 833, 843 n8, 239 CR 292. To intrude into the plaintiff's sexual privacy, a party must show "specific facts justifying that particular inquiry" and the "inquiry into sexuality should not be permitted absent 'extraordinary circumstances.'" 43 C3d at 843 n8. See also *Barrenda L. v Superior Court* (1998) 65 CA4th 794, 802, 76 CR2d 727 (discovery of plaintiff's other sexual activity not permitted; defense counsel's declaration inadequate to establish foundation to show nexus between other sexual activity and nature of damages claimed by plaintiff).

Although the constitutional right to privacy also protects against unwarranted disclosure of a person's sexual conduct (see Cal Const art I, §1), California courts have interpreted CCP §2017.220(a) to be a sufficient safeguard of a plaintiff's privacy interests so that in most cases covered by CCP §2017.220, "a separate weighing of privacy against discovery will not be necessary." *Vinson v Superior Court* (1987) 43 C3d 833, 844, 239 CR 292. See also *Mendez v Superior Court* (1988) 206 CA3d 557, 569, 253 CR 731.

EXAMPLE: In an action for sexual assault, battery, and infliction of emotional distress against a coworker by a sheriff's department employee, the court precluded investigation of the sexual conduct of the plaintiff with other employees. *Mendez v Superior Court, supra*. The defendant's allegations that the sexual conduct of the plaintiff was responsible for part of her emotional damage was insufficient to show good cause under CCP §2017.220(a) to make sexual activity discoverable. For such allegations to be sufficient, either the plaintiff must claim some special damages or the defendant must show truly extraordinary circumstances. 206 CA3d at 573. Likewise, an unsupported allegation that the claim might fall within the Workers' Compensation Reform Act (Govt C §50920) is insufficient to establish good cause. 206 CA3d at 574. In addition, sexual history will not be discoverable to attack credibility, unless the defendant can establish that such history is relevant to attack the credibility of admissible evidence. 206 CA3d at 574.

Even when good cause exists to justify discovery of sexually private information, discovery requests must be narrowly drafted to prevent undue intrusion into the sexual privacy of parties and nonparties to the litigation. *Boler v Superior Court* (1987) 201 CA3d 467, 473, 247 CR 185. For further discussion, see §3.162.

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§15.8 c. Motion for Protective Order

A party who seeks to resist or limit a self-executing form of discovery by moving for a protective order has the burden of producing facts that establish, to the court's satisfaction, good cause for denying or limiting the discovery sought. See, *e.g.*, CCP §2030.090(b). See also *Southern Cal. Edison Co. v Superior Court* (1972) 7 C3d 832, 843, 103 CR 709. On motions for protective orders, see §§15.59-15.84.

NOTE: When a party seeks a protective order on the ground that the number of specially prepared interrogatories or requests for admission is unwarranted, it is the propounding party who has the burden of justifying the number of those interrogatories or requests for admission. CCP §§2030.040(b), 2033.040(b). On showing facts as grounds for granting motion for protective order, which essentially coincides with the concept of "good cause," see §§15.66-15.68.

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§15.9 d. To Modify Discovery Procedures

A showing of good cause is a statutory requirement when a party seeks to modify discovery procedures, including the sequence and timing of discovery methods. CCP §2019.020(b). For example, good cause must be shown to obtain an order:

- **Permitting plaintiff's discovery early in action.**
- **Depositions.** The court may grant leave to a plaintiff to serve a deposition notice earlier than 20 days after commencement of the action. CCP §2025.210(b). See §§5.18, 15.15.
- **Interrogatories.** The court may grant leave to a plaintiff to propound interrogatories earlier than 10 days after commencement of the action. CCP §2030.020(d). See §7.13.
- **Inspection demands.** The court may grant leave to a plaintiff to demand inspection, copying, testing, or sampling of documents, things, places, or electronically stored information (ESI) earlier than 10 days after commencement of the action. CCP §2031.020(d). See §8.15.
- **Requests for admission.** The court may grant leave to a plaintiff to make requests for admission earlier than 10 days after commencement of the action. CCP §2033.020(b), (d). See §9.9.
- **Rescheduling or staying deposition.** On ex parte application, the court may shorten or extend time for scheduling of a deposition or may stay a deposition until determination of an application for a protective order under CCP §2025.420. CCP §2025.270(d). See §15.15.
- **Changing timing of written deposition procedures.** The court may extend or shorten the statutory time periods for interchange of cross (30 days), redirect (15 days), and recross (15 days) questions, respectively. CCP §2028.030. See §5.161.
- **Shortening time for response to inspection.** On good cause shown, the court may specify a date for inspection, copying, testing, or sampling of documents, things, places, or ESI that is earlier than the statutory 30 days after service of the demand. CCP §2031.030(c)(2). See §8.15.
- **Changing timing for response to expert witness demand.** The court may specify an earlier or later date for exchange of expert witness information than the statutory 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date. CCP §§2034.230(b), 2034.250(a), (b)(2). See §11.10.

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§15.10 e. On Motion to Compel Production of Documents Described in Deposition Notice

If a deponent fails to produce documents or other tangible things described in a deposition notice, the noticing party may move for an order compelling the production of those documents or things, but the motion must show good cause justifying their production. CCP §2025.450(a), (b)(1).

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.10A f. Discovery of Electronically Stored Information

§15.10A f. Discovery of Electronically Stored Information

The demanding party must show good cause to obtain discovery of electronically stored information (ESI) from a source that is not reasonably accessible because of undue burden or expense. CCP §§1985.8, 2031.060, 2031.310. See §§8.33, 8.87A, 8.93A.

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III. ORDERS SHORTENING TIME

§15.11 A. Order Shortening Time Explained

An order shortening time is a court order that permits a party to secure a hearing date on a motion that is sooner than would normally be possible under CCP §1005(b), which requires that moving papers be filed at least 16 court days before the date set for hearing. CCP §1005(b); Cal Rules of Ct 3.1300(b). On motion timing requirements, see §2.24.

For a sample order shortening time, see §15.118.

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§15.12 B. Reasons for Seeking Shortened Time

There are circumstances in which a party may be unable to wait to have a discovery motion heard within the normal statutory notice period of CCP §1005(b). First, a party seeking a protective order or to quash a subpoena may not be able to have the motion heard on regular notice before the event giving rise to the motion occurs (*e.g.*, before the date for service of responses or the date set for a deposition). If the party cannot get the notice period shortened, that party may be precluded from obtaining judicial relief.

PRACTICE TIP: Before seeking an order shortening time, counsel should attempt to have the event in question delayed until after the motion can be heard on regular statutory notice. Even if the attempt is unsuccessful, the trial court will be far more likely to shorten time if counsel made efforts to avoid the need to seek shortened time but the opposing party refused to cooperate. On including a description of such efforts in a declaration supporting an ex parte application for an order shortening time, see §15.18.

Second, a party may need a motion heard on shortened time if there is an impending statutory or filing deadline. For example, a party may need evidence to oppose a summary judgment motion, but lack enough time to file a regularly noticed motion to compel that evidence before the opposition is due. See also CCP §2024.020(a) (discovery motions must be heard at least 15 days before date initially set for trial).

Third, an ex parte application for an order shortening time may become necessary between the time of the final status conference and trial. The trial judge will expect the parties to have met and conferred before filing any motions in limine and before the final status conference concerning related trial matters. Evidentiary issues occasionally arise, however, during expert discovery, which is often conducted after the final status conference because of the experts' schedules. Because, in this instance, the evidentiary issue arises after counsel has filed the motions in limine (or obtained rulings on the motions at the final status conference), trial counsel may want to have it addressed by the court before trial begins. For example, if opposing counsel's expert produces a set of documents at deposition that were supplied to him by counsel but not previously produced, trial counsel may want to have the matter presented to the court before trial. Having the matter addressed by an ex parte application can save the court valuable time and allow the trial judge to frame an appropriate remedy, such as reopening discovery and continuing the trial date or setting a date for the newly raised evidentiary issue to be addressed before trial. On motions in limine, see California Trial Practice: Civil Procedure During Trial, chap 7 (3d ed Cal CEB 1995). On final status conferences, see California Civil Procedure Before Trial §40.88 (4th ed Cal CEB 2004). On expert witness exchange, see chap 11.

JUDGE'S PERSPECTIVE: A party's failure to exercise diligence in conducting discovery is not an excuse to seek an order shortening time. For example, a party who waits until the eve of trial to propound discovery, and who is then unhappy with the responses, may not be able to have a motion to compel heard within 15 days of the trial date, as required by CCP §2024.020(a), absent an order shortening time. In this situation, the court is unlikely to grant relief to the dilatory party. Shortening time is an exception to rules that are designed to ensure notice and fairness. Many judges will not shorten time unless the additional burden on court staff and the adversary is shown to be warranted.

PRACTICE TIP: The court will often invite counsel to notify the court of any last minute issues that would have a bearing on the trial date, the length of trial, and the availability of witnesses. Additionally, if previously undisclosed evidence is produced after the discovery cutoff date which would substantially change the liability or damages issues in the case, making an ex parte application for an order shortening time to consider a motion to allow additional discovery and continue the trial date would seem the most appropriate action for counsel to take. Certainly, failing to promptly bring the matter to the court's attention and raising it for the first time on the first day of trial would be disfavored.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.13 C. Who Can Seek Order Shortening Time

§15.13 C. Who Can Seek Order Shortening Time

Although applications to shorten time are usually made by a moving party, they can also be made by an opposing party who desires an earlier hearing date than that specified in the moving party's notice of motion. Cal Rules of Ct 3.1300(b).

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D. Methods of Obtaining Order Shortening Time

§15.14 1. By Stipulation

If the parties agree that the time for notice of the hearing on a motion should be shortened, they can draft a written stipulation memorializing their agreement. However, because local rules or practices usually require the parties to submit such stipulations to the court for approval (see, *e.g.*, Santa Cruz Ct R 2.4.01, stating that hearing dates on motions "must be cleared with the Clerk's Office"), counsel should consult any applicable local rules and contact the court clerk in the courtroom where the hearing will be held to learn any special requirements.

Also, because it is best to have a stipulation specify the date, time, and place of the hearing, contacting the clerk will allow counsel to find out whether the court can in fact accommodate the date, time, and place agreed on.

When time is shortened in this manner, the court's approval of the stipulation operates as the order shortening time.

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§15.15 2. By Ex Parte Application

A party may also obtain an order shortening time by submitting a formal application to the court. Cal Rules of Ct 3.1300(b). Such applications are virtually always submitted on an ex parte basis, because it would be impractical to apply for shortened time to hear a discovery motion using the regular statutory notice period of CCP §1005(b). The ex parte procedure allows a party to obtain a court order virtually on the spot and with almost no notice to opposing parties. See Cal Rules of Ct 3.1203.

NOTE: Granting relief ex parte and granting an ex parte application to shorten time to hear a motion are not the same thing. Most requests for judicial relief, such as a motion to compel or for a protective order, cannot be granted on an ex parte basis because due process requires that notice be given "whenever the order sought may affect the rights of an adverse party." *McDonald v Severy* (1936) 6 C2d 629, 631, 59 P2d 98. See also *Parker v Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 296, 57 CR3d 18 (sanction order issued ex parte is void). However, ex parte judicial relief may be obtained (1) to allow the plaintiff to notice depositions and propound discovery earlier than normally permitted (see CCP §§2025.210(b), 2030.020(d), 2031.020(d), 2033.020(d)); (2) to shorten or extend the time for scheduling a deposition (CCP §2025.270(d)); or (3) to stay a deposition pending the determination of a motion for a protective order (CCP §2025.270(d)).

On drafting and filing ex parte applications, see §§15.16-15.23.

When requesting an ex parte order shortening time, a party should try to give the court different alternatives to get to the desired result. For example, a motion to quash a third party subpoena could ask the trial court either to shorten time to hear the motion to quash or issue an order staying compliance with the subpoena unless and until the hearing occurs.

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E. Drafting Ex Parte Application for Order Shortening Time

§15.16 1. Required Documents

An ex parte application for an order shortening time must be in writing and include all of the following:

- Application containing the case caption and stating the relief requested (Cal Rules of Ct 3.1201(1));
- Declaration making the factual showing of "irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte" (Cal Rules of Ct 3.1201(2), 3.1202(c));
- Declaration demonstrating that notice was properly given (Cal Rules of Ct 3.1204(b)-(c));
- Memorandum (Cal Rules of Ct 3.1201(4)); and
- Proposed order (Cal Rules of Ct 3.1201(5)).

NOTE: Effective January 1, 2007, the term "memorandum of points and authorities" was replaced in the California Rules of Court by the terms "memorandum in support of motion" or simply "memorandum." See, *e.g.,* Cal Rules of Ct 3.1201(4).

Like any other court papers, an ex parte application for an order shortening time must comply with the form and format requirements of Cal Rules of Ct 2.100-2.119 and 3.1110. See California Civil Procedure Before Trial §13.18 (4th ed Cal CEB 2004).

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2. Contents of Required Documents

§15.17 a. Application

The application "must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of such party if known to the applicant." Cal Rules of Ct 3.1202(a).

Additionally, if the party has previously submitted an ex parte application that was denied "in whole or in part, any subsequent application of the same character or for the same relief, although made upon an allegedly different state of facts, must include a full disclosure of any previous applications and the court's actions." Cal Rules of Ct 3.1202(b).

The application may be denominated as follows: "Ex Parte Application for Order Shortening Time for Notice of [Plaintiff's/Defendant's]_ _ _ _ _ _." For a sample ex parte application, see California Civil Procedure Before Trial §13.18 (4th ed Cal CEB 2004).

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§15.18 b. Declaration Stating Basis for Relief

An application for an order shortening time must be supported by a declaration "containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." Cal Rules of Ct 3.1202(c). See also Cal Rules of Ct 3.1300(b) ("on application for an order shortening time supported by a declaration showing *good cause*, [the court] may prescribe shorter times for the filing and service of papers than the times specified in [CCP §]1005"). (Emphasis added.) In other words, it must be demonstrated that shortened time is appropriate and necessary because of some substantial prejudice or harm that would be suffered without the shortening of time.

PRACTICE TIP: In addition to the declaration regarding notice (see §15.19), the declaration demonstrating "irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte" is arguably the most important piece of an ex parte application for an order shortening time. This is where counsel demonstrates *in detail* the facts justifying why time must be shortened in this instance. This is also where counsel can demonstrate any efforts that were made to avoid having to seek shortened time, such as requesting that the opposing party delay a deposition in order to allow counsel the opportunity to seek a regularly noticed motion to quash.

For a sample declaration stating basis for relief, see California Civil Procedure Before Trial §13.18 (4th ed Cal CEB 2004).

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§15.19 c. Declaration Regarding Notice

An ex parte application for an order shortening time must be accompanied by a declaration showing one of the following (Cal Rules of Ct 3.1204(b)):

- That, within the applicable time period under Cal Rules of Ct 3.1203, the applicant informed the opposing party when and where the application would be made;
- That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or
- That, for reasons specified, the applicant should not be required to inform the opposing party.

If notice was given, the declaration must also *describe* the notice given, "including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected." Cal Rules of Ct 3.1204(b).

Also, if notice was provided later than 10:00 a.m. on the court day before the ex parte appearance, the declaration must explain the "exceptional circumstances" that justify the shorter notice or, in unlawful detainer proceedings, why the notice given was reasonable. Cal Rules of Ct 3.1204(c).

For a sample declaration regarding notice, see California Civil Procedure Before Trial §13.18 (4th ed Cal CEB 2004).

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§15.20 d. Supporting Memorandum

An extensive memorandum is seldom needed with an application because the main justification for the order shortening time will usually come not from legal authority but from the factual circumstances leading to the need for shortened time, information that will be contained in the declaration stating the basis for relief. See Cal Rules of Ct 3.1201(4), 3.1202(c) (application for order shortening time must be supported by declaration "containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte"). See §15.18.

In fact, the memorandum can be as simple as a "Memorandum" or "Memorandum of Points and Authorities" heading following the signature block on the application, which cites the authorizing statute and contains a brief summary of the reasons why shortened time is required. (Effective January 1, 2007, the term "memorandum of points and authorities" has been replaced in the California Rules of Court by the terms "memorandum in support of motion" or simply "memorandum." See, *e.g.,* Cal Rules of Ct 3.1201(4).)

PRACTICE TIP: The ex parte application should give a preview of the underlying motion without arguing the merits. The application should clearly set forth the grounds for shortening time, without needlessly reciting all of the facts and procedural posture of the case. The party presenting the ex parte application should have the motion in hand at the hearing, ready to serve on counsel. This will make it easier for the court to set a tight briefing schedule. In fact, unless there is a compelling reason to withhold the motion before the hearing, it should be provided to opposing counsel (and the other parties) before the hearing. This will enhance the applicant's position with the court when pressing for a tight briefing schedule and allay any concerns the court may have about gamesmanship with respect to the application.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.21 e. Proposed Order

§15.21 e. Proposed Order

A proposed order is a required part of an ex parte application for an order shortening time. Cal Rules of Ct 3.1201(5). The proposed order should be drafted to address the following:

- When motion papers are to be served;
- When opposition papers are due;
- When reply papers are due;
- How papers are to be served (*e.g.,* by hand delivery); and
- Date, time, and place of the hearing.

For a sample proposed order, see §15.118.

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§15.22 F. Timing and Content of Notice

Timing of notice. Unless there is a showing of exceptional circumstances that justify a shorter time for notice (or no notice at all), no later than 10:00 a.m. on the court day before the ex parte appearance, a party seeking an ex parte order shortening time must notify all parties of the applicant's intent to submit the application. Cal Rules of Ct 3.1203(a).

Unlawful detainer. A party seeking an ex parte order in an unlawful detainer proceeding may provide shorter notice as long as the notice given is "reasonable." Cal Rules of Ct 3.1203.

Content of notice. The person giving notice to another party "must state with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application, and must attempt to determine whether the opposing party will appear to oppose the application." Cal Rules of Ct 3.1204(a).

Manner of giving notice. Notice may be given by telephoning the attorneys for the other parties or by delivering or mailing a copy of the application with an indication of the date, time, and place when the application will be submitted. If notice is given by telephone message, counsel should include details about the time and contents of the message in counsel's declaration supporting the ex parte application. See *Datig v Dove Books, Inc.* (1999) 73 CA4th 964, 976, 87 CR2d 719 (decided under former Cal Rules of Ct 379(b) (now see Cal Rules of Ct 3.1203(a)); defending attorney failed to give plaintiff appropriate notice of ex parte application to dismiss when attorney's declaration stated that he had telephoned plaintiff's counsel, but did not provide contents of messages or time he left messages).

NOTE: Some attorneys, particularly solo practitioners who use an automated voice mail service, include in their messages that they do not accept ex parte notice on their answering machine or service. Others fail to offer an alternative number where they can be reached for ex parte notice. Despite these disclaimers, however, under Cal Rules of Ct 3.1204(b)(2), "[a]n ex parte application must be accompanied by a declaration regarding notice showing… [t]hat the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party." Thus, merely refusing to accept ex parte notice on the only telephone number available to opposing counsel will most likely fail to prevent the applicant from satisfying the notice requirements of Rules 3.1200-3.1207.

PRACTICE TIP: Because ex parte papers can be long, place a flag or "Post-it" showing where the evidence of having given notice is contained. In evaluating an ex parte application, the clerk or research attorney will generally check first to see if adequate notice has been given. Flagging this evidence will avoid the circumstance of the clerk or research attorney missing the notice.

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§15.23 G. Filing Ex Parte Application

Before the court acts on an ex parte application, it must be filed and any applicable fees paid. Even if the applicant has failed to comply with the notification requirements in Cal Rules of Ct 3.1203, the clerk must accept the ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration. Cal Rules of Ct 3.1205.

Local court rules often dictate how, when, where, and with whom ex parte applications can be filed. See, *e.g.,* San Francisco Ct R 10.0, which provides that (1) commissioners hear discovery disputes arising under the Civil Discovery Act; (2) ex parte applications for orders shortening time are heard at 11:30 a.m. Monday through Friday in Room 633; and (3) counsel must bring a filed-endorsed copy of the application and supporting papers, and a separate proposed order.

PRACTICE TIP: Counsel should consult any applicable local rules and call the clerk's office to verify the ex parte filing procedures, and, if necessary, allow sufficient time to file the application and appear at the hearing. As San Francisco Ct R 10.0(C)(2) suggests, the ex parte application may need to be filed in a different place from where the application is heard. For example, counsel may have to file the application in the clerk's office and then bring filed-endorsed copies of the application to the courtroom in which the hearing will take place.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.24 H. Serving Ex Parte Application

§15.24 H. Serving Ex Parte Application

"Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be conducted unless such service has been made." Cal Rules of Ct 3.1206.

PRACTICE TIP: Service at the hearing is usually sufficient. However, courts may deny a motion if the moving party prepared the application a significant amount of time before the hearing, but failed to serve the papers until the hearing.

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§15.25 I. Personal Appearance Requirements

A personal appearance is required for an ex parte application for an order shortening time. Cal Rules of Ct 3.1207. Notwithstanding the personal appearance requirement, counsel may not actually get to speak with the judge. The ex parte application may be decided solely on the papers or counsel may speak only with court staff or a research attorney.

CAUTION: In presenting oral argument to the judge or research attorney, remember that the court will be focusing on two things: diligence and urgency. It may be tempting to argue the underlying merits of the motion that counsel is seeking (or opposing) to have heard on shortened time. Counsel should resist this temptation and concentrate on the reasons why (or why not) the court should (or should not) shorten time.

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J. Responding to Ex Parte Application for Order Shortening Time

§15.26 1. Whether to Oppose Application

The decision whether to oppose an ex parte application for an order shortening time depends on the circumstances motivating the request. Trial courts will look with disfavor on a party who opposes an application when the requesting party obviously has good cause to make the request.

EXAMPLE: Good cause for seeking an ex parte application for an order shortening time would exist when a subpoena has requested records from a third party, and one party believes the records should not be produced but lacks time to file a regularly noticed motion to quash the subpoena before the production date. The better course of conduct for the party seeking the records is to cooperate by delaying the date of production of the subpoenaed records and scheduling a mutually agreeable hearing date for the motion to quash.

On the other hand, when an order shortening time is sought solely because the opposing party has been dilatory in taking discovery and now faces an impending deadline, such as a trial date, a party can and should consider objecting to an order shortening time on the basis that the requesting party has not shown good cause.

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§15.27 2. Content of Opposition

Declaration in opposition sufficient; proposed order. The party opposing the application can file, if time permits, either a brief with supporting documents or a declaration in opposition, depending on the position the party takes. Also, the opposing party can, but is not required to, provide a proposed order stating that the ex parte application is denied. Generally, the clerk will note the denial in the minutes, which is usually sufficient.

Demonstrate lack of good cause. Any opposition to an application for an order shortening time should focus on showing that the applicant has not demonstrated good cause. See Cal Rules of Ct 3.1300(b), 3.1202(c). On good cause, see §§15.4-15.10. For example, if a party has waited several months before acting, and then seeks an order shortening time on the eve of trial, the responding party should provide the trial court with a chronology and any supporting documents demonstrating the lack of diligence by the requesting party. Despite the time constraints, the opposing party should make every effort to show a lack of good cause through competent evidence, such as declarations and exhibits.

JUDGE'S PERSPECTIVE: Oral argument seldom occurs on ex parte applications for orders shortening time. Counsel should be sure all relevant facts are included in the papers. If a fact is not in the papers, most judges will assume that it is not there because it doesn't exist.

PRACTICE TIP: Counsel opposing the application should include in his or her argument the lack of good cause as well as the procedural history in the case showing the applicant's abuse of the ex parte procedure. For example, if the court previously denied similar applications by the moving party or if the applicant has a history of using the ex parte procedure for improper purposes (*e.g.*, to harass the opposing party or because of lack of diligence*),* the court should be made aware of this history because it could have a bearing on whether the application will be granted.

Demonstrate attempts to accommodate. The opposing party should also show any attempts to accommodate the requesting party to demonstrate that it has acted reasonably. For example, if the opposing party has made a suggestion concerning a briefing schedule that was rejected by the applicant, the opposing party should bring these attempts to informally resolve the matter to the court's attention.

Consider needs if court grants application. Finally, the opposing party should consider what relief it needs if the court grants the ex parte application. For example, if the court is going to allow a motion to quash to be heard in advance of a date set for the production of records by a third party, the party opposing the motion should make sure it has sufficient time to file an opposition brief before the hearing.

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§15.28 K. Orders Shortening Time in Federal Court

Federal Rule of Civil Procedure 37 provides that a party "*upon reasonable notice* to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery" (emphasis added). The rules do not specify the number of days that constitutes "reasonable notice." Thus, a party should consult the applicable local district court rules, and in some cases the applicable rules propounded by the specific district court judge, to determine how much notice needs to be given and how to seek an order shortening time. See, *e.g.*, CD Cal Local Civ R 37-3 (discovery motions will not be heard earlier than 21 days after the filing of the motion, and "[u]nless the court in its discretion otherwise allows, no discovery motions shall be filed or heard on an ex parte basis absent a showing of irreparable injury or prejudice not attributable to the lack of diligence of the moving party").

When an order shortening time is required, the party should file an ex parte application with the district court at the earliest possible opportunity. The ex parte application should be served on the opposing party and, in the case of a motion that will affect the discovery obligations of a third party, on the third party as well.

In general, district courts do not hold hearings on ex parte applications, but delay ruling on the application for 1 to 2 days, to allow the other side to file opposition. Counsel should thus give the court sufficient time to consider the application. Counsel should include with the ex parte application a memorandum identifying the opposing party or counsel and the affected third party(ies) and their counsel; stating the grounds on which the ex parte order is being sought; and containing points and authorities in support of the request. The applying party must also submit a proposed order with the application.

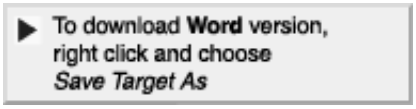
It is the applying party's duty to notify the other side of the application and supply them copies of the papers. See, *e.g.,* CD Cal Local Civ R 7-19; see also ND Cal Civ Local R 7-10.

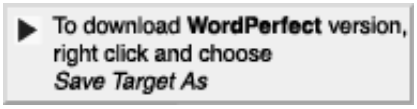
PRACTICE TIP: Counsel needing immediate relief, such as a stay order, should so state in the Notice of Motion and include it in the heading of the document, so that the court recognizes the urgency.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.29 L. Checklist: Procedure for Application for Order Shortening Time

§15.29 L. Checklist: Procedure for Application for Order Shortening Time





- Prepare application for order shortening time (see §§15.16-15.17).
- Attach memorandum, declarations, and proposed order (see §§15.18-15.21).
- Unless there is a showing of exceptional circumstances that justify a shorter time for notice (or no notice at all), give notice to all parties no later than 10:00 a.m. on court day before ex parte appearance (see §15.22).
- File ex parte application and supporting documents (see §15.23).
- Serve copies of application and supporting documents on adverse parties (see §15.24).
- Attend ex parte hearing to argue for issuance of proposed order (see §15.25).
- If proposed order is issued, file and serve copies of motion in manner specified in order (*e.g.,* hand delivery).

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IV. MOTIONS TO COMPEL

§15.30 A. Motion to Compel Explained

A motion to compel is an application to a trial court for an order commanding a party's compliance with one or more provisions of the Civil Discovery Act. It is used to seek information that the opposing party is refusing to give voluntarily through discovery. For a sample Order Compelling or Denying Answers or Further Answers to Interrogatories and for Sanctions, see §7.151.

NOTE: A motion to compel is fundamentally different from a motion for a protective order or a motion to quash because a motion to compel seeks the *disclosure* of information. On motions for protective orders, see §§15.59-15.84; on motions to quash, see §§5.137-5.138.

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§15.31 B. How Motion to Compel Is Used

Motions to compel are used to obtain compliance with the Civil Discovery Act in a variety of circumstances.

Obtain responses to written discovery requests. If a party fails to respond at all to written discovery requests such as interrogatories, inspection demands, or requests for admission, the proper remedy is a motion to compel responses. See CCP §§2030.290 (interrogatories), 2031.300 (inspection demands), 2033.280 (requests for admission).

Obtain further responses to written discovery requests. If a party serves inadequate, evasive, or incomplete responses, the proper remedy is a motion to compel further responses. See CCP §§2030.300 (interrogatories), 2031.310 (inspection demands), 2033.290 (requests for admission).

Obtain appearance at deposition. If an individual fails to appear at, proceed with, or produce for inspection any document or tangible thing described in the deposition notice, the proper remedy is a motion to compel the deponent's attendance and testimony, and the production of any document or tangible thing. See CCP §§2025.450, 2025.480.

Obtain answers to questions at deposition. If an individual refuses to answer, or fully answer, any questions at a deposition, the proper remedy is a motion to compel answers or further answers. See CCP §§2025.450, 2025.480.

Obtaining attendance at physical or mental examination. If a plaintiff in a personal injury suit fails to respond to, or refuses to comply with, a demand for a physical examination, the proper remedy is a motion to compel a response to (or compliance with) the demand. See CCP §§2032.240(b), 2032.250(a).

NOTE: If a party refuses to comply with a court order allowing a physical or mental examination under CCP §§2032.310-2032.320, the proper remedy is a motion for sanctions. See CCP §§2032.410-2032.420.

Force party to admit absence of evidence. A motion to compel can also be used when a party wants to compel the opponent to admit under oath that it does not have certain evidence. For example, if a particular document or category of documents that should be produced is not produced, a motion to compel its production can force the opposing party to state under oath that such documents do not exist. The impeachment value of such an answer is enormous if the party subsequently attempts to use these documents.

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§15.32 C. Deciding Whether to Move to Compel

Before making a motion to compel, counsel should consider carefully whether doing so is truly worthwhile. Motions to compel should be considered a last resort when trying to prepare a case for trial, although when properly used they can force a recalcitrant party to disclose all of its supporting evidence and make the trial court an ally when the discovery abuses prejudice a party's ability to present its claims or defense.

