

Handling Motions to Compel and Other Discovery Motions

Jeffrey A. Tidus

JUDGE'S PERSPECTIVE

by Commissioner Everett Hewlett, Jr.
Superior Court Commissioner, San Francisco

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Scope of Guide

This Action Guide helps the attorney decide whether and when to make a discovery motion and provides step-by-step procedures for preparing, filing, and serving the moving papers. It includes not only motions to compel discovery, but also motions for sanctions, protective orders, and special discovery procedures, *e.g.*, early deposition.

Abbreviations

Civil Discovery

[California Civil Discovery Practice \(4th ed Cal CEB 2006\)](#)

Civ Proc Before Trial

[California Civil Procedure Before Trial \(4th ed Cal CEB 2004\)](#)

Obtaining Discovery

[Obtaining Discovery: Initiating and Responding to Discovery Procedures \(Cal CEB Action Guide March 2007\)](#)

About the Authors

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/Understand Effects of Trial Court Delay Reduction Act on Your Case/STEP 1. DETERMINE WHETHER YOUR CASE IS SUBJECT TO TRIAL COURT DELAY REDUCTION ACT

Understand Effects of Trial Court Delay Reduction Act on Your Case

STEP 1. DETERMINE WHETHER YOUR CASE IS SUBJECT TO TRIAL COURT DELAY REDUCTION ACT

MOST CASES SUBJECT TO TRIAL COURT DELAY REDUCTION ACT (TCDRA)

Virtually *all* general civil actions and proceedings in the superior court in *all* counties are subject to the Trial Court Delay Reduction Act (TCDRA) (Govt C §§68600-68620) and the differential case management rules (Cal Rules of Ct 3.710-3.715). Govt C §§68605.5, 68608(a); Cal Rules of Ct 3.712(a), 3.720; Cal Rules of Ct, Standards of J Admin 2.2.

DETERMINE WHETHER CASE EXEMPTED FROM TCDRA

The TCDRA specifically exempts the following actions and proceedings (see Govt C §68608(a); Cal Rules of Ct 1.6(4), 3.712(a)):

- a. Juvenile cases;
- b. Probate actions;
- c. Guardianship and conservatorship actions;
- d. Cases and actions under Divisions 6 through 9 of the Family Code, the Uniform Parentage Act, the Domestic Violence Prevention Act, and the Uniform Interstate Family Support Act;
- e. Small claims proceedings;
- f. Unlawful detainer proceedings; and
- g. Other civil petitions, including, *e.g.*:
 - (1) Petition for writ of mandate;
 - (2) Temporary restraining order;
 - (3) Writ of possession;
 - (4) Appointment of receiver; and
 - (5) Name change.

May Be Subject to Special Rules

Court may adopt special rules, *e.g.*, uninsured motorist cases are specifically given 180 days after designation to allow for arbitration of plaintiff's claim (see Govt C §68609.5; Cal Rules of Ct 3.712(b)); and collections cases are exempt unless defendant files responsive pleading (Cal Rules of Ct 3.712(d)).

WHEN TO ASK COURT TO TREAT CASE AS EXCEPTION

Courts are reluctant to exempt cases from the TCDRA, but if your case involves exceptional circumstances that will prevent the court and the parties from meeting case management goals and deadlines—or if it would be in the interests of justice—consider asking the court to exempt the case. See Cal Rules of Ct 3.714(c)(1); see also, *e.g.*, Los Angeles Ct R 7.6(c)-(d). See [step 2](#) for further discussion of exceptional cases.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/Understand Effects of Trial Court Delay Reduction Act on Your Case/STEP 2. UNDERSTAND DELAY REDUCTION GOALS

STEP 2. UNDERSTAND DELAY REDUCTION GOALS

ELIMINATE DELAY

Local judges have the responsibility to eliminate delay in litigation. Govt C §6860Z.

COURT MUST ESTABLISH PROCEDURES TO ACHIEVE GOALS

Under the TCDRA, courts must adopt procedures, standards, and policies to achieve goal of eliminating litigation delay by (Govt C §6860Z(c); Cal Rules of Ct 3.714(a)):

- a. Assigning the case to the court's "regular" case management program;
- b. Exempting the case as an exceptional case; or
- c. Assigning the case to the court's plan for uncomplicated cases.

Factors Considered

In making this determination, the court will consider (Cal Rules of Ct 3.715(a)):

- a. The type and subject matter of the action;
- b. The number of causes of action or affirmative defenses alleged;
- c. The number of parties with separate interests;
- d. The number of cross-complaints and the subject matter;
- e. The complexity of the issues, including issues of first impression;
- f. The difficulty in identifying, locating, and serving parties;
- g. The nature and extent of the discovery anticipated;
- h. The number and location of percipient and expert witnesses;
- i. The estimated length of trial;
- j. Whether some or all issues can be arbitrated or resolved through some other alternative dispute resolution process;
- k. The statutory priority for the issues;
- l. The likelihood of review by writ of appeal;
- m. The amount in controversy and the type of remedy sought, including measures of damages;
- n. The pendency of other actions or proceedings that may affect the case;
- o. The nature and extent of law and motion proceedings anticipated;
- p. The nature and extent of the injuries and damages;
- q. The pendency of underinsured claims; and
- r. Any other factor that would affect the time for disposition of the case.

UNDERSTAND CASE DISPOSITION TIME GOALS

Depending on which "program" (see above) your case is assigned to, the court will manage it to achieve specified case disposition time goals.

Unlimited Civil Cases

A court will manage its unlimited civil cases assigned to the court's "regular" case management program so that (Cal Rules of Ct 3.714(b)(1); Cal Rules of Ct, Standards of J Admin 2.2(f)(1)):

- a. 75 percent are disposed of within 12 months of filing;
- b. 85 percent are disposed of within 18 months of filing; and
- c. 100 percent are disposed of within 24 months of filing.

Limited Civil Cases

A court will manage its limited civil cases assigned to the court's "regular" case management program so that (Cal Rules of Ct 3.714(b)(2); Cal Rules of Ct, Standards of J Admin 2.2(f)(2)):

- a. 90 percent are disposed of within 12 months of filing;
- b. 98 percent are disposed of within 18 months of filing; and
- c. 100 percent are disposed of within 24 months of filing.

NOTE

In meeting these case disposition time goals, the court is guided by the factors set out in Cal Rules of Ct 3.715(a).

Exceptional Cases

If, after evaluating a case using the factors listed in Cal Rules of Ct 3.400 and 3.715 (see above), the court finds that it involves "exceptional circumstances" that will prevent it from being disposed of within the case disposition time goals of Cal Rules of Ct 3.714(b), the court may exempt the case from those time goals. Cal Rules of Ct 3.714(c)(1). In such cases, the court must (Cal Rules of Ct 3.714(c)(2)):

- a. Establish a case progression plan to ensure timely disposition;
- b. With the goal of disposing of the case within 3 years.

NOTE

A case does not become exceptional simply because counsel waited until the last minute to start discovery. Very few cases qualify as such, and most of these can be identified up front. If you believe you have such a case, you should bring it to the court's attention at the earliest opportunity. Also, if you successfully oppose an application to have a case classified as exceptional, you must be ready to try the case, because few judges will give you a continuance later if you ask for an earlier trial date at the outset.

Uncomplicated Cases

A local court may institute a case management plan for uncomplicated cases amenable to disposition within 6 to 9 months after filing. Cal Rules of Ct 3.714(d)(1). The court will use the factors listed in Cal Rules of Ct 3.715(a) to identify appropriate cases.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/Understand Effects of Trial Court Delay Reduction Act on Your Case/STEP 3. DETERMINE HOW YOUR CASE WILL BE MANAGED UNDER TRIAL COURT DELAY REDUCTION ACT

STEP 3. DETERMINE HOW YOUR CASE WILL BE MANAGED UNDER TRIAL COURT DELAY REDUCTION ACT

UNDERSTAND JUDICIAL MANAGEMENT GOALS

Civil case disposition time goals of Cal Rules of Ct 3.714 are guidelines for the court's disposition of cases. To help achieve these goals, the judge will "actively manage" cases (see Govt C §68607; Cal Rules of Ct, Standards of J Admin 2.1(a)-(b)):

- a. *To eliminate all unnecessary delays:* Any elapsed time during litigation, other than that reasonably required for pleadings, discovery, preparation, and court events, is unacceptable; and
- b. *To control the pace of litigation:* Judges have the responsibility to achieve a just and effective resolution of each general civil case by actively managing and supervising the litigation to reduce delay and maintain a current docket.

NOTE

Review Cal Rules of Ct 3.720-3.735 and any applicable local rules to determine the subjects to be considered at the case management conference. Counsel has a duty to meet and confer before the initial case management conference to consider any issues concerning electronically stored information, resolve any discovery disputes, and set a discovery schedule. Cal Rules of Ct 3.724.

Judge May Establish Discovery Timetable

At the case management conference, the court may establish a timetable for the litigation, *including discovery deadlines*. See, e.g., Contra Costa Ct R 12.6(B).

Court to Avoid Continuances

The court must:

- a. Adopt a firm policy against continuances at all stages of the litigation (Govt C §68607(g)); and
- b. Make strong efforts to begin trials when scheduled (Cal Rules of Ct 3.1332).

RECOGNIZE COURT'S POWER TO SANCTION

Judges have the power to impose sanctions, including dismissing the case or striking pleadings, to achieve delay reduction in litigation. Govt C §68608(b).

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/Understand Effects of Trial Court Delay Reduction Act on Your Case/STEP 4. RECOGNIZE LIMITATIONS ON LOCAL RULES IMPLEMENTING DELAY REDUCTION GOALS

STEP 4. RECOGNIZE LIMITATIONS ON LOCAL RULES IMPLEMENTING DELAY REDUCTION GOALS

LIMITS ON TIME REQUIREMENTS

In setting up their own procedures to eliminate delay, local courts cannot require shorter time periods than those set forth in Govt C §68616.

Serving Complaint

Local rule cannot require that you serve complaint in less than **60 days** after filing. Govt C §68616(a).

NOTE

Exceptions for *longer* periods may be granted (Govt C §68616(a)):

- a. By local rule authorization; and
- b. On a showing that service could not reasonably be made with due diligence consistent with amount in controversy.

Responding to Complaint

Local rules cannot require that defendant serve responsive pleadings less than **30 days** after service of complaint (an additional **15 days** is allowed by stipulation). Govt C §68616(b).

NOTE

Local rules may authorize exceptions for *longer* periods of time. Govt C §68616(b).

Serving Notice or Other Documents

Local rules cannot require shorter periods for serving documents than as set by statute (Govt C §68616(c)), *e.g.*:

- a. **16 court days'** notice for motion (CCP §1005(b)); or
- b. **30 days** to respond to summons and complaint (CCP §412.20).

Continuance

Local rules can allow parties to stipulate to a single continuance of up to **30 days**. Govt C §68616(d); see, *e.g.*, Contra Costa Ct R 7(H).

Status Conference

Local rules cannot require status conference sooner than **30 days** after (Govt C §68616(e)):

- a. Service of first responsive pleadings; or
- b. If applicable, expiration of stipulated continuance under Govt C §68616(d).

Discovery

Local rules cannot require shorter deadlines for discovery than those set by the discovery statutes. Govt C §68616(f). See CCP §§2016.010-2036.050; County of Los Angeles v Superior Court (1990) 224 CA3d 1446, 1456, 274 CR 712 (court cannot set date for completion of discovery when no trial date has been set).

Setting for Arbitration

Local rules cannot allow court-ordered arbitration to begin sooner than **210 days** after complaint filed, excluding period of stipulated continuance under Govt C §68616(d) (Govt C §68616(g)), although:

- a. Parties may agree or court may appoint referee to try some or all issues under CCP §§638 and 639; and
- b. Parties may stipulate to arbitration at any time.

NOTE

The restrictions on early court-ordered arbitration do not apply to mediation.

Dismissing Unnamed Doe Defendants

Local rules cannot require plaintiff to dismiss or sever unnamed Doe defendants before conclusion of evidence at trial, except on stipulation or motion of the parties. Govt C §68616(h).

Challenging Judges

Local rules cannot require parties to challenge a judge (Govt C §68616(i)):

- a. In direct calendar courts, in less than **15 days** after party's *first* appearance; or
- b. In master calendar courts, in less than time set forth in CCP §170.6.

NOTE

The statute is silent on the time limit that the court may set for a party to challenge the judge when the case is assigned to one judge more than 15 days after the party appeared.

IF LOCAL RULE VIOLATES GOVT C §68616

If your local court rules appear to be in violation of minimum time standards in Govt C §68616, consider the following options:

- a. Comply with local rule without protest (probably the safest option);
- b. Comply with local rule, but bring the time discrepancy to the attention of either:
 - (1) The judge assigned to your case; or
 - (2) The presiding judge, whichever is appropriate in your case; or
- c. Comply with time standards prescribed by Govt C §68616 rather than local rules, in which case:
 - (1) You risk sanctions (see Govt C §68608(b)); and
 - (2) You may have to challenge the local rule in the appellate court.

JUDGE'S PERSPECTIVE

The rules multiply quickly! A new judge may be unaware of a rule or limitation, or of a former rule applicable to a few remaining older cases. A telephone call to the clerk for the judge who has issued the case management schedule to inquire politely about the apparent disparity might solve the problem. In addition, inadvertent errors on websites can cause problems. If you become aware of an error, bring it to the court's attention as soon as possible to prevent further problems.

PRACTICE TIP

Do *not* count on receiving a continuance of a trial date, even with good cause. Many courts will not continue a trial date, regardless of circumstances. Circumstances that may not be sufficient include the unavailability of a key witness who could have been subpoenaed to testify at trial or, if beyond the court's subpoena power, deposed. Counsel being engaged in another trial is good cause for a continuance. See Oliveros v County of Los Angeles (2004) 120 CA4th 1389, 16 CR3d 638.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/Understand Effects of Trial Court Delay Reduction Act on Your Case/STEP 5. PREPARE CASE CALENDAR AND DISCOVERY CALENDAR

STEP 5. PREPARE CASE CALENDAR AND DISCOVERY CALENDAR

CASE CALENDAR

PREPARE CASE CALENDAR

Immediately prepare a calendar of all relevant dates, *e.g.*:

- a. When complaint must be served, *e.g.*, **60 days** or **90 days** after filing;
- b. Status conferences;
- c. Likely trial date, *e.g.*, assume that your case will be resolved within 1 year after complaint is filed; and
- d. Based on likely trial date, other relevant dates, such as date for payment of jury fees, discovery cutoff, summary judgment deadlines, and demand for exchange of expert witness information. For how to develop discovery calendar, see below.

Purpose

Preparing an overall case calendar will allow you to:

- a. Plan how to schedule your discovery; and
- b. Evaluate nature and extent of discovery necessary in your case.

PRACTICE TIP

Ask the judge or clerk at the initial status conference about the likely trial date, if the court does not set the date at the initial conference.

JUDGE'S PERSPECTIVE

Summary judgment deadlines should be considered when scheduling discovery deadlines because the court may not consider those deadlines good cause to shorten time for discovery motions.

DISCOVERY CALENDAR

DEVELOP DISCOVERY CALENDAR

After you have prepared your overall case calendar, prepare specific discovery calendar that takes into account delay reduction deadlines, *e.g.*:

- a. Calendar last day for discovery and discovery motions;
- b. Calendar the last day to send out supplemental interrogatories and demands for inspection, copying, testing, or sampling of documents, things, or electronically stored information (CCP §§2030.070, 2031.050).

Further Research: For additional information on developing discovery calendar, see California Civil Discovery Practice, chap 2 (4th ed Cal CEB 2006), referred to throughout this Action Guide as Civil Discovery; Obtaining Discovery: Initiating and Responding to Discovery Procedures (Cal CEB Action Guide March 2007), referred to throughout this Action Guide as Obtaining Discovery. For additional information on preparing an overall case calendar, see Preparing for Trial (Cal CEB Action Guide March 2008).

PRACTICE TIP

Try to avoid last-minute discovery motions. Courts have and use their discretion to deny motions to compel that they consider untimely even if otherwise in technical compliance with rules. Also, you lose the ability to do follow-up discovery even if you obtain additional responses.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/Understand Effects of Trial Court Delay Reduction Act on Your Case/STEP 6. ANALYZE EFFECT OF DELAY REDUCTION DEADLINES RULES ON DISCOVERY MOTIONS

STEP 6. ANALYZE EFFECT OF DELAY REDUCTION DEADLINES RULES ON DISCOVERY MOTIONS

IF ASSIGNED TO SINGLE JUDGE

Most courts will assign your case to a single judge for all matters, and, if so:

- a. Consider your chances of success in light of the particular judge if you move to compel discovery; and
- b. Be especially careful not to appear *unreasonable* before the judge hearing the motion, because he or she:
 - (1) Will also be your trial judge; and
 - (2) Will remember if you acted unreasonably, *e.g.*, insisted on bringing a motion to compel even though opposing party offered to produce some of the requested information.

CHECK LOCAL RULES FOR DISCOVERY MOTIONS

Review current local rules to ascertain whether discovery motions affect time to bring case to trial.

MAY MEET WITH JUDGE TO ARRANGE SCHEDULE

Consider requesting that all counsel meet with judge, if discovery is not proceeding smoothly, to establish schedule compatible with progress toward trial. This procedure would likely be a part of a status conference if the case is singly assigned. If the case is *not* singly assigned, a request for an informal conference with the judicial officer hearing discovery motions would be the better procedure.

JUDGE'S PERSPECTIVE

If motion, *e.g.*, is to compel further responses or involves complex privilege issues, consider stipulating to have motion heard by mutually acceptable retired judge as referee, because:

- Many courts routinely appoint referees for all but the most simple discovery disputes; and
- You can save time and money by stipulating to a referee.

Be sure to prepare a *very* detailed order defining scope of referee's powers and limitations, if any, on kinds of discovery disputes to be submitted to referee.

If you are appearing in a court that uses commissioners to hear discovery matters, commissioners may be less likely to assign discovery referees without a stipulation. In such cases, be prepared to stipulate to commissioner to hear the matter as a judge pro tem so that your matter can be heard as soon as possible.

Check local rules, which may provide that you are deemed to have stipulated to a commissioner sitting as judge pro tem on all discovery matters unless you object in a timely manner after filing complaint or any responsive pleadings.

Some courts have local rules that allow informal conferences with the assigned judge or the discovery department. Familiarize yourself with whatever informal procedures might be available for more timely resolution of disputes.

PRACTICE TIP

As a practical matter, few courts want to hear long discovery motions. The courts particularly do not want to become involved when attorneys get into peripheral disputes, such as who said what to whom. A private discovery referee is far more likely to spend the time to resolve discovery disputes. However, private referees can be expensive, and a single motion to compel that takes a referee 8 to 10 hours to resolve adds \$3,000 to \$5,000 in costs. Generally, the parties split the cost of the private judge evenly. In multiple party cases, the split in cost is usually the subject of negotiation between the parties. In most cases, the split is made without prejudice to having the referee allocate the costs to be recovered by the prevailing party.

One way to reduce costs is to find a discovery referee who will give the parties guidance on discovery issues without requiring formal motions. However, without a formal motion, it is impossible to appeal any ruling to the superior court.

Keep in mind, too, that if your client cannot afford to use a private referee, the trial court cannot compel you to pay for a referee to rule on a motion the court could hear. For discussion of costs, see [step 34](#).

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Before Moving to Compel

STEP 7. TRY TO ACHIEVE YOUR DISCOVERY GOALS WITHOUT A MOTION TO COMPEL

BENEFITS OF RESOLVING DISPUTES WITHOUT MOTION

Benefits of attempting to resolve discovery disputes before moving to compel include:

- a. Potentially avoiding expense and time of moving to compel;
- b. Limiting issues for motion to compel; and
- c. Complying with statutory meet-and-confer requirements. See below.

MEET-AND-CONFER REQUIREMENTS

ATTEMPT TO RESOLVE REQUIRED BY STATUTE

If you have a "dispute concerning discovery" you *must* attempt to resolve it informally by conferring with opposing party or attorney (see, *e.g.*, CCP §§2023.010(i)-2023.020, 2025.410(c) (depositions), 2030.090(a) (interrogatories), and 2031.060(a) (inspection, copying, testing, or sampling of documents, things, and electronically stored information)):

- a. In person;
- b. By telephone; or
- c. By letter.

Example 1: You believe that responding party needs to clarify responses, *e.g.*, interrogatory asked for name and address of treating doctor and response was yes. Point out to opposing party that response was unclear and ask for further responses or an explanation.

Example 2: Responding party objects to an interrogatory as asking for hearsay. You point out to opposing party that hearsay is discoverable, and ask for answers to the interrogatory.

MEET AND CONFER DECLARATION IF MOTION LATER MADE

A meet and confer declaration in support of a motion must state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. CCP §2025.480(b). See step 13, below.

JUDGE'S PERSPECTIVE

You must make a legitimate good faith attempt to resolve the dispute.

Send a polite letter, without snide remarks or threats, clearly expressing your position, because:

- A letter prevents quibbling about what each counsel said;
- A copy of the letter makes an effective exhibit if you ultimately have to make a motion; but
- A letter that appears to have been written solely as a potential exhibit to a motion is not likely to be well received by the court.

The letter should provide sufficient time to respond and should invite further response.

AVOID SANCTIONS

Failure to meet and confer when required results in mandatory monetary sanctions. See [CCP §§2023.010\(i\), 2023.020](#).

Avoid discovery sanctions by making a good faith effort to resolve conflicts with opposing counsel. See [steps 16-21](#), below. See also [CCP §§2023.010\(i\)-2023.020, 2025.480, 2030.300\(b\), 2031.290-2031.320, 2032.250\(b\), 2033.290\(b\), 2034.630, 2034.730](#); Los Angeles Ct R 7.12(h)(1) (reprinted in [Appendix F](#)).

PRACTICE TIP

It is good practice to meet in person after you send your letter. Try to resolve as many disputes as possible to eliminate or narrow the scope of the motion. You should follow up the meeting (or telephone call) with a polite letter accurately summarizing the areas of agreement and disagreement. Remember that the fewer adjectives the letter contains, the more likely the court will be to agree with your position.

JUDGE'S PERSPECTIVE

You should avoid appearing to make ultimatums that are not good faith efforts to resolve the disputes. If more time spent in conferring is likely to resolve the disputes, attempt to obtain extensions to bring any necessary motion. Those extensions must be in writing.

The meet-and-confer efforts should take place in a timely fashion before the deadline to bring the motion so that your deadline is not so short as to seem unreasonable.

Follow up your letters and phone calls and set forth the nature of your follow-up efforts in your declaration describing your meet-and-confer attempts.

See, e.g., *Stewart v Colonial Western Agency, Inc.* (2001) 87 CA4th 1006, 1015, 105 CR2d 115 ("reasonable and good faith attempt" standard depends on circumstances of case and efforts made); *Obregon v Superior Court* (1998) 67 CA4th 424, 434, 79 CR2d 62 (plaintiff's effort at informal resolution insufficient, but trial court's denial of motion to compel vacated; "when an effort at informal resolution is found wanting ... discovery should not automatically be denied"); *Townsend v Superior Court* (1998) 61 CA4th 1431, 1439, 72 CR2d 333 (motion to compel with sanctions set aside by court of appeal as made in excess of trial court's jurisdiction; "reasonable and good faith attempt at informal resolution" ([CCP §2025.480\(b\)](#)) required before bringing motion to compel).

PRACTICE TIP

Consider what information you are likely to receive. If you can prepare your case for trial without it, then you can generally skip bringing the motion to compel.

SEEK ONLY INFORMATION NEEDED FOR CASE

- a. Ascertain the information you must have to meet your client's litigation objectives (see [Creating Your Discovery Plan \(Cal CEB Action Guide February 2007\)](#)); and
- b. Try to reach a compromise with opposing counsel on the information you will accept.

RESOLVE DISPUTE BY STIPULATION

Consider entering into a *written* stipulation to resolve dispute, e.g., scope of deposition, time and place for deposition, scope of documents to be produced, or scope of inspection, copying, testing, or sampling of electronically stored information. [CCP §2026.030](#); see, e.g., [Civil Discovery §§6.35-6.44, 15.62](#).

Sample Forms: For sample stipulated admissions form, see [Civil Discovery §9.102](#).

EXPLORE OTHER WAYS TO GET INFORMATION

FIND OTHER SOURCES

As an alternative to a discovery motion, consider other sources for the information you seek, e.g.:

- a. Different witnesses, documents, or other physical evidence;
- b. Different electronically stored information;
- c. Different method, *e.g.*, discovery through a bill of particulars; or
- d. Deposition questions to follow up on inadequate interrogatory responses (instead of moving to compel further responses).

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/Before Moving to Compel/STEP 8. DO NOT BRING MOTION TO COMPEL IF DISADVANTAGEOUS TO YOUR CASE

STEP 8. DO NOT BRING MOTION TO COMPEL IF DISADVANTAGEOUS TO YOUR CASE

WHEN NOT TO COMPEL

Moving to compel may not be worthwhile if the motion:

Costs Too Much

Costs more than the information, or case, is worth.

Causes Delay

Causes delay that will substantially diminish the value of the information sought, *e.g.*, it would be received too close to trial to be useful.

May Educate Opponent

Educates your opponent about facts or theories that opponent may not otherwise recognize.

INCOMPLETE OR EVASIVE ANSWER MAY BE USEFUL AT TRIAL

You can also cross-examine a party or witness on an evasive or incomplete discovery response at trial. The answer may damage the credibility of the party or witness with the trier of fact.

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When Preparing Discovery Motion

STEP 9. REVIEW STATUTORY REQUIREMENTS FOR DISCOVERY MOTIONS

REVIEW SPECIFIC STATUTE

Review statutes governing the specific discovery device at issue, *e.g.*:

Depositions

For deposition, use:

- a. CCP §2025.450 to compel attendance at an oral deposition;
- b. CCP §2025.480 to compel deponent to answer a question at an oral deposition;
- c. CCP §2025.410 to move for an order quashing the deposition notice and staying the taking of the deposition; and
- d. CCP §2025.420 to move for a protective order, including a request for monetary sanctions.

Interrogatories

For interrogatories, use:

- a. CCP §2030.290 to compel answers to interrogatories; and
- b. CCP §2030.300 to compel further answers to interrogatories.