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§15.33 1. Time and Expense

Motions to compel tend to be expensive and time-consuming, and clients can end up spending substantial sums of money for very little result. Counsel should therefore consider whether the information to be sought in a motion to compel is sufficiently important to justify the time and expense of making the motion.

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§15.34 2. Potential Imposition of Sanctions

The filing of a motion to compel can constitute a misuse of the discovery process if it is done "unsuccessfully and without substantial justification." CCP §2023.010(h). Any party or attorney who files such a motion risks the imposition of sanctions. CCP §2023.030. Before filing a motion to compel, counsel should thus make certain that it is truly warranted by the facts and the applicable law. On sanctions, see §§15.85-15.116.

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§15.35 3. Considering Alternative Discovery Methods

Counsel should consider other, potentially more cost-effective ways of getting the information For example, if interrogatories were unsuccessful in eliciting needed information, a deposition may provide that information more readily (and at less cost) than a motion to compel further responses.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.36 4. Considering to Meet and Confer Even If Not Required

§15.36 4. Considering to Meet and Confer Even If Not Required

When a party fails to serve any responses to written discovery, there is no meet-and-confer requirement before the propounding party may file a motion to compel. See, *e.g.*, CCP §2030.290. But before filing the motion, counsel should consider contacting the opposing party or attorney to advise of counsel's intent to file a motion to compel responses. Such a letter or telephone call may prompt the dilatory party or attorney to serve the overdue responses, thereby obviating the need to bring a motion to compel.

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§15.37 5. Considering Discovery Referee or Special Master

Discovery disputes sometimes threaten to overwhelm the litigation. In such cases, the parties may find that the appointment of a discovery referee or special master, who can quickly resolve discovery disputes without the need for the parties to make formal motions, can be useful and cost-effective. See CCP §§638-645.2. If the parties do not consent, a discovery referee can only be appointed if there are "extraordinary circumstances" which must be specified in the order of appointment. CCP §639(d)(2).

Depending on the complexity of the case and on how much money is at stake, a referee or special master can become involved only as a last resort or can sit in on sensitive depositions to make rulings on the spot, thereby avoiding the need for the parties to make any motions.

On using a referee in discovery, see §§2.68-2.72.

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§15.38 6. Judicial Disfavor of Motions to Compel

Trial courts generally have little tolerance for discovery motions because of a perception that the parties ought to be able to resolve many, if not most, discovery disputes without judicial intervention. But because legitimate discovery disputes do exist, motions to compel are sometimes justified. If a motion to compel becomes necessary, counsel should understand that busy trial courts will not often be able to spend much time analyzing complex discovery disputes. Motions to compel should therefore be as concise and straightforward as possible.

NOTE: Some trial courts will allow the parties to stipulate to use a commissioner for discovery matters. The advantage of this is that a commissioner may be able to spend more time working on the discovery dispute.

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§15.39 D. Who Can Bring Motion to Compel

The party who propounded the discovery requests is the only party permitted to make a motion to compel based on any perceived inadequacy in the responses. See, *e.g.*, CCP §2030.300(a) ("On receipt of a response to interrogatories, *the propounding party* may move for an order"), §2025.480(a) (if deponent fails to answer any question, "*the party seeking discovery* may move the court for an order") (emphases added).

NOTE: Although not technically a motion to compel, when a deponent fails to appear at a properly noticed deposition, *any* party who appeared for the deposition is entitled to seek monetary sanctions to compensate it for the costs of attending. CCP §2025.450(c)(2).

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E. When to Make Motion to Compel

§15.40 1. Deadline for Filing Motion to Compel

The timing of a motion to compel depends largely on whether responses have been served. However, counsel must also consider other matters, such as an upcoming summary judgment filing deadline or trial date. See CCP §2024.020(a) (discovery motions must be heard at least 15 days before date initially set for trial); *Sexton v Superior Court* (1997) 58 CA4th 1403, 1409, 68 CR2d 708 (time limits on discovery motions are mandatory and jurisdictional). See also *Pelton-Shepherd Indus., Inc. v Delta Packaging Prods., Inc.* (2008) 165 CA4th 1568, 1588, 82 CR3d 64 (trial court abused its discretion by hearing untimely motion to compel without first requiring plaintiff to seek leave to reopen discovery). On timing considerations in planning discovery, see §§2.20-2.28.

If no responses served. If the responding party fails to serve any responses at all, there is no time limit on when the propounding party may file a motion to compel responses. See, *e.g.*, CCP §2030.290(b)-(c). On moving to compel responses to interrogatories, see §§7.107-7.109; on inspection demands, see §8.92. On moving the court for an order that requests for admission be deemed admitted, see §§9.72-9.77.

NOTE: The trial court has the authority to hear a motion to compel responses when the party on whom interrogatories were served failed to serve any response within the required time but, after the motion was served, provided an untimely and inadequate response. *Sinaiko Healthcare Consulting, Inc. v Pacific Healthcare Consultants* (2007) 148 CA4th 390, 409, 55 CR3d 751. Mere service of an untimely discovery response, which may or may not reflect a good-faith effort to comply with the party's discovery obligations, does not divest the trial court of authority to hear and grant a motion to compel responses or to impose sanctions. See 148 CA4th at 408.

When responses inadequate. When inadequate responses to interrogatories, inspection demands, or requests for admission have been served, a motion to compel further responses must be filed and served, absent a written stipulation, within 45 days of service of the responses or any supplemental responses, or on or before any date to which the parties may agree in writing. Failure to do so waives the party's ability to move for further responses. See, *e.g.*, CCP §2030.300(c). On moving to compel further responses to (1) interrogatories, see §§7.110-7.115; (2) inspection demands, see §§8.93-8.95; (3) requests for admission, see §§9.78-9.80.

When deponent fails to appear or produce documents. If a deponent fails to appear or proceed with a deposition or produce documents or things described in the deposition notice, there is no time limit on when the party noticing the deposition may move to compel. CCP §2025.450(a). On moving to compel attendance or production of documents at depositions, see §§6.73, 6.78-6.82.

When deponent fails to answer questions. A motion to compel answers at a deposition must be made within 60 days after the completion of the record of the deposition. CCP §2025.480(b). On moving to compel answers at deposition, see §6.112.

When party refuses to submit to physical or mental examination. There is no time limit on when a party may bring a motion to compel compliance with a demand for a physical or mental examination. CCP §2032.410. On moving to compel physical and mental examinations, see §§10.37-10.39.

CAUTION: The meet-and-confer requirement (see §15.42) does *not* extend the time for filing a motion to compel. *Vidal Sassoon, Inc. v Superior Court* (1983) 147 CA3d 681, 683, 195 CR 295. On receiving inadequate responses or following a deposition, counsel should therefore begin the meet-and-confer process as soon as possible so as to leave enough time to file a motion to compel, if necessary.

JUDGE'S PERSPECTIVE: By written stipulation parties can agree on a different, specific, deadline for a motion to compel. They should not agree to an open extension of time to bring the motion, however. Generally, delay creates an inference that the issue is not that important. Thus the moving party should not delay too long in bringing the motion.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.41 2. Chart: Time Limits for Filing Motions to Compel

§15.41 2. Chart: Time Limits for Filing Motions to Compel

NOTE: Under CCP §2024.020(a), all discovery motions must be heard at least 15 days before the date initially set for trial.

CCP Section	Type of Motion	Time Limits
§2025.480(b)	Motion to compel answers or production of documents at deposition	Motion must be made no later than 60 days after the completion of the record of the deposition.
§2025.450	Motion to compel attendance at deposition (party fails to appear)	No time limit.
§2031.300	Motion to compel response to inspection demand (no response served)	No time limit.
§2031.310	Motion to compel further response to inspection demand	Motion must be made within 45 days of the service of the response, or any supplemental response, unless the parties agree in writing to a specific later date.
§2032.410	Motion to compel party to submit to physical and mental examination	No time limit.
§2033.280	Failure to timely respond to request for admission (no response served)	No time limit.
§2033.290(c)	Motion to compel further response to request for admission	Motion must be made within 45 days of the service of the response, or any supplemental response, unless the parties agree in writing to a specific later date.

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§15.42 3. Meet-and-Confer Requirement

Before filing a motion to compel further responses to written discovery, or to compel an individual to proceed with or answer questions at a deposition, the parties must engage in a "reasonable and good faith attempt at an informal resolution of each issue presented by the motion." CCP §2016.040. See also CCP §§2025.450(b)(2), 2025.480(b), 2030.300(b), 2031.310(b), 2032.250(a), 2033.290(b).

NOTE: The meet-and-confer requirement does not apply when no responses to written discovery have been served, in which case the propounding party may file a motion to compel without first attempting any informal resolution. See, *e.g.*, CCP §§2030.290, 2031.300. See §15.40. When an individual fails to appear for a deposition, however, the moving party is required to contact the deponent to "inquire about the nonappearance." See CCP §2025.450(b)(2). See §6.72.

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§15.43 a. What Constitutes Good Faith Meet-and-Confer Effort?

What constitutes a good faith meet-and-confer effort depends on a variety of factors, including (*Obregon v Superior Court* (1998) 67 CA4th 424, 431, 79 CR2d 62):

- Complexity of the case;
- History of the litigation;
- Nature of the interaction between counsel;
- Nature of the issues;
- Type and scope of discovery requested; and
- Prospects for success.

Not surprisingly, the more complex the issues, the more time and effort need to be spent attempting to resolve the dispute. See *Obregon v Superior Court, supra* (in larger cases with more complex discovery issues, greater effort at informal resolution may be warranted; in simpler disputes or more narrowly focused cases, more modest efforts may suffice).

JUDGE'S PERSPECTIVE: The meet-and-confer effort should reflect the same level of persuasive effort as the motion itself. If the moving party has not given the responding party a chance to consider all the arguments made in the motion, the meet-and-confer effort was lacking. The discussions should have the same level of professionalism as papers filed with the court and argument occurring in the court's presence. Few things make a court's sanctions decision easier than to see disrespectful, nasty, or rude correspondence attached to declarations of counsel. See *Discovery's Top Ten: What Judges Think About Discovery Motions*, ABTL Report, Volume 14, Number 3, Summer 2005.

But even in a relatively uncomplicated case, very few courts will find the mere exchanging of a single letter or e-mail sufficient to satisfy the meet-and-confer requirement. At a minimum, counsel should either meet or talk by telephone to attempt to work out the various issues.

PRACTICE TIP: The best practice is to meet in person when the dispute concerns substantive issues that will take a significant amount of court time. The court will be less inclined to resolve these complex issues if the parties gave only passing attention to the matter during the meet-and-confer process. In fact, in many instances, the court will order the parties during the hearing to meet and confer in an empty jury room or the hallway and return when they have made an effort to resolve their differences. To avoid such an outcome, counsel should meet in person and make a concerted effort to resolve the matters that are truly in dispute. Failing such an effort, the meet-and-confer letter should offer more than a simple demand for further information. It should clearly state the nature of the deficiency, the supporting legal authority and the specific information sought.

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§15.44 b. Sanctions for Failure to Meet and Confer

The imposition of monetary sanctions is mandatory on any party or attorney who fails to meet and confer in good faith, even if the party subject to the sanction prevails on the discovery motion. CCP §2023.020.

In addition, if the section governing a particular motion requires the filing of a declaration showing a reasonable and good faith attempt to resolve the issues informally, the failure to meet and confer constitutes a misuse of the discovery process, which subjects the offending party or attorney not only to monetary sanctions, but also to issue, evidence, contempt, or terminating sanctions. See CCP §§2023.010(i), 2023.030(a)-(e). On sanctions, see §§15.85-15.116.

For a sample Order Compelling or Denying Answers or Further Answers to Interrogatories and for Sanctions, see §7.151.

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F. Drafting Motion to Compel

§15.45 1. Required Papers

A motion to compel must consist of at least all of the following (Cal Rules of Ct 3.1112(a), 3.1345(a)):

- Motion to compel itself;
- Notice of the motion;
- Memorandum in support of the motion; and
- "Separate statement" of items in dispute (if discovery responses were inadequate or evasive).

A motion to compel will also almost certainly include one or more declarations presenting evidence in support of the motion. Cal Rules of Ct 3.1112(b).

The above papers may be filed as separate documents or combined in one or more documents; however, if they are combined, the documents must be listed separately in the caption. Cal Rules of Ct 3.1112(c).

Like any other court papers, a motion to compel must comply with the form and format requirements of Cal Rules of Ct 2.100-2.119 and 3.1110. See California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

For a sample Court Order Compelling Discovery, see §15.119.

Redaction requirement. Under Cal Rules of Ct 1.20(b)(1) (effective Jan. 1, 2008), parties must redact certain identifying information from paper or electronic documents or records filed with the court unless by court order or operation of law the documents or records are filed in their entirety confidentially or under seal. For example, if a person's social security number is included in a paper filed in the public file, only the last four digits of the number may be used. Cal Rules of Ct 1.20(b)(2)(A). The responsibility for redaction lies solely with the parties and their attorneys. Cal Rules of Ct 1.20(b)(3). If the court orders on a showing of good cause, the filing party may also file a confidential reference list. Cal Rules of Ct 1.20(b)(4).

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§15.46 a. Notice of Motion and Motion

As a practical matter, the motion and notice of motion are usually combined into one document entitled "Notice of Motion and Motion to Compel." The motion, an application to a court to make an order (CCP §1003), must contain all of the following (Cal Rules of Ct 3.1112(d)):

- Identity of the party or parties bringing the motion;
- Name of the parties to whom the motion is addressed; and
- Brief statement of the basis for the motion and the relief sought, including whether the moving party requests sanctions, against whom the sanction is sought and the type of sanctions (CCP §2023.040).

The notice of motion must contain all of the following information (CCP §1010):

- Date, time, and place of the hearing;
- Grounds on which the motion is being made, including whether the moving party requests sanctions, against whom the sanction is sought, and the type of sanctions (CCP §2023.040); and
- Papers and other items supporting the motion.

In addition, the notice of motion must state "in the opening paragraph the nature of the order being sought and the grounds for issuance of the order." Cal Rules of Ct 3.1110(a).

JUDGE'S PERSPECTIVE: All relief sought by the motion, including whether the moving party requests sanctions, should be stated in the notice of motion and, if possible, identified in the title of the motion, not just argued in the supporting memorandum.

For a sample Motion to Compel, see §7.147.

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§15.47 b. Supporting Memorandum

A memorandum must contain (Cal Rules of Ct 3.1113(b)):

- A statement of facts;
- A concise statement of the law;
- The evidence and argument relied on; and
- A discussion of the statutes, cases, and textbooks cited in support of the position being advanced.

PRACTICE TIP: The memorandum is used to convince the judge who hears the motion that the law and facts support issuance of the order sought. It should present the best arguments for the motion that can be made. (Effective January 1, 2007, the term "memorandum of points and authorities" was replaced in the California Rules of Court by the terms "memorandum in support of motion" or simply "memorandum." See, *e.g.,* Cal Rules of Ct 3.1113(b).)

JUDGE'S PERSPECTIVE: Counsel should not reserve arguments for the hearing. Most counties use a tentative ruling system, so all arguments should be included in the opening memorandum or the court may never hear them.

Page length. A memorandum may not exceed 15 pages. Cal Rules of Ct 3.1113(d). This page limit does not include exhibits, declarations, attachments, tables of contents or authorities, or the proof of service. Cal Rules of Ct 3.1113(d). If the memorandum exceeds 10 pages, it must include a table of contents and authorities and an opening summary of argument. Cal Rules of Ct 3.1113(f). A party may apply ex parte with written notice to other parties for permission to file a longer memorandum. See Cal Rules of Ct 3.1113(e). The court considers a memorandum that exceeds approved page limits to be the same as a late-filed paper. Cal Rules of Ct 3.1113(g).

Citation of non-California authority. If any non-California authorities are cited in the memorandum, a copy of the authority must be filed with the memorandum and tabbed as an exhibit. Cal Rules of Ct 3.1113(i).

References to exhibits. All references to exhibits or declarations "must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number." Cal Rules of Ct 3.1113(k).

Requests for judicial notice. Any requests for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with Cal Rules of Ct 3.1306(c). Cal Rules of Ct 3.1113(*l*).

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.48 c. Separate Statement (Cal Rules of Ct 3.1345)

§15.48 c. Separate Statement (Cal Rules of Ct 3.1345)

A "separate statement" is a required part of all of the following discovery motions (Cal Rules of Ct 3.1345(a)(1)-(7)):

- Motion to compel further responses to interrogatories, inspection demands, or requests for admission;
- Motion to compel answers at a deposition;
- Motion to compel or to quash the production of documents or tangible things at a deposition;
- Motion for medical examination over objection; and
- Motion for issue or evidentiary sanctions.

NOTE: A separate statement is not required when no response has been provided to a request for discovery. Cal Rules of Ct 3.1345(b).

The separate statement must be "full and complete so that no person is required to review any other document in order to determine the full request and the full response." Cal Rules of Ct 3.1345(c). Failure to include a "separate statement" in compliance with Cal Rules of Ct 3.1345 is grounds for denial of a motion to compel. *Mills v U.S. Bank* (2008) 166 CA4th 871, 893, 83 CR3d 146 (trial court properly denied motion to compel when plaintiffs failed to set forth full response to each discovery request in separate statement).

JUDGE'S PERSPECTIVE: The separate statement is the most important document counsel will prepare for a discovery motion. Particularly for a complex motion, it will be the document the judge will reach for first, so counsel should start there in framing the motion. It is also likely the last thing the judge will look at if a question comes up at the hearing as to what a particular request sought or whether a particular response included an objection. It is not make-work, and should not be an afterthought. See *Discovery's Top Ten: What Judges Think About Discovery Motions*, ABTL Report, Volume 14, Number 3, Summer 2005.

The separate statement must include all of the following for each discovery request to which a further response is requested (Cal Rules of Ct 3.1345(c)):

- The text of the request;
- The text of each response, answer, or objection;
- A statement of the factual and legal reasons for compelling further responses regarding each matter in dispute;
- If necessary, the text of all definitions, instructions, and other matters required to understand each request and the responses to it;
- If the response to a particular request is dependent on a response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the text of the other request and the response to it; and
- If pleadings or other documents in the court file or other items of discovery are relevant to the motion, a summary of each document or item, by the party relying on them.

NOTE: Even if the discovery requests and responses are being lodged with the court as part of a declaration (see §15.49), the moving party must nevertheless set forth in full the disputed requests and responses in the separate statement.

The court rule expressly states that material must not be incorporated by reference into the separate statement. Cal Rules of Ct 3.1345(c).

On a motion to compel further responses to interrogatories, inspection demands, or requests for admission, the separate statement must identify the interrogatories, inspection demands, or requests for admission by set and number. Cal Rules of Ct 3.1345(d).

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.49 d. Declarations and Exhibits

§15.49 d. Declarations and Exhibits

Provide discovery requests and responses. Although not strictly required, the party seeking an order to compel discovery may want to provide the court with copies of the entire set of discovery requests and the responses, if any, of which the disputed requests are a part. This will provide the court with the necessary context to understand why the discovery being sought is relevant and how the moving party will be prejudiced if the motion is denied. If, however, the particular discovery dispute involves only a few requests that are part of a much larger set, to lodge the entire set with the court may overburden, rather than help, the court.

PRACTICE TIP: Rather than inundate the court with a lot of unnecessary paper, the better practice is to prepare a well-organized separate statement for the court so the judge will know the specific matters in dispute and can understand the nature of the dispute. Providing the full set of requests may not only be unnecessary but may give the court the impression that the moving party's discovery requests were, in fact, burdensome.

Provide evidence of meet-and-confer efforts. There must also be a supporting declaration from counsel demonstrating the efforts made to informally resolve the dispute. See, *e.g.,* CCP §2030.300(b) (motion to compel further responses to interrogatories "shall be accompanied by a meet and confer declaration"). The declaration must "state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." CCP §2016.040. The declaration should include copies of all written communication (*i.e.,* letters, e-mails) between counsel trying to resolve the dispute. The failure to include this information can cause the motion to be denied, regardless of its merits.

JUDGE'S PERSPECTIVE: Counsel should not underestimate the importance of declarations, as they will often contain the evidence on which the motion will be granted or denied. However, declarations that contain inadmissible evidence, are not supported by adequate foundations, do not properly authenticate attached exhibits, or are not correctly verified, are all subject to objection. Counsel should include all written communication between counsel, not just the letters written on behalf of the moving party.

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§15.50 2. Request for Sanctions

If the motion to compel is granted, the court must impose a monetary sanction on the party, person, or attorney who unsuccessfully opposed the motion, unless the court finds that the one subject to the sanction acted with "substantial justification" or that some other circumstances make the imposition of the sanction unjust. See, *e.g.*, CCP §2030.300(d).

NOTE: Of course, if the motion is denied, the court must impose monetary sanctions on the moving party unless the moving party acted with "substantial justification" or other circumstances make the imposition of sanctions unjust. See, *e.g.,* CCP §2030.300(d).

If the moving party on a motion to compel wants to have the court impose monetary sanctions on the opposing party, the moving party's motion must also include a proper request for sanctions. On moving for sanctions, see §§15.85-15.116.

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§15.51 3. Burden of Persuasion

Although a moving party on a motion to compel has the burden of bringing a motion, and is required to set forth in the separate statement the factual and legal reasons for compelling further responses (Cal Rules of Ct 3.1345(c)(3)), the legal burden of justifying the failure to provide discovery rests with the objecting party. *Coy v Superior Court* (1962) 58 C2d 210, 220, 23 CR 393. On the opposing party's burden on a motion to compel, see §15.54.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.52 4. Service

§15.52 4. Service

Absent an order shortening time (see §§15.11-15.29), written notice of a motion to compel must be given at least 16 court days before the hearing. CCP §1005(b). If the papers are served by mail in California, the notice period must be increased by 5 calendar days, and if the papers are served by facsimile transmission, express mail, or other method providing for overnight delivery, the notice period must be increased by 2 calendar days. CCP §1005(b). On timing for motions, see §2.23. On extensions for methods of service, see §2.22.

JUDGE'S PERSPECTIVE: It is very important that counsel serve *every party* who has appeared. Too often the court must place a discovery motion off calendar because the moving party served the motion only on the party to whom the discovery request was addressed.

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§15.53 5. Filing

The original of the motion papers, with appropriate proofs of service, should be filed with the court clerk's office (Cal Rules of Ct 3.1302(a)) or, where local rules specify, directly in the law and motion or discovery department in which the hearing is noticed.

Counsel should also have an extra copy of the papers filed-stamped by the clerk. Counsel can then retain these filed-stamped copies in case any question later arises as to the date of filing or if the originals are misplaced.

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§15.54 G. Responding to Motion to Compel

In responding to a motion to compel, counsel should file the following documents:

- A memorandum in opposition to the motion; and
- Responsive declaration(s) containing the client's version of the facts or issues in dispute.

Although a memorandum is not required (as it is of the moving party), it is better practice and more persuasive if one is included as part of a party's response to a motion to compel. On format requirements, see Cal Rules of Ct 3.1113.

PRACTICE TIP: Because the court generally works from the separate statement in analyzing the issues raised in the motion and considering argument from counsel at the hearing, if there are counter arguments to the separate statement, there is no reason to relegate the opposing party's entire argument to its memorandum. If well drafted and properly organized, the opposing party's separate statement may become the controlling document at the hearing and thus enhance that party's chances of prevailing.

PRACTICE TIP: Counsel should consider whether the party opposing a motion to compel has standing. As a general rule, litigants seeking relief must assert their own legal rights rather than rely on the rights or interests of third parties. *Matrixx Initiatives, Inc. v Doe* (2006) 138 CA4th 872, 877, 42 CR3d 79. In *Matrixx*, the court held that appellants were not entitled to resist discovery by invoking the constitutional rights of unrelated third parties when appellants were not parties in the underlying action and there was no showing that appellants held a "close relationship" with the individuals from whom discovery was sought. 138 CA4th at 880. See also §3.159.

Burden of persuasion rests with party objecting to discovery. In drafting the opposition papers, counsel should remember that the burden rests with the party objecting to discovery to justify its failure to respond. *Coy v Superior Court* (1962) 58 C2d 210, 220, 23 CR 393.

Potential imposition of sanctions. Opposing a motion to compel unsuccessfully and without substantial justification is a misuse of the discovery process that subjects the party or attorney to monetary sanctions. See CCP §§2023.010(h), 2023.030. On receipt of a motion to compel, the opposing party should consider serving appropriate supplemental responses. Although doing so might preclude the motion to compel from being heard as to the disputed discovery requests, this does not necessarily mean that the court will decline to impose sanctions. See *Sinaiko Healthcare Consulting, Inc. v Pacific Healthcare Consultants* (2007) 148 CA4th 390, 409, 55 CR3d 751 (trial court has authority to hear motion to compel responses when party on whom interrogatories were served failed to serve any response within required time but, after motion was served, provided untimely and inadequate response). See also Cal Rules of Ct 3.1030(a). Nevertheless, by serving supplemental responses, counsel may at least show some effort to cooperate in discovery.

PRACTICE TIP: Counsel should consider whether to request a hearing. Before ordering the production of privileged information, the trial court must conduct a hearing if requested. *Titmas v Superior Court* (2001) 87 CA4th 738, 742, 104 CR2d 803.

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H. After Motion Has Been Heard

§15.54A 1. Preparation of Order

At the close of the hearing, it is common practice for the court to rule on the motion and request the prevailing party to prepare a proposed order. If the court rules but says nothing about the order, the prevailing party should request the opportunity to prepare an order, citing Cal Rules of Ct 3.1312(a). Under Rule 3.1312(a), unless the parties waive notice or the court orders otherwise, the party prevailing on the motion must prepare a proposed order and mail or deliver it to the opposing party for approval as to form within 5 days of the ruling. Cal Rules of Ct 3.1312(a).

NOTE: Rule 3.1312(a) does not apply if the motion was unopposed and the moving party submitted a proposed order with the motion. Cal Rules of Ct 3.1312(d). If the court takes the motion under submission, the ruling will be written and contain the court's order.

The opposing party then has 5 days from the mailing or delivery to notify the prevailing party whether the proposed order is approved; if it is not approved, the opposing party must state the reasons. If the opposing party fails to notify the prevailing party within 5 days, the proposed order is deemed approved. Cal Rules of Ct 3.1312(a).

After the time for approval by the opposing party has expired, the prevailing party must submit the proposed order to the court with a summary of any response or objection by other parties to the proposed order or a statement that no response was received. Cal Rules of Ct 3.1312(b).

If the prevailing party fails to submit a proposed order, any party may do so. Cal Rules of Ct 3.1312(c).

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§15.55 2. Reconsideration

If new facts are learned after a motion to compel has been denied, a party may apply to the trial court for reconsideration of the decision. CCP §1008. The CCP §1008 application requirements for reconsideration based on the discovery of new facts are difficult to meet, however, and sanctions may be imposed for abuse of this process. Thus, counsel should consider this carefully before making such an application. See California Civil Procedure Before Trial §§12.113-12.118 (4th ed Cal CEB 2004).

For sample Order Compelling or Denying Answers or Further Answers to Interrogatories and for Sanctions, see §7.151.

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§15.56 3. Enforcing Order Compelling Discovery

The violation of a court order requiring a party to comply with a discovery request is a misuse of the discovery process (see CCP §2023.010(g)) punishable by one of the sanctions specified in CCP §2023.030. See §15.91.

In addition to moving for sanctions, counsel should ask the court for a further order requiring the offending party to comply with the order and putting the party on notice that the court will consider issue, evidence, or terminating sanctions in the event of further noncompliance. Many trial courts are reluctant to issue a terminating sanction except for particularly egregious discovery violations. To create a record that will be upheld on appeal if the trial court issues a severe sanction, a showing of multiple violations of the trial court's orders is desirable.

The form of the motion is the same as for a motion to compel. The moving party must file and serve a detailed notice of motion specifying the exact relief being sought, including a detailed description of any sanction being requested.

The moving party also must prepare and file a memorandum explaining the nature of the violation of the court's prior order, how the violation has prejudiced the moving party, and what sanction or further court order should be imposed. The moving party also must prepare and file supporting declarations detailing the nature and extent of the violation, reasonable efforts by the moving party to secure compliance with the court order, and any evidence needed to show that the violation has prejudiced the moving party.

NOTE: Generally, courts do not order the more serious sanctions—*i.e.*, issue, evidence, or terminating sanctions—absent the violation of a court order. However, once a party violates such an order, courts often impose severe sanctions on the offending party. On the types of sanctions, see §§15.92-15.103.

For further discussion on requesting sanctions, see §§15.108-15.109.

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§15.57 I. Motions to Compel in Federal Court

In federal court, motions to compel are made under Fed R Civ P 37, which governs both the failure to make the required initial disclosures under Fed R Civ P 26 and the failure to respond or respond adequately to specific discovery requests.

The moving party submits a motion with a notice of motion specifying the exact relief sought and any sanctions, a memorandum of points and authorities supporting the request, and declarations with supporting evidence demonstrating both why the request has merits and the fact that the party has met and conferred before the motion was brought.

The federal rules, unlike California's Civil Discovery Act, do not contain specific time deadlines for bringing motions. If counsel waits too long to bring the motion, however, the court may deem the party to have waived its right to make the motion.

Counsel must also consult the local rules, some of which materially change the method of bringing a motion to compel under Fed R Civ P 37. For example, the Central District of California requires counsel to meet in person if both are located within the same county and, if no resolution is reached, prepare a joint stipulation setting forth the parties' positions on the discovery dispute. CD Cal Local Civ R 37-1—37-2.4. Some judges have standing orders that no motion may be filed without leave of court.

PRACTICE TIP: Federal Rules of Civil Procedure 37(a)(1) does not appear to require an in-person meeting to satisfy the meet-and-confer requirement. However, unless counsel wants to challenge the local rules, the better practice is to comply with a local rule that requires an in-person meeting. Often, such a meeting will be more effective in reaching an accommodation, thus avoiding the need for judicial intervention.