Demands for Inspection, Copying, Testing, or Sampling

For demands for inspection, copying, testing, or sampling, use:

- a. CCP §2031.300 to compel a party to serve a response to demand for inspection, copying, testing, or sampling;
- b. CCP §2031.310 to compel further response to demand; and
- c. CCP §2031.320 to compel party to permit inspection, copying, testing, or sampling.

NOTE

The Electronic Discovery Act (EDA) (AB 5 (2008)), effective on June 29, 2009, amends the Civil Discovery Act (CCP §§2016.010-2036.050) to reflect the growing presence of electronically stored information. Among the many changes to the act, the methods of discovery now include copying, testing, and sampling. See steps 36-38, below.

Requests for Admission

For requests for admission, use:

- a. CCP §2033.280 to have matters deemed admitted when the responding party fails to serve a timely response;
- b. CCP §2033.290 to compel further responses;
- c. CCP §2033.300 to amend or withdraw an admission; and
- d. CCP §2033.420 to recover expenses incurred in proving matters not admitted.

NOTE

A party is not entitled to an award of expenses if proof of the matters deemed admitted was not required. Stull v Sparrow (2001) 92 CA4th 860, 112 CR2d 239 (defendant refused to concede liability issue until shortly before trial; costs disallowed because proof by plaintiff not required); Barnett v Penske Truck Leasing Co. (2001) 90 CA4th 494, 108 CR2d 821 (defendant proved issue and prevailed at summary judgment; costs allowed).

Further Research: See also Wilcox v Birtwhistle (1999) 21 C4th 973, 90 CR2d 260 ("deemed admitted" order (CCP §2033.280) construed as actual written admission for purposes of relief under CCP §2033.300); New Albertsons, Inc. v Superior Court (2008) 168 CA4th 1403, 1419, 86 CR3d 457 (any doubts in ruling on motion to withdraw or amend admission under CCP §2033.300 must be resolved in favor of party seeking relief).

CONSULT LOCAL COURT RULES

Consult local court rules to:

- a. Determine whether your local court rules have any special requirements for discovery motions; and
- b. Comply with any applicable rules.

CONSULT STATE COURT RULES

Consult state court rules, *e.g.*:

- a. Cal Rules of Ct 3.1100-3.1116, 3.1300-3.1312 for general requirements for motions;
- b. Cal Rules of Ct 3.1345-3.1348 for discovery motions; and
- c. Cal Rules of Ct 3.822 for arbitration discovery deadlines.

CONSIDER ARBITRATION DIFFERENCES

Although an arbitrator is empowered to impose discovery sanctions available to a trial court (see CCP §1283.05), the arbitrator is not bound to impose discovery sanctions by precisely following discovery law. See Alexander v Blue Cross (2001) 88 CA4th 1082, 106 CR2d 431 (arbitrator's refusal to impose mandatory discovery sanction not ground to vacate award).

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Preparing Discovery Motion/STEP 10. REVIEW NOTICE AND FILING DEADLINES FOR DISCOVERY MOTIONS

STEP 10. REVIEW NOTICE AND FILING DEADLINES FOR DISCOVERY MOTIONS

GENERAL DEADLINES

To Complete Discovery Before Trial

Complete discovery **30 days** before date *initially* set for trial (CCP §2024.020(a)). Discovery is considered "complete" on the day:

- a. A response is due; or
- b. A deposition begins.

When the last day to perform or complete any act falls on a Saturday, Sunday, or holiday, the time limit is extended until the next court day closer to the trial date. CCP §2024.020(a).

NOTE

The discovery cutoff is *not* extended if the trial date is postponed or continued, but if the court grants a new trial, declares a mistrial, or orders a reversal on appeal, then discovery opens again as a matter of right and new discovery cutoffs are established with the setting of a new trial. See Fairmont Ins. Co. v Superior Court (2000) 22 C4th 245, 92 CR2d 70 (cutoff date extended by reversal of judgment on appeal, mistrial, or new trial). But see Hernandez v Superior Court (2004) 115 CA4th 1242, 9 CR3d 821 (after granting continuance, court ordered discovery reopened because strong public policy favoring disposition on merits outweighs competing policy favoring judicial efficiency).

To Complete Discovery Before Judicial Arbitration

For matters ordered to judicial arbitration (CCP §2024.040(a); Cal Rules of Ct 3.822(b)):

- a. Complete discovery **15 days** before date set for arbitration hearing; but
- b. Court, on showing of good cause, may extend this deadline.

To Serve Motion

If the motion is served personally, it must be served **30 days** before the *initial* trial date. CCP §2024.020(a). If the motion is served by mail or other means, the provisions of CCP §1013 apply. See step 23, below.

NOTE

These general deadlines do not apply to unlawful detainer and eminent domain proceedings. CCP §2024.040(b).

SCHEDULE HEARING

Before Trial Date

Discovery motions must be *heard* **15 days** before date *initially* set for trial. CCP §2024.020(a); see step 22, below.

Avoid Minimum Notice

Try to avoid setting motions to compel on minimum notice, because court may be unable to accommodate your schedule. Also, courts strongly dislike last-minute discovery motions, especially if they could interfere with trial date.

May Be Long Wait for Hearing Date

Check local rules on scheduling of motions because:

- a. Many courts now require counsel to reserve a hearing date in advance; and

- b. Often, court has no available date for several weeks.

CONSIDER EX PARTE APPLICATION TO SHORTEN TIME

If the court has no available date for several weeks and the deadline for hearing discovery motions (*i.e.*, 15 days before the date *initially* set for trial; see CCP §2024.020(a)) is fast-approaching, you will need to file an ex parte application asking court to set an earlier date for hearing the motion (see Cal Rules of Ct 3.1200-3.1207, 3.1300(b)). See step 22, below.

Sample Form: See Civil Discovery §5.219 for sample ex parte application for order shortening time.

WHEN DEADLINES NOT EXTENDED

Deadlines are *not* extended if trial date is continued or postponed. CCP §2024.020(b).

WHEN DEADLINES EXTENDED

By Motion

You may make a *motion* to extend a deadline or reopen discovery if you can convince the court that (CCP §2024.050), *e.g.*:

- a. You need additional time or additional discovery;
- b. You have been diligent and have a good reason for not completing the discovery sooner;
- c. The additional discovery will not delay trial or prejudice any party; and
- d. You have made a good faith effort to informally resolve your request for additional discovery. See, *e.g.*, Los Angeles Ct R 7.12(h)(1) (reprinted in Appendix F).

NOTE

A court cannot grant a late motion to compel in the absence of a motion to reopen discovery under CCP §2024.050, because without a motion to reopen, the trial court cannot consider the issues relevant to decision regarding whether reopening discovery was warranted. *Pelton-Shepherd Indus., Inc. v Delta Packaging Prods., Inc.* (2008) 165 CA4th 1568, 1588, 82 CR3d 64.

By Stipulation

Parties may stipulate to extend time for completion of discovery or for discovery motion hearings or to reopen discovery as long as parties do not require court to grant a continuance or postponement of the trial. CCP §2016.030.

NOTE

Any stipulated agreement between parties must be confirmed in a writing that specifies the extended date.

By Grant of New Trial, Declaration of Mistrial, or Reversal on Appeal

If court grants a new trial, declares a mistrial, or orders a reversal on appeal, then discovery opens again as a matter of right, and new discovery cutoffs are established with the setting of a new trial. *Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 92 CR2d 70 (cutoff date extended by reversal of judgment on appeal, mistrial, or new trial).

JUDGE'S PERSPECTIVE

Do not ignore deadlines with the hope that your opponent will fail to object, because even if opposing party does not object, the court:

- Will probably notice that you failed to comply with the deadline; and
- May assume you were intentionally attempting to mislead the court.

PRACTICE TIP

Parties routinely stipulate to allowing discovery within 30 days before trial. If you enter into such a stipulation, make sure you receive a stipulation extending time in which to bring motion to compel. Also, make sure the stipulation is in writing.

WHEN TO MOVE

Move at least **30 calendar days** before *initial* trial date so that court can *hear* motion on or before **15th day** before *initial* trial date, unless (CCP §§2024.020(a), 2024.050-2024.060):

- a. You and other parties agree *in writing* to a later date; or
- b. A court order is obtained permitting a later hearing date.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Preparing Discovery Motion/STEP 11. PREPARE NOTICE OF MOTION

STEP 11. PREPARE NOTICE OF MOTION

INCLUDE IN CAPTION

Below case number, state:

Nature of Motion

- a. Nature of motion and statutory authority, *e.g.*, "NOTICE OF MOTION AND MOTION TO COMPEL ATTENDANCE AT A DEPOSITION UNDER CCP §2025.450";
- b. If you seek sanctions, state, *e.g.*: "REQUEST FOR MONETARY SANCTIONS UNDER CCP §2023.030." See Cal Rules of Ct 3.1110 and steps 16-21, below.

JUDGE'S PERSPECTIVE

You will make it easier for the judge if you state in the caption the type of sanction you are seeking, *e.g.*, monetary, evidentiary, issue, or terminating. It is required that you state in the notice of motion the type of sanction that you are seeking.

Supporting Documents

- a. Identify supporting documents you attach, *e.g.*:
 - (1) DECLARATION OF MARY SMITH IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS; or
 - (2) MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS; and
- b. If you refer to a paper previously filed, identify it in your papers by date of execution and title. Cal Rules of Ct 3.1110(d).

Hearing Details

Include (Cal Rules of Ct 3.1110(b)):

- a. Date;
- b. Time; and
- c. Location.

Trial Date and Other Documents

Include (Cal Rules of Ct 3.1110(b)):

- a. Date of filing of the action;
- b. Trial date, if set; and
- c. The nature or title of any attached document other than an exhibit.

Cutoff Dates

Although not required, if the dates are relatively close, it is often advisable to include:

- a. Discovery cutoff date; and
- b. Law and motion (hearing) cutoff date.

INCLUDE IN OPENING PARAGRAPH

Nature of Motion

State (Cal Rules of Ct 3.1110(a)):

- a. Nature of the order you seek; and
- b. Grounds for court to issue order.

Sanctions

State (CCP §2023.040):

- a. Identity of every person, party, and attorney against whom you seek sanctions; and
- b. Type of sanction you are seeking (generally monetary) (see steps 16-21, below).

JUDGE'S PERSPECTIVE

If you are seeking evidentiary sanctions, you should fashion the wording of such sanctions in the notice of motion. If you are seeking monetary sanctions, state *amount* you are requesting.

Sample Forms: For a completed sample of moving papers to compel production of documents at deposition, see Appendixes A-D; Civil Discovery §§6.146-6.150.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Preparing Discovery Motion/STEP 12. PREPARE MEMORANDUM IN SUPPORT OF MOTION

STEP 12. PREPARE MEMORANDUM IN SUPPORT OF MOTION

PURPOSE

The purpose of a memorandum is to (see [Cal Rules of Ct 3.1113](#)):

- a. Convince court that motion is meritorious; and
- b. Allow court to consider motion on its merits.

FOR DISCOVERY MOTION GENERALLY

INCLUDE IN MEMORANDUM

Statement of Facts

- a. Generally state facts that are supported by the declaration(s) you submit (see [step 13](#), below); and
- b. Identify facts that give rise to the *specific* issues that you want court to decide. [Cal Rules of Ct 3.1113\(b\)](#).

JUDGE'S PERSPECTIVE

Always include a statement of facts; while the length of the statement may vary depending on the nature of the motion, the judge *always* needs to know what the case is about.

Statement of Law

- a. Concisely set forth *specific* legal issues you want court to decide;
- b. Briefly discuss and give proper citation of the relevant:
 - (1) Statutes;
 - (2) Cases; and
 - (3) Textbooks or other authority; and
- c. Do *not* give list of authorities on general propositions of discovery law.

Statement of Arguments

Set forth evidence and legal propositions that support motion.

NOTE

Recognize that the judge or commissioner hearing the motion knows general propositions of discovery law, so you should focus your memorandum on the *specific* issues of your case.

Further Research: [CCP §2023.040](#); [Cal Rules of Ct 3.1113\(b\)](#).

LENGTH

State Rule

Under [Cal Rules of Ct 3.1113\(d\)-\(f\)](#):

- a. No opening or responding memorandum shall exceed *15 pages* in length (except in summary judgment or summary adjudication motion, in which case the opening or responding memorandum can be up to 20 pages in length);
- b. The page limit does not take into account exhibits, declarations, attachments, table of contents, table of authorities, or proof of service;
- c. A party may apply to the court, ex parte but with written notice of the application to the other parties, at least **24 hours** before the memorandum is due, for permission to file a longer memorandum;
- d. If the memorandum exceeds *10 pages* in length, it must include a table of contents and table of authorities; and
- e. If the memorandum exceeds *15 pages* in length, it must include an opening summary of argument.

NOTE

A memorandum that exceeds page limits set out in the rules will be filed and considered in the same manner as a late filing. Cal Rules of Ct 3.1113(g).

Local Rule

In addition to the state rule, local courts may impose other limits on the length of a memorandum.

Sample Forms: See Appendix B; Civil Discovery §7.148.

FOR MOTION TO COMPEL WHEN RESPONSE INADEQUATE

INCLUDE IN MEMORANDUM

Because you must file a *separate statement* setting forth factual and legal bases for the motion (Cal Rules of Ct 3.1345), limit memorandum to:

Statement of Facts

Brief statement of facts (Cal Rules of Ct 3.1113(b)); and

Discussion of Law

Concise discussion of discovery statutes and case law supporting your right to:

- a. Compel requested action; and
- b. Support request for sanctions (if appropriate).

Sample Forms: See Civil Discovery §7.148. See also Appendix B.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Preparing Discovery Motion/STEP 13. PREPARE DECLARATION OR AFFIDAVIT

STEP 13. PREPARE DECLARATION OR AFFIDAVIT

FOR DISCOVERY MOTION GENERALLY

INCLUDE IN CAPTION

Below case number, identify (Cal Rules of Ct 3.1115):

- a. Name of declarant; and
- b. Motion or proceeding that declaration supports or opposes.

INCLUDE IN BODY OF DECLARATION

Factual Description of Dispute

Include a brief discussion of what happened during discovery that gave rise to the dispute. For discussion of motion to compel when there is no response, see For Motion to Compel When *No Response*, in this step, below; for discussion of motion to compel when response is inadequate, see For Motion to Compel When *Response Inadequate*, in this step, below.

Describe Your Attempt to Resolve

State your reasonable attempts to resolve the matter informally with opposing counsel even if the attempt was unsuccessful, because (for meet-and-confer requirements, see step 7, above):

- a. There is a general statutory *requirement* to try to resolve before making a motion;
- b. Your attempt supports a request for sanctions; and
- c. It is good practice to do so, even if technically not required when party fails to respond. See, *e.g.*, CCP §§2030.290, 2031.300.

NOTE

For tactical reasons, you may *not* want to confer when seeking to have matters deemed admitted, *i.e.*, if a party fails to respond to requests for admission. See CCP §2033.280. However, you can expect the court to take this into consideration if the other side seeks relief from its obligation to respond in a timely fashion.

Describe Opposing Party's Failure to Try to Resolve

Describe opposing party's failure to try to resolve the matter informally if opposing counsel failed to confer (see CCP §§2023.010(i), 2023.020):

- a. In person;
- b. By telephone; or
- c. In writing.

NOTE

To provide the court with proof on which an order can be based, the best practice is to confirm in writing the details of your own attempts to confer. This usually takes the form of a letter to the other side at the time you made those attempts. See step 7, above.

MADE UNDER PENALTY OF PERJURY

The declaration must be made under penalty of perjury.

Recommended Form in California

If executed anywhere in California (CCP §2015.5):

a. I CERTIFY [OR DECLARE] UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

b. Include:

- (1) Date;
- (2) Place; and
- (3) Signature.

Recommended Form *Any* Place (Including California)

If executed at any place, within or outside the state of California (CCP §2015.5):

a. I CERTIFY [OR DECLARE] UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

b. Include:

- (1) Date; and
- (2) Signature.

Sample Forms: See Appendix C; Civil Discovery §7.149.

SANCTIONS FOR FAILURE TO MEET AND CONFER

Sanctions may be awarded against the party who fails to "meet and confer" even if that party *wins* the motion, because failure to confer is a "misuse of the discovery process." CCP §§2023.010(i), 2023.020, 2025.410(c); for further discussion of sanctions, see steps 16-21, below.

JUDGE'S PERSPECTIVE

If your motion requests monetary sanctions, your declaration must state facts supporting the amount of sanctions you are seeking. A failure to do so will likely result in a denial of a monetary sanction. CCP §§2023.040.

Amount of Sanctions

To support a request for sanctions under CCP §2023.030, include the details that demonstrate the amount you are seeking is reasonable, *e.g.*, the time you spent preparing the discovery request, hourly fees, and cost of service. CCP §2023.040. For a discussion of sanctions, see steps 16-21, below.

Sample Forms: See Appendix C; Civil Discovery §7.149.

FOR MOTION TO COMPEL WHEN NO RESPONSE

INCLUDE IN BODY OF DECLARATION

Factual Description of Dispute

State that:

- a. Your particular request for discovery (*e.g.*, written interrogatories) was properly served on opposing party;
- b. Time to respond has expired;
- c. No extension to respond was given; and

d. No response has been served on moving party.

Further Research: See Leach v Superior Court (1980) 111 CA3d 902, 905, 169 CR 42.

Describe Your Attempt to Resolve

State your reasonable attempts to resolve the matter informally with opposing counsel even if the attempt was unsuccessful because (for meet-and-confer requirements, see step 7, above):

- a. There is a general statutory *requirement* to try to resolve before making a motion;
- b. Your attempt supports a request for sanctions; and
- c. It is good practice to do so, even if technically not required when party fails to respond. See, *e.g.*, CCP §§2030.290, 2031.300.

NOTE

For tactical reasons, you may *not* want to confer when seeking to have matters deemed admitted, *i.e.*, if a party fails to respond to requests for admission. See CCP §2033.280. However, you can expect the court to take a failure to confer into consideration if the other side seeks relief from its obligation to respond in a timely fashion.

Describe Opposing Party's Failure to Try to Resolve

Describe opposing party's failure to try to resolve the matter informally if opposing counsel failed to confer (see CCP §§2023.010(i), 2023.020):

- a. In person;
- b. By telephone; or
- c. In writing.

SANCTIONS FOR FAILURE TO MEET AND CONFER

Sanctions may be awarded against the party who fails to "meet and confer" even if that party *wins* the motion because failure to confer is a "misuse of the discovery process." CCP §§2023.010(i), 2023.020, 2025.410(c); for further discussion of sanctions, see steps 16-21, below.

Amount of Sanctions

To support a request for sanctions under CCP §2023.030, state facts supporting the basis and amount of sanctions (see CCP §2023.040), *e.g.*:

- a. Amount of time you spent preparing the discovery request;
- b. Hourly fees; and
- c. The cost of service.

Sample Forms: Follow form in CCP §2015.5 for certifying the declaration. See also Appendix C; Civil Discovery §§7.149, 8.127.

JUDGE'S PERSPECTIVE

It is also a good idea to attach as an exhibit to the supporting declaration a copy of the discovery request with proof of service so the judge can see that the request was proper in form and content.

FOR MOTION TO COMPEL WHEN RESPONSE INADEQUATE

INCLUDE IN BODY OF DECLARATION

Stipulation

If you and responding party stipulated to extend the 45 days to file the motion to compel, so state, and attach stipulation as exhibit.

NOTE

Always put a stipulation to extend the time to respond or the time in which to compel *in writing*, and state the parameters of the extension very specifically. The writing should clearly specify whether the time in which to object to a discovery response is part of the stipulated extension.

Factual Description of Dispute

Set forth the facts of the dispute, very specifically describing how:

- a. You complied with requirements of the particular discovery method; and
- b. Your opponent's responses were inadequate or evasive, or the objections were improper.

NOTE

Recite the requests and the responses in the separate statement accompanying the motion, not in the declaration. See [step 15](#), below.

Describe Your Attempt to Resolve

State your reasonable attempts to resolve the matter informally with opposing counsel, even if the attempt was unsuccessful, because (for meet-and-confer requirements, see [step 7](#), above):

- a. There is a general statutory *requirement* to try to resolve before making a motion;
- b. Your attempt supports a request for sanctions; and
- c. It is good practice to do so, even if technically not required when party fails to respond. See, *e.g.*, [CCP §§2030.290, 2031.300](#).

Describe Opposing Party's Failure to Try to Resolve

Describe opposing party's failure to try to resolve the matter informally if opposing counsel failed to confer (see [CCP 2023.010\(i\), 2023.020](#)):

- a. In person;
- b. By telephone; or
- c. In writing.

SANCTIONS FOR FAILURE TO MEET AND CONFER

Sanctions may be awarded against the party who fails to "meet and confer" even if that party wins the motion, because failure to confer is a "misuse of the discovery process." [CCP §§2023.010\(i\), 2023.020, 2025.410\(c\), 2025.480](#); for further discussion of sanctions, see [steps 16-21](#), below.

Amount of Sanctions

To support a request for sanctions under [CCP §2023.030](#), state facts supporting the basis and amount of sanctions (see [CCP §2023.040](#)), *e.g.*:

- a. Amount of time you spent preparing the discovery request;
- b. Hourly fees; and
- c. The cost of service.

Sample Forms: Use form in [CCP §2015.5](#) for certifying the declaration. See also [Appendix C; Civil Discovery §§7.149, 8.127](#).

JUDGE'S PERSPECTIVE

As a separate statement is required for this type of motion to compel (see [step 15](#), below), you should attach a copy of the discovery request to your declaration because:

- Sometimes the judge wants to see the context of the request; and
- Sometimes the parties do not provide enough information in the separate statement.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Preparing Discovery Motion/STEP 14. IF APPROPRIATE, PREPARE REQUEST FOR JUDICIAL NOTICE

STEP 14. IF APPROPRIATE, PREPARE REQUEST FOR JUDICIAL NOTICE

RECOGNIZE PROPER MATTERS FOR JUDICIAL NOTICE

Determine matters of which judicial notice shall or may be taken to prove facts needed for motion:

When Mandatory

Remember that judicial notice *shall* be taken of (Evid C §451), *e.g.*:

- a. California and federal constitutional, statutory, and case law, and state court procedures adopted by the Judicial Council;
- b. Any matter specified in Govt C §11343.6, §11344.6, or §18576, or in 44 USC §1507; or
- c. Facts and propositions that are "so universally known" that they cannot reasonably be the subject of dispute.

When Discretionary

Remember that to the extent not covered by mandatory judicial notice, judicial notice *may* be taken of (Evid C §452), *e.g.*:

- a. Statutory or case law of any state or foreign country;
- b. Resolutions and private acts of Congress and the California Legislature;
- c. Regulations and legislative enactments issued under United States authority;
- d. Official acts of the legislative, executive, and judicial departments of:
 - (1) The United States; or
 - (2) Any state;
- e. Records or rules of:
 - (1) Any California court;
 - (2) Any court of another state; or
 - (3) The United States; or
- f. Facts and propositions:
 - (1) Not reasonably subject to dispute; and
 - (2) Capable of "immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

NOTE

Many courts require a separate document requesting judicial notice. See, *e.g.*, Los Angeles Ct R 9.2.

Even if not required by local rule, if you have extensive matters to be judicially noticed, prepare a separate document including the information set forth below.

PREPARE REQUEST FOR JUDICIAL NOTICE

In Notice of Motion

State that you are requesting judicial notice in the notice of motion.

In Notice or Separate Request

a. Specify:

- (1) Matters you want the court to judicially notice; and
- (2) Statutory authority for request (for discussion of proper matters for judicial notice, see Recognize Proper Matters for Judicial Notice in this step, above).

b. Include in your request information that will enable:

- (1) Opposing party to prepare to meet request (Evid C §453(a)); and
- (2) Court to take judicial notice (Evid C §453(b)).

c. Identify in your request the facts and issues that are supported by the matters to be judicially noticed.

Provide Copies

Provide court and each party with a copy of the material of which judicial notice is sought. Cal Rules of Ct 3.1306(c).

JUDGE'S PERSPECTIVE

It is essential to provide copies to the court, even if there are other copies in the court file, because the judge:

- May not have all volumes of the court files; and
- Does not have time to search through the files for the documents.

Include Declaration If Necessary

It may be necessary to include a declaration to explain particular documents or the absence of any documents.

JUDGE'S PERSPECTIVE

If the document in question is voluminous and you *know* that other attorneys already have it, you can so state in your declaration.

A better practice would be to:

- Obtain a stipulation that duplicate exhibits need not be served; or
- Call opposing counsel and ask for agreement that serving duplicate exhibits is unnecessary; and
- Let opposing counsel know that you intend to state agreement reached in your declaration.

Sample Forms: For sample request for judicial notice, see California Civil Procedure Before Trial §21.28 (4th ed Cal CEB 2004) referred to in this Action Guide as Civ Proc Before Trial.

REQUEST JUDICIAL NOTICE OF PART OF COURT FILE

Follow general requirements for judicial notice above, *plus* additional requirements for judicial notice of *part of court file*:

In Same Court

a. Prepare written "Request to Clerk for Files" (Cal Rules of Ct 3.1306(c)):

- (1) Specify in writing which part of court file you want court to judicially notice; and
- (2) Make arrangements with clerk to have file in courtroom at time of hearing.

b. At least **5 days** before date set for hearing, file request to clerk for files directly in department in which motion is noticed. See, *e.g.*, Los Angeles Ct R 9.2(b).

PRACTICE TIP

Keep in mind the distinction between asking the court to judicially notice the existence of a document and the need to have an adequate evidentiary basis for considering the contents of a document. For example, the court may judicially notice the filing of a brief; however, statements in the brief may be excluded on evidentiary grounds, such as lacking foundation or hearsay. See *People v Woodell* (1998) 17 C4th 448, 455, 71 CR2d 241.

From Another Court

For judicial notice of part of court file from another court:

- a. Subpoena court file for hearing; or
- b. Obtain certified copy of part of court file from other court and file it with your declaration as counsel, stating that the copies are certified. See, *e.g.*, San Francisco Ct R 8.6(B).