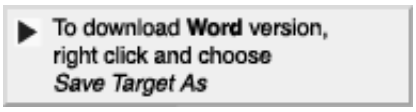
The federal rules provide similar sanctions to those contained in California's Civil Discovery Act. Thus, a federal court can enter a monetary, issue, evidence, or terminating sanction. Similar to state court, it is unlikely that a federal court will impose anything other than a monetary sanction on a motion to compel. However, federal courts do not tolerate repeated violations of discovery orders, and will issue more severe sanctions for repeated violations. On sanctions relating to discovery of electronically stored information (ESI), see §§4.17, 8.91, 8.104-8.108. See generally chap 4.

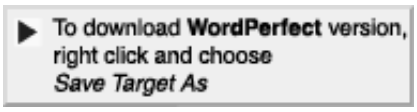
Redaction requirement. Under Fed R Civ P 5.2 (which became effective Dec. 1, 2007), unless the court orders otherwise, certain personal information must be redacted from electronic or paper documents filed in court. For example, a filing may contain only the last four digits of a social security number or taxpayer identification number. Certain exemptions exist, including for court records that were not subject to redaction when originally filed. Fed R Civ P 5.2(b). The court may order that a filing be made under seal without redaction (Fed R Civ P 5.2(d)) and, for good cause, may order the redaction of additional information or prohibit a nonparty's remote electronic access to a document filed with the court. Fed R Civ P 5.2(e). A party making a redacted filing may file an unredacted copy under seal. Fed R Civ P 5.2(f). On provisions for filing a reference list, see Rule 5.2(g). A person who files his or her own information without redaction and not under seal waives the protection of Rule 5.2(a). Fed R Civ Proc 5.2(h).

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.58 J. Checklist: Procedures for Motion to Compel

§15.58 J. Checklist: Procedures for Motion to Compel





MOVING PARTY

- Calendar last day on which a motion to compel can be brought, depending on discovery method (see §§15.40-15.41)
- Review statutory provisions governing the method of discovery for which more discovery is sought (see §15.41)
- Make reasonable, good faith attempt to resolve issues (see §§15.42-15.44)

If agreement not obtained

- Serve and file notice of motion to compel with supporting papers (see §§15.45-15.53)
- The notice must include a specific description of the relief being sought
- If sanctions are being sought, the person against whom sanctions are being sought and the type of sanctions sought must be specified in the notice (see CCP §2023.040)
- A memorandum justifying the motion
- Separate statement
- Supporting declarations with attached evidence showing
- Basis for the relief sought
- Reasonable, good faith attempt to resolve issues informally
- Proposed order
- Prepare reply brief
- Prepare evidentiary objection, if appropriate, to evidence submitted in opposition to the motion

PARTY OPPOSING MOTION

- Review moving papers and continue/commence meet-and-confer efforts to avoid hearing on motion
- Serve and file opposition papers, including (see §15.54)
- Memorandum in opposition to the motion
- Declaration(s) containing facts showing
- Own attempts at informal resolution of issues
- Moving party's unreasonableness and bad faith
- Factual reasons showing that opposing party's responses were adequate and given in good faith
- Expense incurred in opposing the motion to support a request for monetary sanctions
- Objections to improper evidence, *e.g.*, unauthenticated documents
- Proposed order denying motion and imposing monetary sanctions
- Attend hearing on motion

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V. MOTIONS FOR PROTECTIVE ORDERS

§15.59 A. Protective Order Explained

A protective order is a means by which the court shields a party, deponent, or other natural person or organization from "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." See, *e.g.,* CCP §2030.090(b). It achieves this by limiting either the *scope* of discovery (CCP §2017.020(a)) or the *frequency or extent of use* of a discovery method (CCP §2019.030(a)). For example, a protective order limits the scope of discovery by prohibiting the disclosure of trade secrets or other confidential research, development, or commercial information (see, *e.g.,* CCP §2030.090(b)(6)), and limits the frequency or extent of use of a discovery method by relieving a party from its obligation to respond to certain discovery requests (see, *e.g.,* CCP §2030.090(b)(1)). On the scope of discovery and how it may be limited, see chap 2.

What constitutes "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense" depends on the discovery method at issue, the applicable law, and the relevant facts.

For further discussion of the grounds for seeking a protective order, see §§15.66-15.68.

For examples of protective orders, see §§7.155 (interrogatories), 9.110 (requests for admission). For an example of a stipulated protective order, see §8.125.

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§15.60 B. Examples of Protective Orders

The Civil Discovery Act allows a court to fashion "any order that justice requires" to protect a party or person from "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." See, *e.g.*, CCP §2030.090(b). Nevertheless, for each discovery method, the Civil Discovery Act includes an illustrative, but not exhaustive, list of possible "directions" (*i.e.*, forms that a protective order may take).

EXAMPLE: With respect to depositions, CCP §2025.420(b)'s list of possible directions includes ordering that the deposition not be taken at all; that the deposition be taken at another time; that the deposition be taken at a place other than that specified in the deposition notice; that the deposition be taken only on certain specified terms and conditions; and that the scope of the examination be limited to certain matters.

For a full listing of the statutory provisions relating to protective orders for each discovery method, see §15.65.

Protective orders have also been employed in the following circumstances:

- To prevent the deposition of commissioners and executive officers of an administrative agency. *San Joaquin County Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 172, 76 CR3d 93.
- To prevent the extrajudicial medical examination of an employee in an action under the Federal Employers' Liability Act (FELA) (45 USC §§51-60). *Pratt v Union Pac. R.R. Co.* (2008) 168 CA4th 165, 182, 85 CR3d 321.
- To prevent the deposition of high-level officers and governmental officials. *Liberty Mut. Ins. Co. v Superior Court* (1992) 10 CA4th 1282, 1287, 13 CR2d 363.
- To protect a witness's identity. *John Z. v Superior Court* (1991) 1 CA4th 789, 2 CR2d 556.
- To preclude the discovery from third parties of documents that are also in the possession of a party. *Calcor Space Facility, Inc. v Superior Court* (1997) 53 CA4th 216, 61 CR2d 567.
- To limit the dissemination of personal financial information. *Richards v Superior Court* (1978) 86 CA3d 265, 272, 150 CR 77.
- To prevent a party's serving voluminous, unfocused interrogatories on the eve of trial. *Day v Rosenthal* (1985) 170 CA3d 1125, 1171, 217 CR 89.
- To limit the dissemination of information regarding a former spouse's present wife. *Marriage of Candiotti* (1995) 34 CA4th 718, 722, 40 CR2d 299.

For examples of protective orders, see §§7.155 (interrogatories), 9.110 (requests for admission). For an example of a stipulated protective order, see §8.125.

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C. Deciding to Make Motion for Protective Order

§15.61 1. Relying on Objections

The Civil Discovery Act provides for self-executing discovery—*i.e.,* a party demanding discovery does not need prior court approval, and the responding party may object rather than provide the requested information.

EXAMPLE: An attorney responding to an interrogatory or inspection demand may object and refuse to provide the information sought. CCP §§2030.210(a)(3), 2031.210(a)(3). See §§7.84-7.101. After an objection is made, the requesting party may move to compel the information or may abandon efforts to obtain it.

Simply interposing an objection, particularly if the party seeking the information realizes that the objection has merit, often ends the matter, making it unnecessary for the party resisting discovery to also move for a protective order. In certain circumstances, however, an objection may not suffice, in which case it may be necessary to make the substantial effort required to file a motion for a protective order.

EXAMPLE: If an examiner conducts a deposition in an abusive manner, defending counsel may not be able to adequately protect the deponent through objections made on the record. In that case, counsel needs to demand that the deposition officer suspend the examination to enable counsel to seek a protective order. CCP §2025.470. See §6.111.

If counsel intends to rely on an objection, counsel must make certain that the objection was timely made (see, *e.g.*, CCP §2030.290(a) (failure to serve timely objection to interrogatory waives any objection to it)) and that the objection is warranted (*Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 255, 92 CR2d 70 (on motion to compel, burden is on objecting party to justify failure to provide discovery)).

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§15.62 2. When to Seek Stipulated Protective Order

The principal advantage of a stipulated protective order is that it may achieve a result agreeable to the parties at far less expense, and with less uncertainty, than if a motion for a protective order is made. In many instances, particularly when counsel on both sides are reasonable, problems that might require a protective order can be amicably resolved without the expense and delay involved in resorting to court intervention.

If counsel obtains a stipulated protective order, it should be written. CCP §2016.030. For an example of a stipulated protective order, see §8.125. When the matter is of particular significance, or there is concern about the meaning of the stipulation or the ability or intention of other counsel to comply, counsel should submit the stipulation to a judge for approval.

If counsel makes an effort to negotiate an agreement and the dispute cannot be resolved, the moving party can then bring to the attention of the court, by declaration or affidavit, the efforts made to obtain a stipulation, as part of a showing that it has complied with the requirement to meet and confer.

Stipulation to file certain documents under seal. Documents filed under seal pursuant to a stipulated order may later be unsealed. In opposition to a later motion to unseal the records, the proponent of the sealing must at the least come forward with a specific list of facts sought to be withheld from public access and the specific reasons for withholding them. *H.B. Fuller Co. v Doe* (2007) 151 CA4th 879, 894, 60 CR3d 501. In *H.B. Fuller Co*, the plaintiff obtained a subpoena duces tecum to discover the identity of an anonymous defendant who allegedly disclosed confidential information on a web site. When the anonymous defendant moved to quash the subpoena, the parties stipulated, and the court ordered, that certain materials relating to the motion would be placed under seal. After the court denied the motion to quash, the defendant appealed and also moved the appellate court to unseal the documents, which it did, citing the constitutional standard of *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1181, 86 CR2d 778, and finding that even if the NBC standard did not apply, the proponent of sealing had failed to identify any specific facts whose disclosure would harm an identified interest or that keeping the records sealed would prevent the public from learning something it did not already know.

In *Mercury Interactive Corp. v Klein* (2007) 158 CA4th 60, 70 CR3d 88, the court held that the trial court erred in unsealing exhibits to a complaint that had been filed under seal pursuant to a stipulated protective order. Public access to all court-filed civil discovery documents cannot be assumed; the sealed records rules (Cal Rules of Ct 2.550, 2.551) do not apply to discovery materials that were neither used at trial nor submitted as a basis for adjudication.

NOTE: The procedures for filing records under seal are set forth in Cal Rules of Ct 2.551. See *Savaglio v Wal-Mart Stores, Inc.* (2007) 149 CA4th 588, 57 CR3d 215. These procedures "*do not* apply to records required to be kept confidential by law, or to records filed or lodged in connection with discovery motions, unless the discovery materials are used at trial or submitted as a basis for adjudication of substantive matters." 149 CA4th at 597 n6 (emphasis in original).

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§15.63 3. When to Disclose Information

If no agreement with opposing counsel is possible (see §15.62), the party initially resisting discovery should consider not only the merits of a motion for a protective order, but also the expense of making the motion and the significance of the information sought. The party should also consider whether the same information will be necessary to prove its own case. See *Steiny & Co. v California Elec. Supply Co.* (2000) 79 CA4th 285, 292, 93 CR2d 920 (holding that when plaintiff asserts valid trade secret privilege and prevents disclosure of crucial evidence, plaintiff may be prevented from presenting its damage evidence at trial). If the privileged information goes to the heart of the litigation, fairness requires that it be disclosed during discovery. When the requested discovery is not privileged or will not harm the client's interests, it may be less expensive and less burdensome for the party to disclose the information even though a motion for a protective order might ultimately have been successful.

CAUTION: Counsel deciding whether to move for a protective order or to provide the requested information should be aware that the court must impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order unless there was substantial justification for the unsuccessful action or other circumstances make the sanction unjust. See, *e.g.*, CCP §2030.090(d).

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§15.64 4. When to Consider Motion for Protective Order

In some circumstances, it may be too risky to rely solely on an objection, making it advisable for counsel to seek a protective order. But because the burden will be on party seeking the protective order, the reasons for doing so must have merit.

EXAMPLE: If a party served with notice of deposition will be unavailable for the examination, and it is uncertain whether the reasons for the unavailability will establish a legally sufficient and valid excuse, counsel should seek a protective order before the deposition. If no protective order is sought and a party fails to appear for a deposition, the examiner may not only move to compel the deponent's appearance but also may seek sanctions. The court must impose a monetary sanction on the deponent who failed to appear unless there was substantial justification for the failure or there are circumstances that would make sanctions unjust. CCP §2025.450(c). See §§6.68, 6.73.

NOTE: A motion for a protective order made in advance of a deposition on the ground that the witness knows nothing or that the deposition's scope should be limited may be unsuccessful if the court is reluctant to act prematurely. The court may prefer to allow the deposition to go forward and review the objections on a question-by-question basis. See, *e.g., Department of Health Servs. v Superior Court* (1980) 104 CA3d 80, 163 CR 414.

When discovery may be conducted only after obtaining a court order, such as when a party requests a physical or mental examination under CCP §§2032.310-2032.320, the time to resist, limit, or impose conditions on the examination is when the order is sought. In such instances, responsive papers, including declarations in opposition to the discovery motion, should contain a request for a protective order, stating the terms and conditions desired and the grounds for imposing them. In this situation, a protective order is less likely to be granted after an initial court order has been issued.

JUDGE'S PERSPECTIVE: Counsel should keep in mind that at the discovery stage the trial court is usually not conversant with the nuances of a case. When faced with counter arguments that a particular witness's deposition is or is not necessary to a fair resolution of the lawsuit, for example, the court, out of an abundance of caution, may allow the discovery to go forward. The party seeking to preclude discovery must make it very clear that the proposed discovery is inappropriate. It is imperative that counsel marshal sufficient admissible evidence to factually support the client's position. Conclusory and unsupported opinions will not normally be adequate to sustain a party's position.

For procedural checklist for obtaining protective orders, see §15.84.

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D. Procedures for Making Motion for Protective Order

§15.65 1. Table: Who May Make Motion

A party or "other affected person" may move for a protective order. The following table lists who may make a motion for a protective order under each applicable statutory provision.

CCP Section	Subject of Protective Order	Who May Make Motion
§2017.020(a)	Limitations on scope of discovery	Party or other affected person
§2019.030(a)-(b)	Restrictions on frequency or extent of discovery	Party or other affected person
§2025.420	Before, during, or after oral deposition	Party, deponent, or other affected natural person or organization
§2025.470	Bad faith conduct during oral deposition	Party or deponent
§2028.070	Matter concerning written deposition	Not specified, but presumably same as for oral depositions because it refers to CCP §2025.420 for additional orders
§2030.090	Issue pertaining to interrogatories	Responding party, any other party, or affected natural person or organization
§2031.060	Issue pertaining to demand for inspection of documents, things, and places	Party to whom directed, any other party, or affected person or organization
§2032.510(d)	Abusive conduct by examiner, or examiner does unauthorized diagnostic tests and procedures	Observer may suspend examination, so party examined or producing examinee may make motion
§2032.510(e)	Disruptive conduct by observer, or observer participates in examination	Examiner may suspend examination, so party who requested examination may make motion
§2033.080(a)	Requests for admission	Responding party
§2034.250	Exchange of expert information	Party served

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2. Grounds for Protective Order

§15.66 a. Statutes Authorizing Protective Orders

The basic statutory authorities for seeking a protective order are CCP §§2017.020(a) and 2019.030(a)-(b), which apply to all discovery methods:

- **Scope of discovery.** The court must "limit the scope of discovery if it determines that the burden, expense, or intrusiveness of the discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." CCP §2017.020(a).
- **Frequency or extent of discovery.** The court must restrict the frequency or the extent of use of a discovery method if it finds that (CCP §2019.030(a)):
- The discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
- The selected discovery method is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.

In addition to these two generally applicable statutes, for each discovery method there is specific statutory authority for seeking a protective order that includes an illustrative, but not exclusive, list of possible "directions" (*i.e.*, forms that a protective order may take). These are shown in the following table:

Method		**CCP Section**
Depositions	(Oral)	§§2025.420, 2025.470
	(Written)	§2028.070
Interrogatories		§2030.090
Demands for inspection		§2031.060
Physical examination		§2032.510(d)-(e)
Requests for admission		§2033.080
Exchange of expert witness information		§2034.250

NOTE: Protective orders that prevent parties from attending depositions are expressly precluded under CCP §2025.420(b)(12), notwithstanding the extreme discomfort that a party's presence might cause a witness. *Willoughby v Superior Court* (1985) 172 CA3d 890, 218 CR 486.

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§15.67 b. Judicial Guidelines: The *Greyhound* Rules

In *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 15 CR 90, the California Supreme Court set out the factors to be considered in balancing the rights of parties seeking discovery against those of parties from whom information is sought and who seek protective orders. Under *Greyhound*, a court that has been asked to issue a protective order should apply the following factors to the particular case (56 C2d at 382):

- The purpose of the information sought;
- The effect disclosure would have on the parties and the trial;
- The nature of the objections urged by the party resisting disclosure; and
- The court's authority to make an alternative order that may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens justified by the circumstances.

Under *Greyhound,* a court should also consider certain general legal concepts in ruling on a motion for a protective order, such as that discovery statutes should be broadly construed in favor of disclosure. 56 C2d at 377. These concepts are listed in §1.29.

NOTE: The *Greyhound* guidelines have continuing importance because they set out factors not specifically listed in the Civil Discovery Act that do not contravene any express provisions of that statute. The underlying principle that a court should exercise its discretion in the context of balancing factors relevant to the particular case still applies.

On privileges, work product, and other protections, see chap 3.

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§15.68 c. Balancing Constitutional and Statutory Privacy Rights

In addition to the balancing factors set out in the discovery statutes and developed in case law, courts must consider various constitutional and statutory privacy rights that protect the disclosure of certain types of information. See §§1.62, 3.156-3.164.

EXAMPLE 1: In *In re Marriage of Burkle* (2006) 135 CA4th 1045, 37 CR3d 805, the court held unconstitutional Fam C §2024.6, which requires a court to seal any pleading that lists or provides the location or identifying information about the financial assets of the parties in a divorce proceeding. The court held that the statute was not narrowly tailored to protect the parties' right to privacy without unduly burdening the First Amendment right of public access to court records.

EXAMPLE 2: In *Seattle Times Co. v Rhinehart* (1984) 467 US 20, 81 L Ed 2d 17, 104 S Ct 2199, the U.S. Supreme Court considered a Washington state statute and affirmed a protective order preventing defendant newspapers from publicly disseminating certain information derived from discovery. The Court found that the order protected a legitimate interest in privacy and did not offend the First Amendment, because the order did not prevent publication of information that was gained by means independent of the discovery process.

EXAMPLE 3: In *Humboldt Baykeeper v Union Pac. R.R. Co.* (ND Cal 2007) 244 FRD 560, the court applied *Seattle Times Co. v Rhinehart, supra,* to deny a protective order that would have kept confidential the results of on-site environmental inspections of contaminated property that defendant sought to redevelop. The First Amendment imposes some restraints on issuance of protective orders. 244 FRD at 562. A protective order requires good cause, which means that the court must find (1) that the order will advance or protect some legitimate governmental interest unrelated to the suppression of expression and (2) that the order's limitations on expression are no greater than necessary to protect "the particular governmental interest involved." 244 FRD at 561. Here, the privacy interest that might be affected adversely by disclosure was not substantial and disclosure would serve important public interests. Moreover, defendant bought the property knowing that its redevelopment and the information sought to be protected would be subject to public scrutiny. 244 FRD at 565.

EXAMPLE 4: The California Supreme Court affirmed a discovery order over an objection that disclosure of the information sought might violate the privacy of persons whose privacy Ins C §791.13 was intended to protect. *Colonial Life & Acc. Ins. Co. v Superior Court* (1982) 31 C3d 785, 792 n10, 183 CR 810. The court noted that the procedure approved by the trial court for contacting the individuals in question would satisfy one of the exceptions under the statute. The court also held that possible future violations of the rules of professional conduct of the State Bar of California did not justify a blanket ban on discovery. 31 C3d at 794.

EXAMPLE 5: In *Maggi v Superior Court* (2004) 119 CA4th 1218, 1223, 15 CR3d 161, the court held unconstitutional a protective order that (1) prohibited plaintiffs from contacting third party witnesses without first obtaining the court's permission; and (2) prohibited plaintiffs' counsel from accepting the representation of any new clients in lawsuits against defendants. Plaintiffs' right to a fair trial with full discovery outweighed the defendant's right to be free from onerous discovery, and the protective order violated the federal and state constitutional guarantees of free speech.

EXAMPLE 6: In *Boler v Superior Court* (1987) 201 CA3d 467, 247 CR 185, the court vacated a discovery order that permitted the plaintiff in a workplace sexual harassment suit to question the defendant about his sexual activities with unnamed women who were not parties to the lawsuit. Noting that the right of sexual privacy was embedded in the United States and California constitutions, the court stated the disclosure of such information "is only justified… if the sought after disclosure would serve the compelling state interest of the facilitation of truth in legal proceedings." 201 CA4th at 473.

EXAMPLE 7: In *GT, Inc. v Superior Court* (1984) 151 CA3d 748, 198 CR 892, the court of appeal approved a protective order that prevented an attorney from showing to his client financial information that had been

discovered from the opposing party. See also *Moskowitz v Superior Court* (1982) 137 CA3d 313, 187 CR 4 (plaintiff was entitled to protective order limiting use of personal financial information contained in deposition even though plaintiff placed his financial resources at issue by filing lawsuit).

On privacy rights in general, see §§3.156-3.164.

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§15.69 3. Timing

When formal discovery has been served. A responding party must "promptly move" for a protective order with respect to depositions (CCP §2025.420(a)), interrogatories (CCP §2030.090(a)), inspection demands (CCP §2031.060), requests for admission (CCP §2033.080(a)), and the exchange of expert witness lists (CCP §2034.250).

CAUTION: A party who waits beyond the statutory time in which to respond to the particular discovery request will likely be precluded from obtaining a protective order, absent a strong showing justifying the delay. See, *e.g.*, CCP §2030.290(a). On what is "promptly," see discussion in §§9.66, 9.71-9.72.

In other situations, *e.g.*, bad faith conduct during depositions (CCP §2025.470) or abusive conduct by examiner during physical examinations (CCP §2032.510(d)), the statutes do not include the same specific language requiring promptness. Nevertheless, failure to move promptly in such instances will be an important factor the court will consider in assessing the merits of the motion for a protective order. See §§6.111, 10.53.

If the requested discovery is due sooner than when a regularly noticed motion for a protective order can be heard, the party moving for a protective order may file an ex parte application for an order shortening the time required for service of the motion. Another alternative is to seek an ex parte order staying the discovery request pending the outcome of a regularly scheduled hearing on the motion for the protective order. On ex parte applications for orders shortening time, see §§15.11-15.29. For a sample ex parte application for an order shortening time for noticing deposition, see §5.219.

PRACTICE TIP: The timing on a motion to quash a flawed deposition notice differs from the timing on a motion for a protective order. A motion for a protective order does not automatically stay the taking of a deposition; however, a motion to quash a deposition notice stays the taking of the deposition until the court has heard the objection. CCP §2025.410(c). On motions to quash, see §§5.137-5.138.

Before service of formal discovery. Although in general a court will not consider the propriety of an unpropounded discovery request, the service of a subpoena or other formal discovery device is not necessarily a prerequisite to a motion for a protective order. *O'Grady v Superior Court* (2006) 139 CA4th 1423, 1454, 44 CR3d 72. In *O'Grady,* the nonmoving party secured court orders authorizing it to conduct early discovery against the moving party; by doing so, it made the moving party a target of discovery even though no formal discovery had as yet been undertaken. "By seeking and obtaining such leave, Apple ended any speculation about its intention to seek discovery from petitioners and created a concrete dispute concerning its right to do so. At that moment, the prospect of an intrusion on petitioners' interests passed from apprehensive surmise into concrete expectation." *O'Grady v Superior Court, supra.*

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§15.70 4. Meet-and-Confer Requirement

When meet-and-confer required. Except when moving for a protective order under CCP §2032.510(d)-(e) (abusive physical examination; disruptive or participating observer at physical examination), each discovery method requires that before filing a motion for a protective order, the parties engage in a "reasonable and good faith attempt at an informal resolution of each issue presented by the motion." See CCP §§2016.040, 2025.420(a) (oral depositions), 2030.090(a) (interrogatories), 2031.060(a) (inspection demands), 2033.080(a) (requests for admission), and 2034.250(a) (exchange of expert witness information).

The meet-and-confer requirement also applies to a motion for a protective order under CCP §2017.020(a) or §2019.030(b).

JUDGE'S PERSPECTIVE: The mode of communication appropriate for a good meet-and-confer will vary with the nature of the discovery dispute. For example, although a letter or fax may suffice if the issue is simple, a dispute over the production of documents pursuant to a large number of inspection demands may require a lengthy face-to-face meeting. Most discovery disputes can and should be resolved without court intervention, so judges expect the parties to have made every effort to resolve the matter before seeking judicial relief.

For further discussion of what constitutes a good faith attempt at an informal resolution of a discovery dispute, see §§15.42-15.44.

Sanctions. The importance of the meet-and-confer obligation is underscored by the requirement that monetary sanctions be imposed against any party or attorney who fails to confer, regardless of the outcome of the particular discovery motion. CCP §2023.020. See *Parker v Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 294, 57 CR3d 18 (refusal to meet-and-confer is separate sanctionable offense). In addition, if the section governing a particular motion requires the filing of a declaration showing a reasonable and good faith attempt to resolve the issues informally, the failure to confer constitutes a misuse of the discovery process, which may subject the offending party or attorney not only to monetary sanctions, but also to issue, evidence, contempt, or terminating sanctions. See CCP §§2023.010(i), 2023.030(a)-(e). On sanctions, see §§15.85-15.116. See also §7.114.

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5. Drafting Motion for Protective Order

§15.71 a. Required Papers

A motion for a protective order must consist of at least all of the following (Cal Rules of Ct 3.1112(a)):

- The motion itself;
- A notice of the motion;
- A memorandum in support of the motion; and
- A proposed order.

A motion for a protective order usually also includes one or more declarations presenting evidence in support of the motion. Cal Rules of Ct 3.1112(b).

Counsel may file these papers as separate documents or combined in one or more documents. If they are combined, however, counsel must list the documents separately in the caption. Cal Rules of Ct 3.1112(c).

JUDGE'S PERSPECTIVE: The proposed order is a means for the advocate to frame for the court exactly the relief the moving party wants, *e.g.*, who will be excluded from a deposition or which requests the moving party must answer when a challenge to a declaration of necessity is sustained. Submitting a proposed order is helpful because the court will likely sign it (modified or not) at the hearing, thus avoiding time-consuming and expensive post-hearing wrangling about exactly what the order should say.

For a sample motion for protective order, see §§6.142-6.144.

Redaction requirement. Under Cal Rules of Ct 1.20(b)(1) (effective Jan. 1, 2008) parties must redact certain identifying information from paper or electronic documents or records filed with the court. See discussion in §15.45.

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§15.72 b. Factual Showing Required (Good Cause)

The party moving for a protective order must show good cause for its issuance. See, *e.g.*, CCP §2030.090(b).

Statutory requirements. The moving party must show that a protective order is needed to protect it from "unwarranted annoyance, embarrassment, or oppression or undue burden and expense." CCP §§2025.420(b), 2030.090(b), 2031.060(b), 2033.080(b), 2034.250. See §15.66.

If the moving party seeks to limit the scope of discovery, that party must show "that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." CCP §2017.020(a). On the weighing process, see §1.35.

JUDGE'S PERSPECTIVE: The party objecting to the scope of discovery must support its objection with admissible evidence establishing the burden, expense, or intrusiveness of the proposed discovery. CCP §2017.020(a). Counsel should ensure that any declarations supporting a motion for protective order to limit discovery are made by persons having personal knowledge of the facts that support a narrowing of the scope of discovery.

If the moving party is seeking to limit the frequency or extent of use of a discovery method, that party must show either of the following (CCP §2019.030(a)(1)-(2)):

- The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
- The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.

PRACTICE TIP: Counsel should reference the applicable discovery statute when making a motion for protective order (*e.g.,* CCP §2017.020).

***Greyhound* factors.** In determining the existence of good cause, the court will also take into account the factors in *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 382, 15 CR 90. For list of these factors, see §15.67.

Showing of burden alone insufficient. Merely demonstrating that compliance with the requested discovery would be burdensome is not a sufficient ground for granting a motion for a protective order. *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 417, 15 CR 119. Because some burden is inherent in all discovery demands, a court can issue a protective order only if the burden is so substantial that it would result in injustice. 56 C2d at 418; *Pantzalas v Superior Court* (1969) 272 CA2d 499, 504, 77 CR 354.

Additional factors. Good cause may include inconvenience to the producing party and that party's right to privacy, balanced against the requesting party's ability to obtain the information by other means. *Allen v Superior Court* (1984) 151 CA3d 447, 452, 198 CR 737. The court may also consider prejudice to the producing party's trial preparation. See, *e.g., Day v Rosenthal* (1985) 170 CA3d 1125, 1171, 217 CR 89 (court noted that interrogatories were served late in the case, were voluminous, would require a great deal of time to answer, and were without focus). See also *Hauk v Superior Court* (1964) 61 C2d 295, 299, 38 CR 345.

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§15.73 c. When Burden of Showing Good Cause Shifts

Physical or mental examinations. Physical or mental examinations under CCP §§2032.310-2032.320 may be permitted only after a showing of good cause. In that instance, the burden of proving good cause rests with the party *seeking*, rather than with the party *resisting*, discovery. On physical and mental examinations, see chap 10.

Requesting additional interrogatories or requests for admission. A party wishing to propound more than 35 specially prepared interrogatories (or more than 35 requests for admission that do not relate to the genuineness of documents) must attach a declaration for additional discovery, setting out specific justifications for the additional discovery requests. CCP §§2030.050, 2033.050. See §§7.11, 9.5. If the responding party seeks a protective order on the ground that the number of specially prepared interrogatories or requests for admission is unwarranted, the propounding party has the burden of justifying the additional interrogatories. CCP §§2030.040(b), 2033.040(b). On interrogatories, see chap 7. On requests for admission, see chap 9.