Further Research: For additional discussion of the topic of this step, see Civ Proc Before Trial §12.59; California Trial Practice: Civil Procedure During Trial, chap 14 (3d ed Cal CEB 1995).

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Preparing Discovery Motion/STEP 15. PREPARE SEPARATE STATEMENT OF DISPUTED RESPONSES FOR MOTION TO COMPEL WHEN RESPONSE INADEQUATE

STEP 15. PREPARE SEPARATE STATEMENT OF DISPUTED RESPONSES FOR MOTION TO COMPEL WHEN RESPONSE INADEQUATE

WHEN REQUIRED

Prepare separate statement when you are filing motion (Cal Rules of Ct 3.1345(a)):

- a. To compel further responses to requests for admission; interrogatories; or demands for inspection, copying, testing, or sampling of documents, tangible things, or electronically stored information;
- b. To compel answers at deposition;
- c. To compel or quash production of documents or tangible things at deposition;
- d. For medical examination over objection; and
- e. For issue or evidentiary sanctions.

NOTE

Failure to include separate statement in compliance with Cal Rules of Ct 3.1345 is grounds for denial of motion to compel. Mills v U.S. Bank (2008) 166 CA4th 871, 893, 83 CR3d 146.

Further Research: See, e.g., Goffland Entertainment Ctrs., Inc. v Superior Court (2003) 108 CA4th 739, 133 CR2d 828 (medical examination); CCP §§2030.300, 2031.310, 2033.290; Cal Rules of Ct 3.1345; Civil Discovery, chaps 7-8.

WHEN NOT REQUIRED

Separate statement is not required when no response has been made to discovery request. Cal Rules of Ct 3.1345(b).

IN CAPTION

Title document "SEPARATE STATEMENT IN SUPPORT OF MOTION TO COMPEL."

INCLUDE IN BODY OF STATEMENT

Set out in one document all information necessary to understand each discovery request and all responses to it that are at issue so that no one has to review any other document to determine request and response (Cal Rules of Ct 3.1345(c)):

Request

For each request, set out:

- a. Text of request, interrogatory, question, or demand for inspection, copying, testing, or sampling;
- b. Text of each response, answer, or objection, and any further responses or answers;
- c. Statement of factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute.
- d. Text of all definitions, instructions, and other matters required to understand each discovery request and responses to it, if necessary;
- e. If the response to a particular discovery request is dependent on the 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 other request and the response to it; and
- f. If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, a summary of each relevant

document.

NOTE

Interrogatories, admission requests, and demands for inspection, copying, testing, or sampling should be identified by set and number. Cal Rules of Ct 3.1345(d).

Do Not Incorporate by Reference

Do *not* incorporate by reference. Cal Rules of Ct 3.1345(c).

NOTE

You should set forth each request and each response verbatim. Do not try to paraphrase or summarize the requests and the responses! See 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).

Other Documents

Summarize (Cal Rules of Ct 3.1345(c)(6)):

- a. Any relevant pleading;
- b. Relevant documents in the court's file; or
- c. Other discovery items relevant to motion.

Argument Supporting Motion

Include factual and legal reasons for court to compel further response.

NOTE

When moving to compel further responses, your memorandum should be brief and need not repeat arguments and matters set forth in the separate statement. See step 12, above.

JUDGE'S PERSPECTIVE

In the opposition separate statement, it is advisable to repeat the matters in the moving party's separate statement in the same order and to append your arguments in opposition immediately following the reasons to compel a further response. Having the reasons in support and in opposition in one document make it easier for the court.

Sample Forms: For a sample prepared separate statement, see Appendix D. See also Civil Discovery §7.150.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Requesting Sanctions/STEP 16. REVIEW TYPES OF SANCTIONS AVAILABLE

When Requesting Sanctions

STEP 16. REVIEW TYPES OF SANCTIONS AVAILABLE

MONETARY SANCTION

DISCOVERY SANCTIONS UNDER CCP §2023.030(A)

Court may order reasonable expenses, including attorney fees, incurred as a result of a party's misuse of the discovery process. See Safeco Ins. Co. v Parks (2004) 122 CA4th 779, 19 CR3d 17 (counsel made no reasonable attempt to informally resolve discovery dispute, and tone of letters was combative and unprofessional); Ghanooni v Super Shuttle (1993) 20 CA4th 256, 24 CR2d 501 (monetary sanctions against attorney require finding that attorney advised conduct; amount awarded may not include any penalty).

Available After Judgment

Discovery sanctions under CCP §§2023.010-2023.040 are available even after trial and judgment if facts come to light regarding misuse of discovery. See, e.g., Sherman v Kinetic Concepts, Inc. (1998) 67 CA4th 1152, 79 CR2d 641 (defendant intentionally concealed evidence relevant to product liability issues in case). See also Pate v Channell Lumber Co. (1997) 51 CA4th 1447, 59 CR2d 919 (defense sought to gain tactical advantage by withholding documentary evidence until after plaintiff rested during trial).

Not Available Ex Parte

Discovery sanctions cannot be awarded ex parte, because CCP §§2023.030 requires notice and opportunity for hearing on sanctions. Parker v Walter Kluwer, Inc. (2007) 149 CA4th 285, 296, 57 CR3d 18.

SANCTIONS UNDER OTHER STATUTES

Court may order reasonable expenses, including:

Under CCP §128.7

Attorney fees and costs incurred as a result of frivolous filings or other pleadings. But see Goodstone v Southwest Airlines Co. (1998) 63 CA4th 406, 416, 73 CR2d 655 ("safe harbor" provisions of CCP §128.7(c)(1) precluded imposition of sanctions when defendants did not serve plaintiff's attorney with sanctions motions 30 days before filing them).

NOTE

Sanctions "for failure to make discovery or monetary sanctions of less than one thousand dollars" are not reported to the State Bar. Bus & P C §6086.7(a)(3).

Under CCP §128.6

Attorney fees.

Under Cal Rules of Ct 2.30

Attorney fees. But see Trans-Action Commercial Inv., Ltd. v Firmaterr, Inc. (1997) 60 CA4th 352, 365, 70 CR2d 449 (sanctions order reversed when attorney repeatedly attempted to introduce irrelevant matters; contempt is appropriate punishment for disobeying court order; former Cal Rules of Ct 227 (now Cal Rules of Ct 2.30) limited to scope of CCP §128.5 and other statutes awarding attorney fees as sanctions).

NOTE

A pro se litigant is entitled to reasonable expenses incurred (e.g., photocopying, research expenses) as a discovery sanction, but

cannot recover attorney fees. Kravitz v Superior Court (2001) 91 CA4th 1015, 111 CR2d 385. See Do v Superior Court (2003) 109 CA4th 1210, 135 CR2d 855 (pro bono-represented party, however, can recover attorney fees, distinguishing *Kravitz*).

PRACTICE TIP

You need to remember that no matter how egregiously you think the other side has acted, the court generally comes to the dispute without a predisposition toward or against either party. What you see as a clear case the court may view very differently.

ISSUE SANCTION

WHAT COURT CAN ORDER

Court can order that (CCP §2023.030(b)):

- a. Designated facts shall be taken as established in the action; or
- b. Party engaging in the misuse of discovery be prohibited from supporting or opposing a designated claim or defense.

Example 1: Court ordered certain facts relating to tax, income, and expenses declarations to be taken as established under CCP §2023.030(b) after party refused court's order compelling him to produce financial records. See Marriage of Chakko (2004) 115 CA4th 104, 8 CR3d 699. Court ordered that matters are deemed admitted under CCP §2033.290. See Courtesy Claims Serv., Inc. v Superior Court (1990) 219 CA3d 52, 55, 268 CR 30, disapproved on other grounds in Wilcox v Birtwhistle (1999) 21 CA4th 973, 983 n12, 90 CR2d 260.

Example 2: Court ordered that husband be precluded from offering any evidence, making any objections, or cross-examining any of wife's witnesses at trial on any issue except dissolution, custody, and visitation (*i.e.*, all financial issues were taken as established by wife) because husband refused to produce financial records. See Marriage of Economou (1990) 224 CA3d 1466, 1473, 274 CR 473.

Example 3: Court ordered that sanctioned party's objections to an accounting were without merit. See Estate of Ivey (1994) 22 CA4th 873, 28 CR2d 16.

NOTE

Issue sanctions are not available unless there is a failure to obey an order compelling discovery. New Albertsons, Inc. v Superior Court (2008) 168 CA4th 1403, 1428, 86 CR3d 457.

EVIDENCE SANCTION

WHAT COURT CAN ORDER

Party engaged in misuse of discovery is barred from introducing designated matters in evidence. CCP §2023.030(c).

Example: Order precluding introduction of certain documents that the party failed to produce in response to a request for production under CCP §§2031.010-2031.510. See Sauer v Superior Court (1987) 195 CA3d 213, 226, 240 CR 489. Order precluding introduction of evidence as sanction for pattern of discovery abuse that effectively led to loss of various items of evidence. See Karlsson v Ford Motor Co. (2006) 140 CA4th 1202, 1214, 45 CR3d 265.

NOTE

Evidence sanctions are not available unless there is a failure to obey an order compelling discovery. New Albertsons, Inc. v Superior Court (2008) 168 CA4th 1403, 1428, 86 CR3d 457. See Saxena v Goffney (2008) 159 CA4th 316, 333, 71 CR3d 469 (absent violation of court order compelling answer or further answer, evidence sanctions may be imposed only when answer given is willfully false).

JUDGE'S PERSPECTIVE

When a party seeks an evidentiary sanction, the court will consider the form of sanction that will place the moving party in the position that it would have enjoyed had it received favorable responses. Thus the responsibility is on the moving party to make

specific requests in the moving papers. If, in making the motion, you believe that evidentiary sanctions would accomplish that end, specify the evidentiary sanctions you believe would lead to that result. Don't leave it to be fashioned by the judicial officer hearing the motion.

TERMINATING SANCTION

WHAT COURT CAN ORDER

A terminating sanction may include (CCP §2023.030(d)):

- a. Striking out pleadings or parts of pleading of party engaging in misuse of discovery (see, e.g., Johnson v Pratt e³ Whitney Canada, Inc. (1994) 28 CA4th 613, 34 CR2d 26; Collisson e³ Kaplan v Hartunian (1994) 21 CA4th 1611, 26 CR2d 786);
- b. Staying further proceedings by party engaging in misuse of discovery;
- c. Dismissing the action or any part of it (see, e.g., Williams v Russ (2008) 167 CA4th 1215, 1223, 84 CR3d 813; R.S. Creative, Inc. v Creative Cotton, Ltd. (1999) 75 CA4th 486, 89 CR2d 353); or
- d. Rendering judgment by default against party misusing discovery.

Further Research: Reedy v Bussell (2007) 148 CA4th 1272, 1292, 56 CR3d 216 (terminating sanctions justified by persistent and willful noncompliance in almost every aspect of discovery); Jerry's Shell v Equilon Enters., LLC (2005) 134 CA4th 1058, 1069, 36 CR3d 637 (repeated failure to respond to discovery and comply with court orders compelling discovery justifies imposition of terminating sanctions); Ruvalcaba v Government Employees Ins. Co. (1990) 222 CA3d 1579, 1583, 272 CR 541 (dismissal of matter as terminating sanction was inappropriate without prior order directing compliance); Civil Discovery, chap 15.

NOTE

A terminating sanction is never justified if based solely on the failure to pay a monetary sanction. Newland v Superior Court (1995) 40 CA4th 608, 47 CR2d 24; Midwife v Bernal (1988) 203 CA3d 57, 249 CR 708. Also, a terminating sanction will not be granted if the court can equitably fashion complete relief with a lesser sanction. See, e.g., Sherman v Kinetic Concepts, Inc. (1998) 67 CA4th 1152, 79 CR2d 641 (default judgment would have placed plaintiffs in better position than if discovery had been obtained; monetary sanctions proper).

JUDGE'S PERSPECTIVE

A request for terminating sanctions is usually out of line for a first offense of misusing the discovery process.

- Most judges are reluctant to impose drastic sanctions unless they are satisfied that a party will ignore all reasonable orders.
- The better practice is to offer an alternative to a terminating sanction designed to place the moving party in the same position it would have enjoyed had it received favorable responses.
- Monetary sanctions can be reduced to a judgment and this should be requested instead of a request for further monetary sanctions or terminating sanctions. See Jones v Otero (1984) 156 CA3d 754, 203 CR 90.

CONTEMPT SANCTION

WHAT COURT CAN ORDER

Court can order that misuse of discovery is considered contempt of court. CCP §2023.030(e).

JUDGE'S PERSPECTIVE

If discovery matters are heard by commissioners, check local practice to determine whether commissioners hear orders to show cause regarding contempt.

When seeking sanctions or contempt, be sure that you are clear in stating whether you are seeking discovery *sanctions* or *contempt*. This is especially important if discovery matters are heard by commissioners who do not hear motions seeking contempt.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Requesting Sanctions/STEP 17. REVIEW GROUNDS FOR DISCOVERY SANCTIONS

STEP 17. REVIEW GROUNDS FOR DISCOVERY SANCTIONS

SANCTIONS IN DISCOVERY STATUTES

WHEN APPROPRIATE GENERALLY

For *misuses* of the discovery process (CCP §§2023.010(i), 2023.020), the court may, and sometimes must, impose sanctions under the discovery statutes (see, e.g., *Sinaiko Healthcare Consulting, Inc. v Pacific Healthcare Consultants* (2007) 148 CA4th 390, 405, 55 CR3d 751; *Mattco Forge, Inc. v Arthur Young & Co.* (1990) 223 CA3d 1429, 273 CR 262), e.g., for:

Failure to Meet and Confer

Failure to meet and confer when required. See CCP §§2023.010(i), 2023.020 (monetary sanction mandatory); *Parker v Walter Kluwer U.S., Inc.* (2007) 149 CA4th 285 294, 57 CR3d 18 (refusal to meet and confer regarding further responses to interrogatories entitles moving party to monetary sanctions).

NOTE

Sanctions will be awarded against the party who *wins* the discovery motion if that party failed to meet and confer when required. See CCP §2023.020.

Harassment

Using discovery to harass or in an inappropriate fashion, e.g., sending voluminous unnecessary interrogatories. See CCP §2023.010; *Puerto v Superior Court* (2008) 158 CA4th 1242, 1248, 70 CR3d 701 (naming 2,600 employees in response to form interrogatories would likely merit sanctions for use of discovery to cause oppression, or undue burden and expense).

Taking an Unjustified Position

Taking an unjustified position in propounding or responding to discovery. See CCP §2023.010.

Failing to Respond

Failing to respond or submit to an authorized method of discovery. CCP §2023.010. See also *Payne v Exxon Corp.* (9th Cir 1997) 121 F3d 503, 507.

Making an Evasive Response

Making an evasive response to discovery. CCP §2023.010; *Liberty Mut. Fire Ins. Co. v LcL Adm'rs, Inc.* (2008) 163 CA4th 1093, 1102, 78 CR3d 200.

SANCTIONS MAY BE MANDATORY

Monetary sanctions are mandatory when authorized by any provision of CCP §§2016.010-2036.050 (CCP §2023.030(a)) unless the court finds that:

- a. The party subject to the sanction acted with substantial justification; or
- b. Imposing sanctions would be unjust. See, e.g., *Babcock v Superior Court* (1994) 29 CA4th 721, 35 CR2d 462.

REVIEW SPECIFIC DISCOVERY STATUTES

Review the statute that governs your motion to determine whether sanctions are available. See, e.g., CCP §§2030.300(d)-(e), 2031.310(h)-(j); for a chart of discovery statutes that provide for sanctions, see Appendix E.

NOTE

Sanctions will not be awarded against a party who fails to provide electronically stored information that has been lost, damaged, altered, or overwritten as a result of the "routine, good faith operation of the electronic information system." See CCP §§1985.8(l)(1), 2031.060(i)(1), 2031.300(d)(1), 2031.310(j)(1), 2031.320(d)(1). Parties still have an obligation to preserve discoverable information, *e.g.*, maintain a litigation hold. See CCP §§1985.8(l)(2), 2031.060(i)(2), 2031.300(d)(2), 2031.310(j)(2), 2031.320(d)(2).

OTHER SANCTIONS

WHEN APPROPRIATE

Sanctions may be awarded:

CCP §177.5

To the *court* (CCP §177.5; Cal Rules of Ct 2.30) if the court finds that *you or opposing party* have violated any lawful court order without good cause or substantial justification. See *Caldwell v Samuels Jewelers* (1990) 222 CA3d 970, 979, 272 CR 126.

Cal Rules of Ct 2.30

When a party, attorney, or witness violates any pretrial or trial rule of court.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Requesting Sanctions/STEP 18. IF APPROPRIATE, REQUEST SANCTIONS WHEN YOU MAKE ORIGINAL MOTION TO COMPEL

STEP 18. IF APPROPRIATE, REQUEST SANCTIONS WHEN YOU MAKE ORIGINAL MOTION TO COMPEL

INCLUDE IN MOVING PAPERS

When seeking sanctions as part of your original motion to compel discovery, set forth (CCP §§2023.040; Cal Rules of Ct 3.1113(b)):

In Caption

That you seek sanctions, and type of sanctions sought, *e.g.*, monetary sanctions.

In Notice of Motion

- a. Identity of each party, person, or attorney against whom you seek the sanction; and
- b. Specific type of sanction sought:
 - (1) Sanctions under §§2023.010-2023.040; or
 - (2) Monetary sanctions or other types of sanctions.

In Memorandum in Support of Motion

- a. Statement of facts;
- b. Concise statement of law;
- c. Statement of the supporting evidence and arguments supporting request; and
- d. Relevant statutes, cases, and other legal authority (*e.g.*, treatises):
 - (1) Properly cited; and
 - (2) With a discussion of how they apply to your case.

In Declaration

Facts supporting the statement of facts in your memorandum, *e.g.*:

- a. Your reasonable attempts to resolve the matter informally with opposing counsel;
- b. If opposing party failed to confer with you to try to resolve the matter (see CCP §§2023.010(i), 2023.020):
 - (1) In person;
 - (2) By telephone; or
 - (3) In writing; and
- c. The amount and bases of any monetary sanctions you are seeking, to allow court to determine the proper amount of monetary sanctions. CCP §2023.040. Under CCP §§2023.010(i) and 2023.020, a party who fails to meet and confer as required must pay reasonable expenses, including attorney fees, incurred as a result of that conduct.

Further Research: *Sole Energy Co. v Hodges* (2005) 128 CA4th 199, 26 CR3d 823 (imposition of terminating sanctions was improper because notice given to defendants was only for order shortening time on motion to compel). See also step 13, above; for a sample prepared declaration, see Appendix C; Civil Discovery §7.149.

PRACTICE TIP

You do not need to include a request for sanctions with every motion. Sometimes, counsel may have a legitimate good faith dispute over a discovery issue. When you believe the other side is asserting a position in good faith, you can avoid unnecessary antagonism by not asking for sanctions. During the meet and confer process you can also agree that neither side will seek monetary sanctions. The court may take the request more seriously if it sees that both sides are willing to waive sanctions to get a substitute ruling.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Requesting Sanctions/STEP 19. IF APPROPRIATE, REQUEST SANCTIONS WHEN OPPOSING PARTY MOVES FOR RECONSIDERATION

STEP 19. IF APPROPRIATE, REQUEST SANCTIONS WHEN OPPOSING PARTY MOVES FOR RECONSIDERATION

WHEN APPROPRIATE

You may request sanctions if:

- a. You have prevailed in your discovery motion in which you requested sanctions; and
- b. Opposing party moves for reconsideration of that motion.

SANCTIONS AVAILABLE

If opposing party moves for reconsideration of a discovery order (see *Mattco Forge, Inc. v Arthur Young & Co.* (1990) 223 CA3d 1429, 1437, 273 CR 262):

- a. That motion is considered a continuation of the *original* motion;
- b. It is governed by CCP §§2023.010-2023.040; and
- c. The court may impose additional sanctions if it finds that the motion for reconsideration was frivolous.

HOW TO PROCEED

In your opposition to the motion for reconsideration, include a declaration that (CCP §2023.040):

- a. Sets forth the amount and basis of your fees and costs in responding to that motion; and
- b. Permits the court to set a proper amount of monetary sanctions.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Requesting Sanctions/STEP 20. IF APPROPRIATE, REQUEST SANCTIONS AFTER COURT ORDERS DISCOVERY

STEP 20. IF APPROPRIATE, REQUEST SANCTIONS AFTER COURT ORDERS DISCOVERY

WHEN APPROPRIATE

You may request sanctions if the opposing party fails to obey an order to provide discovery. CCP §2023.010. See London v Dri-Honing Corp. (2004) 117 CA4th 999, 1001, 12 CR3d 240 (motion for monetary sanctions may be made after litigation of motion to compel further responses to demand, but request for sanctions must be made promptly).

SANCTIONS AVAILABLE

a. Court is likely to impose (see step 16, above):

- (1) Issue sanctions;
- (2) Evidence sanctions; or
- (3) Terminating sanctions; and

b. Court may also impose monetary sanctions.

JUDGE'S PERSPECTIVE

If a terminating sanction is the only sanction that would put the moving party in the same position it would have been in had it received the most favorable answers, be prepared to demonstrate that to the court.

But be realistic!

- If, *e.g.*, the court's first order included no sanctions or only monetary sanctions for failure to respond, most judges will *not* dismiss an action or strike an answer for the party's failure to comply with that first order. If you can demonstrate, however, that a party has done nothing to move the case forward and has done nothing to respond to discovery requests or motions, it is more likely that a judge will dismiss an action or strike an answer on a second motion. It is important to set forth as many facts as possible to support a finding that a lesser sanction would be futile.
- If the party fails to comply with a *second order*, the court will usually order more drastic sanctions.
- The third order is typically fatal.

HOW TO PROCEED

File another noticed motion requesting further discovery, sanctions, or both.

PREPARE MOVING PAPERS

Include in moving papers the same information as required when requesting sanctions at the time of a motion to compel. See steps 9-13, above.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Requesting Sanctions/STEP 21. MOVE FOR SANCTIONS AGAINST NONPARTY WHO FAILS TO ATTEND AND PRODUCE DOCUMENTS AT CALIFORNIA DEPOSITION

STEP 21. MOVE FOR SANCTIONS AGAINST NONPARTY WHO FAILS TO ATTEND AND PRODUCE DOCUMENTS AT CALIFORNIA DEPOSITION

WHEN APPROPRIATE

Move for sanctions when a *nonparty* deponent fails to appear and produce at a California deposition. CCP §§2020.240, 2023.010-2023.040, 2025.440(a).

Recognize that a prior order directing compliance by the witness is *not* required. CCP §§1991.1, 2020.240.

PRACTICE TIP

Because you generally want information, not sanctions, a motion to compel testimony is generally the preferable and more effective remedy over a contempt proceeding. It is also usually more cost-effective.

JUDGE'S PERSPECTIVE

Try to resolve this matter directly with the *nonparty* deponent *before* you ask for court intervention.

- An angry nonparty witness is usually not very helpful to anyone; a witness will not be happy if charged with contempt because of a misunderstanding.
- Use contempt proceedings as the *last resort*.

WHAT YOU MAY OBTAIN

You may obtain:

a. Punishment for contempt (CCP §§1218, 2023.030(e)):

- (1) Witness may be fined up to \$1000; or
- (2) Witness may be imprisoned for up to 5 days; or
- (3) Both.

NOTE

If the nonparty witness is an agent of the party, the witness can be ordered to pay the initiating party's reasonable attorney fees and costs incurred in contempt proceeding.

b. Forfeiture and payment of damages under CCP §1992.

If the nonparty deponent appears at the deposition but refuses to answer questions, you may seek an order to compel and *monetary sanctions* against the deponent instead. See Marriage of Lemen (1980) 113 CA3d 769, 780, 170 CR 642.

HOW TO PROCEED

Contempt

Under CCP §§1209 and 1218, you must:

a. File an affidavit under CCP §1211 alleging facts showing that:

- (1) Deposition subpoena was properly served;
- (2) Witness disobeyed the subpoena; and

- (3) Witness was able to comply;
- b. Obtain an order to show cause (OSC) re contempt under CCP §1212, signed by the court;
- c. Serve the OSC and declaration on the disobeying witness by *personal service* (Cal Rules of Ct 3.1346); and
- d. Attend the trial on the contempt proceedings. See Lund v Superior Court (1964) 61 C2d 698, 713, 39 CR 891.

JUDGE'S PERSPECTIVE

Remember that contempt proceedings are *quasi-criminal* with all the protections of a criminal trial, except the right to a jury (*e.g.*, proof beyond a reasonable doubt, the right to remain silent).

Civil Action for Damages

You may seek civil remedy under CCP §1992 by filing a separate action, *i.e.*, a complaint, for:

- a. Forfeiture of \$500; and
- b. Damages caused by the witness's disobeying the subpoena.

NOTE

Consider filing this action in small claims court to make this remedy more effective.

Further Research: For how to proceed in small claims court, see California Judges Benchbook: Small Claims Court and Consumer Law (12th ed Cal CJER 2001).

WHEN TO MOVE

- a. If you decide to move for contempt sanctions, file and serve at least **30 calendar days** before the *initial* trial date.
- b. Keep in mind that a continuance or postponement of the *initial* trial date will not automatically allow you to bring a later motion. CCP §2024.020.

NOTE

Recognize that the time limitations imposed by CCP §2024.020(a) do *not* apply to your filing a separate lawsuit for civil damages under CCP §1992.

FILE AND SERVE MOVING PAPERS

See step 23, below.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Making Discovery Motion/STEP 22. OBTAIN AND SCHEDULE HEARING DATE

When Making Discovery Motion

STEP 22. OBTAIN AND SCHEDULE HEARING DATE

DEADLINE FOR HEARING ON MOTIONS

Deadline for hearing on motions is **15 days** before date *initially* set for trial. CCP §2024.020(a).

NOTE

If the court grants a new trial, declares a mistrial, or orders a reversal on appeal, then discovery opens again as a matter of right and new discovery cutoffs are established with the setting of a new trial. See Fairmont Ins. Co. v Superior Court (2000) 22 C4th 245, 92 CR2d 70 (cutoff date extended by reversal of judgment on appeal, mistrial, or new trial).