Class actions. In class actions, the burden shifts to the party propounding interrogatories to unnamed class members to show that the interrogatories are necessary to the trial of proper class issues, that they are not unduly burdensome, and that they are not propounded to decrease the class size. *Danzig v Superior Court* (1978) 87 CA3d 604, 614, 151 CR 185. See also *Spoon v Superior Court* (1982) 130 CA3d 735, 747, 182 CR 44. Contrary to the general rule on interrogatories in class actions, the court has held that the burden does not shift to the propounding party to show good cause to take the *depositions* of unnamed class members. In this situation, the burden remains with the responding party to show good cause for a protective order. *Southern Cal. Edison Co. v Superior Court* (1972) 7 C3d 832, 842, 103 CR 709. On use of interrogatories in class actions, see §§7.23, 7.70.

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§15.74 d. Effect of Presumptions

In certain circumstances, notably when a party seeks personal financial information relevant to a claim for punitive damages, the responding party is presumptively entitled to a protective order limiting dissemination of the information. *Moskowitz v Superior Court* (1982) 137 CA3d 313, 317, 187 CR 4, citing *Richards v Superior Court* (1978) 86 CA3d 265, 272, 150 CR 77. Under the protective order, the information can be revealed only to counsel for the discovering party or to counsel's representative and, once revealed, the information can be used only for purposes of the lawsuit. When the presumption applies, the burden is on the party opposing the protective order to establish a substantial reason why the order should be denied. *Richards v Superior Court*, *supra.* Although not phrased in terms of a presumption against discovery, CC §3295(c) provides that no pretrial discovery of financial information relevant to a punitive damages claim is permitted unless the plaintiff, on motion, establishes that there is a substantial probability of prevailing on the claim. On punitive damages and discovery, see also §1.41.

The presumption that the *Richards* court applied when punitive damages were claimed has not been extended to situations in which corporate financial information relating to causes of action is requested. *GT, Inc. v Superior Court* (1984) 151 CA3d 748, 754, 198 CR 892 (no presumption applied when plaintiff requested documents containing financial information relating to causes of action for antitrust violations and unfair competition).

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§15.75 e. Request for Sanctions

If the motion for a protective order is granted, the court must impose a monetary sanction on the party, person, or attorney who unsuccessfully opposed the motion, "unless the court finds that the one subject to the sanction acted with substantial justification or that some other circumstances make the imposition of the sanction unjust." See, *e.g.*, CCP §2030.090(d).

NOTE: Of course, if the motion is denied, the court must impose monetary sanctions on the moving party unless the moving party acted with "substantial justification" or other circumstances make the imposition of sanctions unjust. See, *e.g.*, CCP §2030.090(d).

If the moving party on a motion for a protective order wants to have the court impose monetary sanctions on the opposing party, the moving party's motion must also be accompanied by a proper request for sanctions. On request for sanctions, see §§15.108-15.109.

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§15.76 6. Service

Absent an order shortening time (see §§15.11-15.29), written notice of a motion for a protective order must be given at least 16 court days before the hearing. CCP §1005(b). If the papers are served by mail in California, the notice period must be increased by 5 calendar days, and if the papers are served by facsimile transmission, express mail, or other method providing for overnight delivery, the notice period must be increased by 2 calendar days. CCP §1005(b). On timing for motions, see §2.23. On extensions for different methods of service, see §2.22.

JUDGE'S PERSPECTIVE: It is very important that counsel serve *every party* who has appeared. Too often the court must place a discovery motion off calendar because the moving party served the motion only on the party directly involved in the dispute.

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§15.77 7. Filing

The original of the motion papers, with appropriate proofs of service, should be filed with the court clerk's office (Cal Rules of Ct 3.1302(a)) or, if local rules specify, directly in the law and motion department in which the hearing is noticed.

Counsel should also have an extra copy of the papers file-stamped by the clerk. Counsel can then retain these file-stamped copies if any question later arises as to the date of filing or if the originals are misplaced.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.78 E. Responding to Motion for Protective Order

§15.78 E. Responding to Motion for Protective Order

In responding to a motion for a protective order, a party should file the following documents:

- Memorandum in opposition; and
- Responsive declaration(s) containing the client's version of the facts or issues in dispute.

A memorandum is not required (as it is of the moving party), but it is better practice and more persuasive if it is included as part of the opposition papers. On format requirements, see Cal Rules of Ct 3.1113.

PRACTICE TIP: Because most courts are inclined to allow discovery, the opposing party should show the court the reasonableness of its position. The court generally will be looking for a middle ground that accommodates the interests and concerns of all parties. If counsel can fashion a position that gets the needed discovery and is reasonable, the court will be more likely to adopt that position.

Burden of persuasion rests with moving party. In drafting the opposition papers, counsel should remember that the burden of showing good cause justifying the issuance of a protective order rests with the moving party. See, *e.g.*, CCP §2030.090(b).

Potential imposition of sanctions. Opposing a motion for a protective order unsuccessfully and without substantial justification is a misuse of the discovery process that subjects the party or attorney to monetary sanctions. See CCP §§2023.010(h), 2023.030, 2030.090(d).

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F. After Motion Has Been Heard

§15.79 1. Making Record of Court's Order

After a motion for a protective order has been heard and decided, the judge may announce the decision from the bench or take the motion under submission and later advise the parties of the ruling. When a motion is taken under submission, the subsequent ruling (*i.e.,* the order) is usually in writing. For examples of protective orders, see §§7.155 (interrogatories), 9.110 (requests for admission).

When the motion is decided at the hearing, however, there may be no written record of the judge's ruling except for the transcript of the hearing and a minute order. In such a case, unless the parties waive notice or the court orders otherwise, the prevailing party must prepare a proposed order and mail or deliver it to the opposing party for approval as to form within 5 days of the hearing. Cal Rules of Ct 3.1312(a). On the procedure for preparing the proposed order, see §15.54A.

On the importance of creating a record for review, see chap 16.

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§15.80 2. Requesting Reconsideration

For discussion of making a motion for reconsideration, see §15.55. Counsel should keep in mind that, in addition to the sanctions available to a party opposing reconsideration under CCP §1008, losing a discovery-based motion for reconsideration is an abuse of discovery that will generally warrant the imposition of a monetary sanction. CCP §2023.010(h).

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§15.81 3. Seeking Appellate Review

Although the court has broad powers to issue protective orders, that power is not unlimited. Its discretion may be exercised only on the basis of the requirements set out in CCP §§2017.020(a) and 2019.030, or on the basis of the guidelines set out with regard to a specific discovery method. Appellate review of a protective order may be sought by extraordinary writ or by appeal, although appellate review of a discovery order is very rarely granted. See chap 16.

For examples of still-applicable cases under the 1956 discovery statute in which the court indicated that there was not an unrestricted power to make protective orders, see *Hauk v Superior Court* (1964) 61 C2d 295, 298, 38 CR 345; *Department of Health Servs. v Superior Court* (1980) 104 CA3d 80, 163 CR 414. For a brief history of California discovery statutes, see §1.3. If good cause is required and none is shown, there is no legal justification for the exercise of discretion and granting a protective order is an abuse of discretion. *Armstrong v Gates* (1973) 32 CA3d 952, 957, 108 CR 604; *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 712, 32 CR 288. On abuse of discretion, see §16.5.

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§15.82 4. Enforcing Protective Orders

Disobeying a court order to provide discovery, including an order to provide limited discovery under a protective order, constitutes a misuse of the discovery process. CCP §2023.010(g). Because most protective orders are self-executing, counsel seldom have difficulty enforcing them, *e.g.*, an order prohibiting the deposition of a party is enforced when that party does not attend the deposition. On protective orders with respect to the taking of oral depositions, see §§5.139-5.141.

Nonetheless, the court may impose sanctions, including monetary, issue, evidence, terminating, or contempt sanctions, on anyone misusing the discovery process. CCP §2023.030(a)-(e). On sanctions, see §§15.85-15.116.

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§15.83 G. Protective Orders in Federal Court

Federal Rules of Civil Procedure 26(c) provides that, on motion by a party or by the person from whom discovery is sought, "the court… may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." See also §8.119.

Who may seek. Either party may seek a protective order to prevent discovery abuses. *Wehling v Columbia Broadcasting Sys.* (5th Cir 1979) 608 F2d 1084. A nonparty witness may also invoke the provisions of Fed R Civ P 30(b) for protection from abuse of discovery. *U.S. v LV No. 134* (SD NY 1953) 14 FRD 261, 263.

Good cause required. The party seeking a protective order has the burden of showing valid grounds for its issuance. See, *e.g., Leighr v Beverly Enters.-Kansas* (D Kan 1996) 164 FRD 550, 552. The court order granting a protective order must include within the order the reasons "good cause" exists for the protection sought. *Phillips v General Motors Corp.* (9th Cir 2002) 307 F3d 1206, 1212.

Types of orders. The types of relief that the federal court can make are very broad and include (Fed R Civ P 26(c)):

- That the disclosure or discovery not be had;
- That the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- That certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- That discovery be conducted with no one present except persons designated by the court;
- That a deposition, after being sealed, be opened only by order of the court;
- That a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
- That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Duty to confer. Federal Rules of Civil Procedure 26(c) also requires that before filing a motion for a protective order, the parties confer in good faith "in an effort to resolve the dispute without court action."

Stipulated protective orders. Generally speaking, parties in many types of cases, such as trade secret or patent cases, routinely stipulate to protective orders. However, a court does not have to accept a stipulated protective order, and has a duty to independently review a stipulation and to reject it if the court finds that no good cause exists for the stipulated order. *Jepson, Inc. v Makita Elec. Works, Ltd.* (7th Cir 1994) 30 F3d 854, 858.

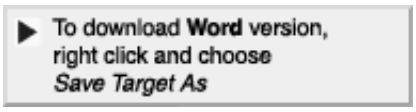
Common law right of access to judicial records. Except for those few public documents "traditionally kept secret" (*e.g.*, grand jury testimony), there is a strong presumption in favor of public access to judicial documents and records. *Kamakana v City & County of Honolulu* (9th Cir 2006) 447 F3d 1172, 1178. A party seeking to overcome this presumption must state "compelling reasons" supported by specific factual findings why a document should remain under seal. 447 F3d at 1179. Although a good cause showing under Fed R Civ P 26(c) is sufficient to seal documents produced during discovery, and to maintain the secrecy of documents attached to nondispositive motions, it is not enough to maintain the secrecy of documents attached to dispositive motions that were filed with the court. As the court said in *Kamakana*: "Unlike private materials unearthed during discovery, judicial records are public documents almost by definition, and the public is entitled to access by default.… Thus a "good cause" showing alone will not suffice to fulfill the "compelling reasons" standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments." 447 F3d at 1180. See also *Foltz v State Farm Mut. Auto Ins. Co.* (9th Cir 2003) 331 F3d 1122, 1135.

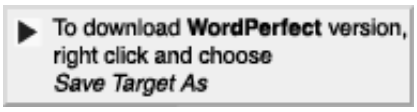
Redaction requirement. Under Fed R Civ Proc 5.2 (which became effective Dec. 1, 2007), unless the court orders otherwise, certain personal information must be redacted from electronic or paper documents filed in court. See §15.57.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.84 H. Checklist: Procedure for Obtaining Protective Order

§15.84 H. Checklist: Procedure for Obtaining Protective Order





Procedural Checklist

MOVING PARTY

- Check protective order provisions in CCP section regulating discovery method against which protection is sought (see §§15.65-15.66)
- Make reasonable, good faith attempt to resolve issues informally (see §15.70)

If agreement and written stipulation not obtained

- Serve and file notice of motion for protective order with supporting papers, including (see §§15.71-15.77)
- Separate Statement
- Declaration(s) stating facts showing
- Reasonable, good faith attempt to resolve issues informally
- Good cause for issuance of requested orders
- Expense of pursuing motion (to support monetary sanction)
- Memorandum
- Proposed protective order(s)
- Attend hearing on motion

If motion denied

- Suggest terms and conditions for discovery
- Argue against imposition of monetary sanction by showing substantial justification or special circumstances

PARTY OPPOSING MOTION

- Serve and file opposition papers, including (see §15.78)
- Declaration(s) stating facts showing
- Own attempts at informal resolution of issues
- Moving party's unreasonableness and bad faith
- Need for the discovery sought and impracticality of limits
- Expense of opposing motion (to support monetary sanction)
- Memorandum
- Proposed order denying motion and imposing monetary sanction
- Prepare and serve reply brief
- Attend hearing on motion

If motion granted

- Argue against imposition of monetary sanction by showing substantial justification or special circumstances that would make sanction unjust

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VI. SANCTIONS

A. General Purposes of Sanctions

§15.85 1. To Compel Discovery

One of the basic purposes for imposing sanctions is to compel disclosure of discoverable information. See, *e.g., Marriage of Economou* (1990) 224 CA3d 1466, 1475, 274 CR 473 (court's discretion to impose sanctions "must be exercised in a manner consistent with the basic purposes of such sanctions: to compel disclosure of discoverable information"); *Kaplan v Eldorado Ins. Co*. (1976) 55 CA3d 587, 591, 127 CR 699 (discovery sanctions enable party "to obtain evidence in the control of his adversary in order to further the efficient, economical disposition of cases according to right and justice *on the merits*").

In keeping with this purpose, the proposed sanction should be "suitable and necessary" to enable the requesting party to obtain the object of its discovery. *Caryl Richards, Inc. v Superior Court* (1961) 188 CA2d 300, 304, 10 CR 377. See *Juarez v Boy Scouts of Am., Inc.* (2000) 81 CA4th 377, 388, 97 CR2d 12. Whatever penalty is imposed should be "appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." *Deyo v Kilbourne* (1978) 84 CA3d 771, 793, 149 CR 499. Sanctions are awardable to parties, not their attorneys. *Poe v Diamond* (1987) 191 CA3d 1394, 1399, 237 CR 80.

NOTE: For each discovery method, procedures are available for compelling discovery should the responding party fail to respond in a timely fashion, respond only partially or evasively, or make meritless objections. The statutory provisions governing each discovery method set out the requirements for compelling discovery pertaining to that method. For discussion on compelling discovery in the context of each individual discovery method, see the chapter in this book on the discovery method for which a motion to compel is under consideration or of concern. For discussion of motions to compel generally, see §§15.30-15.58.

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§15.86 2. To Curb Misuse of Discovery Process

Another basic purpose of sanctions is to curb misuse of the discovery process, which can cause unnecessary delay and add greatly to the financial and human costs of litigation. See CCP §§2023.010-2023.040. The purpose of any discovery sanction is to force a recalcitrant party to comply with discovery orders and to mitigate the prejudice suffered by the propounding party when such orders are disregarded. *Flood v Simpson* (1975) 45 CA3d 644, 651, 119 CR 675; *Pacers, Inc. v Superior Court* (1984) 162 CA3d 686, 208 CR 743.

JUDGE'S PERSPECTIVE: Following a party's failure to comply with an order compelling production of documents which the party had failed to produce in response to a proper demand for inspection of documents under CCP §2031.010, an evidentiary sanction might be used to preclude a party from using those documents at trial.

The purpose is not to punish, however. In cases decided before and after the enactment of the Civil Discovery Act of 1986, courts have repeatedly stated that the purpose of sanctions is not "to provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits." *Crummer v Beeler* (1960) 185 CA2d 851, 858, 8 CR 698. See also *Marriage of Economou* (1990) 224 CA3d 1466, 1475, 274 CR 473 ("[d]iscovery sanctions cannot be imposed to punish the offending party or to bestow an unwarranted 'windfall' on the adversary").

In addition, "[a] discovery sanction may not place the party seeking discovery in a better position than it would have been in if the desired discovery had been provided and had been favorable." *Marriage of Chakko* (2004) 115 CA4th 104, 109, 8 CR3d 699; *Miranda v 21st Century Ins. Co.* (2004) 117 CA4th 913, 12 CR3d 159 (dismissal of uninsured motorist arbitration upheld; trial court not required to impose "lesser sanction" of staying arbitration until discovery answered).

JUDGE'S PERSPECTIVE: Occasionally, the discovery abuse is such that a commensurate monetary or evidence sanction will not return the parties to the status quo. In this situation, the court will attempt to formulate an order that does not allow the abusing party to obtain an advantage because of the abuse. Both parties have a strong interest in suggesting to the court what would be an appropriate order. Because counsel should be much more familiar with the potential evidentiary issues in the case than the court, they can be of great assistance to the court in formulating such an order.

On procedures for making and opposing motions for sanctions, see §§15.108-15.110.

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B. What Constitutes Misuse of Discovery Process

§15.87 1. Misuse in General

Sanctions are available when there has been a misuse of the discovery process. CCP §2023.030. The legislature has set out a nonexclusive list of such misuses (CCP §2023.010):

- Persisting, over objection and without substantial justification, in an attempt to obtain information or materials outside the scope of permissible discovery.
- Using a discovery method in a manner that does not comply with its specified procedures.
- Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.
- Failing to respond or submit to an authorized method of discovery.
- Making an unmeritorious objection to discovery without substantial justification.
- Making an evasive response to discovery.
- Disobeying a court order to provide discovery.
- Making or opposing a motion to compel or to limit discovery unsuccessfully and without substantial justification.
- Failing to confer in person, by telephone, or by letter with opposing counsel in a reasonable, good faith attempt to resolve any dispute about discovery informally, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that such an attempt has been made.

The list of discovery misuses in CCP §2023.010 does not exhaust the circumstances in which misuse can occur. The following behavior also resulted in the imposition of sanctions:

- Refusing to withdraw a motion to compel after a party agreed to answer additional questions. *Safeco Ins. Co. of Am. v Parks* (2004) 122 CA4th 779, 795, 19 CR3d 17.
- Filing a frivolous motion for reconsideration of a prior award of monetary sanctions. *Mattco Forge, Inc. v Arthur Young & Co.* (1990) 223 CA3d 1429, 1435, 273 CR 262.
- Representing a suspended corporation in litigation, subjecting corporation's counsel to discovery sanctions. *Palm Valley Homeowners Ass'n v Design MTC* (2000) 85 CA4th 553, 563, 102 CR2d 350 ("participating in discovery on behalf of a suspended corporation,… qualifies as conduct abusive of the discovery process, and thus sanctionable").
- Withholding or destroying evidence. See *R.S. Creative, Inc. v Creative Cotton, Ltd.* (1999) 75 CA4th 486, 497, 89 CR2d 353.
- Making deceptive or dilatory responses to discovery, resulting in the loss of evidence. *Karlsson v Ford Motor Co.* (2006) 140 CA4th 1202, 1214, 45 CR3d 265 (failure to designate proper "person most knowledgeable"; failure to produce drawings and prototypes; concealment of relevant documents; failure to produce employee to conclude deposition).
- Spoliating evidence, *i.e.,* destroying evidence in response to a discovery request after litigation has commenced or destroying evidence in anticipation of a discovery request. *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248.

PRACTICE TIP: Motions for sanctions based on bad faith conduct in discovery should be brought under the applicable provisions of the Civil Discovery Act. The operative statute for sanctions for bad faith acts does not apply to disclosures and discovery requests, responses, objections, and discovery motions. CCP §128.7(g). For a table of sanctions under various discovery provisions, see §15.103.

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§15.88 2. Failure to Meet and Confer

Regardless of the outcome of the particular discovery motion, the court *must* impose a monetary sanction ordering a party or attorney who fails to confer, as required, to pay the reasonable expenses, including attorney fees, incurred by anyone as a result of the failure to meet and confer. CCP §2023.020; *Leko v Cornerstone Bldg. Inspection Serv.* (2001) 86 CA4th 1109, 1124, 103 CR2d 858 (sanctions imposed for failing to resolve issue of deponent's nonappearance at deposition before bringing motion to compel); *Obregon v Superior Court* (1998) 67 CA4th 424, 431, 79 CR2d 62.

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§15.89 3. Failure to Respond to Discovery Requests or Service of Inadequate Responses

The failure to respond to written discovery requests such as interrogatories, inspection demands, and requests for admission is a misuse of the discovery process. CCP §2023.010(d). So too is the service of unmeritorious objections or incomplete or evasive responses. CCP §2023.010(d)-(f). See *Puerto v Superior Court* (2008) 158 CA4th 1242, 1248, 70 CR3d 701 (naming 2600-3000 employees in response to form interrogatories when responding party knew employees named were not percipient witnesses would "likely merit sanctions for '[m]aking an evasive response to discovery' or '[e]mploying a discovery method in a manner or to an extent that causes … oppression, or undue burden and expense'").

An aggrieved party can move to compel responses (or further responses) and also seek sanctions. See, *e.g.,* CCP §§2030.290, 2030.300. However, if the dilatory party has not violated a prior court order or otherwise engaged in discovery misuse, the moving party is *generally* limited to seeking monetary sanctions, which the court *must* impose if the motion is granted unless the court finds that the one subject to the sanction acted with "substantial justification or that other circumstances make the imposition of the sanction unjust." See, *e.g.,* CCP §§2030.290(c), 2030.300(d); *New Albertsons, Inc. v Superior Court* (2008) 168 CA4th 1403, 1428, 86 CR3d 457 (evidence and issue sanctions improper absent failure to obey order compelling discovery); *Saxena v Goffney* (2008) 159 CA4th 316, 334, 71 CR3d 469 (absent violation of order compelling answer or further answer, evidence sanctions may only be imposed when answer given is willfully false). But see *Karlsson v Ford Motor Co.* (2006) 140 CA4th 1202, 1214, 45 CR3d 265 (although Ford had not violated prior discovery order, imposition of evidence sanctions was nonetheless appropriate in light of Ford's pattern of willful discovery abuse).

On monetary sanctions, see §§15.93-15.96.

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§15.90 4. Failure to Appear for, Proceed With, or Answer Questions at Deposition

A party faced with a deponent who fails to appear for, proceed with, or answer questions at a deposition is generally limited to seeking, in addition to an order compelling the deponent to appear, proceed, or answer, monetary sanctions, which the court *must* impose unless the court finds that the one subject to the sanction acted with "substantial justification or that other circumstances make the imposition of the sanction unjust." See CCP §§2025.450(c), 2025.480(f).

On monetary sanctions, see §§15.93-15.96.

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§15.91 5. Failure to Obey Court Order

When a party fails to obey a court order, the full range of discovery sanctions becomes available. CCP §§2023.010(g), 2023.030. For example, CCP §2030.300(e) provides that if a party fails to obey an order compelling further responses to interrogatories, "the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction," in addition to the imposition of further monetary sanctions. Violation of a discovery order, however, is not a prerequisite to the issuing of evidentiary sanctions when the offending party has engaged in a pattern of willful discovery abuse that causes the unavailability of evidence. *Karlsson v Ford Motor Co.* (2006) 140 CA4th 1202, 1214, 45 CR3d 265.

In order for issue, evidence, or terminating sanctions (see §§15.97-15.101) to be imposed following a party's failure to obey a court order, the court must find that the party's disobedience was willful. See *R.S. Creative, Inc. v Creative Cotton, Ltd.* (1999) 75 CA4th 486, 496, 89 CR2d 353 (dismissal based on plaintiff's repeated efforts to thwart discovery, including the violation of two discovery orders upheld).

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§15.92 C. Types of Sanctions

The five types of sanctions that are available are (CCP §2023.030):

- Monetary sanctions (see §§15.93-15.96);
- Issue sanctions (see §15.97);
- Evidence sanctions (see §15.98);
- Terminating sanctions (see §§15.99-15.101); and
- Contempt sanctions (see §15.102).

JUDGE'S PERSPECTIVE: Courts will frequently take into account the following factors, among others, in determining a sanction appropriate in a given circumstance: (1) whether the nonmoving party has violated a prior discovery order in connection with the discovery at issue; (2) whether monetary sanctions have previously been imposed on the nonmoving party, in connection with this discovery or otherwise; (3) the nature of the discovery abuse in question; and (4) facts indicating that monetary sanctions alone will not end the discovery abuse by the nonmoving party (*e.g.*, a plaintiff has failed to respond to discovery and has done nothing to advance the case following service of the complaint).

Local rules. The court may also award terminating or lesser sanctions against counsel or a party who fails to comply with local rules. CCP §575(a). Significantly, however, CCP §575.2(b) requires that when counsel, rather than the party, is responsible for that failure, the court may impose penalties on counsel only and may not impose sanctions that adversely affect the party's claims or defenses. *Garcia v McCutchen* (1997) 16 C4th 469, 481, 66 CR2d 319.

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1. Monetary Sanctions

§15.93 a. In General

A party or attorney who engages in a misuse of discovery may be assessed a monetary sanction requiring the party, attorney, or both, to pay the reasonable expenses, including attorney fees, incurred by anyone as a result of the discovery misuse. CCP §2023.030(a). A monetary sanction may also be imposed on any party or attorney who unsuccessfully asserts that another has engaged in the misuse of the discovery process. CCP §2023.030(a).

Monetary sanctions are the most common form of sanction because they are considered the least severe (in terms of their effect on the litigation) and the court can impose them even in the absence of a party's failure to obey a prior court order. See *Parker v Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 294, 57 CR3d 18 (upholding monetary sanction against plaintiff for failing to provide further answers to interrogatories despite absence of previous order compelling him to respond).

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§15.94 b. Willfulness Not Required

There is no requirement that misuse of the discovery process must be willful for a monetary sanction to be imposed. See, *e.g.,* CCP §2023.030(a); *Kohan v Cohan* (1991) 229 CA3d 967, 971, 280 CR 474 (sanctions imposed for lack of diligence in designating expert witness).

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§15.95 c. Reasonable Expenses Recoverable

Reasonable expenses can include filing fees and, when deposition responses are at issue, the cost of a deposition transcript. *Johnson v Superior Court* (1968) 258 CA2d 829, 840, 66 CR 134. Reasonable expenses also include costs that unrepresented litigants incur, if reasonably identifiable and allocable, even though those costs are ones that lawyers ordinarily include in their rates or other fee structures. *Kravitz v Superior Court* (2001) 91 CA4th 1015, 1020, 111 CR2d 385 (attorney who appeared in propria persona should be allowed to recover expenses for computer-assisted legal research, photocopying, and transportation to and from court).

Monetary sanctions under CCP §2023.030(a) may not exceed actual costs, including attorney fees, spent or incurred to obtain compliance with discovery. *Argaman v Ratan* (1999) 73 CA4th 1173, 1179, 86 CR2d 917 (mandatory monetary sanctions cannot exceed actual costs incurred). Monetary sanctions for discovery abuse are limited to *reasonable* costs. *Marriage of Niklas* (1989) 211 CA3d 28, 258 CR 921 (award of $45,000 in sanctions reversed because evidence was insufficient to show that amount reflected reasonable expenses resulting from improper conduct).

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§15.96 d. Reasonable Attorney Fees Recoverable

A party may recover reasonable attorney fees incurred as a result of an opposing party's failure to properly respond to discovery requests. "And this is true whether or not a party actually 'incurs' additional fees as a result of the opposing party's conduct as is the case here where the party is represented by a lawyer who does not charge a fee." *Do v Superior Court* (2003) 109 CA4th 1210, 1218, 135 CR2d 855 (in case of first impression, court of appeal reversed trial court order denying sanctions for failure to appear at deposition on sole ground that attorney was representing client without charge).

An attorney appearing in propria persona, however, may not recover attorney fees incurred on his or her own behalf. *Argaman v Ratan* (1999) 73 CA4th 1173, 1177, 86 CR2d 917.

In *Qualcomm Inc. v Broadcom Corp*. (SD Cal, Jan. 7, 2008; No. 05 CV 1958-B (BLM)) 2008 US Dist Lexis 911, aff'd and remanded (9th Cir) 548 F3d 1004, as a sanction for withholding over 46,000 critical electronic documents, the court awarded Broadcom all of the attorney fees and costs it incurred in the litigation, a total of $8,568,633.23; because the fee award was so large, the court did not impose a further fine. The *Qualcomm* court also referred certain of Qualcomm's counsel to the California State Bar for investigation of possible ethical violations; this aspect of the order was later vacated and remanded so that the attorneys could defend themselves in the sanctions hearing. See *Qualcomm Inc. v Broadcom Corp*. (SD Cal, Mar. 5, 2008; No. 05 CV 1958-RMB (BLM)) (Order Remanding in Part Order of Magistrate Court Re Motion for Sanctions Dated 1/07/08). See §4.2.

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§15.97 2. Issue Sanctions

An issue sanction is an order "that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process." CCP §2023.030(b).

The court may also impose an order "prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses." CCP §2023.030(b).

EXAMPLE 1: In *Karlsson v Ford Motor Co.* (2006) 140 CA4th 1202, 1211, 45 CR3d 265, Ford failed to produce information about booster seat warnings and to produce for depositions persons most knowledgeable about the warnings. The court of appeal found that the trial court properly imposed issue sanctions in the form of jury instructions that the center two-point seatbelt did not provide adequate protection, that Ford failed to warn the plaintiff of this dangerous condition, and that Ford could have equipped the vehicle in question with a three-point seatbelt.

EXAMPLE 2: In *Marriage of Chakko* (2004) 115 CA4th 104, 8 CR3d 699, a father refused to provide discovery about his monthly income for purposes of assessing child support arrearages. The district attorney seeking the child support payments obtained from a third party a loan application showing that the father had failed to report $40,000 in monthly income. After the father failed to comply with a court order compelling him to produce evidence about his monthly income, the trial court issued an order deeming his monthly income to be $40,000. The appellate court affirmed, stating that the issue sanction was reasonably related to the discovery violation and was a fair and reasonable way to protect the parties and the judicial system from abuse.

On requesting sanctions, see §§15.108-15.109.