CHECK LOCAL RULES AND PROCEDURES TO SET HEARING

a. Contact court clerk and ascertain whether under *local* rules:

(1) A law and motion hearing date is *assigned*; or

(2) You pick the date; or

(3) Discovery matters are heard in a department other than law and motion. For example, in San Francisco, discovery motions may be heard by a discovery commissioner rather than by the law and motion judge, and if they are, they must be calendared in that discovery department in advance.

b. Schedule hearing date before the deadline; and

c. Do not wait until the last minute, because law and motion hearing dates may not be available for several weeks after you contact the clerk.

MAY NEED EX PARTE APPLICATION TO OBTAIN EARLIER DATE

If the hearing date set by the court is later than the deadline in your case, you may need to make an ex parte application to the court seeking an order allowing the motion to be heard before the deadline. See Cal Rules of Ct 3.1200-3.1207, 3.1300(b).

Prepare Application

The application is a simple statement that you are seeking to shorten the usual notice period for your motion.

Include Declaration

Include a declaration showing facts supporting:

a. Good cause to shorten the notice period; and

b. That, no later than 10:00 a.m. the court day before the ex parte appearance (absent a showing of exceptional circumstances that justify a shorter time for notice), you (Cal Rules of Ct 3.1203(a), 3.1204(b)):

(1) Informed opposing party of when and where you would move; or

(2) Made good faith effort to inform but were unable to do so (specifying efforts); or

(3) For reasons specified, should not be required to inform opposing party.

Include Order

Include an order for the judge to sign and leave blanks for the judge to fill in the time and date for notice to your opponent.

Sample Form: See Civil Discovery §5.219 for a sample ex parte application for order shortening time.

SEEK COURT ORDER TO SET LATER HEARING DATE

If you cannot schedule the date before the deadline, prepare a declaration under penalty of perjury showing:

Good Cause

Why the motion should be heard closer to trial (CCP §2024.050), *e.g.*:

- a. Why motion was not heard earlier;
- b. That you exercised reasonable diligence in completing the discovery and seeking the hearing; and
- c. Whether later hearing will delay trial or prejudice any party.

Attempt to Resolve

That you made a good faith attempt to informally resolve each issue presented by the motion. CCP §2024.050; see Los Angeles Ct R 7.12(h)(1) (reprinted in Appendix F).

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Making Discovery Motion/STEP 23. FILE AND SERVE MOVING PAPERS

STEP 23. FILE AND SERVE MOVING PAPERS

WHAT TO SERVE

Serve copy of notice, motion, and supporting documents. CCP §1010.

WHOM TO SERVE

Serve (CCP §§1010-1011):

- a. Opposing counsel for each party; or
- b. Any unrepresented party; or both.

JUDGE'S PERSPECTIVE

It is *very important* that you 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.

Do not forget to serve the nonparty deponent with moving (and opposing) papers if motion concerns the deposition of a nonparty. See, *e.g.*, steps 26-29, below.

WHEN TO SERVE

Under CCP §1005(b) and Cal Rules of Ct 3.1300(a), serve at least:

If Personally Served

16 court days before hearing date; or

If by Mail

- a. **16 court days plus 5 calendar days** if mailed to a California address;
- b. **16 court days plus 10 calendar days** if mailed to an out-of-state address; or
- c. **16 court days plus 20 calendar days** if mailed to a foreign address.

If by Express Mail, Other Overnight Delivery, Fax, or Electronic Service

Two additional days beyond the minimum 16 court days are required for documents served by Express Mail or other method of overnight delivery, or by fax or electronic service (if the parties previously have agreed in writing to fax or electronic service). CCP §§1005(b), 1010.6; see Cal Rules of Ct 2.260(e)(2), 2.306(d).

NOTE

Although the extension of time under CCP §1005(b) for service by Express Mail, other overnight service, or fax specifies *calendar* days, in CCP §1013 time for service using the exact same means is extended by *2 court* days. Extension of time under CCP §1010.6(a)(6) for electronic service specifies *court* days.

In adopting court rules on extension of time of filing and service, the Judicial Council has specified *court* days. See Cal Rules of Ct 2.260(e)(2) (by electronic means) and Cal Rules of Ct 2.306(c) (by fax transmission).

If You Are Outside California

In the rare event that you mail the moving papers from *outside* California to a California address, the responding party might claim that CCP §1005(b) applies, under which, if the place of *mailing* the motion is outside California, an additional 10 calendar days (instead of just 5 calendar days) is required. In this situation, serve papers **16 court days plus 10 calendar days** before the

hearing date.

WHAT TO FILE

File:

- a. Notice of motion, motion, and all supporting papers; and
- b. Proof of service of these moving papers (see Cal Rules of Ct 3.1300(c)).

WHERE TO FILE

- a. Usually file with the clerk of court where action is pending (Cal Rules of Ct 3.1302(a)); but
- b. Check local rules: Some courts require filing in the department where the motion will be heard.

NOTE

Some courts *require* that you reserve a motion date *before* you file your motion. Check the local rules or ask the clerk whether this requirement exists. See step 22, above.

HOW TO FILE

- a. Pay \$40 filing fee payable to court clerk. Govt C §70617(a)(4).
- b. Have clerk endorse stamp a copy of the papers you file to show the fact and date of filing for your files.

NOTE

If you wish to file by *fax* or by electronic means, check local rules for any additional procedures, particularly if you are out of the county. See, *e.g.*, Contra Costa Ct R 27.

WHEN TO FILE

Moving Papers

The statute requires that all moving and supporting papers be served and filed at least **16 court days** before the hearing, plus any time added based on the type of service (see above). CCP §1005(b); see Cal Rules of Ct 3.1300(a).

Proof of Service

- a. File proof of service **5 court days** before the hearing (Cal Rules of Ct 3.1300(c)); but
- b. To avoid overlooking that deadline, file with motion.

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After Moving Papers Filed and Served

STEP 24. RESPONDING PARTY: PREPARE, FILE, AND SERVE OPPOSING PAPERS

WHAT TO PREPARE

Prepare:

- a. A memorandum in opposition to motion;
- b. Any necessary declarations or affidavits; and
- c. Any other supporting papers or documents.

WHOM TO SERVE

Serve:

- a. Opposing counsel for each party; and/or
- b. Any unrepresented party.

WHEN TO FILE AND SERVE

Serve and file all papers responding to motion **9 court days** before the hearing. CCP §1005(b).

HOW TO SERVE

All papers opposing a motion must be served either by personal delivery, express mail, fax, or some other means "reasonably calculated to ensure delivery ... not later than the close of the next business day" after the opposition papers are filed. CCP §1005(c). On electronic service, see CCP §1010.6 (see step 23, above).

NOTE

Many counties require personal service if any doubt exists whether the paper will be timely received by the opposing party. See Los Angeles Ct R 7.12(b)(4).

WHAT TO FILE

File:

- a. Memorandum and all supporting papers; and
- b. Proof of service of these responding papers.

HOW TO FILE

- a. Ordinarily, no fee is required for opposition papers if party has already paid first-appearance fee, *e.g.*, if you are opposing plaintiff's motion to take the deposition before your client (a defendant) has appeared, defendant will have to pay the first-appearance fee when you file opposition to the motion.
- b. Have clerk endorse stamp a copy of the papers you file to show the fact of and date of filing for your files.

NOTE

If you wish to file by *fax* or my electronic means, check local rules for any additional procedures, particularly if you are out of the county. See, *e.g.*, Contra Costa Ct R 27.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/After Moving Papers Filed and Served/STEP 25. MOVING PARTY: PREPARE, FILE, AND SERVE REPLY PAPERS

STEP 25. MOVING PARTY: PREPARE, FILE, AND SERVE REPLY PAPERS

WHAT TO PREPARE

Prepare memorandum (and supporting declarations, if necessary) that responds to issues and arguments raised by opposing party. See Cal Rules of Ct 3.1113.

WHEN TO FILE AND SERVE

File and serve reply papers at least **5 court days** before the hearing. CCP §1005(b).

HOW TO SERVE

All reply papers must be served either by personal delivery, express mail, fax, or some other means "reasonably calculated to ensure delivery ... not later than the close of the next business day" after the opposition papers are filed. CCP §1005(c). On electronic service, see CCP §1010.6 (see step 23, above).

HOW TO FILE

- a. No fee is required for reply papers.
- b. Have clerk endorse stamp a copy of the papers you file to show the fact of and date of filing for your files.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Taking or Opposing Taking of Deposition/STEP 26. MOVE TO STAY DEPOSITION AND QUASH DEPOSITION NOTICE

If Motion Concerns Taking or Opposing Taking of Deposition

STEP 26. MOVE TO STAY DEPOSITION AND QUASH DEPOSITION NOTICE

WHEN AVAILABLE

You may move to stay the deposition and quash the deposition notice for deposition scheduled to take place (CCP §2025.410(c)):

Party Deponent

Outside of California for a party deponent; or

Any Deponent

Within California for any other deponent.

WHEN APPROPRIATE

If you are unable to reach an agreement with the party noticing the deposition, you may move to stay the deposition and quash the deposition notice based on:

a. An error in the notice (see below); or

b. Actions constituting a misuse of the discovery process. For discussion of misuse of discovery, see below.

Error in Notice

Bring a motion to stay and quash the deposition if you believe that the deposition notice contains an error that the noticing party refuses to correct or modify (CCP §2025.410(c)), *e.g.*:

a. The place of deposition may be improper (see CCP §2025.250); or

b. The proposed method of recording the deposition testimony does not meet statutory requirements (see CCP §2025.220(a)).

Misuse of Discovery

Bring a motion to stay and quash the deposition if you believe that the deposition (see CCP §2023.010):

a. Would be an undue burden; or

b. Has been set solely to harass or intimidate a witness.

Example: Deposition of witness who has no relevant knowledge was noticed solely to harass that witness. See Liberty Mut. Ins. Co. v Superior Court (Frysiner) (1992) 10 CA4th 1282, 1286, 13 CR2d 363. See also Westly v Superior Court (2004) 125 CA4th 907, 910, 23 CR3d 154 (agency heads and other top governmental officials are not subject to deposition absent compelling reasons); Spectra-Physics, Inc. v Superior Court (1988) 198 CA3d 1487, 1493, 244 CR 258 (counsel is not subject to deposition absent compelling reasons).

JUDGE'S PERSPECTIVE

The party seeking the protective order should establish by declaration that the proposed deponent does not have unique or superior personal knowledge.

OBJECT BEFORE MOTION

At least **5 calendar days** before the deposition, serve a *written* objection specifying any error or irregularity in the deposition

notice. [CCP §2025.410\(a\)](#).

How to Serve

If there are only 3 calendar days before the deposition, *personally* serve the objection. [CCP §2025.410\(b\)](#).

If You Fail to Serve

If you fail to serve, you waive any error or irregularity in notice. [CCP §2025.410\(a\)](#).

EFFECT OF MOTION

Deposition is *automatically stayed* pending court's resolution of the motion. [CCP §2025.410\(c\)](#).

JUDGE'S PERSPECTIVE

The best approach to avoid the consequences of a stay of the deposition would be to apply for an order advancing the hearing on any motion for a protective order.

NOTE

A *motion for a protective order* regarding a deposition *does not automatically* stay the taking of the deposition. Therefore, you may need to seek a stay in an *ex parte* application to have the motion heard before the deposition occurs.

WHEN TO MOVE

Make the motion ([CCP §§2024.020\(a\), 2024.050-2024.060, 2025.420](#)):

- a. As soon as possible after you receive the deposition notice; and
- b. After you give the notice of your objection; and
- c. At least **30 calendar days** before the *initial* trial date.

PREPARE MOVING PAPERS

- a. See [steps 9-13](#), above.
- b. Accompany motion with a declaration stating facts showing your reasonable and good faith unsuccessful attempt at informally resolving the issue that you present in the motion. [CCP §2025.410\(c\)](#); see Los Angeles Ct R 7.12(h)(1) (reprinted in [Appendix E](#)).

Further Research: See [Civil Discovery, chap 5](#).

Sample Forms: For a sample motion to quash, see [Civil Discovery §§5.228-5.229](#).

FILE AND SERVE MOVING PAPERS

See [step 23](#), above.

JUDGE'S PERSPECTIVE

If motion involves a nonparty deponent, do not forget to serve the nonparty deponent with moving (and opposing) papers.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Taking or Opposing Taking of Deposition/STEP 27. MOVE TO OBTAIN MORE THAN ONE DEPOSITION OF NATURAL PERSON

STEP 27. MOVE TO OBTAIN MORE THAN ONE DEPOSITION OF NATURAL PERSON

WHEN APPROPRIATE

You may move to obtain more than one deposition of natural person when you are unable to reach an agreement with the other parties or a nonparty deponent to take another deposition of a natural person:

a. If you (CCP §2025.610):

(1) Were the party that noticed the first deposition; or

(2) Received notice of the first deposition; and

b. The first deposition was of a natural person who was not testifying as a designee of an organization under CCP §§2025.230.

NOTE

Recognize that you can take more than one deposition of a natural person *if one of the depositions is on behalf of an organization*. CCP §2025.610(c)(1).

WHEN TO MOVE

Notice motion early, *e.g.*:

Deadline

45 calendar days before the *initial* trial date so that if court grants motion you can take the *subsequent* deposition no later than the 30th day before the *initial* trial date. See CCP §2024.020(a).

JUDGE'S PERSPECTIVE

If you bring the motion early, you will also have time to serve clean-up interrogatories after you review the transcript.

If Deadlines Missed

You can make motion up to **30 calendar days** before the *initial* trial date (court can *hear* motion on or before the **15th day** before the *initial* trial date) (CCP §§2024.020(a), 2024.060), *but* if you make motion that late:

a. Court will also have to allow the deposition to take place after discovery cutoff (CCP §2024.020(a)); or

b. Parties will have to agree in writing to the deposition taking place after the discovery cutoff (CCP §2024.060).

PREPARE MOVING PAPERS

a. See steps 9-13, above.

b. Accompany motion with a declaration stating facts showing:

(1) Good cause for taking a subsequent deposition of the natural person (CCP §2025.610(b)); and

(2) Your reasonable and good faith unsuccessful attempt at informally resolving the issue presented by the motion.

Sample Forms: For a sample motion to compel, see Appendixes A-D.

PRACTICE TIP

You should provide the court with specific reasons why a second deposition should be allowed. For example, if a party suddenly

discovered additional documents that are relevant after the first deposition, that may qualify as good cause. The mere fact that not all pertinent areas were explored in discovery will generally not suffice.

JUDGE'S PERSPECTIVE

The mere fact that time has elapsed since the first deposition is probably *not* sufficient "good cause" for a subsequent deposition.

Most judges require a substantial reason for the subsequent deposition and an explanation why interrogatories will not suffice.

FILE AND SERVE MOVING PAPERS

See step 23, above.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Taking or Opposing Taking of Deposition/STEP 28. MOVE FOR EARLIER DEPOSITION OR SHORTER NOTICE PERIOD

STEP 28. MOVE FOR EARLIER DEPOSITION OR SHORTER NOTICE PERIOD

REVIEW STATUTORY NOTICE PERIODS

For Plaintiff

Plaintiff may serve a deposition notice without leave of court **20 days** after service of summons on, or appearance by, the defendant. CCP §2025.210(b).

For Defendant

Defendant may serve a deposition notice without leave of court any time after defendant has (CCP §2025.210(a)):

- a. Been served with summons; or
- b. Appeared in the action.

Either Party

Either party must serve notice of deposition at least (CCP §§1013, 2016.050, 2025.270):

- a. *Personal service*: **10 days** before deposition; or
- b. *Service by mail*:
 - (1) **15 days** before deposition if to California address;
 - (2) **20 days** before deposition if to out-of-state address; or
 - (3) **30 days** before deposition if to foreign address.
- c. *With production demand*: **20 days** before deposition if deponent is required to produce consumer or employment records.

NOTE

You must serve notice **2 additional court days** beyond the minimum 10 days if you serve documents by Express Mail or other method of overnight delivery, or if you serve by fax (if the parties have agreed in writing to service by fax). CCP §1013. On electronic service, see CCP §1010.6 (see step 23, above).

TO TAKE DEPOSITION BEFORE ACTION FILED

WHEN APPROPRIATE

You may take deposition before action is filed:

- a. When no action has been filed; and
- b. You, as plaintiff's representative, can show that a deposition is needed.

Deposition Needed

A deposition is needed, *e.g.*:

- a. To perpetuate testimony or to preserve evidence for use if an action is filed (CCP §2035.010(a)); or

b. Because you have a *present* inability either to (CCP §2035.030(b)(2)):

- (1) Bring the action; or
- (2) Cause it to be brought.

NOTE

Recognize that as a practical matter these depositions are not common and are prompted only by very unusual circumstances.

HOW TO PROCEED

- a. File a motion titled "petition" in the court of the residence county of any expected adverse party; and
- b. Serve each expected adverse party.

Further Research: See Civil Discovery, chap 5.

JUDGE'S PERSPECTIVE

Remember to *personally serve* the expected adverse parties because they will not have already appeared in the action.

PREPARE MOVING PAPERS

See steps 9-13, above.

TO TAKE DEPOSITION IMMEDIATELY AFTER FILING COMPLAINT

PLAINTIFF'S OPTION

- a. If you can show good cause, on motion *with or without notice*, the court may allow you to serve a deposition notice before the defendant is served. CCP §2025.210(b).
- b. To avoid having to make this motion, wait 20 days after serving the defendant and then serve the notice. CCP §2025.210(b).

HOW TO PROCEED

File an ex parte motion seeking the orders that you described in the motion. CCP §2025.210(b); for discussion of ex parte procedure, see steps 10, 22 above.

Prepare Application

The application consists of a simple statement that you are seeking leave of court to serve a deposition notice before the date service would normally be permitted by statute.

Include Declaration

Include a declaration showing facts supporting:

- a. Good cause to take the deposition at an earlier date; and
- b. That, no later than 10:00 a.m. the court day before the ex parte appearance, you (Cal Rules of Ct 3.1203(a), 3.1204(b)):
 - (1) Informed opposing party when and where you would move; or
 - (2) Made good faith effort to inform but were unable to do so (specifying efforts); or
 - (3) For reasons specified, should not be required to inform opposing party.

Include Order

Include an order for the judge to sign and leave blanks for the judge to fill in the time and date for notice to your opponent.

Sample Form: See Civil Discovery §5.219 for sample ex parte application for order shortening time.

JUDGE'S PERSPECTIVE

To show "good cause" for the early service of the notice of deposition, include in the declaration a detailed explanation of the harm that will result from waiting until 20 days after the defendant is served with the summons. See CCP §2025.210(b).

TO SHORTEN DEPOSITION NOTICE PERIOD

WHEN APPROPRIATE

You can show good cause for scheduling the deposition within **10 days** after you serve the deposition notice (CCP §2025.270(d)), *e.g.*, court *might* consider it good cause if:

- a. Testimony is needed at an imminent hearing; or
- b. Deponent:
 - (1) Is leaving the jurisdiction; or
 - (2) Is very ill.

HOW TO PROCEED

File an ex parte motion. Cal Rules of Ct 3.1200-3.1207. For discussion of ex parte application procedure, see step 22, above. See also step 10, above.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Taking or Opposing Taking of Deposition/STEP 29. MOVE TO COMPEL DEPOSITION OF PARTY AT LOCATION OUTSIDE STATUTORY DISTANCE LIMITS

STEP 29. MOVE TO COMPEL DEPOSITION OF PARTY AT LOCATION OUTSIDE STATUTORY DISTANCE LIMITS

WHEN APPROPRIATE

You may move to compel deposition of party located outside statutory distance limits when you can show that the "interests of justice" will be served by doing so. See CCP §§2025.260(b), 2026.010(b).

REVIEW STATUTORY DISTANCE LIMITS

The statutory distance limits for compelling depositions are:

In California

a. For natural person deponent (CCP §2025.250(a)):

- (1) Within 75 miles of the deponent's residence; or
- (2) Within forum county and 150 miles of deponent's residence.

b. For organization party deponent (CCP §2025.250(b)):

- (1) Within 75 miles of the organization's principal executive or business office in California; or
- (2) Within the forum county and 150 miles of that office.

c. For organization nonparty deponent (CCP §2025.250(c)-(d)):

- (1) Within 75 miles of the organization's principal executive or business office in California; or
- (2) If no principal office designated in California:

- (a) Within the forum county; or
- (b) Within 75 miles of *any* California business office of deponent.

d. For deponent disclosed as retained expert (CCP §2034.420):

- (1) Within 75 miles of courthouse where action is pending; or
- (2) Greater than 75 miles from courthouse, if exceptional hardship is shown.

Outside California

Party deponent: Within 75 miles of the deponent's residence or business office. CCP §2026.010(b).

Nonparty deponent: Court cannot order a nonparty deponent to go beyond location prescribed by applicable *local* laws. CCP §2026.010(b)(2).

TRY TO STIPULATE

Meet and confer first (CCP §2025.260(a)-(b)):

- a. Try to reach an agreement for taking the deposition; and
- b. Keep in mind the interests of justice that the court will consider.

NOTE

It may make economic sense to agree to share the deponent's travel expenses, because it would be less expensive for the deponent to travel to the lawyers than for multiple lawyers to travel to the deponent.

WHEN TO MOVE

Notice motion early, *e.g.*:

Deadline

45 calendar days before the *initial* trial date so that if court grants motion you can take the deposition no later than the **30th day** before the *initial* trial date. CCP §2024.020(a).

If Deadlines Missed

You can notice the motion up to **30 calendar days** before the *initial* trial date (*i.e.*, court can hear motion on or before the **15th day** before the *initial* trial date) (CCP §§2024.020(a), 2024.060) but:

- a. Court will also have to allow the deposition to take place after discovery cutoff (CCP §2024.020(a)); or
- b. Parties will have to agree in writing to the deposition taking place after the discovery cutoff (see CCP §2024.060).

PREPARE MOVING PAPERS

See steps 9-13, above.

Include Declaration

Prepare a declaration with facts showing:

- a. Good-faith effort to meet and confer (CCP §2025.260(a)-(b)); for meet-and-confer requirements, see step 7, above;
- b. Why the deposition should be allowed outside the statutory limits, *i.e.*, show "interests of justice" served; see below.

Show "Interests of Justice" Served

State in a declaration how interests of justice will be served by taking deposition beyond the statutory limits, *e.g.*, (CCP §2025.260(b)):

- a. Deponent chose the forum, *i.e.*, the deponent is the plaintiff or an officer, director, managing agent, or employee of the plaintiff;

JUDGE'S PERSPECTIVE

If there were other forums for the deponent to choose, this argument is more compelling than when there is only one available forum.

- a. It will not inconvenience the deponent to travel to the deposition;
- b. Discovery by deposition is required, because, *e.g.*, the case:
 - (1) Is complex; or
 - (2) Depends on the deponent's credibility;
- c. It would be *more* expensive to travel to the deponent's residence than to have the deponent travel to the place you propose for the deposition; or
- d. Deponent's whereabouts at the time of the deposition makes attendance at a place admittedly distant from his or her residence reasonable, *e.g.*, deponent might be present there anyway.

Example 1: Nonresident deponent was officer of plaintiff organization and frequently was in forum county on business, the lawsuit was complex, credibility was a factor, and it would be less expensive to take the deposition in California. See *Glass v Superior Court* (1988) 204 CA3d 1048, 1053, 251 CR 690, in which the court held that the motion should be granted.

Example 2: Court may order deposition in a more distant location when multiple counsel need to examine a witness or the documents needed to conduct the deposition would be too voluminous to move.

YOU MAY HAVE TO PAY TRAVEL AND OTHER EXPENSES

Court May Order

The court may condition its order on your paying the deponent reasonable travel costs and expenses in advance. CCP §2025.260(c).

Consider Offering to Pay

Unless travel and related expenses are exorbitant, consider offering to pay travel costs and related expenses *before* making your motion, because the offer:

- a. May persuade some deponents to travel to the deposition and thus save the time and cost of making the motion; and
- b. Will strengthen your case by informing the court that you made the offer and that it was rejected.

JUDGE'S PERSPECTIVE

The court will probably make one or more parties advance all reasonable costs of any *nonparty* deponent.

FILE AND SERVE MOVING PAPERS

See step 23, above.

Further Research: For additional discussion of the topic of this step, see Civil Discovery, chap 5.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Compliance With Deposition Procedures/STEP 30. MOVE TO COMPEL COMPLIANCE BY DEPONENT WHO FAILS TO APPEAR, PROCEED, OR PRODUCE AT DEPOSITION

If Motion Concerns Compliance With Deposition Procedures

STEP 30. MOVE TO COMPEL COMPLIANCE BY DEPONENT WHO FAILS TO APPEAR, PROCEED, OR PRODUCE AT DEPOSITION

WHEN APPROPRIATE

- a. When deponent fails to (CCP §2025.450(a)):
 - (1) Appear; or
 - (2) Proceed; or
 - (3) Produce for inspection any document or tangible thing described in the deposition notice at deposition; and
 - (4) Properly object under CCP §2025.410.
- b. You may also use this motion to compel compliance when the deponent is:
 - (1) Designated by an organization party (CCP §2025.230); but
 - (2) Not sufficiently familiar with the subject matter to proceed with the deposition.

WHAT YOU MAY OBTAIN

- a. You may obtain an order compelling deponent to (CCP §2025.480(a)):
 - (1) Appear;
 - (2) Testify; and/or
 - (3) Produce.
- b. If the motion is granted, the court may also impose monetary sanctions against (CCP §2023.040):
 - (1) Deponent; or
 - (2) The party with whom the deponent is affiliated.
- c. If the motion is granted, any party who attended the deposition expecting it to take place may obtain monetary sanctions under CCP §§2023.010-2023.040.

WHERE TO BRING MOTION

If Deposing a Party

If deposing a party, bring motion in the court where the action is pending, even if the deposition is to take place *outside* of California. See CCP §2025.480(a).

If Deposing Nonparty Witness

- a. If deposing a nonparty witness, bring motion in the court where the action is pending, if the deposition is taking place in California (CCP §2025.480(a)); but
- b. Because the California courts do *not* have jurisdiction over *nonparty* witnesses, to compel attendance or answers (CCP §2026.010(b)(2)):

- (1) Obtain an out-of-state commission from the local court where the nonparty resides; and
- (2) Bring a motion to compel in that jurisdiction.