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§15.98 3. Evidence Sanctions

An evidence sanction "prohibits any party engaging in the misuse of the discovery process from introducing designated matters in evidence." CCP §2023.030(c). See *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248. An evidence sanction is most often used to remedy a situation in which a party refuses to produce evidence despite a court order. See, *e.g., Do It Urself Moving & Storage, Inc. v Brown, Leifer, Slatkin & Berns* (1992) 7 CA4th 27, 36, 9 CR2d 396 (evidence sanctions against plaintiffs, which prevented them from offering accounting evidence at trial, were appropriate when plaintiff failed to produce an audit report and supporting documentation that defendants had requested); *Thoren v Johnston & Washer* (1972) 29 CA3d 270, 105 CR 276 (failure to designate key witness in response to interrogatory in negligence case resulted in exclusion of witness's testimony at trial). But see *Karlsson v Ford Motor Co.* (2006) 140 CA4th 1202, 1214, 45 CR3d 265 (although Ford had not violated prior discovery order, imposition of evidence sanctions was nonetheless appropriate in light of Ford's pattern of willful discovery abuse). On requesting sanctions, see §§15.108-15.109.

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§15.99 4. Terminating Sanctions

In the most egregious cases of discovery abuse, the trial court can enter a terminating sanction by issuing one of the following orders (CCP §2023.030(d)(1)-(4)):

- An order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process;
- An order staying further proceedings by that party until an order for discovery is obeyed;
- An order dismissing the action, or any party of the action, of that party; or
- An order rendering a judgment by default against that party.

In the Ninth Circuit, courts weigh five factors in deciding whether to dismiss a case for failure to comply with a court order:

- The public interest in expeditious resolution of litigation;
- The court's need to manage its docket;
- The risk of prejudice to the defendants;
- The public policy favoring disposition of cases on their merits; and
- The availability of less drastic sanctions.

Allen v Bayer Corp. (In re Phenylpropanolamine (PPA) Prods. Liab. Litig.) (9th Cir 2006) 460 F3d 1217, 1226), quoting *Malone v U.S. Postal Serv.* (9th Cir 1987) 833 F2d 128, 130.

Although terminating sanctions have been confined to flagrant abuses of the discovery process and courts may be reluctant to order them, terminating sanctions have been imposed in many situations, discussed in §15.100.

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§15.100 a. When Terminating Sanctions May Be Granted

In general. In general, the behavior justifying terminating sanctions includes repeated refusals to respond to discovery requests, violation of previous court orders, and destruction of evidence. Thus, terminating sanctions are appropriate when a chronic pattern of delay or evasiveness by the defaulting party is egregious enough to warrant denial of a trial on the merits. *Electronic Funds Solutions, LLC v Murphy* (2005) 134 CA4th 1161, 1183, 36 CR3d 663 (terminating sanctions appropriate when defendants' "persistent failure to comply with the court's discovery orders resulted in a discovery stay and continuance of the trial").

Even a refusal to obey a discovery order for the first time may be sufficient to justify dismissal of a case, if the court finds that the refusal was willful and that no other lesser sanction would compel the party to obey the discovery order. *Rail Servs. of Am. v State Compensation Ins. Fund* (2003) 110 CA4th 323, 331, 1 CR3d 700 (plaintiffs, having lost motion for summary adjudication on all but one cause of action, attempted to create final judgment for appellate purposes by categorically refusing to comply with court's discovery order justifying trial court's dismissal of remaining cause of action).

JUDGE'S PERSPECTIVE: When the opposing side has failed to respond to discovery despite an order granting a motion to compel, counsel are sometimes too eager to move for terminating sanctions. For example, it is not the best strategy to request an order shortening time to make a motion for terminating sanctions. If the goal is to obtain a dismissal that will hold up on appeal, counsel is better advised to ensure that the opposing party had every procedural opportunity to do the right thing and yet failed to do so.

Multidistrict proceedings. In multidistrict litigation ("a special breed of complex litigation"), the court has broad discretion to fashion a framework for moving the cases forward and to issue sanctions, including terminating sanctions, to ensure compliance with the case management program. *Allen v Bayer Corp. (In re Phenylpropanolamine (PPA) Prods. Liab. Litig.)* (9th Cir 2006) 460 F3d 1217, 1232) (affirming dismissals for failure to comply with pretrial discovery and case management orders; dismissals reversed as to parties that had merely delayed in providing information they had already given). Firm deadlines are required and the trial court has discretion to decide what amount of delay in complying with discovery and other orders is too much. Nevertheless, when a dismissal sanction is imposed sua sponte, without a noticed motion, and the party's conduct is not egregious or if the party has received insufficient warning, the court should consider alternatives to dismissal. Dismissal should not become too attractive or too available. 460 F3d at 1250.

PRACTICE TIP: Counsel should not ignore an order of the court; if it will be difficult to comply by the deadline in the order, request an extension of time.

Examples. Examples of cases in which terminating sanctions were granted include the following:

- *Doppes v Bentley Motors, Inc.* (2009) 174 CA4th 967, 994, 94 CR3d 802 (trial court abused its discretion by not ordering terminating sanctions during trial when it learned that defendant still had failed to comply with discovery orders and directives, had been irresponsible in preventing destruction of e-mail, had not fully permitted data mining of e-mail as previously ordered, and had failed to produce documents that should have been produced months earlier).
- *Williams v Russ* (2008) 167 CA4th 1215, 1223, 84 CR3d 813 (terminating sanction justified by intentional destruction of critical evidence).
- *Liberty Mut. Fire Ins. Co. v LcL Adm'rs, Inc.* (2008) 163 CA4th 1093, 1102, 78 CR3d 200 (trial court did not abuse its discretion in imposing terminating sanctions for plaintiff's willful violations of discovery orders; court properly concluded that plaintiff was being "evasive" when it tendered discovery responses without meaningful information, repeatedly ignored meet-and-confer letters, and gave same answers after two orders compelling further responses).
- *Parker v Wolters Kluwer United States, Inc*. (2007) 149 CA4th 285, 296, 57 CR3d 18 (terminating sanction of

dismissal as to party that propounded discovery upheld when plaintiff refused to testify at deposition; disrupted and unilaterally terminated second deposition; and violated court orders to appear for third deposition and provide verified supplemental answers to interrogatories).

- *Reedy v Bussell* (2007) 148 CA4th 1272, 1292, 56 CR3d 216 (terminating sanctions justified by persistent and willful non-compliance in almost every aspect of discovery, including failure to produce documents, failure to provide written answers to discovery, and failure to appear at deposition).
- *Miranda v 21st Century Ins. Co.* (2004) 117 CA4th 913, 929, 12 CR3d 159 (trial court did not abuse its discretion by imposing terminating sanction of dismissal when plaintiff refused to obey court order and sign authorizations for release of medical records).
- *R.S. Creative, Inc. v Creative Cotton, Ltd.* (1999) 75 CA4th 486, 498, 89 CR2d 353 (trial court's termination of case and monetary sanctions of $5000 were "fully justified," based on plaintiff's use of forged contract, refusal to complete deposition after forgery came to light, and destruction of evidence of forgery on plaintiff's computer, which appellate court found to be a "particularly egregious example of an effort at discovery games" that "went beyond gamesmanship and intruded into the area of actual fraud").
- *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248 (although there was no cause of action for spoliation of evidence, other remedies were available, including terminating sanctions).
- *Collisson & Kaplan v Hartunian* (1994) 21 CA4th 1611, 1617, 26 CR2d 786 (defendants repeatedly failed to respond properly to special interrogatories, requests for document production, and requests for admission; court characterized defendants' responses to requests for admission as "evasive and quibbling" and as "lawyer game playing at its worst").
- *Laguna Auto Body v Farmers Ins. Exch.* (1991) 231 CA3d 481, 282 CR 530 (even though no monetary sanctions were awarded against plaintiff before dismissal of plaintiff's case, dismissal upheld because of plaintiff's failure to comply with previous court order, despite defendant's repeated extensions, and plaintiff's failure to file any opposition to defendant's motion for sanctions or dismissal). But see *Garcia v McCutchen* (1997) 16 C4th 469, 481, 66 CR2d 319 (under CCP §575.2, sanctions should be assessed only against counsel when failure to comply is solely counsel's fault).
- *Alliance Bank v Murray* (1984) 161 CA3d 1, 207 CR 233 (default judgment for willful failure to attend depositions).
- *Calvert Fire Ins. Co. v Cropper* (1983) 141 CA3d 901, 190 CR 593 (plaintiff failed to answer interrogatories after five extensions, including one extension granted after filing of motion to compel; defendant's motion to dismiss was ultimately granted almost 8 months after service of interrogatories).
- *Computer Task Group, Inc. v Brotby* (9th Cir 2004) 364 F3d 1112 (defendant's repeated failure to respond properly to discovery requests after two monetary sanctions, five orders compelling cooperation, and repeated oral warnings was proper ground for terminating sanctions under Fed R Civ P 37(b)(2)(C)).
- *Connecticut Gen. Life Ins. Co. v New Images of Beverly Hills* (9th Cir 2007) 482 F3d 1091 (when party so damages integrity of discovery process that there never can be assurance of proceeding on the true facts, case-dispositive sanction is appropriate).

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§15.101 b. When Terminating Sanctions Are Improper

Dismissal for failure to make discovery is justified by the presumption that the resisting party is impliedly admitting lack of merit in a claim or defense. *Hammond Packing Co. v Arkansas* (1909) 212 US 322, 353, 53 L Ed 530, 29 S Ct 370. Discovery sanctions are intended to enable a party seeking discovery to obtain it, not to impose punishment on the refusing party. Due process is violated when a case is dismissed for a party's failure to pay discovery sanctions if the party's refusal to make discovery will not support the *Hammond Packing Co.* presumption. *Midwife v Bernal* (1988) 203 CA3d 57, 249 CR 708 (trial order dismissing action for failure to pay sanctions reversed on appeal). A terminating sanction has also been held improper in the following situations:

- **When no prior discovery order was disobeyed.** Before it can dismiss an action for failure to comply with discovery, in general the court must first issue an order to comply with discovery. *Ruvalcaba v Government Employees Ins. Co.* (1990) 222 CA3d 1579, 1583, 272 CR 541. The trial court in *Ruvalcaba* imposed a terminating sanction on the defendant for repeatedly refusing to produce requested documents absent a prior court order compelling the defendant to respond. The court could have imposed a monetary sanction or ordered the defendant to respond to the discovery request. Then, if the defendant refused to comply with its order, it would be within the court's authority under CCP §2023.030(d)(3) to dismiss the action for failure to comply with discovery. But see *Williams v Russ* (2008) 167 CA4th 1215, 1223, 84 CR3d 813 (terminating sanction appropriate with violation of prior court order in egregious cases of intentional spoliation of evidence); *Do It Urself Moving & Storage, Inc. v Brown, Leifer, Slatkin & Berns* (1992) 7 CA4th 27, 9 CR2d 396 (no violation of an underlying discovery order).
- **When evidence is negligently lost.** The loss of evidence by a party can result in a refusal to respond to discovery that is neither willful nor in bad faith. Under these circumstances, an order that prevents the offending party from obtaining an advantage from the situation (*e.g.,* barring expert testimony based on inspection of the lost evidence) is justified. However, an order that excludes all evidence (*e.g.,* expert testimony based on photographs of the missing evidence) is an abuse of discretion. *Puritan Ins. Co. v Superior Court* (1985) 171 CA3d 877, 884, 217 CR 602.
- **When monetary sanctions are not paid.** Constitutional due process prevents a court from dismissing an action for a party's failure to pay monetary discovery sanctions. *Newland v Superior Court* (1995) 40 CA4th 608, 615, 47 CR2d 24 ("a terminating sanction issued solely because of a failure to pay a monetary discovery sanction is never justified"); *Jones v Otero* (1984) 156 CA3d 754, 203 CR 90 (attorney's failure to pay monetary sanctions under discovery order did not justify dismissal of case).
- **When less drastic action is more appropriate.** A reviewing court may find an abuse of discretion when a terminating sanction is excessive, and a less drastic sanction would have been appropriate. *Deyo v Kilbourne* (1978) 84 CA3d 771, 793, 149 CR 499. Examples of cases in which a terminating sanction was reversed as excessive include:
  - *Brown v Presley of S. Cal.* (1989) 213 CA3d 612, 261 CR 779 (party's willingness to appear for deposition and pay sanctions negated necessity of terminating sanctions).
  - *McArthur v Bockman* (1989) 208 CA3d 1076, 256 CR 522 (in fraud action, default judgment entered against defendants for failing to attend deposition limited to defendant's financial condition reversed because of relatively slight potential of prejudice to plaintiffs).
  - *Thomas v Luong* (1986) 187 CA3d 76, 231 CR 631 (defendant's willingness to stipulate to liability in personal injury case made striking defendant's answer an inappropriate sanction for failure to attend deposition and answer form interrogatories).
  - *Wilson v Jefferson* (1985) 163 CA3d 952, 210 CR 464 (defendant's refusal in legal malpractice action to produce office calendars, cost records, and forms relevant to one affirmative defense was not dispositive of other unrelated issues present in case, such as fraud and punitive damages).
- **When parties did not themselves propound discovery or show prejudice.** Terminating sanctions cannot

issue in favor of parties who neither propounded discovery nor showed any prejudice from the failure to comply with discovery. *Parker v Wolters Kluwer United States, Inc*. (2007) 149 CA4th 285, 301, 57 CR3d 18 (no sanctions to nonpropounding parties that failed to show their discovery interests were closely aligned with those of propounding party and failed to show detriment as result of sanctioned party's misuse of discovery process).

On requesting sanctions, see §§15.108-15.109.

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§15.102 5. Contempt Sanctions

A violation of a discovery order, just like any other court order, is punishable as a contempt of court, and contempt sanctions are available against parties, attorneys, and nonparty witnesses to achieve the objectives of discovery. CCP §2023.030(e). See CCP §1209 for a list of acts and omissions punishable as contempt.

A contempt sanction consists either of the imposition of a fine not exceeding $1000 or imprisonment not exceeding 5 days, or both. CCP §1218(a). In addition, a person adjudged guilty of contempt for violating a court order may be ordered to pay to the party initiating the contempt proceeding the "reasonable attorney's fees and costs incurred" in connection with the contempt proceeding. CCP §1218(a).

EXAMPLE: Anyone who disobeys a subpoena requiring attendance at a deposition, or who refuses to be sworn as a witness at a deposition, may be held in contempt, without the necessity of a prior court order directing the witness's compliance. CCP §§1991.1, 2023.030(e). See CCP §2020.240. This sanction applies to any lawfully issued subpoena. See CCP §1985.1 (failure to appear under agreement modifying terms of subpoena punishable as contempt). On sanctions against nonparties, see §§6.93, 15.105.

JUDGE'S PERSPECTIVE: A contempt sanction is seldom used to enforce discovery orders and is inappropriate in all but the most extreme situations in which "the court's dignity is truly compromised and no other suitable penalty can be found." *In re de la Parra* (1986) 184 CA3d 139, 228 CR 864.

In addition, the basis for contempt may also be a criminal offense (*e.g.,* deceiving a witness with intent to affect the witness's testimony, preparing false documents with intent to use them in trial, inducing a witness to give false testimony or to withhold true testimony). Criminal contempt is charged and prosecuted like any other misdemeanor offense. *People v Saffell* (1946) 74 CA2d Supp 967, 982, 168 P2d 497.

PRACTICE TIP: Counsel should be aware that the limitations discussed under CCP §1218 do not apply to discovery sanctions under CCP §2023.010. Courts have imposed sanctions in amounts well over $1000 under former §2023. See *London v Dri-Honing Corp.* (2004) 117 CA4th 999, 1010, 12 CR3d 240 (court upheld $6045 in sanctions). See also *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1373, 282 CR 783 (sanctions of $7500 for failure to produce documents).

On procedures with respect to civil and criminal contempt, and the penalties that may be imposed, see California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995) and California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual).

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.103 6. Chart: Sanctions Authorized by Civil Discovery Act

§15.103 6. Chart: Sanctions Authorized by Civil Discovery Act

The following table shows the sanctions authorized by the Civil Discovery Act (CCP §§2016.010-2036.050) for noncompliance with its provisions, misuse of a discovery method, or failure to attempt to resolve a dispute informally before moving or opposing a court motion.

NOTE: Unless otherwise indicated, when monetary sanctions are mandatory, they are mandatory unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust.

GENERAL SUBJECT OF STATUTE	CCP STATUTE	SANCTION	MANDATORY (absent substantial justification)	ACTION SANCTIONED	AVAILABLE AGAINST
Discoverable matters	§2017.020(b)	Monetary	Yes	Unsuccessfully making or opposing motion for protective order	Losing party, person, or attorney
	§2017.220(b)	Monetary	Yes	Unsuccessfully making or opposing discovery motion in sexual harassment, sexual assault, or sexual battery case	Losing party, person, or attorney
Methods of discovery	§2019.030(c)	Monetary	Yes	Unsuccessfully making or opposing motion for protective order	Losing party, person, or attorney
Misuse of motion to compel	§2023.010(i)	Monetary	Yes	Failing to confer when discovery method section requires declaration accompanying motion	Party or attorney
Nonparty deposition	§2020.240	Contempt; forfeiture and damages under CCP §1992	No	Deponent disobeys deposition subpoena	Disobedient deponent
Party and party-related oral deposition	§2025.260(d)	Monetary	Yes	Unsuccessfully making or opposing motion to increase travel limits	Losing party, person, or attorney
	§2025.410(d)	Monetary	Yes	Unsuccessfully making or opposing motion to quash deposition notice	Losing party, person, or attorney
	§2025.420(d)	Monetary	Yes	Unsuccessfully making or opposing motion for protective order	Losing party, person, or attorney
	§2025.430	Monetary	Yes	Party noticing deposition fails to attend or proceed	Party or attorney, or both, who failed to attend or proceed
	§2025.440(a)	Monetary	Yes	Party failed to serve required deposition subpoena on deponent who then fails to appear	Party or attorney, or both, who failed to serve

	§2025.440(b)	Contempt; forfeiture and damages under CCP §1992	No	Deponent served fails to attend or refuses to be sworn	Deponent
	§2025.450(c)(1)	Monetary	Yes	Losing motion to compel attendance, testimony, and production of documents	Deponent or party with whom deponent affiliated against whom motion is made
	§2025.450(c)(2)	Monetary	Yes	Deponent fails to attend, to proceed, or to produce	Deponent (*Note*: *Sanction available in favor of any other party (i.e., nonnoticing party) who attended in expectation that deposition would be taken.*)
	§2025.450(d)	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Failing to obey order compelling attendance, testimony, and/or production	Disobedient party or party-affiliated deponent
	§2025.480(f)	Monetary	Yes	Unsuccessfully making or opposing motion to compel answer or production	Losing party, person, or attorney
	§2025.480(g)	Contempt	No	Deponent failing to obey order made under CCP §2025.480(e)	Any deponent who fails to obey order
	§2025.480(g)	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Deponent failing to obey order made under CCP §2025.480(e)	Disobedient deponent, if a party or officer, director, managing agent, or employee of party
	§2025.520(h)	Monetary	Yes	Unsuccessfully making or opposing motion to suppress stenographically recorded deposition	Losing party, person, or attorney
	§2025.530(f)	Monetary	Yes	Unsuccessfully making or opposing motion to suppress audio or video recorded deposition	Losing party, person, or attorney
Deposition by written questions	§2028.040(c)	Monetary	Yes	Unsuccessfully making or opposing motion to sustain objection	Losing party, person, or attorney
	§2028.050(c)	Monetary	Yes	Unsuccessfully making or opposing motion to overrule objection	Losing party, person, or attorney
Interrogatories	§2030.090(d)	Monetary	Yes	Unsuccessfully making or opposing motion for protective order	Losing party, person, or attorney

	§2030.290(c)	Monetary	Yes	Unsuccessfully making or opposing motion compelling answer	Losing party, person, or attorney
	§2030.290(c)	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Failing to obey order compelling answers	Disobedient party
	§2030.300(d)	Monetary	Yes	Unsuccessfully making or opposing motion to compel further responses	Losing party, person, or attorney
	§2030.300(e)	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Failing to obey order compelling further answers	Disobedient party
	§2030.310(b)-(c)	Initial answer deemed binding	Yes, if all three requirements of CCP §2030.310(c) are met	Amending answer to interrogatory	Party who amended
	§2030.310(d)	Monetary	Yes	Unsuccessfully making or opposing motion to deem initial answer binding	Losing party, person, or attorney
Inspection demands	§2031.060(d)	Monetary	Yes	Unsuccessfully making or opposing motion for protective order	Losing party, person, or attorney
	§2031.300(c)	Monetary	Yes	Unsuccessfully making or opposing motion compelling answer	Losing party, person, or attorney
	§2031.300(c)	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Failing to obey order compelling responses	Disobedient party
	§2031.310(d)	Monetary	Yes	Unsuccessfully making or opposing motion to compel further responses	Losing party, person, or attorney
	§2031.310(e)	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Failing to obey order compelling further responses	Disobedient party
	§2031.320(b)	Monetary	Yes	Unsuccessfully making or opposing motion to compel compliance with inspection demand	Losing party, person, or attorney
	§2031.320(c)	Just orders, including	No	Failing to obey order compelling inspection	Disobedient party

		issue, evidence, terminating, and/or monetary sanction			
Medical examinations	§2032.240(c)	Monetary	Yes	Unsuccessfully making or opposing motion to compel response and compliance	Losing party, person, or attorney
	§2032.240(d)	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Failing to obey order compelling response and compliance	Disobedient party
	§2032.250(b)	Monetary	Yes	Unsuccessfully making or opposing motion to compel compliance	Losing party, person, or attorney
	§2032.410	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Party failing to submit to required exam	Party failing to submit
	§2032.420	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Party failing to produce another for required exam, unless inability to produce person is demonstrated	Party failing to produce another
	§2032.510(f)	Monetary	Yes	Unsuccessfully making or opposing motion for protective order after exam begun	Losing party, person, or attorney
	§2032.620(b)	Monetary	Yes	Unsuccessfully making or opposing motion to compel delivery of medical records demanded under CCP §2032.610(a)	Losing party, person, or attorney
	§2032.620(c)	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Failing to obey order compelling delivery	Disobedient party
	§2032.620(c)	Exclude at trial testimony of examiner whose report not provided	Yes	Failing to provide report	Party failing to provide report
	§2032.650(b)	Monetary	Yes	Unsuccessfully making or opposing motion to compel delivery of medical	Losing party, person, or attorney

				reports under CCP §2032.650(a)	
	§2032.650(c)	Just orders, including issue, evidence, terminating, and/or monetary sanction	No	Failing to obey an order compelling delivery	Disobedient party
	§2032.650(c)	Exclude at trial testimony of health care practitioner whose report not provided	Yes	Failing to provide report	Party failing to provide report
Request for admission	§2033.080(d)	Monetary	Yes	Unsuccessfully making or opposing motion for protective order	Losing party, person, or attorney
	§2033.280(c)	Monetary	Yes	Failing to serve timely response to requests	Party or attorney, or both
	§2033.280(c)	Genuineness of documents and trust of specified matter deemed admitted	Yes, unless requirements specified in CCP §2033.280(c) met	Failing to serve response by hearing date	Party
	§2033.290(d)	Monetary	Yes	Unsuccessfully making or opposing motion to compel further response	Losing party, person, or attorney
	§2033.290(e)	Matters deemed admitted and/or monetary sanction	No	Failing to obey order compelling further response	Disobedient party
	§2033.300(c)	Just order, including order that costs of additional discovery be borne by moving party	No	Moving to withdraw or amend admission	Moving party
	§2033.420(a)	Responding party to pay reasonable expenses, including attorney fees, incurred in making proof	Yes, unless requirements specified in CCP §2033.420(b) met	Failing to admit and requesting party later proves	Party failing to admit
Expert witness information	§2034.250(d)	Monetary	Yes	Unsuccessfully making or opposing motion for protective order	Losing party, person, or attorney
	§2034.300	Exclude from evidence expert opinion	Yes, except as provided in CCP §§2034.310, 2034.610-2034.630, 2034.710-2034.730	Unreasonably failing to comply with provisions of CCP §2034.300(a)-(d)	Party failing to comply
	§2034.470(g)	Monetary	Yes	Unsuccessfully making or opposing motion to set expert witness fees	Losing party, person, or attorney

§2034.630	Monetary	Yes	Unsuccessfully making or opposing motion to augment or amend expert witness information	Losing party, person, or attorney
§2034.730	Monetary	Yes	Unsuccessfully making or opposing motion to submit tardy expert witness information	Losing party, person, or attorney

Comment: Individual chapters covering particular discovery methods (*e.g.,* depositions, interrogatories) discuss the sanctions authorized by the provisions governing that particular method.

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D. On Whom Sanctions May Be Imposed

§15.104 1. Parties

The court may impose sanctions on any party engaging in conduct that is a misuse of the discovery process. CCP §2023.030.

Under CCP §§2025.440(b), 2025.450(d), and 2025.480(g), sanctions may be imposed not only against a party but also against a party-affiliated witness (*i.e.,* an officer, director, managing agent, or employee of a party) who fails to obey a court order regarding depositions.

For a table showing specific sanctions authorized by the provisions of the Civil Discovery Act, and against whom they are authorized, see §15.103.

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§15.105 2. Nonparties

Sanctions are seldom awarded against nonparties. See *Temple Community Hosp. v Superior Court* (1999) 20 C4th 464, 476, 84 CR2d 852 (most discovery sanctions not available "when a person who is not a party to the litigation and who is not an agent of a party intentionally has destroyed evidence"). However, the court may impose sanctions against a nonparty witness who makes an unsuccessful motion for a protective order. *Brun v Bailey* (1994) 27 CA4th 641, 658, 32 CR2d 624 (trial court found that nonparty witness's motion for protective order and to compel payment of expert witness fee was without merit and brought to harass defendant).

Because nonparties usually do not have a stake in the outcome of the lawsuit, the problem typically arises when a nonparty deponent refuses either to attend or to answer questions at a deposition, often at the urging of counsel for a party who might be adversely affected by the deponent's responses. See, *e.g., Sears, Roebuck & Co. v National Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1350, 32 CR3d 717 (monetary sanctions against nonparty witness upheld for nonparty's failure to comply with deposition subpoenas). Although a nonparty deponent has standing to have the court determine the matter, the party most often takes the lead when submitting a supporting memorandum and argument to the court. On advising a nonparty deponent not to answer, see §6.105. On standing to raise the constitutional rights of others, see §3.159.

Monetary and contempt sanctions against nonparty witnesses are available to achieve the objectives of discovery. CCP §2023.030(a), (e). Anyone, including a nonparty, who disobeys a subpoena requiring attendance at a deposition, or who refuses to be sworn as a witness at a deposition, may be held in contempt under CCP §1991.1. CCP §2023.030(e). This sanction applies to any lawfully issued subpoena. A witness disobeying a subpoena can be liable for all resulting damages, plus the sum of $500. CCP §§1992, 2020.240. The major risk to the recalcitrant witness is that the additional damages might be substantial if nonappearance results in loss of the case, *e.g.,* when the witness refuses to produce important documents. The purpose of CCP §1992 is to place the aggrieved party in the same position monetarily that the party would have enjoyed had the prior discovery order been obeyed. Because this section requires the filing of a separate civil action, however, counsel seldom resort to it, but it may be justified when the damages sustained are substantial.

See §15.107 for discussion of use of civil contempt as a sanction outside of the Civil Discovery Act.

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§15.106 3. Attorneys

Monetary and contempt sanctions against an attorney are authorized if the attorney engages in conduct that is a misuse of the discovery process, including failing to meet and confer when required. CCP §§2023.020, 2023.030(a), (e). Monetary sanctions may also be awarded against an attorney who encourages conduct constituting a misuse of the discovery process. CCP §2023.030(a).

Before monetary sanctions can be ordered against an attorney, the trial court must make a finding that the attorney *advised* the client to undertake the offending conduct. CCP §2023.030(a). Merely opposing a motion to compel discovery does not give rise to an inference that the attorney counseled his or her client to obstruct discovery. *Ghanooni v Super Shuttle* (1993) 20 CA4th 256, 24 CR2d 501.

EXAMPLE: An attorney's use of a presigned verification form in discovery proceedings, without first verifying with the client the accuracy of the facts asserted, is a violation of professional ethics and a serious misuse of the discovery process. *Drociak v State Bar* (1991) 52 C3d 1085, 278 CR 86 (30 days of actual suspension, 1 year of stayed suspension, and 2 years of supervised probation given to attorney for attaching presigned verification form to interrogatory responses).

Although the moving party generally has the burden of proving all facts necessary to prevail, the rule is slightly different on a motion for sanctions, in which the *responding party,* including an attorney, has the burden of proving they had substantial justification for the positions taken even though ultimately unsuccessful. *Corns v Miller* (1986) 181 CA3d 195, 201, 226 CR 247. In doing so, however, counsel should take care not to waive the attorney-client privilege.

For discussion of sanctions available outside the Civil Discovery Act (*e.g.,* sanctions under CCP §128.7), see §15.107.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.107 E. Sanctions Outside Civil Discovery Act

§15.107 E. Sanctions Outside Civil Discovery Act

When the responding party's conduct crosses the line into willful misconduct, a party may be liable for sanctions under CCP §128.7 as well as under the discovery statutes. To impose such sanctions, however, the court must find the party or the attorney to be guilty of a willful discovery violation.

Courts enjoy a high degree of flexibility in fashioning orders to enforce their decrees. Under the authority of CCP §128, a trial court can bar an especially recalcitrant litigant from seeking affirmative relief until that party complies with previous court orders. See CCP §187 (court may use any suitable process in exercise of its jurisdiction). See also CCP §1218(a) (motion for contempt against disobedient party who is guilty of contempt for violating court order may result in order to pay reasonable attorney fees and costs in connection with contempt proceeding). However, the authority of CCP §128 and the inherent power of the trial court to control its own proceedings are insufficient to support an order requiring an attorney to pay discovery referee fees. *Andrews v Superior Court* (2000) 82 CA4th 779, 781, 98 CR2d 426. But note the *Andrews* court's suggestion in dicta that such an order might be proper under former CCP §§2023 and 2031 (now CCP §§2023.030 and 2031.310(d)).