WHEN TO MOVE

Bring motion:

- a. After deponent fails to comply;
- b. At least **30 calendar days** before *initial* trial date (CCP §2024.020(a)); and
- c. No later than **60 days** after record is complete or it is clear that no appearance will be made (see *Unzipped Apparel, LLC v Bader* (2007) 156 CA4th 123, 67 CR3d 111).

PREPARE MOVING PAPERS

- a. See steps 9-13, above.
- b. Include in declaration (CCP §2025.450(b)):
 - (1) *Specific* facts showing good cause justifying the production or inspection of records or tangible things you described in the deposition notice; and
 - (2) Facts showing a reasonable and good faith attempt at informal resolution of *each* issue presented by the motion, or
 - (3) When the deponent fails to attend the deposition or to produce the documents or things described in the deposition notice, a statement that the petitioner has contacted the deponent to inquire about the nonappearance. For further discussion of meet-and-confer requirements, see step 7, above.

Sample Forms: For a sample motion to compel, see Appendixes A-D.

FILE AND SERVE PAPERS

See step 23, above.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Compliance With Deposition Procedures/STEP 31. MOVE TO COMPEL DEPONENT AT CALIFORNIA DEPOSITION TO ANSWER QUESTION OR TO PRODUCE A WRITING OR TANGIBLE THING

STEP 31. MOVE TO COMPEL DEPONENT AT CALIFORNIA DEPOSITION TO ANSWER QUESTION OR TO PRODUCE A WRITING OR TANGIBLE THING

WHEN APPROPRIATE

You may move to compel deponent at California deposition to answer question or produce a writing or tangible thing if deponent fails to:

- a. Answer a question; or
- b. Produce a writing or tangible thing.

WHAT YOU MAY OBTAIN

Against Party Deponent

- a. You may obtain an order compelling a party deponent to answer or produce (CCP §2025.480(a)); and
- b. If motion is successful, the court *shall* impose a monetary sanction under CCP §§2023.010-2023.040 against a party/deponent (CCP §2025.480(f)).

Against Nonparty Deponent

- a. You may obtain an order compelling a nonparty deponent to answer or produce (CCP §2025.480(a)); and
- b. You *may* also obtain a contempt sanction against a nonparty deponent for refusing to answer a question (see CCP §§2020.220(c), 2020.040); but:

(1) Deponent may argue that under CCP §1991.2, CCP §1991's contempt provisions do not apply to a refusal to answer questions at a deposition (under former CCP §2034(b)(1)(ii), CCP §1991 was inapplicable); and

(2) It is easier to obtain an order compelling deponent to answer and produce, and is probably almost as effective.

Further Research: See Marriage of Lemen (1980) 113 CA3d 769, 780, 170 CR 642.

JUDGE'S PERSPECTIVE

If you anticipate problems with the interpretation of an order to answer deposition questions, or if you have problems with taking a deposition, you may:

- Seek the appointment of a referee to attend the deposition; or
- Call the judge or commissioner to ask whether official is willing to resolve disputes over the telephone instead of adjourning the deposition. Because depositions are court proceedings, the introduction of a judicial officer into those proceedings may result in resolution of disputes without further motions, especially when the problems arise from complaints that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent.

DEADLINES TO MOVE

Deadlines to move are:

- a. **60 days** after the reporter completes the deposition record (CCP §2025.480(b); Unzipped Apparel, LLC v Bader (2007) 156 CA4th 123, 131, 67 CR3d 111); and
- b. **30 days** before the *initial* trial date (CCP §2024.020(a)).

NOTE

Parties often stipulate to take a deposition within the 30-day period before trial. If you enter into such a stipulation, you must separately agree to extend the deadline for bringing a discovery motion.

HOW TO PROCEED

Either (CCP §2025.460(d)):

- a. Adjourn the deposition immediately and move to compel further responses; or
- b. Better practice is to complete the deposition on other matters and then move to compel, because this approach:
 - (1) May be required by local rules in some counties; and
 - (2) Allows you to bring all disputes before the court at one time, rather than having court resolve disputes piecemeal.

NOTE

If you choose the first approach, make sure that you state on the record that you intend to ask additional questions in other areas when the deposition is resumed. With either approach, make sure that you ask several questions and obtain several refusals on the record. By having more than one question about the disputed issue you avoid an objection being sustained without the issue being resolved.

PREPARE MOVING PAPERS

See steps 9-13, above.

Declaration

- a. Accompany motion with a declaration stating facts showing a reasonable and good faith attempt to informally resolve each issue presented by the motion. CCP §2025.480(b); for discussion of meet-and-confer requirements, see step 7, above, and Civil Discovery §5.124. See also Stewart v Colonial Western Agency, Inc. (2001) 87 CA4th 1006, 1015, 105 CR2d 115.
- b. If the parties have agreed in writing to an extension of the deadline to move, incorporate the agreement in the declaration and file it with the motion.

Sample Forms: For a sample prepared declaration, see Appendix C.

Separate Statement

Prepare a separate document that sets forth (Cal Rules of Ct 3.1345(c)):

- a. The text of the question;
- b. The text of each response, answer, or objection, and any further responses or answers;
- c. A statement of the factual and legal reasons for compelling further responses or answers;
- d. The text of all definitions, instructions, and other matters required to understand each discovery request and responses to it, if necessary;
- e. Any other response and request on which the response is dependent, or, if a reason that further response is deemed necessary is based on the response to another request, the text of the other request and response; and
- f. A summary of pleadings or other documents in the file or other items of discovery relevant to the motion.

NOTE

You should set forth each request and each response verbatim. Do not try to paraphrase or summarize the requests and the responses!

Sample Forms: For sample prepared separate statement, see Appendix D.

Do Not Incorporate Transcript by Reference

Do not incorporate material from the transcript by reference. Cal Rules of Ct 3.1345(c).

GIVE NOTICE

Give notice to the deponent and all parties of the time and place of the motion.

Oral Notice

The deposition officer must direct the deponent to appear at court at a specified time. CCP §2025.480(c).

Written Notice to Nonparty

Personally serve notice of motion unless the deponent consents to accept service by mail at an address specified on the deposition record. CCP §2020.220(c); Cal Rules of Ct 3.1346.

Written Notice to Party

See step 23, above.

FILE PAPERS

- a. See step 23, above; and
- b. At least **5 calendar days** before the hearing, file (CCP §2025.480(d)):
 - (1) A certified copy of any relevant parts of the stenographic transcript; or
 - (2) If the deposition was videotaped or audiotaped, a certified copy of the relevant portions that you have had transcribed.

IF DEPONENT DISOBEYS

If the deponent thereafter disobeys the court order compelling the answer or production of a writing or thing (CCP §2025.480(g)):

Sanctions

The court may both impose issue, evidence, terminating, or monetary sanctions (see steps 16-17 above); and

Contempt

Find the deponent in contempt of court. For discussion of contempt, see step 16, above. See also CCP §§2020.240, 2023.030(e), 2025.480(g).

Further Research: See CCP §§2020.240, 2023.030, 2025.480; Civil Discovery, chaps 6 and 15.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Compliance With Deposition Procedures/STEP 32. PARTY, DEPONENT, OR AFFECTED PERSON: MOVE FOR PROTECTIVE ORDER

STEP 32. PARTY, DEPONENT, OR AFFECTED PERSON: MOVE FOR PROTECTIVE ORDER

WHEN APPROPRIATE

You and any other party (regardless of deposition location), or any deponent, or any other affected person may move for an order to protect moving party from (CCP §2025.420(b)(1)-(16)):

- a. Unwarranted annoyance, embarrassment, oppression; or
- b. Undue burden and expense.

Examples: Plaintiff in an employment discrimination action based on sexual harassment did not need to answer questions about sexual violence suffered as a child. See Knoettgen v Superior Court (1990) 224 CA3d 11, 14, 273 CR 636 (citing CCP former §2017(d) (now CCP §2017.020(b)) and general policy against intrusiveness, annoyance, and embarrassment). See also John B. v. Superior Court (2006) 38 C4th 1177, 45 CR3d 316 (husband's right to privacy concerning broad-ranging discovery over identity of prior partners in action by wife alleging that husband had infected her with HIV); Barrenda L. v Superior Court (1998) 65 CA4th 794, 803, 76 CR2d 727 (in juvenile action, plaintiffs were not compelled to answer defendants' deposition questions on unrelated sexual matters).

WHAT YOU MAY OBTAIN

If the court finds that you have shown good cause, the court may order that the deposition (CCP §2025.420(b)(1)-(16)), *e.g.*:

Not Taken

- a. Not be taken at all; or
- b. Not be taken and written examination (CCP §2025.420(b)(6)) or interrogatories be used instead of oral deposition; or

Taken With Restrictions

Be taken:

- a. At a different time;
- b. At a different place if the new place is within a distance permitted by CCP §2025.250;
- c. With certain matters being exempted from examination; or
- d. Without production of all or some of the writings or tangible things designated in the deposition notice.

WHEN TO MOVE

Move:

- a. Before, during, or after a deposition (CCP §2025.420(a)); and
- b. At least **30 calendar days** before the *initial* trial date (CCP §2024.020(a)).

PREPARE MOVING PAPERS

- a. See steps 9-13, above.
- b. Accompany motion with a declaration stating facts showing your reasonable and good faith attempt to informally resolve the issue presented by the motion. CCP §2025.420(a).

Further Research: See Civil Discovery, chaps 6 and 15.

Sample Forms: For a sample motion for protective order, see Civil Discovery §§6.142-6.144.

FILE AND SERVE MOVING PAPERS

See step 23, above.

Further Research: For additional discussion of moving for a protective order, see Civil Discovery, chaps 6 and 15. See also CCP §2025.470 (suspension of testimony to enable party or deponent to move for protective order).

COMBINE WITH MOTION TO QUASH NOTICE OF DEPOSITION

Unless you have *no* problem with the date of the deposition or other particulars in the notice, combine the motion for protective order with a motion to quash the notice of deposition because:

- a. The motion for protective order does *not* automatically stay the taking of the deposition pending the court's ruling; and
- b. The motion to quash the notice of deposition automatically stays the taking of the deposition until the court rules on the motion (CCP §2025.410(c)).

NOTE

A motion for a protective order brought without substantial justification can be the basis for imposing sanctions. CCP §2025.420(d); *Brun v Bailey* (1994) 27 CA4th 641, 32 CR2d 624.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Interrogatories/STEP 33. MOVE TO COMPEL RESPONSES TO INTERROGATORIES WHEN NO RESPONSE OR UNVERIFIED RESPONSE

If Motion Concerns Interrogatories

STEP 33. MOVE TO COMPEL RESPONSES TO INTERROGATORIES WHEN NO RESPONSE OR UNVERIFIED RESPONSE

WHEN APPROPRIATE

Propounding party can move to compel responses under CCP §2030.290 when responding party:

- a. Fails to respond; or
- b. Serves an *unverified* response that is considered failing to respond (see CCP §§2030.250(a), 2030.290); or
- c. Gives wholly evasive answers or frivolous objections, in which event you may choose to:
 - (1) Treat the responses as refusals to answer, and move to compel responses; or
 - (2) Move to compel *further responses*.

Further Research: See *Sinaiko Healthcare Consulting, Inc. v Pacific Healthcare Consultants* (2007) 148 CA4th 390, 409, 55 CR3d 751 (party may not respond to interrogatories just by asserting inability to respond); *Regency Health Servs. v Superior Court* (1998) 64 CA4th 1496, 1504, 76 CR2d 95 (plaintiff's claim of generalized exemption from discovery based on incompetency was "unprecedented and insupportable").

JUDGE'S PERSPECTIVE

Be careful if you choose to treat mixed answers and objections as a refusal, because the court may:

- Disagree with your treatment; and
- Consider your motion to compel untimely as not brought within 45 days of receipt or insufficient (*e.g.*, if no separate statement).

The better practice is to comply with requirements for a motion to compel further responses.

WHEN TO MOVE

Move:

- a. Any time after the failure to respond; but
- b. At least **30 calendar days** before the *initial* trial date (CCP §2024.020(a)).

PREPARE MOVING PAPERS

- a. See steps 9-13, above.
- b. It is good practice, even though not required by CCP §2030.290, to include in your declaration facts showing that you attempted to informally resolve the issues presented. CCP §§2023.010(i), 2023.020.

Sample Forms: For a sample motion to compel, see Appendixes A-D; for sample supporting memorandum and sample declaration, see Civil Discovery §§7.148-7.149.

JUDGE'S PERSPECTIVE

Attach a copy of the interrogatories to your declaration so the court can see that they are not overreaching or otherwise defective.

FILE AND SERVE MOVING PAPERS

See step 23, above.

RETAIN ORIGINALS

Until 6 months after *final* disposition of the case, retain the original of (CCP §2030.280(b)):

- a. Interrogatories;
- b. Proofs of service; and
- c. Responses.

Further Research: For additional discussion of moving to compel responses to interrogatories when no response or unverified response, see CCP §2030.290; Cal Rules of Ct 3.1110, 3.1113, 3.1115. See also Civil Discovery, chaps 7 and 15.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Interrogatories/STEP 34. MOVE TO COMPEL FURTHER RESPONSES FROM PARTY WHO OBJECTED, OR SERVED INADEQUATE OR EVASIVE RESPONSES

STEP 34. MOVE TO COMPEL FURTHER RESPONSES FROM PARTY WHO OBJECTED, OR SERVED INADEQUATE OR EVASIVE RESPONSES

WHEN APPROPRIATE

Propounding party may move for an order compelling further responses if the response (CCP §2030.300(a)):

- a. Is evasive or incomplete;
- b. Unjustifiably exercises the option to produce documents under CCP §2030.230, or inadequately specifies the documents; or
- c. Includes objections that are:
 - (1) Too general; or
 - (2) Without merit.

Further Research: See Coy v Superior Court (1962) 58 C2d 210, 220, 23 CR 393 (interrogatories merited further response); Sinaiko Healthcare Consulting, Inc. v Pacific Healthcare Consultants (2007) 148 CA4th 390, 406, 55 CR3d 751 (party may not respond to interrogatories only by asserting its inability to respond); Hernandez v Superior Court (2003) 112 CA4th 285, 293, 4 CR3d 883 (no claim of privilege concerning existence of document).

DEADLINES TO MOVE

Serve notice of motion after the response and before the trial date. CCP §§1013(a), 2016.050, 2030.300(c).

After the Response

After the response, serve the notice of motion within:

- a. **45 days** after responding party serves the responses if *personally* served; or
- b. If *mailed*:
 - (1) **50 days** if responding party served to your address in California;
 - (2) **55 days** if to your address in another state;
 - (3) **65 days** if to your address outside the United States; or
- c. At a later date if both parties agree in writing.

NOTE

Two additional court days beyond the minimum 45 days are allowed when the responding party served by Express Mail or other method of overnight delivery, or by fax (if the parties have agreed in writing to service by fax). CCP §1013(c), (e). On electronic service, see CCP §1010.6 (see step 23, above).

Before Trial Date

Serve the notice of motion at least **30 days** before the *initial* trial date. CCP §2024.020(a).

EFFECT OF LATE MOTION

If you do not serve the notice of motion within the allotted period (see above):

Waived

Your right to compel any further response is waived. CCP §2030.300(c).

No Extension

a. The deadline is not extended by an attempt to "meet and confer." CCP §2030.300(c); see *Vidal Sassoon, Inc. v Superior Court* (1983) 147 CA3d 681, 683, 195 CR 295.

b. The court will not allow the motion to be served after the 45 days, because the court has:

- (1) No jurisdiction to hear the motion after 45 days have passed; and
- (2) No authority to grant the order.

Further Research: See CCP §2030.300(a); *Sexton v Superior Court* (1997) 58 CA4th 1403, 1410, 68 CR2d 708; *Professional Career Colleges, Inc. v Superior Court* (1989) 207 CA3d 490, 492, 255 CR 5.

PREPARE MOVING PAPERS

See steps 9-13, above.

Declaration

a. Accompany the motion with a declaration stating facts showing your reasonable and good faith attempt to resolve the issue informally. CCP §2030.300(b); for a prepared sample, see Appendix C.

b. If the parties have agreed in writing to an extension of the deadline to move, incorporate the agreement in the declaration and file it with the motion.

JUDGE'S PERSPECTIVE

A writing that sets forth an agreement to extend the time to bring a motion is very important because:

- a. Such an agreement must be in writing (CCP §2031.310(c)); and
- b. Extension is often a matter about which there is disagreement.

Separate Statement

Prepare a separate document (Cal Rules of Ct 3.1345(a), (c)) that sets forth:

- a. The text of the interrogatory;
- b. The text of each response or objection, and any further responses or answers;
- c. A statement of the factual and legal reasons for compelling further responses or answers;
- d. The text of all definitions, instructions, and other matters required to understand each discovery request and responses to it, if necessary;
- e. Any other response and request on which the response is dependent, or, if a reason that further response is deemed necessary is based on the response to another request, the text of the other request and response; and
- f. A summary of pleadings or other documents in the file or other items of discovery relevant to the motion.

NOTE

Interrogatories should be identified by set and number. Cal Rules of Ct 3.1345(d).

Sample Forms: For a sample motion to compel, see Appendixes A-D.

REFERRAL TO DISCOVERY REFEREE

Routine Referrals

Many courts routinely refer discovery disputes to retired judges or attorneys to act as discovery referees. This procedure can be beneficial when the motions are lengthy or the issues involved may consume more time than the trial court can generally afford to give a discovery dispute. See CCP §639; Lu v Superior Court (1997) 55 CA4th 1264, 1269, 64 CR2d 561 (upholding appointment of discovery referee in complex litigation). The disadvantage to this procedure is that discovery referees can be costly.

Cost Issues

If your client cannot afford to pay for a discovery referee, you should object to any assignment. See, e.g., DeBlase v Superior Court (1996) 41 CA4th 1279, 1285, 49 CR2d 229, on criteria to guide the trial court in deciding whether to appoint a discovery referee when a party has claimed indigence. See also, e.g., Taggares v Superior Court (1998) 62 CA4th 94, 102, 72 CR2d 387 (order requiring defendants to finance discovery referee was abuse of discretion; not "fair and reasonable" (CCP §645.1) to require one party to bear full cost based solely on other party's indigent financial status).

FILE AND SERVE MOVING PAPERS

See step 23, above.

RETAIN ORIGINALS

- a. Do not file original interrogatory and response with the court; and
- b. Retain originals until 6 months after final disposition of the action. CCP §2030.280(b).

Further Research: For additional discussion of moving to compel further responses from party who objected or served *inadequate* or evasive responses, see CCP §2030.300; Cal Rules of Ct 3.1110, 3.1113, 3.1115; Civil Discovery, chaps 7 and 15.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Interrogatories/STEP 35. ANY PARTY OR AFFECTED PERSON: MOVE FOR PROTECTIVE ORDER

STEP 35. ANY PARTY OR AFFECTED PERSON: MOVE FOR PROTECTIVE ORDER

WHEN APPROPRIATE

You and any other party or any other affected person may move for an order to protect the moving party from (CCP §2030.090(b)):

- a. Unwarranted annoyance, embarrassment, or oppression; or
- b. Undue burden and expense.

WHAT YOU MAY OBTAIN

If you have shown good cause, the court may order that (CCP §2030.090(b)), *e.g.*:

Not Answered

- a. The interrogatories not be answered at all; and
- b. Deposition used instead; or

Answered With Conditions

- a. You may have a longer period of time to answer;
- b. Certain matters, *e.g.*, trade secrets, not be disclosed; or
- c. Some of the answers be sealed.

WHEN TO MOVE

Move:

- a. Promptly after receiving the interrogatories (CCP §2030.090(a)); and
- b. At least **30 calendar days** before the *initial* trial date (CCP §2024.020(a)).

PREPARE MOVING PAPERS

- a. See steps 9-13, above.
- b. Accompany motion with a declaration stating facts showing your reasonable and good faith attempt to informally resolve the issue presented by the motion. CCP §2030.090(a). See generally step 9, above.

FILE AND SERVE MOVING PAPERS

See step 23, above.

Further Research: For additional discussion of moving for a protective order, see Civil Discovery, chaps 7 and 15.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Production and Inspection/STEP 36. MOVE TO COMPEL PRODUCTION AND INSPECTION WHEN NO RESPONSE, OR WHEN INSPECTION NOT PERMITTED AFTER RESPONSE

If Motion Concerns Production and Inspection

STEP 36. MOVE TO COMPEL PRODUCTION AND INSPECTION WHEN NO RESPONSE, OR WHEN INSPECTION NOT PERMITTED AFTER RESPONSE

WHEN APPROPRIATE

Propounding party may move for an order compelling a response, or inspection, copying, testing, or sampling, if a party (CCP §§2031.300, 2031.320):

- a. Fails to serve a timely response to a demand for inspection, copying, testing, or sampling; or
- b. Serves a response and then fails to permit inspection, copying, testing, or sampling.

NOTE

If the party fails to serve a timely response, that party waives its right to object to the demand for inspection, copying, testing, or sampling, unless the court grants relief from this waiver. CCP §2031.300.

WHEN TO MOVE

Move *any* time after the failure to respond (CCP §2031.310(b)), *except*:

- a. You should do so promptly to avoid a potential claim of waiver; and
- b. At least **30 calendar days** before the *initial* trial date (CCP §2024.020(a)).

PREPARE MOVING PAPERS

- a. See steps 9-13, above;
- b. Accompany motion with declaration stating that (CCP §§2023.010-2023.040, 2031.310(b)):
 - (1) You met requirements of CCP §2031.010;
 - (2) Time for other party to respond has expired;
 - (3) Other party has not responded; and
 - (4) You made a good-faith effort to resolve the dispute informally.

NOTE

Demands for inspection, copying, testing, or sampling should be identified by set and number. Cal Rules of Ct 3.1345(d).

Further Research: See Wellpoint Health Networks, Inc. v Superior Court (1997) 59 CA4th 110, 121, 68 CR2d 844 (defendant employer's broad privilege claim narrowed); Kaiser Found. Hosps. v Superior Court (1998) 66 CA4th 1217, 1228, 78 CR2d 543 (distinguishing Wellpoint and limiting production of documents; plaintiff's claim of waiver of attorney-client and work product privileges rejected). See also Anti-Defamation League of B'nai B'rith v Superior Court (1998) 67 CA4th 1072, 1098, 79 CR2d 597 (under journalist's privilege, limited immunity from invasion of privacy liability for defendants who gathered and disseminated personal information from confidential government records); Wells Fargo Bank v Superior Court (2000) 22 C4th 201, 91 CR2d 716 (attorney-client privilege obtains in confidential communications between fiduciary and attorney); Civil Discovery, chaps 8 and 15.

NOTE

If a party claims attorney-client privilege, the trial court must hold a full hearing with oral argument before ruling on the motion.
Titmas v Superior Court (2001) 87 CA4th 738, 104 CR2d 803.

Sample Forms: For a sample motion to compel, see Appendixes A-D; Civil Discovery §§8.126-8.127.

FILE AND SERVE MOVING PAPERS

See step 23, above.

RETAIN ORIGINALS

Propounding party should retain originals (CCP §2031.290(b)):

- a. Do not file original demand and responses with the court.
- b. Retain originals until 6 months after final disposition of the action.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Production and Inspection/STEP 37. MOVE TO COMPEL FURTHER RESPONSE WHEN ORIGINAL RESPONSE WAS INCOMPLETE, INADEQUATE, OR TOO GENERAL

STEP 37. MOVE TO COMPEL FURTHER RESPONSE WHEN ORIGINAL RESPONSE WAS INCOMPLETE, INADEQUATE, OR TOO GENERAL

WHEN APPROPRIATE

Party demanding production or inspection may move for an order compelling further response if the response (CCP §2031.310(a)):

- a. Is an incomplete statement of compliance;
- b. Is an inadequate, incomplete, or evasive representation of inability to comply; or
- c. Contains nonmeritorious or overly general objections.

DEADLINES TO MOVE

Serve notice of motion after the response and before the trial date.

After the Response

After the response, *or any supplemental response*, serve the notice of motion within (CCP §§1013(a), 2016.050, 2031.310(c)):

- a. **45 days** after responding party serves the responses if *personally* served; or
- b. If *mailed*:
 - (1) **50 days** if responding party served to your address in California;
 - (2) **55 days** if to your address in another state;
 - (3) **65 days** if to your address outside the United States; or
- c. At a later date if both parties agree in writing.

NOTE

Two additional court days beyond the minimum 45 days are allowed when the responding party served by Express Mail or other method of overnight delivery, or for service by fax (if the parties have agreed in writing to service by fax). CCP §1013(c), (e). On electronic service, see CCP §1010.6 (see step 23, above).

A motion for discovery monetary sanctions may be filed separately from a motion to compel. A separate motion for sanctions need not be filed within the 45-day limit set forth in CCP §2031.310(c). London v Dri-Honing Corp. (2004) 117 CA4th 999, 1005, 1007, 12 CR3d 240.

Before Trial Date

Serve the notice of motion at least **30 days** before the *initial* trial date. CCP §2024.020(a).

DEADLINE BASED ON WRITTEN RESPONSE

The deadline for bringing a motion to compel is calculated from the due date of the written response, *not* the date set for the actual production of documents. See Standon Co. v Superior Court (1990) 225 CA3d 898, 902, 275 CR 833.

EFFECT OF LATE MOTION

Waiver

If you do not give notice of motion before deadline to move, you waive any right to compel further responses to the demand. CCP §2031.310(c). See Sexton v Superior Court (1997) 58 CA4th 1403, 68 CR2d 708.

Try Deposition

You *may* be able to avoid the time limit for moving to compel by demanding production of the documents at a *deposition*, an approach that was approved in Carter v Superior Court (1990) 218 CA3d 994, 997, 267 CR 290. Compare *Carter* with Professional Career Colleges, Inc. v Superior Court (1989) 207 CA3d 490, 494, 255 CR 5 (no need to answer interrogatory that duplicated earlier unanswered interrogatory on which no timely motion to compel response was made).

PREPARE MOVING PAPERS

See steps 9-13, above.

Declaration

Accompany motion with declaration setting forth facts showing (CCP §2031.310(b)):

- a. Good cause for discovery that you seek;
- b. That you made reasonable and good faith attempt to resolve issue informally and that issue remains unresolved (see step 9 above; for prepared sample, see Appendix C); and
- c. If parties have agreed in writing to extension of 45-day deadline for filing motion to compel (for deadline to move, see above), incorporate agreement by declaration and file it with motion.

NOTE

Do not incorporate by reference pleadings or other discovery responses. Cal Rules of Ct 3.1345(c).

Sample Forms: For sample motion to compel, see Appendixes A-D. See also Civil Discovery, chap 8 for discussion and a sample form.

NOTE

Demands for inspection, copying, testing, or sampling should be identified by set and number. Cal Rules of Ct 3.1345(d).

FILE AND SERVE MOVING PAPERS

See step 23, above.

RETAIN ORIGINALS

Propounding party should retain originals (CCP §2031.290(b)):

- a. Do not file original demand and responses with the court.
- b. Retain originals until 6 months after final disposition of the action.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Production and Inspection/STEP 38. ANY PARTY OR AFFECTED PERSON: MOVE FOR PROTECTIVE ORDER

STEP 38. ANY PARTY OR AFFECTED PERSON: MOVE FOR PROTECTIVE ORDER

WHEN APPROPRIATE

You and any other party or any other affected person may move for an order to protect the moving party from (CCP §2031.060(b)):

- a. Unwarranted annoyance, embarrassment, or oppression; or
- b. Undue burden and expense.

WHAT YOU MAY OBTAIN

If court finds that you have shown good cause, court may order that (CCP §2031.060(b)), *e.g.*:

- a. All or some of items or categories need not be produced or made available;
- b. You may have longer period of time to respond or produce;
- c. Place of production be other than that specified in demand for inspection, copying, testing, or sampling;
- d. Inspection, copying, testing, or sampling be made only on specified terms and conditions;
- e. Certain matters, *e.g.*, trade secrets, not be disclosed or their dissemination restricted (see, *e.g.*, *Stadish v Superior Court* (1999) 71 CA4th 1130, 84 CR2d 350); or
- f. Some of the documents be sealed.

Protective Order For Electronically Stored Information

You or any other affected person may move for protective order regarding production, inspection, copying, testing, or sampling of electronically stored information on basis that information is from source that is not reasonably accessible because of undue burden or expense. CCP §2031.060(c).

The Court May Order Electronic Discovery If Good Cause Is Shown

The court still may order discovery of electronically stored information that is not reasonably accessible if demanding party shows good cause. CCP §2031.060(d).

The Court May Limit Electronic Discovery

The court may limit frequency or extent of discovery of electronically stored information, even from sources that are reasonably accessible, if (CCP §2031.060(f)):

- a. Information can be obtained from another source that is more convenient, less burdensome, or less expensive;
- b. Discovery sought is unreasonably cumulative or duplicative;
- c. Party seeking discovery has had ample opportunity by discovery to obtain information sought; or
- d. Likely burden or expense of proposed discovery outweighs likely benefit, considering amount in controversy, resources of parties, importance of issues in litigation, and importance of requested discovery in resolving issues.

WHEN TO MOVE

Move:

- a. Promptly after receiving the demand (CCP §2031.060(a)); and

b. At least **30 calendar days** before the *initial* trial date (CCP §2024.020(a)).

PREPARE MOVING PAPERS

Prepare moving papers:

a. See steps 9-13, above.

b. Accompany motion with declaration stating facts showing your reasonable and good faith attempt to informally resolve issue presented by motion. CCP §§2016.040, 2031.060(a).

FILE AND SERVE MOVING PAPERS

File and serve moving papers. See step 23, above.

NOTE

There are special procedures when a party issues a subpoena to obtain certain information, *e.g.*, personal records, electronically stored information, and "personally identifying information" sought in connection with underlying action involving exercise of free speech rights. See, *e.g.*, CCP §§1985.3, 1985.6, 1985.8, 1987.1(b)(5).

PARTY OBJECTING TO SUBPOENA

If you are a party to an action in which a subpoena duces tecum is being served, move before the date of production to quash or modify the subpoena. See CCP §1987.1; *Lee v Swansboro Country Prop. Owners Ass'n* (2007) 151 CA4th 575, 59 CR3d 924.

NONPARTY OBJECTING TO SUBPOENA FOR CONSUMER OR EMPLOYMENT RECORDS

If you are a nonparty, before the date of production serve on the requesting party a written objection that identifies specific grounds for prohibiting the production of the consumer or employment records. CCP §§1985.3(g), 1985.6(f)(2).

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Requests for Admissions/STEP 39. MOVE FOR ORDER THAT MATTERS BE DEEMED ADMITTED WHEN THERE IS NO RESPONSE

If Motion Concerns Requests for Admissions

STEP 39. MOVE FOR ORDER THAT MATTERS BE DEEMED ADMITTED WHEN THERE IS NO RESPONSE

WHEN APPROPRIATE

Move for order when responding party fails to serve a timely response to requests for admissions. CCP §2033.280.

WHAT YOU MAY OBTAIN

If Party Serves Response

If responding party serves a late proposed response *before* the hearing:

- a. The matters are not deemed admitted; but
- b. The court must still impose a monetary sanction against the responding party, the attorney, or both.

If Party Does *Not* Serve Response

If party does not serve response, the court must order (CCP §2033.280):

- a. That matters are deemed admitted; and
- b. Monetary sanctions against the responding party, the attorney, or both. See steps 16-21, above.

WHEN TO MOVE

To obtain an order that matters be deemed admitted when there is no response to your requests for admission:

- a. Move *immediately* after other party fails to respond (CCP §2033.280 does not include time requirements for serving and filing your motion), but:
 - (1) Be aware that you could be wasting time preparing the motion if responding party has served the responses by mail; and
 - (2) Consider telephoning opposing counsel the morning after you should have received responses to make sure a motion is necessary (but your call may alert opposing counsel to prepare and serve late responses); and
- b. Move at least **30 calendar days** before the *initial* trial date. CCP §2024.020(a).

PREPARE MOVING PAPERS

- a. See steps 9-13, above.
- b. In your motion, identify admission requests by set and number. Cal Rules of Ct 3.1345(d).

Further Research: See Civil Discovery, chap 9. See also Wilcox v Birtwhistle (1999) 21 C4th 973, 90 CR2d 260 (former CCP §2033(k) (now CCP §2033.280); "deemed admitted" order construed as an actual written admission for purposes of relief under CCP §2033.300).

Include Proof of Service

Although not expressly required by CCP §2033.280, it is good practice to include copy of proof of service of requests to show that they were in fact served on opposing party.

Include Declaration

Include in your declaration facts showing that (CCP §2033.290(b)):

- a. You complied with CCP §§2033.280-2033.290; and
- b. Responding party did not serve any proposed responses.

FILE AND SERVE MOVING PAPERS

See step 23, above.

RETAIN ORIGINALS

Propounding party should retain originals (CCP §2033.270):

- a. Do not file original demand and responses with court.
- b. Retain originals until 6 months after final disposition of action.

NOTE

The responding party can always defeat the motion by serving proposed responses before the hearing, as long as such responses substantially comply with CCP §2033.220, which requires that each answer be as complete and straightforward as the information reasonably available to the responding party permits. Tobin v Oris (1992) 3 CA4th 814, 828, 4 CR2d 736, disapproved on other grounds in Wilcox v Birtwhistle (1999) 21 C4th 973, 983 n12, 90 CR2d 260.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Requests for Admissions/STEP 40. MOVE TO COMPEL FURTHER RESPONSES TO REQUESTS FOR ADMISSIONS

STEP 40. MOVE TO COMPEL FURTHER RESPONSES TO REQUESTS FOR ADMISSIONS

WHEN APPROPRIATE

Move to compel further responses to requests for admissions when you, representing propounding party, believe that opposing party's timely response to a request for admission (CCP §2033.290(a)):

- a. Is evasive;
- b. Is incomplete; or
- c. Contains a nonmeritorious or overly general objection.

JUDGE'S PERSPECTIVE

Very few judges will compel responses to requests for admissions that are too broad in scope. Avoid this problem by carefully drafting narrow requests.

DEADLINES TO MOVE

Serve notice of motion after the response and before the trial date. CCP §§1013(a), 2016.050, 2033.290(c).

After the Response

After the response, serve the notice of motion within:

- a. **45 days** after responding party served the responses if you were *personally* served; or
- b. If *mailed*:
 - (1) **50 days** if responding party served by mail to your address in California;
 - (2) **55 days** if mailed to your address in another state; or
 - (3) **65 days** if mailed to your address outside the United States; or
- c. At a later date if both parties agree in writing.

NOTE

Two additional court days beyond the minimum 45 days are allowed when the responding party is served by Express Mail or other method of overnight delivery, or for service by fax (if the parties have agreed in writing to service by fax). CCP §1013(c), (e). On electronic service, see CCP §1010.6 (see step 23, above).

Before Trial Date

Serve the notice of motion at least **30 days** before the *initial* trial date. CCP §2024.020(a).

EFFECT OF MISSING DEADLINE

If you do not give notice within the required time period, you waive any right to compel further responses. CCP §2033.290(c).

PREPARE MOVING PAPERS

See steps 9-13, above.

Declaration

Include a declaration stating facts showing (CCP §2033.290(b)):

- a. Your reasonable and good faith attempt to informally resolve the issue, despite which the issue remains unresolved; and
- b. Any written agreement extending the deadline to move, which should be incorporated into the declaration and filed with the motion.

Sample Forms: For a sample declaration, see Appendix C.

Further Research: See Civil Discovery, chaps 9 and 15.

Separate Statement

Prepare a separate document (Cal Rules of Ct 3.1345(a), (c)) that sets forth:

- a. The text of the admission request;
- b. The text of each response or objection, and any further responses or answers;
- c. A statement of the factual and legal reasons for compelling further responses or answers;
- d. The text of all definitions, instructions, and other matters required to understand each discovery request and responses to it, if necessary;
- e. Any other response and request on which the response is dependent, or, if a reason that further response is deemed necessary is based on the response to another request, the text of the other request and response; and
- f. A summary of pleadings or other documents in the file or other items of discovery relevant to the motion.

NOTE

You should set forth each request and each response verbatim. Do not paraphrase or summarize the requests and the responses!

Sample Forms: See Civil Discovery §9.117; Appendix D.

Admission requests should be identified by set and number. Cal Rules of Ct 3.1345(d).

FILE AND SERVE MOVING PAPERS

See step 23, above.

RETAIN ORIGINALS

Propounding party should retain originals (CCP §2033.270):

- a. Do not file original demand and responses with the court.
- b. Retain originals until 6 months after final disposition of the action.

IF PARTY DISOBEYS

If the court compels further responses that opposing party does not subsequently provide, the court may (CCP §2033.290(d)):

- a. *On noticed motion*, order that the matters are deemed admitted; and
- b. Impose a further sanction against the disobedient party, *either*:
 - (1) In addition to the order deeming matters admitted; or
 - (2) Instead of the order deeming matters admitted.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/If Motion Concerns Requests for Admissions/STEP 41. RESPONDING PARTY: MOVE FOR PROTECTIVE ORDER

STEP 41. RESPONDING PARTY: MOVE FOR PROTECTIVE ORDER

WHEN APPROPRIATE

Responding party may move for an order for protection from (CCP §2033.080(a)-(b)):

- a. Unwarranted annoyance, embarrassment, or oppression; or
- b. Undue burden and expense.

WHAT YOU MAY OBTAIN

If you have shown good cause, the court may order that (CCP §2033.080(b)), *e.g.*:

Not Answered

All or some of the requests need not be answered at all;

Answered With Conditions

- a. You may have a longer period of time to answer;
- b. Certain matters, *e.g.*, trade secrets, not be disclosed; or
- c. Some of the answers be sealed.

WHEN TO MOVE

Move:

- a. Promptly after receiving the request (CCP §2033.080(a)); and
- b. At least **30 calendar days** before the *initial* trial date (CCP §2024.020(a)).

PREPARE MOVING PAPERS

- a. See steps 9-13, above.
- b. Accompany motion with a declaration stating facts showing your reasonable and good faith attempt at informally resolving the issue presented by the motion. CCP §2033.080(a).

FILE AND SERVE MOVING PAPERS

See step 23, above.

Further Research: See Civil Discovery, chaps 9 and 15.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/When Compelling Special Limited Civil Case Discovery/STEP 42. MOVE TO COMPEL DISCOVERY OF CASE QUESTIONNAIRE, IF APPROPRIATE

When Compelling Special Limited Civil Case Discovery

STEP 42. MOVE TO COMPEL DISCOVERY OF CASE QUESTIONNAIRE, IF APPROPRIATE

WHEN APPROPRIATE

Move to compel discovery of case questionnaire when opposing party has failed to respond to case questionnaire in a timely or complete manner. CCP §93(e).

NOTE

The methods for compelling other discovery in limited civil cases are the same as those used when compelling discovery in superior court. See CCP §§90, 94.

WHAT YOU MAY OBTAIN

You may obtain an order:

- a. Compelling a response, or a further response; and
- b. For a monetary sanction.

WHEN TO MOVE

Move:

- a. Any time after the failure to respond; and
- b. At least **30 calendar days** before the *initial* trial date (CCP §2024.020(a)).

PREPARE MOVING PAPERS

See steps 9-13, above.

Include Declaration

Show in declaration (under penalty of perjury) that:

- a. You served (CCP §93):
 - (1) A completed case questionnaire with the complaint; and
 - (2) A blank copy of the defendant's case questionnaire;
- b. The time to respond has expired; and
- c. No response was served.

FILE AND SERVE MOVING PAPERS

See step 23, above.

IF PARTY DISOBEYS

If opposing party disobeys an order compelling answers, the court on motion may (CCP §93(e)):

a. Impose issue, evidence, or terminating sanction under CCP §§2023.030(b)-(d); and

b. Instead of *or in addition to* that sanction, impose a monetary sanction under CCP §§2023.010, 2023.020, 2023.030(a), 2023.040.

Further Research: See CCP §§90-97.

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/APPENDIX A Sample Notice of Motion to Compel Production of Documents and Further Responses to Request for Production of Documents

APPENDIX A

Sample Notice of Motion to Compel Production of Documents and Further Responses to Request for Production of Documents

Editor's 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.*

MANATT, PHELPS, ROTHENBERG & PHILLIPS

BARRY S. LANDSBERG (State Bar No. 117284)

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11355 West Olympic Boulevard

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(213) 312-4000

Attorneys for Plaintiff and Cross-Defendant IMC

and Cross-Defendant CENTINELA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IMC,	)	CASE No. C_____
)	
Plaintiff(s)	)	NOTICE OF MOTION AND
	)	MOTION TO COMPEL
vs	)	PRODUCTION OF DOCUMENTS
	)	AND FURTHER RESPONSES TO
MAJOR ASSOCIATION, et al	)	REQUEST FOR PRODUCTION
	)	OF DOCUMENTS FROM MAJOR
Defendant(s)	)	ASSOCIATION, AND FOR
	)	SANCTIONS; MEMORANDUM IN
_____	)	SUPPORT OF MOTION;
AND RELATED CROSS-ACTIONS	)	DECLARATIONS OF BARRY S.
	)	LANDSBERG AND LISA M.
_____	)	ROCKWELL; SEPARATE
	)	STATEMENT
)	
	)	<u>[CCP §§2031.310-2031.320,</u>
	)	<u>2023.010(i), and 2023.020]</u>

DATE: August 3, 2009

TIME: 8:30 a.m.

DEPT.: 24

TRIAL DATE: None

HEARING JUDGE: HONORABLE
ROBERT M. MALLANO

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on August 3, 2009, at 8:30 a.m. or as soon thereafter as counsel may be heard in Department 24 of the Los Angeles County Superior Court, located at 111 N. Hill Street, Los Angeles, California, plaintiff and cross-defendant IMC and cross-defendant CENTINELA (Collectively referred to hereinafter as "CENTINELA") will move the court for : (1) an order compelling defendant, MAJOR ASSOCIATION, to produce documents responsive to the Demand for Inspection and Copying of Documents served by CENTINELA on MAJOR ASSOCIATION on May 29, 2009 (the "Inspection Demand"); (2) an order compelling the MAJOR ASSOCIATION to provide further responses to Inspection Demand; and (3) an order imposing sanctions against MAJOR ASSOCIATION and its counsel in an amount equal to CENTINELA's reasonable expenses, including attorney fees incurred in the amount of \$3,440 in bringing this motion, pursuant to Code of Civil Procedure §§2031.310-2031.320, 2023.010(i), and 2023.020.

This motion is made on the grounds that MAJOR ASSOCIATION has failed and refused to produce documents requested by CENTINELA in the Inspection Demand, failed and refused to provide further responses to the Inspection Demand, and that these failures and refusals are willful and without substantial justification.

This motion is based on this Notice, the attached Memorandum in Support of Motion, the accompanying Separate Statement, the Declarations of Barry S. Landsberg and Lisa M. Rockwell, all the pleadings, records, and papers on file in this action, and on such further oral and documentary evidence as may be presented at the hearing of this motion.

Dated: July 17, 2009.

MANATT, PHELPS, ROTHENBERG & PHILLIPS

LISA M. ROCKWELL

By _____

LISA M. ROCKWELL

Attorneys for Plaintiff and Cross-Defendant IMC and Cross-Defendant

CENTINELA

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/APPENDIX B Sample Memorandum in Support of Motion to Compel Production of Documents and Further Responses to Request for Production of Documents

APPENDIX B

Sample Memorandum in Support of Motion to Compel Production of Documents and Further Responses to Request for Production of Documents

Editor's 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.*

MANATT, PHELPS, ROTHENBERG & PHILLIPS

BARRY S. LANDSBERG (State Bar No. 117284)

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11355 West Olympic Boulevard

Los Angeles, CA 90064

(213) 312-4000

Attorneys for Plaintiff and Cross-Defendant IMC and Cross-Defendant CENTINELA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IMC,	)	No. _____
)	
Plaintiff(s)	)	MEMORANDUM IN SUPPORT
	)	OF PLAINTIFF'S MOTION TO
	)	COMPEL
vs	)	[<u>CCP §§2031.310-2031.320 &</u>
	)	<u>2023.010-2023.040</u>]
)	
MAJOR ASSOCIATION, et al.	)	DATE: August 3, 2009
	)	TIME: 8:30 a.m.
Defendant(s)	)	DEPT.: 24
)	
	)	TRIAL DATE: None
)	
AND RELATED CROSS-ACTIONS	)	HEARING JUDGE: HONORABLE
	)	ROBERT M. MALLANO
_____)	

I.

PRELIMINARY STATEMENT

Plaintiff IMC and cross-defendant Centinela (hereinafter collectively referred to as "CENTINELA") have been put to the regrettable task of requesting this Court's assistance to resolve an impasse between CENTINELA and the defendant MAJOR ASSOCIATION regarding discovery. Specifically, MAJOR ASSOCIATION has refused to produce documents pursuant to an inspection demand propounded by CENTINELA (the "Inspection Demand") on the frivolous ground that CENTINELA granted MAJOR ASSOCIATION total discovery priority in this action. MAJOR ASSOCIATION claims, without any basis in fact or in logic, that CENTINELA agreed to forgo its statutory right to proceed with written discovery in the form of the Inspection Demand so that MAJOR ASSOCIATION can take and complete depositions of certain principals within CENTINELA.

As is set forth below and in the attached declarations of CENTINELA's attorneys, MAJOR ASSOCIATION's brazen attempt to forestall the production of documents required both in the Inspection Demand and by statute is nothing less than an unprincipled attempt to secure unfair litigation advantage by compromising the completeness of the deposition testimony of CENTINELA's key witnesses. Although CENTINELA agreed in good faith to defer proceeding with its own depositions until completion of the depositions which MAJOR ASSOCIATION has noticed, at no time did CENTINELA agree to forgo its

insistence that MAJOR ASSOCIATION comply with the statutory obligation to timely produce the documents requested in CENTINELA's Inspection Demand. On the contrary, the record reflects that MAJOR ASSOCIATION's assertion of a total discovery priority agreement is not to be taken seriously and that its present attempt to evade compliance with CENTINELA's Inspection Demand is an improper manipulation of the discovery process. In addition, MAJOR ASSOCIATION's unalterable commitment to delay production of documents until it takes and completes key depositions is confirmed by MAJOR ASSOCIATION's unwillingness to respond to CENTINELA's efforts to resolve informally the numerous objections to the production of documents which pervade every one of the fifty-nine requests set forth in CENTINELA's Inspection Demand.

Accordingly, CENTINELA respectfully requests the Court to issue an order compelling MAJOR ASSOCIATION to conform to its statutory obligation to respond adequately and to produce documents responsive to CENTINELA's Inspection Demand before MAJOR ASSOCIATION may proceed with the presently noticed depositions.

II.

FACTUAL BACKGROUND OF THE CASE

On April 9, 2009, plaintiff filed its complaint against MAJOR ASSOCIATION and others, claiming, *inter alia*, breaches of contract, fraud, conversion, and tortious interference with contractual relations.

[Omitted here is a brief summary of the allegations in the complaint and cross-complaint, the basis for the claims and defenses, and the identity of the various parties]

III.

THE INSPECTION DEMAND THAT IS THE SUBJECT OF THIS MOTION

CENTINELA propounded a demand for Inspection and Production of Documents to MAJOR ASSOCIATION on May 29, 2009 (the "Inspection Demand"). The Inspection Demand specified that the documents were to be produced on July 6, 2009. The written response, although replete with objections, expressly states that, as to those few requests to which MAJOR ASSOCIATION willingly agreed to produce documents, it would produce them "within the time specified for production." However, MAJOR ASSOCIATION failed to produce documents on July 6 and has since continued to fail to produce the documents.

IV.

MAJOR ASSOCIATION SHOULD BE COMPELLED TO PRODUCE THE DOCUMENTS FORTHWITH.

Code of Civil Procedure §2031.310(d) provides in pertinent part:

[Omitted here is the text of the statute, which was quoted in part]

As mentioned above, MAJOR ASSOCIATION has refused to produce the documents requested in the Inspection Demand. It has become apparent after several letters and phone calls between counsel (which are fully documented in the attached Declaration of Lisa M. Rockwell) that MAJOR ASSOCIATION has refused to produce the documents because of a supposed discovery priority agreement. This claimed agreement is purportedly evidenced by two letters.

[Omitted here is a summary of the letters and their contents]

The specific facts showing good cause are set forth in the accompanying Separate Statement, all of which is incorporated herein by this reference.

V.

MAJOR ASSOCIATION'S WRITTEN RESPONSES TO THE INSPECTION DEMAND ARE IMPROPER.

Code of Civil Procedure §2031.240 provides in pertinent part:

[Omitted here is the text of the statute, which was quoted in full]

MAJOR ASSOCIATION's written responses fail entirely to comply with this statutory requirement. The response contains no description of documents which are being withheld pursuant to any objection. Indeed, the response merely asserts the same boilerplate objections (in varying combinations) to each document request. This clearly is an improper response. Thus, MAJOR ASSOCIATION should be compelled to provide further responses by identifying all documents which fall within each request to which MAJOR ASSOCIATION has objected.

VI.

SANCTIONS SHOULD BE IMPOSED AGAINST MAJOR ASSOCIATION AND ITS COUNSEL.

Sanctions are required to be imposed under at least three statutory provisions. Under Code of Civil Procedure §2031.320, sanctions must be imposed if a party or attorney:

[Omitted here is the text of the statute, which was quoted in part]

MAJOR ASSOCIATION has no justification for refusing to produce the documents requested in the Inspection Demand, since CENTINELA never agreed to delay timely production of the documents.

Code of Civil Procedure §2031.310(h) similarly requires the imposition of sanctions. Section 2031.310(h) mandates the Court to impose sanctions against a party or attorney who:

[Omitted here is the text of the statute, which was quoted in part]

MAJOR ASSOCIATION has no justification for failing to properly identify documents which it is withholding pursuant to objections asserted in response to the Inspection Demand. Further, MAJOR ASSOCIATION has no substantial justification for interposing the objections contained in the Inspection Demand which are the subject of this Motion. Therefore, the Court is obligated to impose sanctions pursuant to Code of Civil Procedure §2031.310(h) against MAJOR ASSOCIATION and its counsel.

Finally, sanctions are warranted under Code of Civil Procedure §§2023.010(i) and 2023.020, which provide:

[Omitted here is the text of the statute, which was quoted in full]

As reflected in the accompanying Declaration of Barry S. Landsberg and Declaration of Lisa M. Rockwell, counsel for MAJOR ASSOCIATION refused to make an attempt to reach an informal resolution of the issues presented by the motion to compel further responses. Landsberg Decl., ¶13, Rockwell Decl., ¶13. Therefore, sanctions must be imposed against counsel for MAJOR ASSOCIATION regardless of the outcome of this Motion.

VII.

CONCLUSION

CENTINELA respectfully requests this Court to order MAJOR ASSOCIATION to produce documents responsive to the Inspection Demand before the deposition of any officer, employee, or other representative of CENTINELA takes place and to further order MAJOR ASSOCIATION to provide further responses to the Inspection Demand.

Dated: July 17, 2009

MANATT, PHELPS, ROTHENBERG & PHILLIPS

BARRY S. LANDSBERG

LISA M. ROCKWELL

BY _____

LISA M. ROCKWELL

Attorneys for Plaintiff and Cross-Defendant IMC and Cross-Defendant

CENTINELA

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/APPENDIX C Sample Declaration in Support of Motion to Compel Production of Documents and Further Responses to Request for Production of Documents

APPENDIX C

Sample Declaration in Support of Motion to Compel Production of Documents and Further Responses to Request for Production of Documents

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MANNATT, PHELPS, ROTHENBERG & PHILLIPS

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11355 West Olympic Boulevard

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Attorney for Plaintiff and Cross-Defendant IMC and

Cross-Defendant CENTINELA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IMC,	)	CASE NO. C_-----
Plaintiff(s))	
	)	DECLARATION OF LISA M.
vs	)	ROCKWELL IN SUPPORT OF
	)	PLAINTIFF'S MOTION TO
	)	COMPEL
MAJOR ASSOCIATION, et al.)	
Defendant(s)	)	DATE: August 3, 2009
	)	TIME: 8:30 a.m.
	)	DEPT.: 24
AND RELATED CROSS-ACTIONS	)	TRIAL DATE: None
_____	)	HEARING JUDGE: HONORABLE
	)	ROBERT M. MALLANO

I, Lisa M. Rockwell, declare as follows:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California and am an associate in the law firm of Manatt, Phelps, Rothenberg & Phillips, attorneys of record for plaintiff IMC and cross-defendant CENTINELA (hereinafter collectively referred to as "CENTINELA").