Sanctions under former CCP §128.5 (now CCP §128.7) have been imposed on an attorney who filed a motion for summary judgment based on interrogatory answers, knowing that the interrogatory answer was incomplete and that a supplemental answer was forthcoming. *Olson Partnership v Gaylord Plating Lab, Inc.* (1990) 226 CA3d 235, 276 CR 493. However, an attorney may not be required to pay discovery referee fees as a sanction under CCP §128. *Andrews v Superior Court* (2000) 82 CA4th 779, 782, 98 CR2d 426 (court suggested in dicta that such order might be proper under former CCP §§2023 and 2031 (now CCP §§2023.010-2023.040 and 2031.300-2031.320)). The trial court's inherent supervisory and administrative powers are codified in CCP §128. Because an award of fees is not authorized by the statute, a trial court is without authority to award them.

NOTE: A court may impose sanctions under CCP §128.7 against a substituting attorney for failure to file a written, formal substitution of attorney with the court. *Rush v Weinzettl* (1993) 14 CA4th 66, 17 CR2d 354 (imposing sanctions under former CCP §128.5 (now CCP §128.7)).

Although it has been held that monetary sanctions may be imposed under CCP §128.7 or §177.5, or former Cal Rules of Ct 227 (now Cal Rules of Ct 2.30), any order imposing sanctions must be in writing and must recite in detail the conduct or circumstances justifying the order. Merely issuing a sanction order for "good cause" does not satisfy due process requirements of either the federal or state constitution. *Caldwell v Samuels Jewelers* (1990) 222 CA3d 970, 978, 272 CR 126 ("due process requires that any order giving rise to the imposition of sanctions state with particularity the basis for finding a violation of the rule").

JUDGE'S PERSPECTIVE: When granting discovery sanctions against a party, a court is not required to make findings. *Ghanooni v Super Shuttle* (1993) 20 CA4th 256, 261, 24 CR2d 501. When granting discovery sanctions against an attorney, the only finding that is required is that the attorney advised the conduct warranting sanctions. 20 CA4th at 261.

In practice, when granting or denying a request for sanctions, most courts will state a factual finding tracking the language of the statute, *e.g.* "The court finds that defendant opposed the motion without substantial justification and therefore grants plaintiff's request for monetary sanctions" or "The court finds that other circumstances make the imposition of sanctions unjust and therefore denies plaintiff's request for monetary sanctions." Although it might be ideal for the order to include a recitation of the specific facts that support the court's finding that a motion was made without substantial justification or that identify the circumstances that make the imposition of sanctions unjust, as a practical matter the court rarely has the leisure to do so. The appellate court will look at the record on an abuse-of-discretion standard and not be confined by the wording of the order. On appellate review, see chap 16.

This rule also seems to apply to sanctions ordered under CCP §§2023.010-2023.040. In fact, Cal Rules of Ct 2.30

allows a court, after written notice and an opportunity to be heard, to order sanctions not only on a party, attorney, or witness, but also on "an insurer or any other individual or entity whose consent is necessary for the disposition of the case" for violations of the California Rules of Court relating to "general civil cases, unlawful detainer cases, probate proceedings, civil proceedings in the appellate division of the superior court, and small claims cases." Cal Rules of Ct 2.30(b), (a). The motion must set forth the rule that was violated, the specific conduct that violated the rule, and the identity of the attorney, party, or witness against whom sanctions are sought. Cal Rules of Ct 2.30(c).

NOTE: A temporary judge stipulated to by the parties for all purposes, including pretrial motions, has the inherent power to impose discovery sanctions. *Estate of Ruchti* (1993) 12 CA4th 1593, 1602, 16 CR2d 151.

On criminal contempt sanctions, see §15.102.

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F. Making Request for Sanctions

§15.108 1. Content and Format for Request for Sanctions

Notice of motion. Sanctions may be requested as a separate motion or as part of any discovery motion. The notice of motion must specify the sanction sought and identify every person, party, and attorney against whom it is sought. CCP §2023.040; *In re Marriage of Fuller* (1985) 163 CA3d 1070, 1076, 210 CR 73 (failure to give notice to attorney against whom sanctions were awarded violates Civil Discovery Act as well as state and federal guarantees of due process of law).

Sanctions are often sought concurrently against an attorney and his or her client. In this situation there is no conflict of interest that would prevent a sanctions motion against the party. See *R.S. Creative, Inc. v Creative Cotton, Ltd.* (1999) 75 CA4th 486, 497, 89 CR2d 353 (court rejected appellant's argument that terminating sanctions were inappropriate simply because appellant's attorney was at the same time responding to monetary sanctions motion against himself).

PRACTICE TIP: When requesting monetary sanctions, counsel should specify in the notice of motion "every person, party and attorney against whom the sanction is sought" and "the type of sanction sought." CCP §2023.040. The omission of this information is an error made frequently, even by experienced counsel, and is a sufficient basis to deny a request for sanctions.

In requesting an evidence sanction, the requesting party must specify, in detail, exactly what evidence it seeks to preclude.

No ex parte awards. Discovery sanctions cannot be awarded ex parte. *Parker v Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 296, 57 CR3d 18 (CCP §2023.030 requires notice and opportunity for hearing on sanctions; order issued ex parte reversed).

Supporting papers. The motion must be accompanied by a supporting memorandum and by a declaration of facts justifying the amount of any monetary sanction requested. CCP §2023.040.

NOTE: Although the Rules of Court as renumbered and reordered effective January 1, 2007, refer to "memorandum" rather than "memorandum of points and authorities," CCP §2023.040 continues to use "memorandum of points and authorities."

A request for issue or evidence sanctions must be accompanied by a separate statement. See Cal Rules of Ct 3.1345(a)(7). On format and content of separate statements, see §15.48.

JUDGE'S PERSPECTIVE: A request for monetary sanctions should be accompanied by a declaration setting forth the time spent in preparing the motion or opposition and reply, if any, as well as an estimate of the time to be spent on any court appearances. The declarant should also set forth the hourly rate the client is being billed for this work. Absent such evidence, the court will have no factual basis for awarding "reasonable" fees and costs.

Redaction requirement. Under Cal Rules of Ct 1.20(b)(1) (effective Jan. 1, 2008) parties must redact certain identifying information from paper or electronic documents or records filed with the court. See §15.45.

Prima facie showing of misuse. In applying the "mandatory" monetary sanctions provision of CCP §2023.030(a), law and motion courts usually require a prima facie showing by the moving party that the other party or attorney has committed one of the enumerated discovery misuses. The burden then shifts to the party or attorney so accused to demonstrate that he or she acted with substantial justification. On monetary sanctions, see §§15.93-15.96.

Proposed order. The party on the motion should submit a proposed order containing all findings necessary, including the finding that the responding party acted without substantial justification, to help protect a sanctions award on appeal.

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§15.109 2. Timing of Request for Sanctions

A request for sanctions can be made separate and apart from the motion to compel discovery, if the request is made within the 45-day time limit for bringing a motion to compel. *London v Dri-Honing Corp.* (2004) 117 CA4th 999, 1004, 12 CR3d 240.

Sanctions may be requested after conclusion of trial if it first appears then that an opposing party withheld requested discovery. Unless discovery responses are deemed inadequate or evasive, there is no requirement that a motion to compel be made within 45 days. For example, in *Sherman v Kinetic Concepts, Inc.* (1998) 67 CA4th 1152, 79 CR2d 641, the plaintiff did not learn until 1 week after an adverse jury verdict that defendants had withheld numerous requested documents. Reversing the trial court's refusal to award sanctions under former CCP §§128.5 and 2023 (now CCP §§128.7 and 2023.010), the court of appeal ordered a new trial and sanctions at least sufficient to compensate the plaintiff for the attorney fees and costs of the first trial.

An otherwise meritorious claim for sanctions may be lost if the request is untimely. For example, in *Colgate-Palmolive Co. v Franchise Tax Bd.* (1992) 10 CA4th 1768, 1788, 13 CR2d 761, the court analyzed the issue of timeliness, holding that when the defendant in a tax refund action waited over 7 months after learning during the first days of trial that the plaintiffs had not timely produced requested documents in discovery. The posttrial motion for sanctions was denied by the trial court on the grounds of untimeliness and failure to show prejudice, and the appellate court found no abuse of discretion under the circumstances.

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§15.110 G. Responding to Request for Sanctions

Generally, a request for sanctions will be made as part of a discovery motion. Often, especially with a monetary sanction request, opposition to the request for sanctions will be part of the overall opposition to the discovery motion. A sanction order issued *ex parte* is void. *Parker v Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 296, 57 CR3d 18 (CCP §2023.030 requires notice and opportunity for hearing on sanctions; order issued ex parte reversed).

To avoid monetary sanctions if a discovery motion is lost, a party must show either "substantial justification" for its position or other circumstances that would make the imposition of sanctions unjust. See, *e.g.,* CCP §§2025.410(d), 2025.420(d), 2030.310(d).

JUDGE'S PERSPECTIVE: In addition, counsel should consider inviting the opposing party to waive monetary sanctions in exchange for a concession that may have more value to the opposing party and yet cost less to the offering party: *e.g.*, a declaration that all responsive documents have now been produced.

The opposing party can show "substantial justification" in two different ways. First, if the moving party failed to meet and confer in good faith, that failure not only can justify avoiding sanctions but can form the basis for the imposition of sanctions on the moving party. CCP §2023.030; *Obregon v Superior Court* (1998) 67 CA4th 424, 431, 79 CR2d 62. The second way to avoid sanctions is to show a legitimate, good faith dispute on the merits. If the responding party can convincingly show why its position is reasonable, even if ultimately found to be erroneous, the trial court may decide not to impose sanctions.

PRACTICE TIP: A violation of a court order requires a far more convincing explanation of why the opposing party should not be sanctioned. Often, the more credible approach is to concede the violation, comply with the order before the hearing, and oppose the imposition of any sanction more serious than monetary.

That the trial court could have imposed a lesser sanction, such as monetary sanctions, does not establish that a more severe sanction (*e.g.,* exclusion of evidence) is an abuse of discretion. The burden is on the aggrieved party to show that the sanction was unreasonable. *Waicis v Superior Court* (1990) 226 CA3d 283, 287, 276 CR 45 (petitioner's factual arguments, contradicted by record, were insufficient to overturn trial court's exclusion of expert witness for failing to cooperate in taking of his deposition).

PRACTICE TIP: In arguing against the court's imposing stringent sanctions on counsel or client, counsel should show how the facts do not warrant a severe penalty and should call attention to the general rule against punitive or excessive sanctions, particularly those that would put the prevailing party in a better position than if discovery had been obtained and had been completely favorable to the prevailing party's cause.

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H. Review of Sanctions Orders

§15.111 1. Motion for Reconsideration

A trial court has the authority to reconsider an order imposing sanctions, including a judgment against a disobedient party. *Jacuzzi v Jacuzzi Bros. Inc.* (1966) 243 CA2d 1, 26, 52 CR 147. A trial court's failure to reconsider its grant of a motion striking an answer and declaring a default may be an abuse of discretion. *Fred Howland Co. v Superior Court* (1966) 244 CA2d 605, 612, 53 CR 341.

The time within which a trial court may reexamine its orders with respect to compelling discovery or sanctions is the same period within which a court may review other judicial acts (*i.e.,* within 10 days after service of written notice of entry of order). CCP §1008; *Jacuzzi v Jacuzzi Bros., supra*.

It is a tactical error to allow a sanctions motion to proceed unopposed on the assumption that no award will be made against counsel, and then later seek reconsideration on the same set of facts known at the time of the first motion. A party seeking reconsideration must provide new evidence and a satisfactory explanation of why the evidence was not previously produced. *Corns v Miller* (1986) 181 CA3d 195, 202, 226 CR 247 (no abuse of discretion in trial court's denial of motion for reconsideration when sanctioned attorney had failed to offer any opposition or appear at first hearing).

NOTE: A motion for reconsideration of a prior order awarding monetary sanctions is a continuation of the hearing in which the order to be reconsidered was rendered. Thus, a notice of request for sanctions on the first motion under CCP §2023.040 also applies to the motion for reconsideration. The trial court can award sanctions on reconsideration without applying CCP §128.7. *Mattco Forge, Inc. v Arthur Young & Co.* (1990) 223 CA3d 1429, 1442, 273 CR 262 (discussing former CCP §128.5).

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§15.112 2. Motion to Vacate Under CCP §473

An order dismissing a suit because of a plaintiff's failure to comply with a discovery order can be vacated under CCP §473 on the grounds of mistake, inadvertence, surprise, or excusable neglect.

The grounds for vacating a dismissal cannot be based on intentional misconduct by the client or attorney, but rather on unintentional mistake, inadvertence, surprise, or excusable neglect by either the attorney or client. See *Benedict v Danner Press* (2001) 87 CA4th 923, 929, 104 CR2d 896 (client's honest misinterpretation of events supported vacating dismissal). A dismissal must be vacated under §473 whenever application for relief is accompanied by an attorney affidavit in which the attorney accepts responsibility for the dismissal. The courts will not grant relief, however, when the attorney is simply "covering up" for the client. *Todd v Thrifty Corp.* (1995) 34 CA4th 986, 40 CR2d 727 (after first attributing dismissal to client's personal problems, attorney could not later change facts and attempt to blame himself for his client's noncompliance with discovery order).

For a case holding that the trial court abused its discretion in denying a party's motion under CCP §473 for relief from a discovery order, see *Cohen v Superior Court* (1976) 63 CA3d 184, 133 CR 575.

If the failure is jointly caused by the client and the attorney, relief under CCP §473, because of the attorney's mistake, is not available. *Lang v Hochman* (2000) 77 CA4th 1225, 1243, 92 CR2d 322.

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§15.113 3. Writs and Appeals

In general, an order imposing sanctions over $5000 is immediately appealable. CCP §904.1(a)(11)-(12); *Rail-Transport Employees Ass'n v Union Pac. Motor Freight* (1996) 46 CA4th 469, 475, 54 CR2d 713. A split of authority remains, however, about whether a party can immediately appeal from an interlocutory judgment or order directing payment of monetary discovery sanctions by a party or an attorney if the amount exceeds $5000. On the appealability of discovery sanctions awards, see §16.31.

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§15.114 I. Enforcement of Orders Imposing Sanctions

Unlike a protective order, for which de facto enforcement is available to the prevailing party, an order imposing sanctions is not self-enforcing. The court may enforce terminating, issue, and evidence sanctions by dismissal, default, refusal to permit introduction of evidence at trial, or other appropriate orders.

A party may enforce orders imposing monetary sanctions or awarding costs by a writ of execution. CCP §§680.010, 680.270, 680.230. See also *Jones v Otero* (1984) 156 CA3d 754, 759, 203 CR 90. A monetary sanction order is immediately enforceable as a judgment, see *Newland v Superior Court* (1995) 40 CA4th 608, 615, 47 CR2d 24 (terminating order unnecessary to enforce monetary sanctions order, because order is immediately enforceable through execution).

PRACTICE TIP: The moving party should ask for the court to set a date for the payment of sanctions. For example, the order may state that the sanctions must be paid within 20 days of the hearing. Plaintiff's counsel may ask the court to defer payment of sanctions until the end of the case when the sanction can be deducted from any recovery or subsumed in the defendant's cost bill. It is rare for counsel to actually pursue collecting a sanctions order as a judgment.

JUDGE'S PERSPECTIVE: Monetary sanctions are not always paid. Sometimes, receiving payment of a sanctions award is subject to the rule of not throwing good money after bad, if, for example, the sanctioned party is judgment-proof. An award of monetary sanctions may be waived by wise counsel who know that the client's interests may be better served by negotiating a waiver of payment in furtherance of a more significant litigation goal, such as a favorable, prompt, and low-cost resolution of the next discovery dispute.

On enforcing a money judgment and obtaining a writ of execution, see Enforcing Civil Money Judgments (Cal CEB Action Guide Fall 2003).

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§15.115 J. Requesting Sanctions in Federal Court

Federal Rules of Civil Procedure 37 provides the basis for sanctions in federal court. Like state courts, federal courts can impose monetary, evidence, issue, or terminating sanctions.

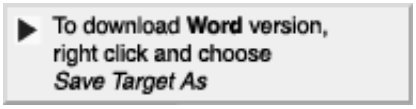
Federal Rules of Civil Procedure 26 requires parties to engage in certain mandatory exchanges of documents, evidence, and witnesses. A party can be sanctioned for failing to comply with the requirements of Rule 26, the same as for other discovery abuses.

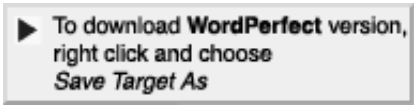
On sanctions in federal court for spoliation of evidence, see §8.108; on sanctions for failure to respond to inspection demands, see §8.118.

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.116 K. Checklist: Procedures for Obtaining Sanctions

§15.116 K. Checklist: Procedures for Obtaining Sanctions





Procedural Checklist

MOVING PARTY

- Ascertain types of sanctions available for the situation (see §§15.92-15.103)
- Select each person (party, party's attorney, or other) against whom each type of sanction is to be sought (see §§15.104-15.106)
- Determine whether to file separate motion for sanctions:
- Include request for sanction in notice of motion to compel, motion for protective order, etc.; *or*
- Serve and file separate notice of motion for sanction(s) with supporting papers, including (see §§15.108-15.109):
- Declaration(s) stating facts showing
- Nature of other person's misuse of discovery process
- Moving party's attempts, if any, at informal resolution
- Justification for each sanction sought
- Expense of pursuing motion and expense caused to moving party by other person's misuse of discovery process
- Memorandum
- Proposed order imposing sanction(s)
- Attend hearing on motion

If sanction ordered

- Take appropriate steps to enforce sanction, *e.g.,* move for dismissal, obtain writ of execution (see §15.114)

PARTY OR PERSON OPPOSING MOTION

- Serve and file opposition papers, including (see §15.110)
- Declaration(s) stating facts
- Countering moving party's declarations
- Showing that own conduct was reasonable and in good faith
- Supporting monetary sanction against moving party
- Memorandum
- Proposed order denying motion and imposing monetary sanction
- Attend hearing on motion

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§15.117 VII. CHART: OTHER DISCOVERY MOTIONS

The Civil Discovery Act contains a number of other motions that can be useful in addition to those discussed in this chapter. Those motions are included in the following chart.

CCP Section	Type of Motion
§2024.050	Motion to reopen or extend discovery; see §2.21.
§2025.260	Motion to increase distance limits for a deposition; see §§5.142-5.144.
§2025.410	Motion to quash deposition notices or subpoenas; see §§5.137-5.138.
§2025.520(g)	Motion to suppress deposition transcript; see §6.130.
§2025.530(e)	Motion to suppress audio/video deposition; see §6.130.
§§2028.040, 2028.050	Motion to sustain or overrule written objections to a written deposition; see §5.76.
§2030.310	Motion to bind responding party to original interrogatory answer; see §7.75.
§2033.280	Motion to deem a request for admission admitted; see §§9.72-9.77.
§2034.300	Motion to exclude experts; see §§11.61-11.66.
§2034.470	Motion to set expert fees; see §11.45.
§2034.630	Motion to augment expert witness information; see §§11.51-11.55.
§2034.730	Motion to submit late expert designation; see §§11.57-11.60.

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VIII. FORMS

§15.118 A. Form: Sample Proposed Order Granting Application for Order Shortening Time

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Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**ORDER SHORTENING TIME**
vs	)	
	)	**Hearing:** _ _[*date; time*]_ _
_ _[*Name(s)*]_ _,	)	**Dep't:** _ _[*number*]_ _
Defendant(s)	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

GOOD CAUSE HAVING BEEN SHOWN THEREFOR, it is hereby ORDERED that the Application of _ _[*plaintiff/defendant*]_ _ _ _[*party's name*]_ _ **to Shorten Time for Notice of** _ _[*Defendant's/Plaintiff's*]_ _ _ _[*title of motion*]_ _ **is GRANTED.** _ _[*Defendant/Plaintiff*]_ _ **shall file and serve the moving papers by personal delivery or fax before the close of business on** _ _[*date*]_ _**. Opposition papers shall be filed and served by personal delivery or fax on or before** _ _[*date*]_ _**. Reply papers, if any, shall be filed and served by personal delivery or fax on or before** _ _[*date*]_ _**. The hearing on this matter shall be set for** _ _[*date*]_ _**, at** _ _[*time*]_ _**, in Department/Division/Courtroom** _ _[*place*]_ _**.**

IT IS SO ORDERED

Date: _ _ _ _ _ _ _____

Judge of the Superior Court

Comment: On an ex parte application for an order shortening time, any order that the parties serve their papers by fax is separate and distinct from any agreement counsel may have reached regarding fax service under CCP §1013(e).

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Source: Civil Litigation/California Civil Discovery Practice/15 Discovery Motion Practice and Sanctions/§15.119 B. Form: Sample Order on Motion to Compel

§15.119 B. Form: Sample Order on Motion to Compel

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

Superior Court of the County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No. _ _ _ _ _ _**
vs	**ORDER GRANTING MOTION TO COMPEL**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of the _ _[*Moving Party*]_ _ to compel compliance with prior Court orders came on regularly for hearing on _ _[*date*]_ _. _ _[*Name of counsel*]_ _ appeared for plaintiff. _ _[*Name of counsel*]_ _ appeared for defendant(s).

The Court having reviewed the papers in support of and in opposition to the motion, and having considered the oral argument of counsel, ruled as follows:

1. The Court orders that each of the defendants, _ _[*name of defendant(s)*]_ _, must serve by hand or by facsimile a declaration signed under penalty of perjury no later than _ _[*date*]_ _ stating the following:

That all documents in their possession, custody, or control, wherever located, that fall within the categories of documents contained in the requests for production of documents addressed separately to each defendant have been produced;

The declarations shall detail the exact files searched, the location of the files, the identity of the people participating in the search, and all steps taken to locate all responsive documents. The declarations shall be sufficiently detailed to permit the Court, if necessary, to determine whether the defendants and cross-complainants made a good faith effort to comply with the Court's orders requiring the production of all requested documents without objection.

2. To the extent documents were identified in prior deposition testimony, such documents, to the extent they have not yet been produced, shall be produced on or before _ _[*date*]_ _. If documents cannot be produced, the declaration of the Custodian(s) of Records shall explain in detail why the documents cannot be produced and the steps taken to secure and locate such documents.

The Court specifically orders that the document production requests be broadly interpreted in that they are intended as discovery. The Court also orders that the parties search all locations in which responsive documents may be located, including but not limited to, the offices of both of _ _[*name(s)*]_ _ and _ _[*name(s)*]_ _, in which documents may exist that are responsive to the document requests addressed to _ _[*name*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

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16

Writs and Appeals

Robert C. Wright

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§16.1 I. SCOPE OF CHAPTER

This chapter addresses:

- Matters to consider before seeking writ or taking appeal (see §§16.2-16.6).
- Review by petitions for extraordinary writ, including when to seek writ review (§16.8); who may seek writ review (§16.10); when writ review is available (§§16.11-16.24); procedures for obtaining a writ (§§16.25-16.28); and requesting a temporary stay (§16.29).
- Review by appeal, including when appeal is available (§§16.30-16.35); when to seek appeal (§16.36); review on appeal from a final judgment (§16.37); who may appeal (§16.38); and appeal procedures (§§16.39-16.44).
- Federal court writ and appeal procedures (see §§16.45-16.47).
- Steps to take after writ or appeal is decided (see §16.45).

This chapter is meant to provide an overview of writ and appeal procedures in the context of discovery motions and is not meant to be a comprehensive review of that subject. For more detailed information on writs, see California Civil Writ Practice (4th ed Cal CEB 2008). For more detailed information on appeals, see California Civil Appellate Practice §§3.24-3.25 (3d ed Cal CEB 1996).

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II. BEFORE SEEKING WRIT OR TAKING APPEAL

§16.2 A. Understanding Restrictions on Appellate Review

Prejudgment review of discovery orders is rare, reflecting a policy decision that the harm from obeying an erroneous discovery order is usually less than the harm from delaying trial through piecemeal review of such order. *Johnson v Superior Court* (2000) 80 CA4th 1050, 1060, 95 CR2d 864. This policy decision prevents prejudgment review of discovery orders from interfering with the court's interest in expediting trial under the Civil Discovery Act and helps avoid possible unnecessary appeals that might result if, *e.g.,* the party adversely affected by the discovery order wins the case at trial and thus suffers no prejudice from the order.

JUDGE'S PERSPECTIVE: At least 90 percent of writ petitions are summarily denied. This large-scale rejection stems from the reluctance of appellate courts to second-guess trial court rulings when such interference wastes rather than saves time and judicial resources and seldom hastens the resolution of the lawsuit. See *Omaha Indemnity Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 ("if granted at the drop of a hat [writ relief] would interfere with an orderly administration of justice"). Counsel should carefully consider the costs to the client and the chances of success before seeking writ review of a discovery order that often may have little to do with the eventual outcome of the case.

Appeals. In general, unless a statute specifically makes an interlocutory judgment or order appealable, the "one final judgment" rule requires that an appeal may be taken only from a final judgment in an action or proceeding or from an order after judgment that affects the judgment or its enforcement. *Lester v Lennane* (2000) 84 CA4th 536, 101 CR2d 86. Although CCP §904.1(a)(11)-(12) provides for an immediate appeal from an interlocutory judgment or order directing payment of monetary sanctions in excess of $5000 (see §16.31), in general, because an order granting or denying discovery is considered interlocutory it is not directly reviewable by an immediate appeal. See CCP §904.1(a)(1)(A). See also California Civil Appellate Practice §§3.24-3.25 (3d ed Cal CEB 1996). See §§16.30-16.45.

Writs. Because interlocutory court orders such as discovery rulings are not directly appealable, a litigant is often faced with the single option of filing a writ petition to challenge and obtain immediate relief from an adverse discovery order. Thus, a writ is often the only alternative for expedient, timely, and meaningful relief. On writs generally, see California Civil Writ Practice (4th ed Cal CEB 2008).

Although prejudgment review of any kind of discovery order is rare, there are three well-established exceptions for writs seeking review of orders: (1) compelling production of privileged information; (2) preventing a party from having a fair opportunity to present a case at trial; and (3) involving unresolved issues of importance to the trial courts and bar. *OXY Resources Cal. LLC v Superior Court* (2004) 115 CA4th 874, 886, 9 CR3d 621. In these situations an aggrieved party cannot be adequately protected by post-judgment appeal.

JUDGE'S PERSPECTIVE: Not all discovery orders carry insuperable barriers to writ review. Appellate courts give serious attention to writ review of discovery orders when the issue involves privileged information or privacy interests. For example, revealing information in medical and bank records, in documents or discussions involving a patient and physician or attorney and client, or about trade secrets may create irreparable harm that compels immediate relief.

For discussion of petitioning for extraordinary writ in context of discovery orders, see §§16.7-16.29.

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§16.3 B. Making Record of Court's Reasoning

Discovery orders. Before seeking review of a discovery order, whether by writ or appeal, counsel should ensure that an adequate record has been made of the basis of the trial court's determination. In *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 384, 15 CR 90, the court noted that, although no findings are required for discovery orders, difficulty arises when the record is devoid of any clue of the trial court's reasoning and that "a careful trial judge, faced with a questionable request for discovery, will find some way to let the record show the basis of his determination." Similarly, in *Carlson v Superior Court* (1961) 56 C2d 431, 439 n4, 15 CR 132, the court reiterated that "the trial court's failure to make a record of the grounds on which it exercised its discretion often leaves an appellate court in a serious quandary which may not always be resolved by recourse to the presumption in favor of the order."

PRACTICE TIP: To ensure an adequate record, counsel should set out all factual bases for the proposed order in the supporting declarations and other documents on file so that the decision is supported in the record. Counsel should also consider requesting a written decision or an expanded tentative or final ruling. A court reporter should be present to prepare a transcript of oral argument and the court's statements. On adequate arguments on the record, see §16.4.

JUDGE'S PERSPECTIVE: On a writ petition, it is often impossible for counsel to have a complete record to file with the appellate court. If, *e.g.*, the trial court rules that privileged information be disclosed in the middle of trial, the court reporter will need at least a day or two to prepare a transcript. When filing the writ petition, trial counsel should scrupulously and accurately summarize the court's ruling and state that the record is on its way and will be filed shortly. A sure way to ensure an unfavorable ruling is to hyperbolize or exaggerate the facts. Nothing can be more embarrassing or self-defeating than for counsel to be impeached by the record he or she is presenting to the court.

When no grounds are given, the reviewing court will uphold the trial court's determination if any evidence exists to support any of the grounds on which the court could have based its decision. *Carlson v Superior Court* (1961) 56 C2d 431, 438, 15 CR 132. If there is no statement of reasons or grounds for the trial court's ruling, however, and the record discloses an insufficient showing to sustain the trial court's order, the higher court may find an abuse of discretion and reverse the trial court. See *Darbee v Superior Court* (1962) 208 CA2d 680, 687, 25 CR 520 (reviewing court would be "resorting to clairvoyance" if it undertook to imply grounds for denying discovery). See also *Coy v Superior Court* (1962) 58 C2d 210, 224, 23 CR 393 (lack of reasons for trial court order denying discovery regarding third defendant, together with lack of sufficient factual showing by that defendant, justified issuance of peremptory writ reversing trial court).

Orders for sanctions. In rendering a sanctions order, the court is not required to make a finding or recite its reasons in detail. *California Shellfish, Inc. v United Shellfish Co.* (1997) 56 CA4th 16, 25, 64 CR2d 797. See, *e.g.,* CCP §§2023.030(a), 2025.410(d). A finding by the court is necessary, however, if substantial justification exists for *not* imposing monetary sanctions against the losing party. 56 CA4th at 26. The burden of showing "substantial justification" then shifts to the party resisting discovery. See 56 CA4th at 25. See also *Estate of Ruchti* (1993) 12 CA4th 1593, 1603, 16 CR2d 151.

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§16.4 C. Getting Adequate Arguments and Evidence on Record

In addition to seeing that the record reflects the basis for the ruling, counsel should make sure that the record contains all the evidence and arguments relied on. See, *e.g., Protect Our Water v County of Merced* (2003) 110 CA4th 362, 364, 1 CR3d 726 ("When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two"). A reviewing court will consider only those matters duly presented in the trial court, and will not consider facts presented for the first time during the writ proceeding. See *West Pico Furniture Co. v Superior Court* (1961) 56 C2d 407, 414, 15 CR 119 (court refused to consider objections to interrogatories presented for the first time in writ proceeding); *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 390, 15 CR 90 (court will not consider evidence not presented in trial court unless it could be presented to that court subsequently on a new motion).

The reviewing court will not reverse a trial court decision if the appellant fails to provide an adequate record of the proceedings in the trial court. See *People ex rel Gow v Mitchell Bros. Santa Ana Theater* (1981) 114 CA3d 923, 937, 171 CR 85, disapproved on other grounds in *California ex rel Cooper v Mitchell Bros. Santa Ana Theater* (1981) 454 US 90, 70 L Ed 2d 262, 102 S Ct 172 (failure to furnish complete record of interrogatories that appellant claimed it should not have been ordered to answer was relied on in affirming order imposing $5000 in discovery sanctions for failure to respond).

JUDGE'S PERSPECTIVE: It is bad enough to have the court reject a petition, but even worse for the attorney's clients to read this reason for rejecting the claim: "We reject defendants' claim… because they failed to provide this court with a record adequate to evaluate [their] contention." *Aguilar v Avis Rent A Car Sys., Inc.* (1999) 21 C4th 121, 132, 87 CR2d 132. See also *Maria P. v Riles* (1987) 43 C3d 1281, 1295, 240 CR 872 (party challenging fee award on appeal has burden of providing adequate record to assess error; failure to furnish record requires rejection of claim of error).

Error is never presumed on appeal. On the contrary, judgments and orders are presumed correct and the appellant has the burden of affirmatively showing error on an adequate record. See *Ketchum v Moses* (2001) 24 C4th 1122, 1140, 104 CR2d 377. An appellant cannot obtain reversal of a trial court ruling being reviewed under the abuse of discretion standard, for example, if there is no record explaining the trial court's reasoning (*Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 447, 94 CR2d 143) or insufficient evidence in the record to allow the appellate court to determine whether the result would have been different in the absence of the alleged trial court error. *Nelson v Anderson* (1999) 72 CA4th 111, 136, 84 CR2d 753.

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§16.5 D. Understanding Standard of Review

The standard of review for discovery orders, whether by writ or by appeal, is abuse of discretion. *Venture Law Group v Superior Court* (2004) 118 CA4th 96, 101, 12 CR3d 656 (writ review appropriate when trial court's discovery order compels answers that might violate attorney-client privilege). Judicial discretion is defined as follows (*Hernandez v Superior Court* (2004) 115 CA4th 1242, 1246, 9 CR3d 821):

> The term implies the absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [¶] To exercise the power of judicial discretion all the material facts in evidence must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision. [Fn. omitted.] [Citation omitted.] "The appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason." [Citation omitted.]

The trial court's order is reviewed under a deferential abuse of discretion standard, meaning that "a trial court's ruling 'will be sustained on review unless it falls outside the bounds of reason.'" *Fuller v Superior Court* (2001) 87 CA4th 299, 304, 104 CR2d 525, citing *Avant! Corp. v Superior Court* (2000) 79 CA4th 876, 881, 94 CR2d 505.

The appellate court may consider issues of law de novo and should follow "the substantial evidence test with respect to any issues of fact." *County of Los Angeles v Superior Court* (2000) 82 CA4th 819, 824, 98 CR2d 564, quoting *City of Hemet v Superior Court* (1995) 37 CA4th 1411, 1416, 44 CR2d 532. The trial court's determination of the facts will be upheld if supported by substantial evidence. *Scripps Health v Superior Court* (2003) 109 CA4th 529, 533, 135 CR2d 126. Questions of statutory interpretation and constitutional rights are reviewed de novo. *Maggi v Superior Court* (2004) 119 CA4th 1218, 1224, 15 CR3d 161; *Do v Superior Court* (2003) 109 CA4th 1210, 1212, 135 CR2d 855.

PRACTICE TIP: Appellate courts are mindful of the liberal policies favoring discovery. They are inclined to uphold an order allowing discovery and reverse an order refusing it. *Forthmann v Boyer* (2002) 97 CA4th 977, 987, 118 CR2d 715.

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Source: Civil Litigation/California Civil Discovery Practice/16 Writs and Appeals/§16.6 E. Table: Determining Type of Review Available

§16.6 E. Table: Determining Type of Review Available

Issue	Method of Review	Authority
Issue Presented Is of First Impression and of General Importance to the Trial Courts of the Profession	Writ	*Britt v Superior Court* (1978) 20 C3d 844, 851, 143 CR 695; *Save Open Space Santa Monica Mountains v Superior Court* (2000) 84 CA4th 235, 245, 100 CR2d 725.
Violation of a Privilege	Writ	*Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 3, 123 CR 283; *Titmas v Superior Court* (2001) 87 CA4th 738, 744 n4, 104 CR2d 803.
Encroachment on Privacy Interest in Confidential Information	Writ	*Valley Bank v Superior Court* (1975) 15 C3d 652, 656, 125 CR 553.
Discovery Ruling Denies Party Fair Opportunity to Litigate the Case	Writ	*Waicis v Superior Court* (1990) 226 CA3d 283, 287, 276 CR 45.
Motion to Compel Production/Answers—Granted	Writ	*Roberts v Superior Court* (1973) 9 C3d 330, 107 CR 309; *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 123 CR 283 (writ lies when discovery would invade privilege).
Motion to Compel Production/Answers—Denied	Writ	*Rojas v Superior Court* (2004) 33 C4th 407, 15 CR3d 643.
Motion to Quash Subpoena or for Protective Order—Denied	Writ	*Aetna Cas. & Sur. Co. v Superior Court* (1984) 153 CA3d 467, 471, 200 CR 471.
Motion for Protective Order (Nonparty Witness)—Denied	Appeal	*Brun v Bailey* (1994) 27 CA4th 641, 32 CR2d 624 (appealable as collateral order).
	Writ	*Monarch Healthcare v Superior Court* (2000) 78 CA4th 1282, 1290, 93 CR2d 619.
Nonparty Expert Witness Challenges Amount of Fee	Appeal	*Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 298, 50 CR2d 493.
Order That Plaintiff Submit to Examination—Granted	Writ	*Browne v Superior Court* (1979) 98 CA3d 610, 613, 159 CR 669.
Motion for Sanctions—Granted Against Party or Attorney; Amount Is Over $5000	Appeal and writ, in the alternative	CCP §904.1(a)(11)-(12). Note: There may be a question of whether orders for discovery sanctions over $5000 are appealable. See §16.31.

Motion for Sanctions—Granted; Amount Is $5000 or Less	Writ or appeal final judgment	CCP §§904.1(a)(11)-(12); 904.1(b).
Motion for Sanctions—Denied	Writ	*Do v Superior Court* (2003) 109 CA4th 1210, 135 CR2d 855; *Wells Prop. v Popkin* (1992) 9 CA4th 1053, 1056, 11 CR2d 845.
Motion for Non-Monetary Discovery Sanctions—Granted	Writ	*Maggi v Superior Court* (2004) 119 CA4th 1218, 15 CR3d 161 (protective order violated Fifth Amendment).
	Appeal	*Barton v Ahmanson Devs., Inc.* (1993) 17 CA4th 1358, 22 CR2d 56.
Motion to Disqualify Judge Appointed as Discovery Referee	Writ	CCP §170.3(d); *Sears, Roebuck & Co. v National Union Fire Ins.* Co. (2005) 131 CA4th 1342, 1348, 32 CR3d 717.

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§16.7 III. REVIEW BY PETITION FOR EXTRAORDINARY WRIT

Because discovery orders in general are interlocutory and thus not immediately appealable (see §§16.2, 16.30-16.45), the primary vehicle for challenging discovery orders is by extraordinary writs of mandate or prohibition. On writs generally, see California Civil Writ Practice (4th ed Cal CEB 2008); Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide November 2005). When analyzing whether to take a writ, counsel should first ask whether the order is appealable. If it is, the appellate court is likely to decide that an adequate remedy at law exists and the writ should be denied (see, *e.g., Omaha Indemnity Co. v Superior Court* (1989) 209 CA3d 1266, 1274, 258 CR 66), although there may be situations in which even though an order is directly appealable, it may also be reviewable by writ if counsel can show that the appellate remedy would be insufficiently speedy. See *Reed v Superior Court* (2001) 92 CA4th 448, 455, 111 CR2d 842 (disqualification of counsel).

PRACTICE TIP: Appellate courts are unforgiving about notice of appeal deadlines; if the order is immediately appealable, counsel must file a timely notice of appeal or forfeit the client's right to appellate review.

On when discovery orders are immediately appealable, see §§16.31-16.35.

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§16.8 A. When Important to Seek Writ Review

Seeking appellate review by petitioning for a writ may sometimes be the only way to adequately protect a client from inappropriate discovery or possible sanctions. For example, in *Marriage of Niklas* (1989) 211 CA3d 28, 258 CR 921, the wife and her counsel were asked certain questions that they contended violated the attorney work product protection. Instead of seeking immediate writ review, however, they refused to answer the challenged questions, even after the trial court ordered them to comply with the requested discovery. On review, the appellate court upheld the imposition of sanctions, noting that parties disobey a court order at their peril; if the order cannot be shown to be unconstitutional or in excess of the court's jurisdiction, sanctions can be imposed for willful violation of the court's orders even if the trial court erred in issuing the discovery order. Thus, when a trial court order would require disclosure of privileged information, a writ must be taken to avoid irreparable harm. *OXY Resources Cal. LLC v Superior Court* (2004) 115 CA4th 874, 886, 9 CR3d 621 (writ is only adequate remedy when court orders production of documents that may be subject to privilege).

As the court said in *Zurich Am. Ins. Co. v Superior Court* (2007) 155 CA4th 1485, 1493, 66 CR3d 833: "Extraordinary review of a discovery order will be granted when a ruling threatens immediate harm, such as loss of a privilege against disclosure, for which there is no other adequate remedy."

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§16.9 B. Writs Granted Sparingly

Issuance of extraordinary writs is discretionary, however, and case law suggests that they should be used sparingly. See, *e.g., Pacific Tel. & Tel. Co. v Superior Court* (1970) 2 C3d 161, 84 CR 718 (objection to discovery on relevancy grounds does not usually support issuance of extraordinary writ; most successful cases have involved either denial of discovery in lower court or order permitting discovery in face of claim of privilege); *Oceanside Union Sch. Dist. v Superior Court* (1962) 58 C2d 180, 185 n4, 23 CR 375.

The rationale for issuing writs sparingly is that trials would be unduly delayed, and the proceedings protracted, if every disappointed litigant had the right to review every discovery order. *Catanese v Superior Court* (1996) 46 CA4th 1159, 54 CR2d 280. Typically, the delay caused by writ review is considered to "result in greater harm than in the enforcement of an improper discovery order." *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 5, 123 CR 283.

JUDGE'S PERSPECTIVE: An appellate court's summary denial of a writ petition does not constitute the law of the case. Thus, the appellate court may consider the same issue on appeal and decide the issue anew. *Kowis v Howard* (1992) 3 C4th 888, 894, 12 CR2d 728. See also *Varian Medical Systems, Inc. v Delfino* (2005) 35 C4th 180, 200, 25 CR3d 298; *People v Haley* (2004) 34 C4th 283, 310 n9, 17 CR3d 877.

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§16.10 C. Who May Seek Writ Review

The petitioner must have a "beneficial interest" in the outcome of the writ proceedings. "Beneficial interest" means some special interest to be served or some particular right to be preserved or protected, over and above the interest held in common with the public at large. *Carsten v Psychology Examining Comm.* (1980) 27 C3d 793, 796, 166 CR 844. See *Thomasson v Jones* (1945) 68 CA2d 640, 157 P2d 655.

If the petitioner does not have a beneficial interest in the outcome of the proceedings, the petitioner does not have standing to bring the writ petition. *Driving Sch. Ass'n v San Mateo Union High Sch. Dist.* (1992) 11 CA4th 1513, 1517, 14 CR2d 908. See also *Matrixx Initiatives, Inc. v Doe* (2006) 138 CA4th 872, 881, 42 CR3d 79 (nonparty litigants had no standing to resist discovery by invoking constitutional rights of presumably unrelated third parties). For further discussion of beneficial interest, see California Civil Writ Practice §§2.12-2.14 (4th ed Cal CEB 2008).

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§16.11 D. When Writ Review Available

In general, writ review is limited to situations in which:

- The issues are of first impression and general importance to the court and the legal profession;
- An order denying discovery prevents the party's fair opportunity to litigate its case; or
- An order compelling discovery violates a privilege or a protected privacy interest.

Valley Bank v Superior Court (1975) 15 C3d 652, 656, 125 CR 553 (trial court must fashion orders balancing competing interests when discovery relates to confidential information of bank customers); *OXY Resources Cal. LLC v Superior Court* (2004) 115 CA4th 874, 886, 9 CR3d 621 (writ issued reversing trial court's order to require production of privileged documents protected by "joint defense agreement"); *Johnson v Superior Court* (2000) 80 CA4th 1050, 1061, 95 CR2d 864. See *Oceanside Union Sch. Dist. v Superior Court* (1962) 58 C2d 180, 185 n4, 23 CR 375 ("writs should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and where general guidelines can be laid down for future cases").

EXAMPLE: A challenge to an order granting discovery against a claim of privilege is likely to obtain immediate review because otherwise the issue becomes moot. See *City of Redding v Municipal Court* (1988) 200 CA3d 1181, 246 CR 417 (city in criminal case sought writ to review order requiring production of police personnel records). Indeed, a writ may be the only adequate remedy to challenge an order erroneously compelling production of privileged information. *Hernandez v Superior Court* (2003) 112 CA4th 285, 292, 4 CR3d 883.

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1. Case of First Impression or General Importance to Courts and Profession

§16.12 a. Case of First Impression

The court may not always articulate its rationale for deciding to hear a writ petition, but will generally decide to hear a matter in which there is an absence of appellate law on the subject. For example, in *Maldonado v Superior Court* (2002) 94 CA4th 1390, 115 CR2d 137, the court considered the parties' obligations in responding to a request for "person most knowledgeable" depositions under former CCP §2025, an issue of first impression, but did not discuss its grounds for granting writ review.

Another example of a case presenting a "novel issue" in which the court granted an alternative writ of mandate is *Johnson v Superior Court* (2000) 80 CA4th 1050, 1061, 95 CR2d 864, which raised the issue of whether the child of an anonymous sperm donor and his parents, who were suing the sperm bank for selling sperm which allegedly transmitted a serious kidney disease to the child, could compel the donor's deposition and production of documents. See also *Advanced Modular Sputtering, Inc. v Superior Court* (2005) 132 CA4th 826, 33 CR3d 901 (case of first impression concerning discovery of trade secrets under CCP §2019.210); *Carter v Superior Court* (1990) 218 CA3d 994, 267 CR 290 (case of first impression; request for production of documents).

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§16.13 b. Issue Important to Courts and Profession

Courts are also more likely to decide to hear a writ petition if a case presents an issue of importance to courts and the legal profession. In *Catanese v Superior Court* (1996) 46 CA4th 1159, 54 CR2d 280, after the plaintiff had been deposed for 8 days, she propounded interrogatories asking whether defendant contended that any of her answers to the deposition questions were untruthful and if so, what evidence supported that contention. In essence, she sought to compel defense counsel to compare eight volumes of deposition testimony with the transcripts of two related criminal trials, one related criminal proceeding, and other information, then analyze plaintiff's deposition answers, and give plaintiff the analysis in the form of written answers to interrogatories. The court granted writ review "[b]ecause of the impact the availability of [the discovery] tactic could have on litigation and especially on litigation expense, and the prevalence such a tactic would likely soon achieve." The court warned that "if [plaintiff's] tactic were permissible, it would likely soon be *de rigueur* in every case," and would result in retaliatory interrogatories that would consume time and money and could chill the taking of depositions and hamper settlements. 46 CA4th at 1164. In such a circumstance, writ review was permissible. See *CashCall v Superior Court* (2008) 159 CA4th 273, 285, 71 CR3d 441 (considering question of first impression regarding precertification discovery of identities of potential class members); *Best Prods., Inc. v Superior Court* (2004) 119 CA4th 1181, 15 CR3d 154 (order finding waiver of attorney-client privilege for failure to produce privilege log reversed on appeal); *Smith v Superior Court* (1996) 41 CA4th 1014, 1026, 49 CR2d 20 (review of trial court's refusal to issue commission to take out-of-state deposition because of injunction issued by another state preventing witness from testifying against former employer).

The need to resolve a recurring question may add support to a petition for a writ. In *Volkswagen of Am., Inc. v Superior Court* (2006) 139 CA4th 1481, 1487, 43 CR3d 723, for example, the court granted writ review of an order denying discovery of documents submitted by plaintiff's attorneys to bankruptcy trusts in support of claims for compensation for alleged asbestos-related injuries, stating that "writ review is appropriate in this case to resolve what we are advised is a recurring question in other asbestos litigation."

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§16.14 2. Discovery Order May Prevent Fair Litigation of Case

Courts may decide to hear a writ petition when the trial court issues a discovery order that might prevent the fair litigation of a case. For example, in *City of King City v Community Bank of Cent. Cal.* (2005) 131 CA4th 913, 32 CR3d 384, the court reversed a trial court order denying trial continuance to permit discovery on the ownership of funds in a bank account. The refusal to permit discovery could not be justified by any rule of law. 131 CA4th at 931. Similarly, in *Hernandez v Superior Court* (2004) 115 CA4th 1242, 1246, 9 CR3d 821, the trial court's refusal to extend the trial and discovery cut-off dates after the death of plaintiff's counsel was an abuse of discretion. In *Do v Superior Court* (2003) 109 CA4th 1210, 135 CR2d 855, the court held that it would be unfair to allow discovery abuse in cases in which a litigant was represented pro bono, and reviewed a trial court order denying discovery sanctions on the grounds that counsel was serving on a pro bono basis.

Writ review may be granted "to prevent an unjustifiable denial of discovery." *Volkswagen of Am., Inc. v Superior Court* (2006) 139 CA4th 1481, 1487, 43 CR3d 723, citing *Lehman v Superior Court* (1986) 179 CA3d 558, 562, 224 CR 572. In *Volkswagen of Am., Inc.,* that discovery was still open and questions could still be asked of a party did not substitute for access to documents "which ordinarily are more reliable, may be used for such purposes as refreshing recollection and impeachment, and may lead to the discovery of other admissible evidence." 139 CA4th at 1487.

Although the court in *Golfland Entertainment Ctrs. v Superior Court* (2003) 108 CA4th 739, 133 CR2d 828, did not state the basis for agreeing to hear the writ petition, it appears that it did so because the trial court's order permitting counsel and a court reporter to attend a child's mental examination, and limiting the stenographic record to the child's oral responses, would have interfered with fair litigation of the case. In *Golfland*, the appellate court directed the trial court to enter an order that neither counsel nor the court reporter be present and that the entire exam be audiotaped.

The court's rationale for hearing a writ petition is not always stated explicitly, but other cases in which courts appear to have decided to hear writ petitions on grounds of fairness include *McDonald v Superior Court* (1994) 22 CA4th 364, 27 CR2d 310 (trial court's order allocating discovery referee fees equally between parties was vacated because plaintiff had demonstrated inability to pay); *McGinty v Superior Court* (1994) 26 CA4th 204, 31 CR2d 292 (review of discovery order that caused dismissal of case when plaintiff's only expert was precluded from testifying at trial because he inadvertently disclosed documents subject to protective order); *Wagner v Superior Court* (1993) 12 CA4th 1314, 16 CR2d 534 (review of trial court's order refusing to extend discovery cutoff even though no trial date had yet been established); and *Waicis v Superior Court* (1990) 226 CA3d 283, 276 CR 45 (review of discovery sanctions order that excluded witness from testifying at trial and thus could prevent party from having fair opportunity to litigate case).

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§16.15 3. Discovery May Violate Privilege or Other Protection

When a court orders production of documents that may be protected by a privilege, interlocutory review by writ is the only adequate remedy because once a party produces privileged material, there is no way to undo the harm which is caused by the disclosure. *Raytheon Co. v Superior Court* (1989) 208 CA3d 683, 256 CR 425. See also *OXY Resources Cal. LLC v Superior Court* (2004) 115 CA4th 874, 886, 9 CR3d 621. Although the attorney-client privilege deserves a particularly high degree of protection in this regard (*OXY Resources*, 115 CA4th at 887), materials covered by other recognized privileges will be considered by writ review, as well.

On privileges and other protections in general, see chap 3.

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§16.16 a. Attorney-Client Privilege

Cases in which courts considered writ petitions because of attorney-client privilege issues include the following:

- *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 741, 101 CR3d 758 (court of appeal directed to issue writ of mandate granting relief in case involving letter from outside counsel to corporate counsel that had been partially redacted by court);
- *Zurich Am. Ins. Co. v Superior Court* (2007) 155 CA4th 1485, 1503, 66 CR3d 833 (writ review proper in case involving documents consisting of confidential communications between insurer's employees and insurer's attorneys about legal advice and strategy);
- *Carehouse Convalescent Hosp. v Superior Court* (2006) 143 CA4th 1558, 1566, 50 CR3d 129 (writ issued; plaintiffs' failure to rebut presumption against deposing opposing counsel was so obvious that "no purpose could be served by plenary consideration of the issue");
- *OXY Resources Cal. LLC v Superior Court* (2004) 115 CA4th 874, 886, 9 CR3d 621 (writ review proper in case involving ordered production of potentially privileged documents);
- *Best Prods., Inc. v Superior Court* (2004) 119 CA4th 1181, 15 CR3d 154 (vacating order finding waiver of attorney-client privilege for failure to produce privilege log);
- *Scripps Health v Superior Court* (2003) 109 CA4th 529, 135 CR2d 126 (vacating order requiring production of occurrence reports communicated to insurance company for use by counsel defending the insured);
- *Raytheon Co. v Superior Court* (1989) 208 CA3d 683, 256 CR 425 (review of discovery order that allegedly undermined attorney-client privilege);
- *Spectra-Physics, Inc. v Superior Court* (1988) 198 CA3d 1487, 1493, 244 CR 258 (writ relief is particularly appropriate because "the damage done by improperly allowing such discovery cannot readily be cured after it has occurred"); and
- *Dickerson v Superior Court* (1982) 135 CA3d 93, 185 CR 97 (reversing order requiring corporate attorney to answer questions in litigation between minority and majority shareholders).

On attorney-client privilege in general, see chap 3.

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§16.17 b. Attorney Work Product

In *City of Long Beach v Superior Court* (1976) 64 CA3d 65, 134 CR 468, the court issued a writ of mandamus to vacate a trial court's order requiring disclosure of information that qualified as work product. See also *Metro-Goldwyn-Mayer, Inc. v Superior Court* (1994) 25 CA4th 242, 30 CR2d 371 (writ review of trial court's order regarding nondisclosure of documents protected by absolute work product doctrine).

On attorney work product protection in general, see chap 3.

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§16.18 c. Constitutional Rights

In *St. Paul Fire & Marine Ins. Co. v Superior Court* (1984) 156 CA3d 82, 202 CR 571, the court issued a writ of mandate to set aside a trial court discovery order on the grounds that it violated due process principles because of lack of notice and opportunity to be heard.

Other cases in which the court granted writ review to consider protection of constitutional rights include *Fuller v Superior Court* (2001) 87 CA4th 299, 104 CR2d 525 (review of trial court order denying motion to preclude depositions on Fifth Amendment grounds), and *Taggares v Superior Court* (1998) 62 CA4th 94, 72 CR2d 387 (sua sponte trial court order, appointing discovery referee for current and future discovery disputes and requiring that defendants assume responsibility for all referee fees because plaintiff was indigent, vacated by writ of mandate). See also *H.B. Fuller Co. v Doe* (2007) 151 CA4th 879, 60 CR3d 501 (when plaintiff sought to discover identity of anonymous defendant who allegedly disclosed confidential information on website, trial court's denial of anonymous defendant's motion to quash would have been reviewable by writ had it not been appealable because enforcement of subpoena would deprive defendant of his First Amendment interest in speaking anonymously).

On protection of constitutional rights in general, see chap 3. See also §1.62.

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§16.19 d. Legislative Motive

A trial court may be restrained from requiring members of a board of supervisors to answer deposition questions about their motives for enacting legislation *County of Los Angeles v Superior Court* (*Burroughs)* (1975) 13 C3d 721, 119 CR 631. See §§1.56, 3.108.

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§16.20 e. Mediation Confidentiality

Courts may grant writ review of a trial court order that fails to protect the confidentiality under Evid C §1115-1128 of communications made during a mediation. See *Eisendrath v Superior Court* (2003) 109 CA4th 351, 363, 134 CR2d 716 (reviewing denial of protective order to prevent testimony of mediator concerning spousal support agreement reached during mediation between spouses). On mediation confidentiality, see §3.147. See also A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005).

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§16.21 f. Physician-Patient Privilege

Courts may grant writ review of orders that might lead to the disclosure of information protected by the physician-patient privilege or the psychotherapist-patient privilege. See *Roberts v Superior Court* (1973) 9 C3d 330, 107 CR 309 (discovery order rejecting claim of psychotherapist-patient privilege reversed); *Slagle v Superior Court* (1989) 211 CA3d 1309, 260 CR 122 (challenge to discovery order was based on physician-patient privilege and was issue of first impression); *Scull v Superior Court* (1988) 206 CA3d 784, 786, 254 CR 24 (order to disclose to district attorney names of psychiatrist's former female patients vacated).

On physician-patient privilege and psychotherapist-patient privilege in general, see §§3.84-3.106.

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§16.22 g. Right to Privacy

Courts may grant writ review to protect privacy rights. See *Valley Bank v Superior Court* (1975) 15 C3d 652, 125 CR 553 (although party may discover information disclosed to bank by customer, bank must take reasonable steps to locate customer, inform him or her of the discovery proceedings, and provide customer reasonable opportunity to object and seek protective order). See also *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 123 CR 283 (order requiring disclosure of data in sales tax return reversed); *Save Open Space Santa Monica Mountains v Superior Court* (2000) 84 CA4th 235, 100 CR2d 725 (writ of mandate issued to limit the discovery of identities of members of nonprofit association to protect their privacy rights); *Doyle v Superior Court* (1996) 50 CA4th 1878, 58 CR2d 476 (order requiring mental examination in a sexual harassment case reviewed to resolve conflict between defendant's right to conduct discovery and plaintiff's constitutionally protected right of privacy); *Abex Corp. v Superior Court* (1989) 209 CA3d 755, 257 CR 498 (review of discovery order denying skin biopsy of lesion in asbestos personal injury case).

On privacy rights in general, see §§3.156-3.164.

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§16.23 h. Confidential Reporting Required by Law

To protect a confidential reporting privilege created by federal law, the court granted a petition for writ of mandamus in *Union Bank v Superior Court* (2005) 130 CA4th 378, 29 CR3d 894. Under federal regulations, banks are required to file a suspicious activity report (SAR) with the federal government whenever they detect a known or suspected violation of federal law or a suspicious transaction related to money laundering. 12 CFR §21.11(a). SARs are confidential and banks are prohibited from producing an SAR or providing any information that could disclose whether it prepared or filed an SAR. 12 CFR §21.11(k). In *Union Bank*, the court of appeal granted writ review and reversed the trial court's order requiring production of the SAR reports.

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§16.24 4. Sanctions in Any Amount

It is in the appellate court's discretion to review sanction orders or judgments, regardless of amounts, by petition for extraordinary writ under CCP §904.1(b).

An interlocutory judgment or order imposing sanctions of $5000 or more may be reviewed by immediate appeal. CCP §904.1(a)(11)-(12). There may be some question on whether orders granting *discovery* sanctions of $5000 or more are immediately appealable. See §16.31. On discovery appeals, see §§16.30-16.44.

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E. Procedure for Obtaining Writ

§16.25 1. Timing Limitations

As a general rule, in the absence of a specific statutory provision, an appellate court may consider a petition for extraordinary writ at any time, subject to its power to deny relief on ground of laches. *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 499, 165 CR 748. It is good practice, however, to file the petition *as soon as possible* and in any event no later than 60 calendar days after the order or judgment for which relief is sought. *Volkswagen of Am., Inc. v Superior Court* (2001) 94 CA4th 695, 701, 114 CR2d 541. See California Civil Writ Practice §§18.62-18.75 (4th ed Cal CEB 2008) (60-day limit). In general, CCP §1013 does *not* apply to extend the time for filing a petition. See Civ Writ Prac §18.66. Check local rules for the application of CCP §1013.

File before the deadline. It is best to file the petition as soon as possible, and well before any deadline, because writ petitions are intended for use primarily when immediate action is needed. Courts are unlikely to decide that a petitioner needs immediate relief if the petition is filed a month or two after the complained-of act. Any delay in filing should be explained in the body of the petition.

Application of doctrine of laches. If a petition is filed later than 60 days after the order or judgment and there is no statutory deadline, the opposing party may assert the doctrine of laches. This doctrine may defeat a petition if there is an unreasonable delay in filing the petition plus prejudice to the real party. *Peterson v Superior Court* (1982) 31 C3d 147, 163, 181 CR 784. On laches, see Civ Writ Prac §18.67.

Although laches is a basis for denying review of discovery orders by writ, a reviewing court can nevertheless exercise its discretion to protect the rights of third parties. *Irwin Mem. Blood Bank v Superior Court* (1991) 229 CA3d 151, 279 CR 911 (although defendant-petitioner delayed 10 months in seeking review of order providing for depositions of persons suspected of having AIDS and defendant's delay prejudiced plaintiff, court exercised discretion to resolve issue on merits).