2. I have personal knowledge of the following facts, and if called as a witness, I could and would competently testify thereto.

3. On May 29, 2009, I caused to be personally served on defendant MAJOR ASSOCIATION a Demand for Inspection and

Production of Documents (the "Inspection Demand"), with a time of production "July 6, 2009 at 10:00 a.m. at the offices of Manatt, Phelps, Rothenberg & Phillips." A true and correct copy of the Inspection Demand is attached hereto as Exhibit A.

4. On or about June 19, 2009, I received the written responses of MAJOR ASSOCIATION to the Inspection Demand. The written responses specify that, as to those categories for which major association will produce documents, MAJOR ASSOCIATION will produce them "within the time specified for production." A true and correct copy of the responses of MAJOR ASSOCIATION which I received are attached hereto as Exhibit B.

5. On July 3, 2009, I spoke with Attorney, counsel for MAJOR ASSOCIATION in this matter, regarding discovery. I sought Attorney's assurance that he would be producing documents on July 6, 2009, the date on which CENTINELA had requested production in its Inspection Demand. Attorney informed me that he would not be producing documents on that date because MAJOR ASSOCIATION had discovery priority. I told Attorney that I was unaware of any priority agreement, but that I would discuss it with Barry Landsberg of our office, the attorney with whom Attorney had earlier spoken. When I spoke with Mr. Landsberg, he informed me that no discovery priority agreement existed with respect to the Inspection Demand. I then sent a letter by facsimile to Attorney explaining this, and extending the date for production of documents to Thursday, July 9, 2009. A true and correct copy of my July 6, 2009, letter to Attorney is attached hereto as Exhibit C.

6. On July 9, 2009, I spoke with Attorney by telephone. He informed that he had received my letter, and that nevertheless, MAJOR ASSOCIATION would not produce documents that day or, in fact, any day, until the depositions he had noticed on June 22 had been completed.

[Omitted here are paragraphs 7-10. They set forth the numerous telephone calls, letters, and facsimiles (including an offer by the moving party to complete the noticed depositions and extend the time to produce the documents) that were exchanged before the motion to compel was made.]

11. As of the date of this declaration, MAJOR ASSOCIATION has not produced any documents to CENTINELA.

12. On July 13, 2009, Mr. Landsberg and I spoke with Attorney in an attempt to "meet and confer" regarding the objections which MAJOR ASSOCIATION asserted in its written response to the Inspection Demand in order that CENTINELA could bring a motion to compel further responses, if necessary. The substance of that telephone conversation is accurately set forth in paragraph 14 of the Declaration of Barry S. Landsberg filed herewith.

13. The hourly billing rate for attorney time expended by Mr. Landsberg and myself is \$205 and \$180, respectively. Mr. Landsberg and I have expended _____ and _____ hours, respectively, in preparing the foregoing motion. These hours do not include the time we will be required to expend in preparing a reply in support of this motion and to attend the hearing. At present, I anticipate that Mr. Landsberg and I will expend approximately _____ and _____ hours, respectively, for these tasks. Accordingly, while more precise proof of our attorney fees and expenses will be set forth in our reply in support of this motion, we request sanctions in the amount of \$_____ in this matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this _____ day of July 2009 at Los Angeles, California.

LISA M. ROCKWELL

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/APPENDIX D Sample Separate Statement in Support of Motion to Compel Production of Documents and Further Responses to Request for Production of Documents

APPENDIX D

Sample Separate Statement in Support of Motion to Compel Production of Documents and Further Responses to Request for Production of Documents

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MANNATT, PHELPS, ROTHENBERG & PHILLIPS

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11355 West Olympic Boulevard

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(213) 312-4000

Attorney for Plaintiff and Cross-Defendant IMC and

Cross-Defendant CENTINELA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IMC,	)	CASE NO. C_____
Plaintiff(s)	)	SEPARATE STATEMENT IN SUPPORT
vs	)	OF PLAINTIFF'S MOTION TO
MAJOR ASSOCIATION, et al.	)	COMPEL PRODUCTION OF
Defendant(s)	)	DOCUMENTS AND FURTHER
_____	)	RESPONSES TO REQUEST FOR
AND RELATED CROSS-ACTIONS	)	PRODUCTION OF DOCUMENTS
_____	)	DATE: August 3, 2009
	)	TIME: 8:30 a.m.
	)	DEPT.: 24
	)	TRIAL DATE: None
	)	HEARING JUDGE: HONORABLE
	)	ROBERT M. MALLANO
)	

REQUEST NO. 1:

All correspondence, memoranda, writings, or other DOCUMENTS that reflect, refer, or relate to any communication between MAJOR ASSOCIATION and any MAJOR ASSOCIATION player regarding the 2006 CENTINELA CLASSIC.

RESPONSE TO REQUEST NO 1:

MAJOR ASSOCIATION objects to Plaintiff's Request No. 1 on the grounds set out in objections 1 through 6 above, incorporated by this reference, and on the additional grounds that it seeks privileged information protected by the common law right of privacy and is overbroad and unduly burdensome. Without waiver of said objections, MAJOR ASSOCIATION will produce the requested documents to the extent that the documents requested exist, are not privileged, and/or that it can locate and assemble the documents within the time specified for production.

FACTUAL AND LEGAL REASONS FOR COMPELLING FURTHER RESPONSE TO REQUEST NO. 1:

MAJOR ASSOCIATION has agreed to produce documents responsive to this request, subject to objections. However, to the extent that full production of documents is compromised by these objections, CENTINELA submits the following arguments.

MAJOR ASSOCIATION's objections to this request on the grounds that the request invades the common law right of privacy and is overbroad and burdensome are improper. First, MAJOR ASSOCIATION fails to identify whose right of privacy purportedly will be violated. If MAJOR ASSOCIATION means that MAJOR ASSOCIATION's right of privacy will be violated, then the objection is without merit because it is not at all clear that a corporation has a right of privacy. See *Roberts v Gulf Oil Corp.* (1983) 147 CA3d 770, 793. However, even if a corporation did have a right of privacy, it most likely would not be in documents such as those requested, but rather in books and proprietary information of the corporation. *Id.* Thus, MAJOR ASSOCIATION's right of privacy is not a valid objection to this request. Further, if the objection means that the players' rights to privacy will be violated, the objection is equally without merit. The request does not seek financial, medical, insurance, or other types of information which might be considered subject to a right of privacy. See *Code of Civil Procedure §1985.3*. Without further explanation or declaration by MAJOR ASSOCIATION, the purported right to privacy does not appear to apply to the requested documents.

The overbroad and burdensome objection is patently without merit. The request specifies documents relating to communications between MAJOR ASSOCIATION and its players regarding the 2006 CENTINELA CLASSIC tournament. This is a specific category of documents, the production of which would not be burdensome.

TEXT OF ALL DEFINITIONS, INSTRUCTIONS, AND OTHER MATTERS REQUIRED TO UNDERSTAND REQUEST NO. 1:

[Omitted here is the text of definitions, instructions, and other matters required to understand the discovery request and the response to it]

TEXT OF OTHER DISCOVERY RESPONSES ON WHICH THE ANSWER TO THIS ONE IS DEPENDENT:

[Omitted here is the text of other discovery responses on which the answer to this one is dependent]

[Omitted here are Requests 2-12, Responses to Requests 2-12, and the Factual and Legal Reasons for Compelling Further Responses to Requests 2-12]

REQUEST NO. 13:

All correspondence, memoranda, writings, or other DOCUMENTS that reflect, refer, or relate to any communication from and including January 1, 2005, to the present between MAJOR ASSOCIATION and any individual or entity, including without limitation, KIMBLE, PATTERSON, AJ SPORTS, and Angus MacKenzie regarding a MAJOR ASSOCIATION sanctioned golf tournament planned or considered at Wood Ranch Country Club in California.

RESPONSE TO REQUEST NO. 13:

MAJOR ASSOCIATION objects to Plaintiff's Request No. 13 on the grounds set out in objections 1 through 6 above, incorporated by this reference, and on the additional grounds that it seeks information not relevant to the subject matter of this action or reasonably calculated to lead to the discovery of admissible evidence, that it seeks information privileged and protected by the common law right of privacy, and seeks information of a sensitive nature to competitors of CENTINELA, and that production of said documents would be unreasonably burdensome.

FACTUAL AND LEGAL REASONS FOR COMPELLING FURTHER RESPONSE TO REQUEST NO. 13:

This request seeks documents that are relevant to this action and reasonably calculated to lead to the discovery of admissible evidence. CENTINELA has alleged that MAJOR ASSOCIATION breached the covenant of good faith and fair dealing which it had with close proximity, both temporally and geographically, with the CENTINELA CLASSIC. MAJOR ASSOCIATION's participation in this other tournament caused CENTINELA to suffer damages as title sponsor of the CENTINELA CLASSIC. CENTINELA is entitled to discover whether MAJOR ASSOCIATION participated, discussed, or agreed to sanction other tournaments that similarly damaged CENTINELA. Further, the documents sought are not protected by any right to privacy. As stated above, MAJOR ASSOCIATION may not even have a common law right to privacy, and even if it did, it would not apply to the requested documents. Alternatively, if MAJOR ASSOCIATION's objection based upon privacy is directed to others who may have made the communications which were documented, the objection still does not apply.

MAJOR ASSOCIATION's objections to this request on the grounds that the request invades the common law right of privacy and is overbroad and burdensome are improper. First, MAJOR ASSOCIATION fails to identify whose right of privacy purportedly will be violated. If MAJOR ASSOCIATION means that MAJOR ASSOCIATION's right of privacy will be violated, then the objection is without merit because it is not at all clear that a corporation has a right of privacy. See *Roberts v Gulf Oil Corp.* (1983) 147 CA3d 770, 793. However, even if a corporation did have a right of privacy, it most likely would not be in documents such as those requested, but rather in books of the corporation. *Id.* Thus, MAJOR ASSOCIATION's right of privacy is not a valid objection to this request. Further, if the objection means that the players' rights to privacy will be violated, the objection is equally without merit. The request does not seek financial, medical, insurance or other types of information which might be considered subject to a right of privacy. See *Code of Civil Procedure §1985.3*. Without further explanation or

declaration by MAJOR ASSOCIATION, the purported right to privacy does not appear to apply to the requested documents.

The third objection, that the request seeks information of a sensitive nature to *competitors of CENTINELA*, is also improper. It is not clear how letters or other documented communications between MAJOR ASSOCIATION and its players could prove to be of a sensitive nature to CENTINELA's competitors. CENTINELA is aware of no authority to justify the withholding of responsive documents on the basis of a purported claim that the documents reflect information of a "sensitive nature" to the requesting party's own competitive interests.

Finally, the production of documents would not be unreasonably burdensome as the request seeks only documents pertaining to one specific tournament.

TEXT OF ALL DEFINITIONS, INSTRUCTIONS, AND OTHER MATTERS REQUIRED TO UNDERSTAND REQUEST NO. 1:

[Omitted here is the text of definitions, instructions, and other matters required to understand the discovery request and the response to it]

TEXT OF OTHER DISCOVERY RESPONSES ON WHICH THE ANSWER TO THIS ONE IS DEPENDENT:

[Omitted here is the text of other discovery responses on which the answer to this one is dependent]

[Omitted here are Requests 14-24, Responses to Requests 14-24, and the Factual and Legal Reasons for Compelling Further Responses to Requests 14-24]

REQUEST NO. 25:

All correspondence, memoranda, writings, or other DOCUMENTS that reflect, refer, or relate to the 2007 or 2008 CENTINELA CLASSIC.

RESPONSE TO REQUEST NO. 25:

MAJOR ASSOCIATION objects to Plaintiff's Request No. 25 on the grounds set out in objections 1 through 6 above, incorporated by this reference, and on the additional grounds that it is overbroad and seeks information privileged and protected by the common-law right of privacy. Without waiver of said objections, to the extent that such documents are produced in response to Requests directed to the said tournaments, MAJOR ASSOCIATION will produce the requested documents to the extent that the documents requested exist, are not privileged, and/or that it can locate the documents within the time specified for production.

FACTUAL AND LEGAL REASONS FOR COMPELLING FURTHER RESPONSE TO REQUEST NO. 25:

MAJOR ASSOCIATION has agreed to produce documents responsive to this request, subject to objections. However, to the extent that full production of documents is compromised by these objections, CENTINELA submits the following arguments.

The request is not overbroad. Indeed, it requests documents relating directly to the very golf tournaments which are the subject of the disputes in this action. Further, it does not seek privileged or private information. Again, MAJOR ASSOCIATION has failed to identify, and CENTINELA cannot conceive of, any privilege which would apply to these documents (other than those asserted in MAJOR ASSOCIATION's general objections, *i.e.*, attorney-client and work product). It is equally unclear how the right to privacy constitutes a viable objection to the request. MAJOR ASSOCIATION should be compelled to identify all documents it is withholding pursuant to these objections.

TEXT OF ALL DEFINITIONS, INSTRUCTIONS, AND OTHER MATTERS REQUIRED TO UNDERSTAND REQUEST NO. 1:

[Omitted here is the text of definitions, instructions, and other matters required to understand the discovery request and the response to it]

TEXT OF OTHER DISCOVERY RESPONSES ON WHICH THE ANSWER TO THIS ONE IS DEPENDENT:

[Omitted here is the text of other discovery responses on which the answer to this one is dependent]

[Omitted here are Requests 26-48, Responses to Requests 26-48, and the Factual and Legal Reasons for Compelling Further Responses to Requests 26-48]

REQUEST NO. 49:

All correspondence, memoranda, writings, or other DOCUMENTS that reflect, refer, or relate to any attempt, plan, or intention by MAJOR ASSOCIATION to mitigate the damages it claims in the cross-complaint on file herein.

RESPONSE TO REQUEST NO. 49:

MAJOR ASSOCIATION objects to Plaintiff's Request No. 49 on the grounds set out in objections 1 through 6 above, incorporated by this reference, and on the grounds that it calls for legal conclusions and attorney work product. Without waiver of said objections or any of them, MAJOR ASSOCIATION further answers and states that some or all of the documents to be produced by MAJOR ASSOCIATION in response to Plaintiff's requests do or may support this claim.

FACTUAL AND LEGAL REASONS FOR COMPELLING FURTHER RESPONSE TO REQUEST NO. 49:

MAJOR ASSOCIATION's response to this request is improper. MAJOR ASSOCIATION states that some of the documents it promises to produce in response to other requests support the other cross-complaint allegation identified in this request. This response is useless to CENTINELA. Code of Civil Procedure §2031.210(a) requires that the responding party respond that it will comply with the demand, is unable to comply, or objects to compliance. The responding party cannot respond that it will produce *some* documents that are responsive. Therefore, MAJOR ASSOCIATION should be compelled to further respond to this request by stating that it will produce *all* documents responsive to the request.

TEXT OF ALL DEFINITIONS, INSTRUCTIONS, AND OTHER MATTERS REQUIRED TO UNDERSTAND REQUEST NO. 1:

[Omitted here is the text of definitions, instructions, and other matters required to understand the discovery request and the response to it]

TEXT OF OTHER DISCOVERY RESPONSES ON WHICH THE ANSWER TO THIS ONE IS DEPENDENT:

[Omitted here is the text of other discovery responses on which the answer to this one is dependent.]

[Omitted here are Requests 49-59, Responses to Requests 49-59, and the Factual and Legal Reasons for Compelling Further Responses to Requests 49-59.]

Dated: _ _ _ _ _

MANATT, PHELPS, ROTHENBERG & PHILLIPS

BARRY S. LANDSBERG (State Bar No. 117284)

LISA M. ROCKWELL (State Bar No. 123141)

By _____

LISA M. ROCKWELL

Attorneys for Plaintiff IMC

and Cross-Defendant CENTINELA

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/APPENDIX E Chart of Discovery Statutes Providing Sanctions

APPENDIX E

Chart of Discovery Statutes Providing Sanctions

ACTION(S) SANCTIONED	STATUTE (CCP)	SANCTION	MANDATORY?*	AVAILABLE AGAINST
1. Scope of Discovery				
Unsuccessfully making or opposing motion for protective order	<u>§2017.020(b)</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing discovery motion in sexual harassment, sexual assault, or sexual battery case	<u>§2017.220(b)</u>	Monetary	Yes	Losing party, person, or attorney
2. Method of Discovery				
Unsuccessfully making or opposing motion for protective order	<u>§2019.030(a)(2)</u>	Monetary	Yes	Losing party, person, or attorney
3. Discovery Process				
Misuse of discovery process: failure to confer	<u>§§2023.010(i)-2023.020</u>	Monetary	Yes	Party or attorney
Misuse of discovery process	<u>§2023.030</u>	Issue, evidence, terminating, and/or monetary, contempt	No	Party, person, or attorney
4. Depositions				
Nonparty deponent disobeys deposition subpoena	<u>§2020.240</u>	Contempt; forfeiture and damages under <u>CCP §1992</u>	No	Disobedient deponent
Unsuccessfully making or opposing motion to increase deposition travel limits	<u>§2025.260(d)</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing motion to quash deposition notice	<u>§2025.410(d)</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing motion for protective order	<u>§2025.420(d)</u>	Monetary	Yes	Losing party, person, or attorney
Party noticing deposition fails to attend or proceed	<u>§2025.430</u>	Monetary	Yes	Party or attorney, or both, who failed to attend or proceed
Party failed to serve required deposition subpoena on deponent, who then fails to appear	<u>§2025.440(a)</u>	Monetary	Yes	Party or attorney, or both, who failed to serve
Deponent served fails to attend or refuses to be sworn	<u>§2025.440(b)</u>	Contempt; forfeiture and damages under <u>CCP §1992</u> (see <u>CCP §2020.240</u>)	No	Deponent
Unsuccessfully opposing motion to compel attendance, testimony, and production of documents	<u>§2025.450(c)</u>	Monetary	Yes	Deponent or party with whom deponent affiliated
Deponent fails to attend, to proceed, or to produce	<u>§2025.450(c)</u>	Monetary	Yes	Deponent (Note: Sanction available in favor of any

Failing to obey order compelling attendance, testimony, and/or production at deposition	<u>§2025.450(d)</u>	"Just orders," including issue, evidence, terminating, and/or monetary	No	other party (<i>i.e.</i> , nonnoticing party) who attended in expectation that deposition would be taken) Disobedient party or party-affiliated deponent
Unsuccessfully making or opposing motion for protective order made after deposition begun	<u>§2025.420(d)</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing motion to compel answer or production at deposition	<u>§2025.480(f)</u>	Monetary	Yes	Losing party, person, or attorney
Deponent failing to obey order made under <u>CCP §2025.480(d)</u>	<u>§2025.480(g)</u>	Contempt; "just orders," including issue, evidence, terminating, and/or monetary	No	Disobedient deponent, or if a party or officer, director, managing agent, or employee of party, the party with whom disobedient deponent is affiliated
Unsuccessfully making or opposing motion to suppress stenographically recorded deposition	<u>§2025.520(h)</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing motion to suppress audiotaped or videotaped deposition	<u>§2025.530(f)</u>	Monetary	Yes	Losing party, person, or attorney
5. Written Depositions				
Unsuccessfully making or opposing motion to sustain objection	<u>§2028.040(c)</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing motion to overrule objection	<u>§2028.050(c)</u>	Monetary	Yes	Losing party, person, or attorney
6. Interrogatories				
Unsuccessfully making or opposing motion for protective order	<u>§2030.090(d)</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing motion compelling answer	<u>§2030.290(c)</u>	Monetary	Yes	Losing party, person, or attorney
Failing to obey order compelling answers	<u>§2030.290</u>	"Just orders," including issue, evidence, terminating, and/or monetary	No	Disobedient party
Unsuccessfully making or opposing motion to compel further responses	<u>§2030.300(d)-(e)</u>	Monetary	Yes	Losing party, person, or attorney
Failing to obey order compelling further answers	<u>§2030.300(d)-(e)</u>	"Just orders," including issue, evidence, terminating, and/or monetary	No	Disobedient party

Amending answer to interrogatory	<u>§2030.310</u>	Initial answer deemed binding	Yes, unless requirements specified in <u>CCP §2030.310</u> are met	Party who amended
Unsuccessfully making or opposing motion to deem initial answer binding	<u>§2030.310(d)</u>	Monetary	Yes	Losing party, person, or attorney
7. Production/Inspection, Copying, Testing, or Sampling				
Unsuccessfully making or opposing motion for protective order	<u>§2031.060(h)</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing motion compelling responses	<u>§2031.300(c)</u>	Monetary	Yes	Losing party, person, or attorney
Failing to obey order compelling responses	<u>§2031.300(c)</u>	"Just orders," including issue, evidence, terminating, and/or monetary	No	Disobedient party
Unsuccessfully making or opposing motion to compel further responses	<u>§2031.310(h)</u>	Monetary	Yes	Losing party, person, or attorney
Failing to obey order compelling further responses	<u>§2031.310(i)</u>	"Just orders," including issue, evidence, terminating, and/or monetary	No	Disobedient party
Unsuccessfully making or opposing motion to compel compliance with demand for inspection, copying, testing, or sampling	<u>§2031.320(b)</u>	Monetary	Yes	Losing party, person, or attorney
Failing to obey order compelling inspection, copying, testing, or sampling	<u>§2031.320(c)</u>	"Just orders," including issue, evidence, terminating, and/or monetary	No	Disobedient party
8. Physical/Mental Exams				
Unsuccessfully making or opposing motion to compel response and compliance	<u>§2032.240(c)</u>	Monetary	Yes	Losing party, person, or attorney
Failing to obey order compelling response and compliance	<u>§2032.240(d)</u>	"Just orders," including issue, evidence, terminating, and/or monetary	No	Disobedient party
Unsuccessfully making or opposing motion to compel compliance	<u>§2032.250(d)</u>	Monetary	Yes	Losing party, person, or attorney
Party failing to submit to required exam	<u>§2032.410</u>	"Just orders," including issue, evidence, terminating, and/or monetary	No	Party failing to submit
Party failing to produce another for required exam, unless inability to	<u>§2032.410</u>	"Just orders," including issue, evidence,	No	Party failing to produce another

produce person is demonstrated		terminating, and/or monetary		
Unsuccessfully making or opposing motion for protective order after exam begun	<u>§2032.510(f)</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing motion to compel delivery of medical records demanded under CCP	<u>§2032.620(b)</u>	Monetary	Yes	Losing party, person, or attorney
Failing to obey order compelling delivery	<u>§2032.620(c)</u>	"Just orders," including issue, evidence, terminating, and/or monetary	No	Disobedient party
Failing to provide report	<u>§2032.620(a)</u>	Exclude at trial testimony of examiner whose report not provided	Yes	Party failing to provide report
Unsuccessfully making or opposing motion to compel delivery of medical reports under CCP	<u>§2032.650(b)</u>	Monetary	Yes	Losing party, person, or attorney
Failing to obey an order compelling delivery	<u>§2032.650(c)</u>	"Just orders," including issue, evidence, terminating, and/or monetary	No	Disobedient party
Failing to provide report	<u>§2032.650(a)</u>	Exclude at trial testimony of health care practitioner whose report not provided	Yes	Party failing to provide report
9. Requests for Admission				
Unsuccessfully making or opposing motion for protective order	<u>§2033.080(d)</u>	Monetary	Yes	Losing party, person, or attorney
Failing to serve timely response to requests	<u>§2033.280(c)</u>	Monetary	Yes†	Party or attorney, or both
Failing to serve response by hearing date	<u>§2033.280(c)</u>	Genuineness of documents and truth of specified matter deemed admitted	Yes, unless requirements specified in <u>§§2033.210-2033.230</u> are met	Party
Unsuccessfully making or opposing motion to compel further response	<u>§2033.290(d)</u>	Monetary	Yes	Losing party, person, or attorney
Failing to obey order compelling further response	<u>§2033.290(e)</u>	Matters deemed admitted and/or monetary sanction	No	Disobedient party
Moving to withdraw or amend admission	<u>§2033.300(c)</u>	Just order, including order that costs of additional discovery be	No	Moving party

Failing to admit, and requesting party later proves	<u>§2033.420</u>	borne by moving party Responding party to pay reasonable expenses, including attorney fees, incurred in making proof	Yes, unless requirements specified in <u>§2033.420(b)</u> met	Party failing to admit
10. Expert Witnesses				
Unsuccessfully making or opposing motion for protective order	<u>§2034.250</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing motion to set expert witness fees	<u>§2034.470(g)</u>	Monetary	Yes	Losing party, person, or attorney
Unreasonably failing to comply with <u>CCP §2034.300(a)-(d)</u>	<u>§2034.300</u>	Exclude expert opinion from evidence	Yes, except as provided in <u>CCP §§2034.310, 2034.610, 2034.730</u>	Party failing to comply
Unsuccessfully making or opposing motion to augment or amend expert witness information	<u>§2034.630</u>	Monetary	Yes	Losing party, person, or attorney
Unsuccessfully making or opposing motion to submit tardy expert witness information	<u>§2034.730</u>	Monetary	Yes	Losing party, person, or attorney
11. Extending or Reopening Discovery				
Unsuccessfully making or opposing motion to extend or reopen discovery	<u>§2024.050(c)</u>	Monetary	Yes	Losing party, person, or attorney

*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.

†CCP §2033.280(c) provides that monetary sanctions for failure to timely respond are "mandatory," *i.e.*, the court does *not* have discretion to deny sanctions because of justification.

7.12 LITIGATION CONDUCT

The following "guidelines" adopted by the Los Angeles County Bar Association are adopted as civility in litigation recommendations to members of the bar.

(a) Continuances and Extensions of Time.

(1) First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted as a matter of courtesy unless time is of the essence. A first extension should be allowed even if the counsel requesting it has previously refused to grant an extension.

(2) After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

(3) A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."

(4) A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.

(5) A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions. A lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.

(b) Service of Papers.

(1) The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

(2) Papers should not be served sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.

(3) Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

(4) Service should be made personally or by facsimile transmission when it is likely that service by mail, even when allowed, will prejudice the opposing party.

(c) Written Submissions to a Court, Including Briefs, Memoranda, Affidavits, and Declarations.

(1) Written briefs or memoranda or points and authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical, economic, or sociological data if such data appear in or are derived from generally available sources.

(2) Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

(d) Communications With Adversaries.

(1) Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.

(2) Letters should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.

(3) Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances.

(4) Unless specifically permitted or invited by the court, letters between counsel should not be sent to judges.

(e) Depositions.

(1) Depositions should be taken only where actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense.

(2) In scheduling depositions, reasonable consideration should be given to accommodating schedules or opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.

(3) When a deposition is noticed by another party in the reasonably near future, counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.

(4) Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.

(5) Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.

(6) Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.

(7) Counsel defending a deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought.

(8) While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers.

(9) Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass.

(10) Counsel for all parties should refrain from self-serving speeches during depositions.

(11) Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

(f) Document Demands.

(1) Demands for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.

(2) Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case.

(3) In responding to document demands, counsel should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure.

(4) Documents should be withheld on the grounds of privilege only where appropriate.

(5) Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.

(6) Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

(g) Interrogatories.

(1) Interrogatories should be used sparingly and never to harass or impose undue burden or expense on adversaries.

(2) Interrogatories should not be read by the recipient in an artificial manner designed to assure that answers are not truly responsive.

(3) Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

(h) Motion Practice.

(1) Before filing a motion, counsel should engage in more than a mere pro forma discussion of its purpose in an effort to resolve the issue.

(2) A lawyer should not force his or her adversary to make a motion and then not oppose it.

(i) Dealing with Non-Party Witness.

(1) Counsel should not issue subpoenas to nonparty witnesses except in connection with their appearance at a hearing, trial or deposition.

(2) Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel.

(3) Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made available to the adversary at his or her expense even if the deposition is canceled or adjourned.

(j) Ex Parte Communications with the Court.

(1) A lawyer should avoid ex parte communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending.

(2) Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application.

(3) Where the rules permit an ex parte application or communication to the court in an emergency situation, a lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there is a bona fide emergency such that the lawyer's client will be seriously prejudiced by a failure to make the application or communication on regular notice.

(k) Settlement and Alternative Dispute Resolution.

(1) Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.

(2) Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

(3) In every case, counsel should consider and discuss with the client whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

(4) Counsel are encouraged to discuss the various ADR processes with their clients and explain the confidentiality and nonbinding nature of the selected process.

(5) The court ADR program may be used for 1 pro bono ADR process through an ADR hearing. The court ADR program is available for an additional ADR process, if the parties want to retain the court ADR Neutral on a private basis.

(l) Trials and Hearings.

(1) Counsel should be punctual and prepared for any court appearance.

(2) Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility.

Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/TABLE OF STATUTES, REGULATIONS, AND RULES

TABLE OF STATUTES, REGULATIONS, AND RULES

CALIFORNIA

Statutes

BUSINESS AND PROFESSIONS CODE

6086.7(a)(3): [Step 16](#)

CODE OF CIVIL PROCEDURE

90: [Step 42](#)

90-97: [Step 42](#)

93: [Step 42](#)

93(e): [Step 42](#)

94: [Step 42](#)

128.5: [Step 16](#)

128.6: [Step 16](#)

128.7: [Step 16](#)

128.7(c)(1): [Step 16](#)

170.6: [Step 4](#)

177.5: [Step 17](#)

412.20: [Step 4](#)

638: [Step 4](#)

639: [Steps 4, 34](#)

645.1: [Step 34](#)

1005(b): [Steps 4, 23-25](#)

1005(c): [Steps 24-25](#)

1010: [Step 23](#)

1010-1011: [Step 23](#)

1010.6: [Steps 24-25, 28, 34, 37, 40](#)

1010.6(a)(6): [Step 23](#)

1013: [Steps 10, 23, 28](#)

1013(a): [Steps 34, 37, 40](#)

1013(c): [Steps 34, 37, 40](#)

1013(e): [Steps 34, 37, 40](#)

1209: [Step 21](#)

1211: [Step 21](#)

1212: [Step 21](#)

1218: [Step 21](#)

1283.05: [Step 9](#)

1985.3: [Step 38](#), [App D](#)

1985.3(g): [Step 38](#)

1985.6: [Step 38](#)

1985.6(f)(2): [Step 38](#)

1985.8: [Step 38](#)

1985.8(l)(1): [Step 17](#)

1985.8(l)(2): [Step 17](#)

1987.1: [Step 38](#)

1987.1(b)(5): [Step 38](#)

1991: [Step 31](#)

1991.1: [Step 21](#)

1991.2: [Step 31](#)

1992: [Step 21](#), [App E](#)

2015.5: [Step 13](#)

2016.010-2036.050: [Steps 4](#), [9](#), [17](#)

2016.030: [Step 10](#)

2016.040: [Step 38](#)

2016.050: [Steps 28](#), [34](#), [37](#), [40](#)

2017(d) (former): [Step 32](#)

2017.020(b): [Step 32](#), [App E](#)

2017.220(b): [App E](#)

2019.030(a)(2): [App E](#)

2020.040: [Step 31](#)

2020.220(c): [Step 31](#)

2020.240: [Steps 21](#), [31](#), [App E](#)

2023.010: [Steps 17](#), [20](#), [26](#), [42](#)

2023.010-2023.040: [Steps 16](#), [19](#), [21](#), [30-31](#), [36](#), [App B](#)

2023.010(i): [Steps 7](#), [13](#), [17-18](#), [33](#), [App A](#), [App B](#)

2023.010(i)-2023.020: Step 7, App E

2023.020: Steps 7, 13, 17-18, 33, 42, Apps A-B

2023.030: Steps 11, 13, 16, 31, App E

2023.030(a): Steps 16-17, 42

2023.030(b): Step 16

2023.030(b)-(d): Step 42

2023.030(c): Step 16

2023.030(d): Step 16

2023.030(e): Steps 16, 21, 31

2023.040: Steps 11-13, 18-19, 30, 42

2024.020: Step 21

2024.020(a): Steps 10, 21-22, 26-27, 29-42

2024.020(b): Step 10

2024.040(a): Step 10

2024.040(b): Step 10

2024.050: Steps 10, 22

2024.050-2024.060: Steps 10, 26

2024.050(c): App E

2024.060: Steps 27, 29

2025.010-2025.620: Step 9

2025.210(a): Step 28

2025.210(b): Step 28

2025.220(a): Step 26

2025.230: Steps 27, 30

2025.250: Steps 26, 32

2025.250(a): Step 29

2025.250(b): Step 29

2025.250(c)-(d): Step 29

2025.260(a)-(b): Step 29

2025.260(b): Step 29

2025.260(c): Step 29

2025.260(d): App E

2025.270: Step 28

2025.270(d): Step 28

2025.410: Steps 9, 30

2025.410(a): Step 26

2025.410(b): Step 26

2025.410(c): Steps 7, 13, 26, 32

2025.410(d): App E

2025.420: Steps 9, 26

2025.420(a): Step 32

2025.420(b)(1)-(16): Step 32

2025.420(b)(6): Step 32

2025.420(d): Step 32, App E

2025.430: App E

2025.440(a): Step 21, App E

2025.440(b): App E

2025.450: Steps 9, 11

2025.450(a): Step 30

2025.450(b): Step 30

2025.450(c): App E

2025.450(d): App E

2025.460(d): Step 31

2025.470: Step 32

2025.480: Steps 7, 9, 13, 31

2025.480(a): Steps 30, 31

2025.480(b): Steps 7, 31

2025.480(c): Step 31

2025.480(d): Step 31, App E

2025.480(f): Step 31, App E

2025.480(g): Step 31, App E

2025.520(h): App E

2025.530(f): App E

2025.610: Step 27

2025.610(b): Step 27

2025.610(c)(1): Step 27

2026.010(b): Step 29

2026.010(b)(2): Steps 29-30

2026.030: Step 7

2028.040(c): App E

2028.050(c): App E

2030.010-2030.310: Step 9

2030.070: Step 5

2030.090(a): Steps 7, 35

2030.090(b): Step 35

2030.090(d): App E

2030.230: Step 34

2030.250(a): Step 33

2030.280(b): Steps 33-34

2030.290: Steps 9, 13, 33, App E

2030.290(c): App E

2030.300: Steps 9, 15, 34

2030.300(a): Step 34

2030.300(b): Steps 7, 34

2030.300(c): Step 34

2030.300(d)-(e): Step 17, App E

2030.310: App E

2030.310(d): App E

2031.010: Step 36

2031.010-2031.510: Steps 9, 16

2031.050: Step 5

2031.060(a): Steps 7, 38

2031.060(b): Step 38

2031.060(c): Step 38

2031.060(d): Step 38

2031.060(f): Step 38

2031.060(h): App E

2031.060(i)(1): [Step 17](#)

2031.060(i)(2): [Step 17](#)

2031.210(a): [App D](#)

2031.240: [App B](#)

2031.290-2031.320: [Step 7](#)

2031.290(b): [Steps 36, 37](#)

2031.300: [Steps 9, 13, 36](#)

2031.300(c): [App E](#)

2031.300(d)(1): [Step 17](#)

2031.300(d)(2): [Step 17](#)

2031.310: [Steps 9, 15](#)

2031.310-2031.320: [Apps A-B](#)

2031.310(a): [Step 37](#)

2031.310(b): [Steps 36-37](#)

2031.310(c): [Steps 34, 37](#)

2031.310(d): [App B](#)

2031.310(h): [App B, App E](#)

2031.310(h)-(j): [Step 17](#)

2031.310(i): [App E](#)

2031.310(j)(1): [Step 17](#)

2031.310(j)(2): [Step 17](#)

2031.320: [Steps 9, 36, App B](#)

2031.320(b): [App E](#)

2031.320(c): [App E](#)

2031.320(d)(1): [Step 17](#)

2031.320(d)(2): [Step 17](#)

2032.240(c): [App E](#)

2032.240(d): [App E](#)

2032.250(b): [Step 7](#)

2032.250(d): [App E](#)

2032.410: [App E](#)

2032.510(f): [App E](#)

2032.620(a): [App E](#)

2032.620(b): [App E](#)

2032.620(c): [App E](#)

2032.650(a): [App E](#)

2032.650(b): [App E](#)

2032.650(c): [App E](#)

2033.010-2033.740: [Step 9](#)

2033.080(a): [Step 41](#)

2033.080(a)-(b): [Step 41](#)

2033.080(b): [Step 41](#)

2033.080(d): [App E](#)

2033.210-2033.230: [App E](#)

2033.220: [Step 39](#)

2033.270: [Steps 39-40](#)

2033.280: [Steps 9, 13, 39](#)

2033.280-2033.290: [Step 39](#)

2033.280(c): [App E](#)

2033.290: [Steps 9, 15-16](#)

2033.290(a): [Step 40](#)

2033.290(b): [Steps 7, 39-40](#)

2033.290(c): [Step 40](#)

2033.290(d): [Step 40, App E](#)

2033.290(e): [App E](#)

2033.300: [Steps 9, 39](#)

2033.300(c): [App E](#)

2033.420: [Step 9, App E](#)

2033.420(b): [App E](#)

2033(k) (former): [Step 39](#)

2034.250: [App E](#)

2034.300: [App E](#)

2034.300(a)-(d): [App E](#)

2034.310: [App E](#)

2034.420: [Step 29](#)

2034.470(g): App E

2034.610: App E

2034.630: Step 7, App E

2034.730: Step 7, App E

2034(b)(1)(ii) (former): Step 31

2035.010(a): Step 28

2035.030(b)(2): Step 28

EVIDENCE CODE

451: Step 14

452: Step 14

453(a): Step 14

453(b): Step 14

FAMILY CODE

Divs6-9: Step 1

GOVERNMENT CODE

11343.6: Step 14

11344.6: Step 14

18576: Step 14

68600-68620: Step 1

68605.5: Step 1

68607: Steps 2-3

68607(c): Step 2

68607(g): Step 3

68608(a): Step 1

68608(b): Steps 3-4

68609.5: Step 1

68616: Step 4

68616(a): Step 4

68616(b): Step 4

68616(c): Step 4

68616(d): Step 4

68616(e): Step 4

68616(f): Step 4

68616(g): [Step 4](#)

68616(h): [Step 4](#)

68616(i): [Step 4](#)

70617(a)(4): [Step 23](#)

ACTS BY POPULAR NAME

Civil Discovery Act: [Step 9](#)

Domestic Violence Prevention Act: [Step 1](#)

Electronic Discovery Act (EDA): [Step 9](#)

Trial Court Delay Reduction Act (TCDRA): [Steps 1-2](#)

Uniform Interstate Family Support Act: [Step 1](#)

Uniform Parentage Act: [Step 1](#)

Rules

CALIFORNIA RULES OF COURT

1.6(4): [Step 1](#)

2.110: [Apps A-D](#)

2.260(e)(2): [Step 23](#)

2.30: [Steps 16-17](#)

2.306(c): [Step 23](#)

2.306(d): [Step 23](#)

3.1100-3.1116: [Step 9](#)

3.1110: [Steps 11, 33-34](#)

3.1110(a): [Step 11](#)

3.1110(b): [Step 11](#)

3.1110(d): [Step 11](#)

3.1113: [Steps 12, 25, 33-34](#)

3.1113(b): [Steps 12, 18](#)

3.1113(d)-(f): [Step 12](#)

3.1113(g): [Step 12](#)

3.1115: [Steps 13, 33-34](#)

3.1200-3.1207: [Steps 10, 22, 28](#)

3.1203(a): [Steps 22, 28](#)

3.1204(b): [Steps 22, 28](#)

3.1300-3.1312: Step 9

3.1300(a): Step 23

3.1300(b): Steps 10, 22

3.1300(c): Step 23

3.1302(a): Step 23

3.1306(c): Step 14

3.1332: Step 3

3.1345: Steps 12, 15

3.1345-3.1348: Step 9

3.1345(a): Steps 15, 34, 40

3.1345(b): Step 15

3.1345(c): Steps 15, 31, 34, 37, 40

3.1345(c)(6): Step 15

3.1345(d): Steps 15, 34, 36-37, 39-40

3.1346: Steps 21, 31

3.400: Step 2

3.710-3.715: Step 1

3.712(a): Step 1

3.712(b): Step 1

3.712(d): Step 1

3.714: Step 3

3.714(a): Step 2

3.714(b): Step 2

3.714(b)(1): Step 2

3.714(b)(2): Step 2

3.714(c)(1): Steps 1-2

3.714(c)(2): Step 2

3.714(d)(1): Step 2

3.715: Step 2

3.715(a): Step 2

3.720: Step 1

3.720-3.735: Step 3

3.724: Step 3

3.822: [Step 9](#)

3.822(b): [Step 10](#)

227 (former): [Step 16](#)

2023.010-2023.040: [Step 18](#)

Standards of J Admin 2.1(a)-(b): [Step 3](#)

Standards of J Admin 2.2: [Step 1](#)

Standards of J Admin 2.2(f)(1): [Step 2](#)

Standards of J Admin 2.2(f)(2): [Step 2](#)

CONTRA COSTA COURT RULES

7(H): [Step 4](#)

12.6(B): [Step 3](#)

27: [Steps 23-24](#)

LOS ANGELES COURT RULES

7.6(c)-(d): [Step 1](#)

7.12(b)(4): [Step 24](#)

7.12(h)(1): [Steps 7, 10, 22, 26](#)

9.2: [Step 14](#)

9.2(b): [Step 14](#)

SAN FRANCISCO COURT RULES

8.6(B): [Step 14](#)

UNITED STATES

Statutes

UNITED STATES CODE

Title 44

1507: [Step 14](#)

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Source: Civil Litigation/Handling Motions to Compel and Other Discovery Motions (Action Guide)/TABLE OF CASES

TABLE OF CASES

A

Alexander v Blue Cross (2001) 88 CA4th 1082, 106 CR2d 431: [Step 9](#)

Anti-Defamation League of B'nai B'rith v Superior Court (1998) 67 CA4th 1072, 79 CR2d 597: [Step 36](#)

B

Babcock v Superior Court (1994) 29 CA4th 721, 35 CR2d 462: [Step 17](#)

Barnett v Penske Truck Leasing Co. (2001) 90 CA4th 494, 108 CR2d 821: [Step 9](#)

Barrenda L. v Superior Court (1998) 65 CA4th 794, 76 CR2d 727: [Step 32](#)

Brun v Bailey (1994) 27 CA4th 641, 32 CR2d 624: [Step 32](#)

C

Caldwell v Samuels Jewelers (1990) 222 CA3d 970, 272 CR 126: [Step 17](#)

Carter v Superior Court (1990) 218 CA3d 994, 267 CR 290: [Step 37](#)

Collisson & Kaplan v Hartunian (1994) 21 CA4th 1611, 26 CR2d 786: [Step 16](#)

County of Los Angeles v Superior Court (1990) 224 CA3d 1446, 274 CR 712: [Step 4](#)

Courtesy Claims Serv., Inc. v Superior Court (1990) 219 CA3d 52, 268 CR 30, disapproved on other grounds in Wilcox v Birtwhistle (1999) 21 C4th 973, 90 CR2d 260: [Step 16](#)

Coy v Superior Court (1962) 58 C2d 210, 23 CR 393: [Step 34](#)

Creative, R.S. Inc. v Creative Cotton, Ltd. (1999) 75 CA4th 486, 89 CR2d 353: [Step 16](#)

D

DeBlase v Superior Court (1996) 41 CA4th 1279, 49 CR2d 229: [Step 34](#)

Do v Superior Court (2003) 109 CA4th 1210, 135 CR2d 855: [Step 16](#)

E

Estate of Ivey (1994) 22 CA4th 873, 28 CR2d 16: [Step 16](#)

F

Fairmont Ins. Co. v Superior Court (2000) 22 C4th 245, 92 CR2d 70: [Steps 10, 22](#)

G

Ghanooni v Super Shuttle (1993) 20 CA4th 256, 24 CR2d 501: [Step 16](#)

Glass v Superior Court (1988) 204 CA3d 1048, 251 CR 690: [Step 29](#)

Golfland Entertainment Ctrs., Inc. v Superior Court (2003) 108 CA4th 739, 133 CR2d 828: [Step 15](#)

Goodstone v Southwest Airlines Co. (1998) 63 CA4th 406, 73 CR2d 655: [Step 16](#)

H

Hernandez v Superior Court (2003) 112 CA4th 285, 4 CR3d 883: [Step 34](#)

Hernandez v Superior Court (2004) 115 CA4th 1242, 9 CR3d 821: [Step 10](#)

J

Jerry's Shell v Equilon Enters., LLC (2005) 134 CA4th 1058, 36 CR3d 637: [Step 16](#)

John B. v. Superior Court (2006) 38 CA4th 1177, 45 CR3d 316: [Step 32](#)

Johnson v Pratt & Whitney Canada, Inc. (1994) 28 CA4th 613, 34 CR2d 26: [Step 16](#)

Jones v Otero (1984) 156 CA3d 754, 203 CR 90: [Step 16](#)

K

Kaiser Found. Hosps. v Superior Court (1998) 66 CA4th 1217, 78 CR2d 543: [Step 36](#)

Karlsson v Ford Motor Co. (2006) 140 CA4th 1202, 45 CR3d 265: [Step 16](#)

Knoettgen v Superior Court (1990) 224 CA3d 11, 273 CR 636: [Step 32](#)

Kravitz v Superior Court (2001) 91 CA4th 1015, 111 CR2d 385: [Step 16](#)

L

Leach v Superior Court (1980) 111 CA3d 902, 169 CR 42: [Step 13](#)

Lee v Swansboro Country Prop. Owners Ass'n (2007) 151 CA4th 575, 59 CR3d 924: [Step 38](#)

Liberty Mut. Fire Ins. Co. v LcL Adm'rs, Inc. (2008) 163 CA4th 1093, 78 CR3d 200: [Step 17](#)

Liberty Mut. Ins. Co. v Superior Court (Frysingr) (1992) 10 CA4th 1282, 13 CR2d 363: [Step 26](#)

London v Dri-Honing Corp. (2004) 117 CA4th 999, 12 CR3d 240: [Steps 20, 37](#)

Lu v Superior Court (1997) 55 CA4th 1264, 64 CR2d 561: [Step 34](#)

Lund v Superior Court (1964) 61 C2d 698, 39 CR 891: [Step 21](#)

M

Marriage of Chakko (2004) 115 CA4th 104, 8 CR3d 699: [Step 16](#)

Marriage of Economou (1990) 224 CA3d 1466, 274 CR 473: [Step 16](#)

Marriage of Lemen (1980) 113 CA3d 769, 170 CR 642: [Steps 21, 31](#)

Mattco Forge, Inc. v Arthur Young & Co. (1990) 223 CA3d 1429, 273 CR 262: [Steps 17, 19](#)

Midwife v Bernal (1988) 203 CA3d 57, 249 CR 708: [Step 16](#)

Mills v U.S. Bank (2008) 166 CA4th 871, 83 CR3d 146: [Step 15](#)

N

New Albertsons, Inc. v Superior Court (2008) 168 CA4th 1403, 86 CR3d 457: [Steps 9, 16](#)

Newland v Superior Court (1995) 40 CA4th 608, 47 CR2d 24: [Step 16](#)

O

Obregon v Superior Court (1998) 67 CA4th 424, 79 CR2d 62: [Step 7](#)

Oliveros v County of Los Angeles (2004) 120 CA4th 1389, 16 CR3d 638: [Step 4](#)

P

Parker v Walter Kluwer U.S., Inc.(2007) 149 CA4th 285, 57 CR3d 18: [Steps 16, 17](#)

Pate v Channel Lumber Co. (1997) 51 CA4th 1447, 59 CR2d 919: [Step 16](#)

Payne v Exxon Corp. (9th Cir 1997) 121 F3d 503: [Step 17](#)

Pelton-Shepherd Indus., Inc. v Delta Packaging Prods., Inc. (2008) 165 CA4th 1568, 82 CR3d 64: [Step 10](#)

People v Woodell (1998) 17 C4th 448, 71 CR2d 241: [Step 14](#)

Professional Career Colleges, Inc. v Superior Court (1989) 207 CA3d 490, 255 CR 5: [Steps 34, 37](#)

Puerto v Superior Court (2008) 158 CA4th 1242, 70 CR3d 701: [Step 17](#)

R

R.S. Creative, Inc. v Creative Cotton, Ltd. (1999) 75 CA4th 486, 89 CR2d 353: [Step 16](#)

Reedy v Bussell (2007) 148 CA4th 1272, 56 CR3d 216: [Step 16](#)

Regency Health Servs. v Superior Court (1998) 64 CA4th 1496, 76 CR2d 95: [Step 33](#)

Roberts v Gulf Oil Corp. (1983) 147 CA3d 770, 793: [App D](#)

Ruvalcaba v Government Employees Ins. Co. (1990) 222 CA3d 1579, 272 CR 541: [Step 16](#)

S

Safeco Ins. Co. v Parks (2004) 122 CA4th 779, 19 CR3d 17: [Step 16](#)

Sassoon, Vidal Inc. v Superior Court (1983) 147 CA3d 681, 195 CR 295: [Step 34](#)

Sauer v Superior Court (1987) 195 CA3d 213, 240 CR 489: [Step 16](#)

Saxena v Goffney (2008) 159 CA4th 316, 71 CR3d 469: [Step 16](#)

Sexton v Superior Court (1997) 58 CA4th 1403, 68 CR2d 708: [Steps 34, 37](#)

Sherman v Kinetic Concepts, Inc. (1998) 67 CA4th 1152, 79 CR2d 641: [Step 16](#)

Sinaiko Healthcare Consulting, Inc. v Pacific Healthcare Consultants (2007) 148 CA4th 390, 55 CR3d 751: [Steps 17, 33, 34](#)

Sole Energy Co. v Hodges (2005) 128 CA4th 199, 26 CR3d 823: [Step 18](#)

Spectra-Physics, Inc. v Superior Court (1988) 198 CA3d 1487, 244 CR 258: [Step 26](#)

Stadish v Superior Court (1999) 71 CA4th 1130, 84 CR2d 350: [Step 38](#)

Standon Co. v Superior Court (1990) 225 CA3d 898, 275 CR 833: [Step 37](#)

Stewart v Colonial Western Agency, Inc. (2001) 87 CA4th 1006, 105 CR2d 115: [Steps 7, 31](#)

Stull v Sparrow (2001) 92 CA4th 860, 112 CR2d 239: [Step 9](#)

T

Taggares v Superior Court (1998) 62 CA4th 94, 72 CR2d 387: [Step 34](#)

Titmas v Superior Court (2001) 87 CA4th 738, 104 CR2d 803: [Step 36](#)

Tobin v Oris (1992) 3 CA4th 814, 4 CR2d 736, disapproved on other grounds in Wilcox v Birtwhistle (1999) 21 C4th 973, 90 CR2d 260: [Step 39](#)

Townsend v Superior Court (1998) 61 CA4th 1431, 72 CR2d 333: [Step 7](#)

Trans-Action Commercial Inv., Ltd. v Firmaterr, Inc. (1997) 60 CA4th 352, 70 CR2d 449: [Step 16](#)

U

Unzipped Apparel, LLC v Bader (2007) 156 CA4th 123, 67 CR3d 111: [Steps 30, 31](#)

V

Vidal Sassoon, Inc. v Superior Court (1983) 147 CA3d 681, 195 CR 295: [Step 34](#)

W

Wellpoint Health Networks, Inc. v Superior Court (1997) 59 CA4th 110, 68 CR2d 844: [Step 36](#)

Wells Fargo Bank v Superior Court (2000) 22 C4th 201, 91 CR2d 716: [Step 36](#)

Westly v Superior Court (2004) 125 CA4th 907, 23 CR3d 154: [Step 26](#)

Wilcox v Birtwhistle (1999) 21 C4th 973, 90 CR2d 260: [Steps 9, 39](#)

Williams v Russ (2008) 167 CA4th 1215, 84 CR3d 813: [Step 16](#)

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