This section contains only a brief overview of timing requirements. For further discussion of timing requirements, see Civ Writ Prac and Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide November 2005).

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§16.26 2. Format and Content

Contents of petition. A petition is the document filed to request issuance of a writ of mandate, prohibition, or certiorari. It contains the allegations that establish what relief is desired, the grounds for relief, and that the petitioner meets the requirements for obtaining a writ. The petition must allege specific facts showing entitlement to writ relief. *Gong v City of Fremont* (1967) 250 CA2d 568, 573, 58 CR 664. But see *Chapman v Superior Court* (2005) 130 CA4th 261, 271, 29 CR3d 852 (court overruled demurrer to petition despite inadequate rendition of undisputed facts in petition because respondent was able to file two briefs fully addressing issues). It closes with a prayer requesting particular relief. The petition is verified and is accompanied by proof of service. A supporting memorandum and all exhibits necessary for the reviewing court to make its determination must be filed with the petition. The petitioner should keep the petition as brief as possible; it does not have to be long to be persuasive. Although it is called a "petition" rather than a complaint, it is a type of complaint and, under CCP §1109, the general rules of pleading and practice prescribed in CCP §§307-1062.20 apply. See 8 Witkin, California Procedure, *Extraordinary Writs* §170 (5th ed 2008).

Use of term "petition." The term "petition" is frequently used to include the petition, supporting memorandum, exhibits, request for stay, prayer for relief, and declaration of service. This chapter uses the term in that broad sense. A checklist of items to be included in the petition, in the usual order in which they appear, is in California Civil Writ Practice §18.4 (4th ed Cal CEB 2008).

Designating parties. The person filing the petition is called the petitioner. In cases involving judicial action, the opposing party is called the real party in interest, and the court is called the respondent. In petitions attacking administrative and other nonjudicial proceedings, the opposing party may be called the respondent, and there may be no real party in interest. When an agency and an opposing party are involved, the agency is usually the respondent, and the opposing party is usually the real party.

Applications for stay. An application for stay may be included in the petition or may be filed as a separate document.

JUDGE'S PERSPECTIVE: A stay should be requested *only* when necessary and not as a matter of course. When a stay is requested, be sure to so indicate on the cover of the petition.

Length requirements. The page-length requirements of Cal Rules of Ct 8.204(c)(1)-(2) govern the length of writ petitions (14,000 words for a computer-produced petition, 50 pages for a typewritten petition). Cal Rules of Ct 8.490(b)(6). Tables, certificate, verification, and any supporting documents are excluded from the page limits. Cal Rules of Ct 8.204(c)(3), 8.486(a)(6).

Redaction requirement. Under Cal Rules of Ct 1.20(b)(1) (effective Jan. 1, 2008) parties must redact certain identifying information from paper or electronic documents or records filed with the court. See §15.45.

This discussion contains only a brief overview of format and content requirements for writ petitions. For further discussion of format and content requirements for writ petitions, see Civ Writ Prac and Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide November 2005).

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3. Filing and Service

§16.27 a. Service

Serve before filing. The petition (including the supporting memorandum and the exhibits) should be served before filing. Cal Rules of Ct 8.25(a), 8.486(e). The court, in its discretion, may allow the petition to be filed without service and the proof of service to be filed later (CCP §§1088, 1088.5; Cal Rules of Ct 8.486(e)), but this is rarely done.

How to serve. The petition must be served in the same manner as a brief in an ordinary civil action: serving personally, or by mail, on counsel. See Cal Rules of Ct 8.25(a). If an immediate stay is sought, the best practice is service by personal delivery, overnight delivery, or by facsimile. See CCP §1011. Most courts will insist on counsel's best efforts to give the opponent a realistic opportunity to respond.

Serving counsel or unrepresented party. Technically, Cal Rules of Ct 8.486(e) requires the petitioner to serve the respondent and real party in interest, as well as the Attorney General, when required by Cal Rules of Ct 8.29. See California Civil Writ Practice §5.82 (4th ed Cal CEB 2008). In practice, if a party is represented by counsel in the underlying action, serve counsel. Serve the party if the party is unrepresented.

Serving trial court. In a multijudge court, serve the respondent trial court by serving the presiding judge. CCP §416.50(a). A courtesy copy should be delivered to the trial judge. In practice, service is commonly made on the trial court clerk.

This discussion contains only a brief overview of service requirements for writ petitions For further discussion of service requirements, see Civ Writ Prac and Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide November 2005).

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§16.28 b. Filing

Where to file. Writ petitions generally must be filed in the next-higher court. Cal Rules of Ct 8.486(a)(1).

The court of appeal reviews a trial court determination in a pending case, or a judgment of the appellate division of the trial court granting or denying a petition for writ of mandate or prohibition in a pending limited civil case. The California Supreme Court reviews a court of appeal decision. Cal Const art VI, §10; *Ramis v Superior Court* (1977) 74 CA3d 325, 332, 141 CR 374. For further discussion of this rule, see California Civil Writ Practice, chap 5 (4th ed Cal CEB 2008).

Limited civil case. For review of a trial court decision in a pending limited civil case (formerly a municipal court case), file the petition in the appellate department of the trial court. See Civ Writ Prac §12.3.

When filing effective. Filing of a petition for writ is effective only on receipt by the court—not on the mailing date. See *People v Slobodion* (1947) 30 C2d 362, 367, 181 P2d 868. If time is short or there is any question concerning timeliness, hand deliver the petition to the court.

No exceptions. The priority mail, express mail, or overnight delivery exceptions in Cal Rules of Ct 8.25(b)(3) do not apply to petitions for original writs. See Cal Rules of Ct 8.25(b)(4).

This discussion contains only a brief overview of filing requirements for writ petitions For further discussion of filing requirements see Civ Writ Prac and Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide November 2005).

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§16.29 4. Request for Temporary Stay

To maintain the status quo while the court considers a writ petition, the court of appeal may enter temporary stay orders. CCP §§1071-1072; California Civil Writ Practice §18.58 (4th ed Cal CEB 2008). Counsel should request a stay as soon as it becomes apparent that the client's interests could suffer adverse effects (*e.g.,* discovery could continue or trial could begin) before the court of appeal acts on the petition's merits. The words "STAY REQUESTED" must be prominently displayed on the cover of the writ petition and the nature and date of the proceeding or act sought to be stayed must appear on the cover of the petition. Cal Rules of Ct 8.116(a).

When requesting a stay, explain the reasons for the stay and include all relevant time constraints. Cal Rules of Ct 8.486(a)(7). Counsel must file the petition first or serve it at the same time as the request for temporary stay.

NOTE: The court may impose sanctions on counsel who mislead the appellate court into granting a temporary stay. *Jones v Superior Court* (1994) 26 CA4th 92, 31 CR2d 264.

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IV. REVIEW BY APPEAL

§16.30 A. Most Discovery Orders Not Immediately Appealable

In general, an order granting or denying discovery is considered interlocutory and thus not directly reviewable by an immediate appeal. See CCP §904.1(a)(1)(A). See also California Civil Appellate Practice §§3.24-3.25 (3d ed Cal CEB 1996). Similarly, a discovery order is not generally considered collateral to the main proceeding and thus is not appealable as a collateral ruling. Civ App Prac §3.24.

NOTE: In *Gregori v Bank of America* (1989) 207 CA3d 291, 310, 254 CR 853, a rare case in which an order denying discovery was directly reviewed on appeal, the appellate court noted that the attempted discovery—concerning a social relationship between the plaintiff's attorney and the defense attorney's legal secretary—was closely related to another matter the court was already reviewing on appeal, the denial of a motion to disqualify the plaintiff's attorney. The court implied that considerations of judicial convenience and the collateral nature of the issues in controversy justified appellate review.

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B. When Appeal Available

§16.31 1. Discovery Sanctions Over $5000

In general, an order imposing sanctions over $5000 is immediately appealable. CCP §904.1(a)(11)-(12). Although the California Supreme Court has not resolved the issue of whether an order imposing *discovery* sanctions over $5000 is immediately appealable, the weight of recent authority is that it is. See *Sears, Roebuck & Co. v National Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1352, 32 CR3d 717 (discovery sanctions over $5000 are appealable under CCP §904.1(a)(11)); *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 262, 264, 26 CR3d 831 (monetary discovery sanctions over $5000 immediately appealable under CCP §904.1(a)(12)); *Rail-Transport Employees Ass'n v Union Pac. Motor Freight* (1996) 46 CA4th 469, 475, 54 CR2d 713 (1993 revisions to CCP §904.1(a)(11)-(12) permit direct appeal of discovery sanctions over $5000). See CCP §904.1(a)(11)-(12). See also California Civil Appellate Practice §3.41 (3d ed Cal CEB 1996).

At common law, discovery sanctions were not considered directly appealable collateral orders and there remains disagreement among the courts of appeal as to the effect of CCP §904.1(a)(11)-(12) on this common-law treatment. See *Drum v Superior Court* (2006) 139 CA4th 845, 850 n3, 43 CR3d 279. There is a line of cases, generally predating the 1993 revisions to CCP §904.1(a)(11)-(12), which holds that although sanctions awards over $5000 are appealable under CCP §904.1(a)(11), *discovery* sanctions are not. See *Ballard v Taylor* (1993) 20 CA4th 1736, 25 CR2d 384; *Hanna v Bankamerica Bus. Credit, Inc.* (1993) 16 CA4th 913, 20 CR2d 430; *Russell v General Motors Corp.* (1992) 3 CA4th 1114, 4 CR2d 750; *Ghanooni v Super Shuttle* (1992) 2 CA4th 380, 3 CR2d 43; *Rao v Campo* (1991) 233 CA3d 1557, 285 CR 691; *Imuta v Nakano* (1991) 233 CA3d 1570, 285 CR 681.

PRACTICE TIP: Although most recent authority holds that discovery sanctions over $5000 are appealable, it may be safest for the party seeking review to file both a notice of appeal and a writ petition, explaining in the papers that counsel has filed both in an abundance of caution. This will allow the court to determine the appropriate method for immediate review of the order, without the party jeopardizing the opportunity to obtain immediate review.

Cannot aggregate sanctions amount. Discovery sanctions may not be aggregated to reach the minimum amount for appealability when the course of conduct giving rise to each sanction is separate and distinct. *Champion/L.B.S. Assoc. Dev. Co. v E-Z Serve Petroleum Mktg.* (1993) 15 CA4th 56, 59, 18 CR2d 726. Nonetheless, the court in *Champion/L.B.S* suggested in dictum that if the same offensive conduct is sanctioned more than once, the sanctions may be combined to reach the minimum on appeal. In *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 24 CR2d 337, the First District Court of Appeal held that sanctions orders may not be aggregated under any circumstances to meet the appealability threshold, noting it considered the standards for aggregation discussed in *Champion/L.B.S.* too vague and unwieldy to be of practical use.

Sanctions against counsel. When sanctions are awarded against counsel, counsel must file a notice of appeal on his or her own behalf. 20 CA4th at 42 (court lacked jurisdiction to review sanctions award against attorney when appeal filed by party instead of attorney).

Court may treat appeal as application for writ. When a party erroneously appeals from discovery sanctions, the reviewing court has discretion to treat the appeal as an application for extraordinary writ relief. *Green v GTE Cal., Inc.* (1994) 29 CA4th 407, 409, 34 CR2d 517; *Marriage of Niklas* (1989) 211 CA3d 28, 34, 258 CR 921.

NOTE: Denial of a sanctions order can be reviewed on appeal from an ultimate judgment. The appeal will be successful, however, only if counsel can show prejudice as a result of the order denying sanctions.

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Source: Civil Litigation/California Civil Discovery Practice/16 Writs and Appeals/§16.32 2. Sanction Orders or Judgments of $5000 or Less

§16.32 2. Sanction Orders or Judgments of $5000 or Less

Sanction orders or judgments of $5000 or less against a party or an attorney can be reviewed on appeal only after entry of final judgment or on petition for an extraordinary writ. CCP §904.1(b).

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§16.33 3. Person No Longer Involved in Suit

At least one court has held that a discovery sanctions order is immediately appealable when the person who is sanctioned is no longer involved in the underlying suit. *Barton v Ahmanson Devs., Inc.* (1993) 17 CA4th 1358, 1361, 22 CR2d 56 (when sanctions were awarded against party and attorney, attorney could appeal on his own behalf after his client had substituted new counsel).

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§16.34 4. Order Made After Appealable Judgment

An order made after an appealable judgment is appealable if it raises issues that are different from those arising from an appeal on the judgment and either affects the judgment or relates to it by enforcing it or staying its execution. *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 651, 25 CR2d 109; CCP §904.1(b). Thus, in *Lakin,* an order denying an award under former CCP §2033(o) of attorney fees incurred in proving facts that the losing party had refused to admit was appealable because it determined the rights and liabilities of the parties arising from the judgment, was not preliminary to later proceedings, and would not become subject to appeal after some future judgment.

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§16.35 5. Expert Witness Fees

An order denying an expert's motion for payment of witness fees is similar to a final judgment and therefore appealable. *Brun v Bailey* (1994) 27 CA4th 641, 648, 32 CR2d 624 (superseded by statute on other grounds as stated in *Baker-Hoey v Lockheed Martin Corp.* (2003) 111 CA4th 592, 602, 3 CR3d 593).

An order determining the "reasonable" deposition fee for an expert witness may be sufficiently binding on the expert and injurious to his immediate pecuniary interest to provide the expert's standing for an appeal. *Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 50 CR2d 493. The court in *Marsh* also ruled that the order at issue was final and collateral to the subject matter of the litigation.

For a comprehensive discussion of appeals, see California Civil Appellate Practice (3d ed Cal CEB 1996).

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§16.35A 6. Order Directs Compliance With City Legislative Subpoena

Orders compelling compliance with legislative subpoenas issued under Govt C §§37104-37109 have been held to be appealable final judgments. *City of Santa Cruz v Patel* (2007) 155 CA4th 234, 242, 65 CR3d 824 (orders directing respondent to comply with city's subpoena requiring production of records for tax compliance audit were appealable final orders).

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§16.35B 7. Order Ancillary to Litigation in Another Jurisdiction

When a discovery order is ancillary to litigation in another jurisdiction and becomes the final word of a California court on a particular disputed issue, then the order is appealable. *H.B. Fuller Co. v Doe* (2007) 151 CA4th 879, 60 CR3d 501 (plaintiff seeking to discover identity of anonymous defendant who allegedly disclosed confidential information on website obtained commission from Minnesota court for subpoena duces tecum in California; trial court's denial of anonymous defendant's motion to quash was appealable and would have been reviewable by writ if unappealable because enforcement of the subpoena would deprive defendant of his First Amendment interest in speaking anonymously).

NOTE: Operative January 1, 2010, the California version of the Uniform Interstate and International Depositions and Discovery Act (CCP §§2029.100-2029.900) will take effect. See Stats 2008, ch 231, §§1-3. The Uniform Act provides a procedure for obtaining discovery from a California witness for purposes of a case pending in an out-of-state jurisdiction and includes mechanisms for resolving discovery disputes, including seeking review of a superior court order in such a case. See CCP §§2029.600, 2029.650.

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§16.36 C. When Important to Seek Review by Appeal

If a collateral sanctions order directed against counsel for a party can be appealed immediately and counsel fails to seek the appeal, the right to appeal is lost and the issue may not be reviewed once a final judgment has been entered in the underlying action. *Imuta v Nakano* (1991) 233 CA3d 1570, 1581 n12, 285 CR 681. When a party erroneously appeals, rather than seeking a writ, the reviewing court has discretion to treat the appeal as an application for extraordinary relief. *Green v GTE Cal., Inc.* (1994) 29 CA4th 407, 409, 34 CR2d 517; *Marriage of Niklas* (1989) 211 CA3d 28, 34, 258 CR 921. Failure to timely appeal forfeits the right to appeal, however. If an appeal can be taken, it should be.

JUDGE'S PERSPECTIVE: When in doubt, the practitioner should file an appeal and, in the alternative, a writ petition.

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§16.37 D. Review on Appeal From Final Judgment

A discovery order may be reviewed on appeal from a final judgment, but the chances of success are diminished by the difficulty of establishing both of the following:

- The trial court committed an abuse of discretion (*Schaefer v Manufacturers Bank* (1980) 104 CA3d 70, 74, 163 CR 402); and
- The erroneous ruling was so prejudicial as to constitute a miscarriage of justice (see *Stein v Hassen* (1973) 34 CA3d 294, 299, 109 CR 321; *Wooldridge v Mounts* (1962) 199 CA2d 620, 628, 18 CR 806).

For example, an order requiring compliance with a subpoena is not appealable until the aggrieved party suffers some adverse consequences as a result of failing to comply. See *Bishop v Merging Capital, Inc.* (1996) 49 CA4th 1803, 57 CR2d 556 (court order requiring corporate custodian of records, who asserted Fifth Amendment right against self-incrimination, to comply with administrative subpoena not appealable). But see *People ex rel DuFauchard v U.S. Fin. Mgmt., Inc.* (2009) 169 CA4th 1502, 1511, 87 CR3d 615 (order compelling compliance with administrative subpoena appealable as final judgment under CCP §904.1).

JUDGE'S PERSPECTIVE: It is rare that counsel can raise a viable appellate issue from a routine discovery order. The issue on appeal usually involves the admissibility of evidence that stemmed from the discovery order. The appealing party has a reasonable chance to prevail only if the trial court's admission of evidence or failure to admit evidence results in a miscarriage of justice.

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§16.38 E. Who May Appeal

Code of Civil Procedure §902 governs whether a person has "standing to appeal," *i.e.,* whether he or she has a sufficient interest in a decision to appeal that decision. The statute provides that "[a]ny party aggrieved may appeal." This provision has been liberally construed, as a procedural statute, with any doubt resolved in favor of a right to appeal. *Koehn v State Bd. of Equalization* (1958) 50 C2d 432, 326 P2d 502 (decided under former CCP §938, replaced by CCP §902); *Aries Dev. Co. v California Coastal Zone Conserv. Comm'n* (1975) 48 CA3d 534, 542, 122 CR 315. However, courts have held that §902 must be applied strictly in the context of defining whether an aggrieved party is involved. See *Kunza v Gaskell* (1979) 91 CA3d 201, 206, 154 CR 101; *Hensley v Hensley* (1987) 190 CA3d 895, 898, 235 CR 684.

Arbitrator discovery decisions regarding nonparty. An arbitrator's discovery order against a nonparty to the arbitration is subject to full judicial review. *Berglund v Arthroscopic & Laser Surgery Ctr., L.P.* (2008) 44 C4th 528, 537, 79 CR3d 370.

This discussion contains only a brief summary of the standing requirements for an appeal. For detailed discussion of the rules governing standing, see California Civil Appellate Practice, chap 4 (3d ed Cal CEB 1996).

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F. Appeal Procedure

§16.39 1. Timing Limitations

Only a timely filed notice of appeal can invoke appellate court jurisdiction. The court can neither extend the time to file the notice nor hear an appeal that was not initiated by proper and timely notice. Cal Rules of Ct 8.104(b). See *Van Beurden Ins. Servs., Inc. v Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 C4th 51, 56, 61 CR2d 166; *Estate of Hanley* (1943) 23 C2d 120, 123, 142 P2d 423. No relief is available under the law for failure to timely file a notice of appeal. Cal Rules of Ct 8.104(b); *Hollister Convalescent Hosp., Inc. v Rico* (1975) 15 C3d 660, 125 CR 757. But see *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 129, 92 CR3d 595 (prison-delivery rule applies to self-represented prisoner's filing of notice of appeal in civil case; notice of appeal is deemed filed when prisoner submits notice to prison authorities for forwarding to superior court).

Under Cal Rules of Ct 8.104(a), the time for filing a notice of appeal from a judgment or an appealable order, in the absence of an otherwise applicable statute or rule, is the earliest of the following:

- 60 days after the superior court clerk serves the party filing the notice of appeal with a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was served (Rule 8.104(a)(1));
- 60 days after the party filing the notice of appeal serves or is served by a party with a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service (Rule 8.104(a)(2)); or
- 180 days after the date of entry of the judgment (Rule 8.104(a)(3)).

NOTE: The 60-day time periods are not extended by 5 days when the notice of entry of judgment is served by mail. CCP §1013(a). A shorter time period applies to appeals from validating actions involving public agencies. See California Civil Appellate Practice §7.43 (3d ed Cal CEB 1996).

A file-stamped copy of the judgment may be served by the court clerk or a party instead of the notice of entry of judgment. Cal Rules of Ct 8.104(a)(1)-(2). The proof of service establishes the date that the 60-day periods under Rules 8.104(a)(1) and (2) begin to run. Advisory Committee Comments to Rule 8.104(a)(1), (2).

This discussion contains only a brief summary of the timing requirements for an appeal. For detailed discussion of the rules governing timing, see Civ App Prac, chap 7.

Limited civil case. An appeal from a discovery order in a limited civil case should be filed in the appellate division of the superior court. CCP §77. See §16.28. See also California Civil Writ Practice §12.3 (4th ed Cal CEB 2008) and California Civil Appellate Practice, chap 10 (3d ed Cal CEB 1996).

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§16.40 2. Notice of Appeal

The notice of appeal must identify the *specific* judgment or order from which the appeal is taken. Because most nonappealable pretrial orders are merged into a judgment, a notice of appeal from "the judgment" preserves appellant's right to raise all errors occurring both at trial and in most pretrial proceedings. CCP §906. Although the case number should be included on the notice of appeal (as on any other pleading), one court has held that omission of the case number is not fatal to the appeal. See *D'Avola v Anderson* (1996) 47 CA4th 358, 54 CR2d 689 (notice of appeal found to be sufficient even though case number on notice of appeal was incorrect; no evidence that respondent was prejudiced by error). For a form Notice of Appeal, see California Civil Appellate Practice §7.14 (3d ed Cal CEB 1996).

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3. Filing and Service

§16.41 a. Filing of Notice of Appeal

The original, signed notice of appeal, along with the required filing fee, must be filed with the clerk of the superior court that rendered the judgment. The court of appeal will not accept the notice. Cal Rules of Ct 8.100(a)(1). The clerk of the court cannot refuse to accept the notice of appeal on the ground that, in the clerk's opinion, the order is not appealable. However, the clerk is under no duty to "file" an obviously untimely notice of appeal. In such a case, the notice should be stamped "Received but not filed." *People v Funches* (1998) 67 CA4th 240, 244, 78 CR2d 882 (notice of appeal filed 13 years after criminal case). On appealability of judgments and orders, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996). For discussion of filing fees, see Civ App Prac §§7.18-7.24.

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b. Service of Notice of Appeal

§16.42 (1) By Appellant

The appellant must serve the notice of appeal on all parties under Cal Rules of Ct 8.25(a) and file proof of service with the clerk of the superior court. Cal Rules of Ct 8.100(a)(1). Failure to serve the notice, however, will not prevent its filing or affect the appeal's validity. Nonetheless, the appellant may be required to remedy the failure on reasonable notice. Cal Rules of Ct 8.100(a)(3).

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§16.43 (2) By Court Clerk

Under Cal Rules of Ct 8.100(e)(1), the clerk of the superior court is required to mail notification of the filing of the notice of appeal to the attorney of record for each party or, if a party is unrepresented, to that party's last known address. The clerk must also mail notification of the filing of the notice of appeal to the clerk of the reviewing court; however, the clerk's failure to give this notice does not affect the validity of the appeal. Cal Rules of Ct 8.100(e)(6). If the appellant elects to use an appendix in the notice designating the record on appeal, or if the respondent serves and files a notice electing to use an appendix within 10 days after the notice of appeal is filed and no fee waiver for the clerk's transcript is granted to the appellant, the superior court clerk must promptly send a copy of the register of actions to the attorney of record for each party and to any unrepresented party. See Cal Rules of Ct 8.124(a)(1)-(2).

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§16.44 4. Procedures After Filing Notice of Appeal

After filing the notice of appeal, counsel should designate the record in a discovery-related appeal as he or she would do in an ordinary appeal from a judgment. Based on the schedule the court sets, counsel will prepare the appropriate briefs and participate in oral argument just as in any non-discovery-related appellate proceeding.

JUDGE'S PERSPECTIVE: In discovery-related appeals, it is most efficient and cost saving to use a joint appendix. Counsel may also want to submit transcripts of hearings held on the discovery motion. Request a stay of the order in the trial court, and if it is denied, ask for a stay pending appeal in the court of appeal by way of a writ of supersedes.

Redaction requirement. Under Cal Rules of Ct 1.20(b)(1) (effective Jan. 1, 2008) parties must redact certain identifying information from paper or electronic documents or records filed with the court. See §15.45.

For full discussion of how to handle an appeal and post-appeal matters, see California Civil Appellate Practice (3d ed Cal CEB 1996).

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V. FEDERAL COURT WRIT AND APPELLATE REVIEW

§16.45 A. Differences From State Law

Under 28 USC §1291, federal courts of appeal have jurisdiction to review all final decisions of the district courts of the United States. Because discovery orders requiring production of protected or privileged material may effectively be unreviewable after final judgment, a party must seek review under one of the exceptions to the final judgment rule discussed below.

Collateral order. A narrow exception to this limitation on jurisdiction has been found for orders which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. *Cohen v Beneficial Indus. Loans Corp.* (1949) 337 US 541, 545, 93 L Ed 1528, 69 S Ct 1221. Under the so-called *Cohen* exception, an order must meet three criteria for immediate review:

(1) Conclusively determine a disputed question;

(2) Resolve an important issue completely separate from the merits of the action; and

(3) Be effectively unreviewable on appeal from a final judgment.

Flat Glass Antitrust Litig. (3d Cir 2002) 288 F3d 83, 88, citing *Coopers & Lybrand v Livesay* (1978) 437 US 463, 468, 57 L Ed 2d 351, 98 S Ct 2454.

The collateral order doctrine is modest in scope, and conditions for its application are stringent. *Will v Hallock* (2006) 546 US 345, 349, 163 L Ed 2d 836, 844, 126 S Ct 952. The doctrine

> accommodates a "small class" of rulings, not concluding the litigation, but conclusively resolving in "claims of right separable from, and collateral to, rights asserted in the action." The claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Will v Hallock, supra (citations omitted). See, *e.g.*, *Mohawk Indus. v Carpenter* (2009) ___ US ___, 175 L Ed 2d 458, 464, 130 S Ct 599 (disclosure orders adverse to attorney-client privilege do not qualify for immediate appeal under collateral order doctrine).

Disinterested third party. Another exception, the so-called Perlman doctrine, provides that a "discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology v U.S.* (1992) 506 US 9, 18 n11, 121 L Ed 2d 313, 322, 113 S Ct 447. Direct appeal is unavailable, however, to an interested third party who has the necessary incentive and ability to risk contempt, be cited for contempt, and then appeal the contempt citation. See *In re Sealed Case* (DC Cir 1998) 141 F3d 337, 340.

Contempt order. Although discovery orders requiring production of protected or privileged materials may effectively be unreviewable after final judgment in the case, the federal procedure for obtaining review is different than in California courts: A party taking exception to a discovery order can refuse to obey the order, be cited for contempt, and appeal the contempt citation. *Church of Scientology v U.S., supra; Flat Glass Antitrust Litig.*, *supra*.

Extraordinary writ. In the Ninth Circuit, a writ of mandamus is possible to correct an erroneous discovery order using criteria somewhat more restrictive than those employed by California courts of appeal when issuing writs of mandate. See *Bauman v District Court* (9th Cir 1977) 557 F2d 650, 654. On writ criteria, see §16.46.

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§16.46 B. Review by Petition for Extraordinary Writ

The Ninth Circuit is disinclined to resort to the use of extraordinary writs to review discovery orders "unless such orders disclose a prejudicial usurpation of authority not correctable on appeal." *Belfer v Pence* (9th Cir 1970) 435 F2d 121, 122. The preferred mechanism is for the person to disobey the order and appeal from the subsequent citation for contempt. Federal courts view discovery orders and subpoenas as inherently unripe for review because the party could simply refuse to comply; once held in contempt, the party can challenge the contempt order, which is appealable as a final order under 28 USC §1291. Some discovery orders, such as those involving the denial of a privilege, may be reviewable by writ of mandamus, however.

The standards for granting a writ of mandamus are set out in *Bauman v District Court* (9th Cir 1977) 557 F2d 650, 654:

- Does the petitioner have other adequate means, such as direct appeal, to obtain relief?
- Does the order damage petitioner in a way not correctable on appeal?
- Is the order clearly erroneous as a matter of law?
- Is the order an oft-repeated error thus manifesting a persistent disregard of the federal rules?
- Does the order raise issues of first impression and create new and important problems?

For examples of cases in which writs have been granted, see, *e.g., Barton v District Court* (9th Cir 2005) 410 F3d 1104 (Internet questionnaire claiming to waive attorney-client privilege waives neither privilege nor prospective clients' claim of confidentiality); *Philippine Nat'l Bank v District Court* (9th Cir 2005) 397 F3d 768 (writ granted to prevent district court from pursuing discovery against bank because it had transferred funds to Republic of Philippines in accord with order of Philippine Supreme Court).

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§16.47 C. Review by Appeal

As in state court, orders denying motions for discovery are considered interlocutory and not subject to appeal. See *Louie v Carnevale* (9th Cir 1971) 443 F2d 912 (appeal from order denying motion for inspection and copying under Fed R Civ Proc 34). Under 28 USC §1291, the federal court of appeal has jurisdiction only of appeal from final decisions by the district court. *Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig. v Standard Oil Co.* (9th Cir 1984) 747 F2d 1303.

A nonparty may disobey an order and then appeal either a contempt order or a discovery sanction before final judgment if the order or sanction is directed at the nonparty, unless "there is a substantial congruence of interests between the nonparty and a party to the action." 747 F2d at 1305 (in case brought by state, Attorney General not a "nonparty for purpose of appealing the contempt sanction").

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